REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3860 OF 2007

T.A. KATHIRU KUNJU ... Appellant

VERSUS

JACOB MATHAI & ANR. ... Respondents

J U D G M E N T

Dipak Misra, J.

The present appeal preferred under Section 38 of the Advocates Act, 1961 (for brevity, 'the Act') assails the correctness of the order dated 15.10.2006 passed by the Disciplinary Committee of the Bar Council of India in BCI TR Case No.138 of 2005 whereby the said authority has found the appellant guilty of gross negligence in discharge of his professional service to the client and accordingly imposed the punishment of reprimand with a further stipulation that he shall pay a sum of Rs.5,000/- to the Bar Council of India and an equivalent amount to the

complainant within two weeks' time from the date of receipt of the order failing which he would stand suspended from practising for a period of six months.

2. As the factual score would unroll, the respondent-complainant engaged the appellant as advocate in respect of a matrimonial dispute and during the pendency of the matrimonial case, the wife of the respondent breathed her last due to kidney failure in the year 2002. The appellant advised the complainant-respondent that as the wife had expired, there was no justification to prosecute any further the case for divorce and it was advisable to withdraw the said litigation. In the meantime, the respondent engaged him to file a complaint under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the N.I. Act') as a cheque issued by one Ramachandran in favour of the respondent for a sum of Rs.75,000/- (Rupees seventy five thousand only) had been dishonoured. It is not in dispute that the appellant thought it appropriate not to file a complaint under the N.I. Act but he felt it apposite to file a complaint case before the competent Magistrate under Section 420 of the Indian Penal

Code and accordingly he did so. As is demonstrable, the learned Magistrate directed investigation to be conducted under Section 156(3) of the Code of Criminal Procedure. The eventual result of the said investigation has not been brought on record.

3. At this stage, the respondent filed a complaint before the Bar Council of Kerala, principally alleging that the cheque that was handed over to the appellant to initiate criminal action against Ramachandran under Section 138 of the NI Act was not returned to him. On the basis of complaint received, a disciplinary proceeding was initiated against him and eventually the Disciplinary Committee issued a memo of charges on the appellant. It is seemly to reproduce the same :-

"**MEMO OF CHARGES**

> "That Sri Jacob Mathai, Kachirackal House, Marampally, Always entrusted with you to file a case under the provisions of Negotiable Instruments Act against Sri. Ramachandran, Nedumpally House, Marampally for bouncing of cheque dated 04.09.2002; and that you have not filed the case under N I Act; and that the Thandiyittaparambu police station directed the complainant to produce the said cheque to the said police, but you didn't return it so far; and you did it so on the offer of the said Ramachandran to pay you Rs.10,000/- and thereby you had committed professional and

> other misconduct punishable u/s 35 of the Advocats Act, 1961."

4. The said memo of charges is dated 22.8.2004. As the Disciplinary Committee of the Bar Council of Kerala could not complete the proceeding within a span of one year, the matter stood transferred to Bar Council of India where it was registered as BCI TR Case No.138 of 2005. Before the Disciplinary Committee, the complainant examined himself and asserted that the appellant was under legal obligation to file the complaint under Section 138 of the NI Act and further, he was obligated to return the cheque. The appellant, in the cross examination before the Disciplinary Committee, stated that he was entrusted with the original cheque along with the photostat copies and the original cheque was handed over to the investigating agency when the investigation commenced in pursuance of the direction issued under Section 156(3) Cr.P.C. by the learned Magistrate. The Disciplinary Committee adverted to the facts and held as follows :-

> "But, however, the Advocate in his professional capacity while discharging the duties is to be doubly careful in dealing such matters. According to his own evidence, he has stated that

> he has returned some cheque to the complainant and he is unable to prove which cheque he has returned. Though he stated the cheque which he has returned was not the subject matter of the complaint, but he failed to et *(sic)* an acknowledgment from the respondent for having returned the cheque. It is a well settled law that a person who is throwing allegation against another person, the burden of proof is on the part of the complainant who is throwing the allegation. Here in this case, the complainant had not proved his case beyond reasonable doubt and hence we are not inclined to give severe punishment to the respondent herein."

5. While expressing the aforesaid opinion, the Disciplinary Committee observed that as the appellant was an advocate, he should have been more careful and, therefore, he was guilty of gross negligence and accordingly imposed the punishment as has been indicated hereinbefore.

6. On a perusal of the analysis of the findings returned by the Disciplinary Committee of the Bar Council of India, it is evident that it has taken exception to one aspect, namely, the appellant had not obtained the acknowledgment of the cheque from the respondent. Be it noted, the Disciplinary Committee did not think it appropriate to advert to the fact whether the cheque was handed over to the police for the

purpose of investigation. That apart, the Committee has also not adverted to any other aspect, and correctly so, as nothing else was brought in evidence.

7. It is submitted by Mr. Sanjay Parikh, learned counsel for the appellant, that when the Disciplinary Committee of the Bar Council of India has unequivocally arrived at the conclusion that it is a case of mere negligence which is also evincible, a punishment as envisaged under Section 35 could not have been imposed. He would further submit that disciplinary authority has erroneous stamped it as gross negligence which makes the order absolutely indefensible. He has commended us to a Constitution Bench decision in the matter of ***Mr. 'P' an Advocate, Re v.***[1]]. That apart, he has also placed reliance on a three Judge Bench decision in ***P.D. Khandekar* vs. *Bar Council of Maharashtra, Bombay & Ors.***[2].

8. Ms. K. Sarda Devi, learned counsel for the respondent supported the order passed by the Disciplinary Committee of the Bar Council of India.

---

1 AIR 1963 SC 1313

2 (1984) 2 SCC 556

9. Section 35 of the Act reads as under :-

"35. Punishment of advocates for misconduct (1) Where on receipt of a complaint or otherwise a State Bar Council has reason to believe that any advocate on its roll has been guilty of professional or other misconduct, it shall refer the case for disposal of its disciplinary committee.

(1A) The State Bar Council may, either of its own motion or on application made to it by any person interested, withdraw a proceeding pending before its disciplinary committee and direct the inquiry to be made by any other disciplinary committee of that State Bar Council.

(2) The disciplinary committee of a State Bar Council shall fix a date for the hearing of the case a notice thereof to be given to the advocate concerned and to the Advocate General of the State.

(3) The disciplinary committee of a State Bar Council after giving the advocate concerned and the Advocate –General an opportunity of being heard, may make any of the following orders, namely-

a. Dismiss the complaint or, where the proceedings were initiated at the instance of the State Bar Council, direct that the proceedings be filed.

b. Reprimand the advocate

c. Suspend the advocate from practice for such periods as it may deem fit.

d. Remove the name of the advocate from the State roll of advocates

(4) Where an advocate is suspended from practice under clause (c) of sub section (3) he shall, during the period of suspension, be debarred from practicing in any court or before any authority or person in India.

> (5) Where any notice is issued to the Advocate-General under sub-section (2) the Advocate –General may appear before the disciplinary committee of the State Bar Council either in person or through any advocate appearing on his behalf.
>
> Explanation - In this section, section 37 and section 38 the expression "Advocate-General" and "Advocate-General of the State" shall, in relation to the Union territory of Delhi, mean the Additional Solicitor General of India."

10. On a plain reading of the aforesaid provision, it is clear as crystal what punishment is to be imposed in case of misconduct. In the case at hand, as we find, that a conclusion has been arrived at by the Disciplinary Authority that it is a case of gross negligence at the hands of the appellant. As urged by Mr. Parikh, it is only required to be seen whether it is a mere negligence or gross negligence.

11. The Constitution Bench, in the matter of ***Mr. 'P' an Advocate***, (supra) has ruled that mere negligence or error of judgment on the part of an advocate would not amount to professional misconduct. It has been further held therein that error of judgment cannot be completely eliminated in all human affairs and mere negligence may not necessarily show that the advocate who is guilty of it can be charged with misconduct. The Constitution Bench, as is

demonstrable, has drawn a distinction between 'negligence' and the 'gross negligence'. We think it appropriate to reproduce the said passage. It is as follows:-

> "But different considerations arise where the negligence of the Advocate is gross. It may be that before condemning an Advocate for misconduct, courts are inclined to examine the question as to whether such gross negligence involves moral turpitude or delinquency. In dealing with this aspect of the matter, however, it is of utmost importance to remember that the expression "moral turpitude or delinquency" is not to receive a narrow construction. Wherever conduct proved against an Advocate is contrary to honesty, or opposed to good morals, or is unethical, it may be safely held that it involves moral turpitude. A willful and callous disregard for the interests of the client may, in a proper case, be characterised as conduct unbefitting an Advocate. In dealing with matters of professional propriety, we cannot ignore the fact that the profession of law is an honourable profession and it occupies a place of pride in the liberal professions of the country. Any conduct which makes a person unworthy to belong to the noble fraternity of lawyers or makes an Advocate unfit to be entrusted with the responsible task of looking after the interests of the litigant, must be regarded as conduct involving moral turpitude. The Advocates-on-record like the other members of the Bar Advocates are Officers of the Court and the purity of the administration of justice depends as much on the integrity of the Judges as on the honesty of the Bar. That is why in dealing with the question as to whether an Advocate has rendered himself unfit to belong to the brotherhood at the Bar, the expression "moral turpitude or delinquency" is not to be construed in an unduly narrow and restricted sense."

[Emphasis Supplied]

12. On a careful reading of the aforesaid passage, it is quite clear that concept of "gross negligence" cannot be construed in a narrow or a restricted sense. It is because honesty of an Advocate is extremely significant. The conduct of an Advocate has to be worthy so that he can be called as a member of the noble fraternity of lawyers. It is his obligation to look after the interest of the litigant when is entrusted with the responsible task in trust. An Advocate has to bear in mind that the profession of law is a noble one. In this regard, we may fruitfully refer to what has been stated in ***Sanjiv Datta Dy. Secy. Ministry of Information & Broadcasting, In re.***[3]:-

> "The legal profession is a solemn and serious occupation. It is a noble calling and all those who belong to it are its honourable members. Although the entry to the profession can be had by acquiring merely the qualification of technical competence, the honour as a professional has to be maintained by its members by their exemplary conduct both in and outside the court. The legal profession is different from other professions in that what the lawyers do, affects not only an individual but the administration of justice which is the foundation of the civilised society. Both as a leading member of the intelligentsia of the society and as a responsible citizen, the lawyer has to conduct himself as a model for others both in his

[3] (1995) 3 SCC 619

> professional and in his private and public life. The society has a right to expect of him such ideal behaviour. It must not be forgotten that the legal profession has always been held in high esteem and its members have played an enviable role in public life. The regard for the legal and judicial systems in this country is in no small measure due to the tireless role played by the stalwarts in the profession to strengthen them. They took their profession seriously and practised it with dignity, deference and devotion. If the profession is to survive, the judicial system has to be vitalised. No service will be too small in making the system efficient, effective and credible."

13. Slightly recently in ***Dhanraj Singh Choudhary v. National Vishwakarma***[4], it has been observed:-

> "The legal profession is a noble profession. It is not a business or a trade. A person practising law has to practise in the spirit of honesty and not in the spirit of mischief-making or money-getting. An advocate's attitude towards and dealings with his client have to be scrupulously honest and fair."

14. There can be no doubt that nobility, sanctity and ethicality of the profession has to be kept uppermost in the mind of an Advocate. Keeping that primary principle in view, his conduct has to be weighed. There the approach of appreciating the evidence brought on record and the yardstick to be applied, become quite relevant. A three-Judge Bench in ***P.D Khandekar*** (supra) while dealing

[4] (2012) 1 SCC 741

with the scope of an appeal preferred under Section 38 of the Act, ruled that in an appeal under Section 38, this Court in a general rule, cannot interfere with the concurrent finding of fact by the Disciplinary Committee of the Bar Council of India and the State Bar Council unless the finding is based on no evidence or it proceeds on mere conjectures and surmises. The Court has further laid down that finding in such disciplinary proceedings must be sustained by a higher degree of proof than that required in civil suits, yet falling short of the proof required to sustain a conviction in a criminal prosecution; and there should be convincing preponderance of evidence. We must immediately note with profit that the said principle is absolutely significant. The Court has stressed upon the rule to be applied for acceptance or treating the finding defensible by the Disciplinary Committee of Bar Council. In this regard it is fruitful to reproduce the following passage from the said authority:-

> "There is a world of difference between the giving of improper legal advice and the giving of wrong legal advice. Mere negligence unaccompanied by any moral delinquency on the part of a legal practitioner in the exercise of his profession does not amount to professional misconduct. In re A Vakil, Coutts Trotter, C.J. followed the decision

in re G. Mayor Cooke and said that:

> "Negligence by itself is not professional misconduct; into that offence there must enter the element of moral delinquency. Of that there is no suggestion here, and we are therefore able to say that there is no case to investigate, and that no reflection adverse to his professional honour rests upon Mr. M.', The decision was followed by the Calcutta High Court in re An Advocate, and by the Allahabad High Court in the matter of An Advocate of Agra and by this court in the matter of *P. An Advocate*.
>
> The decision was followed by the Calcutta High Court *In re An Advocate* [AIR 1955 CAL 484], and by the Allahabad High Court *In the matter of An Advocate of Agra* [AIR 1940 All 289] and by this Court *In the matter of P. An Advocate* [AIR 1934 Rang 33]"

15. It is urged by Mr. Parikh that when no finding is returned that the cheque was kept back by the appellant, there is no gross negligence. On the contrary, as he would submit, it was handed over to the investigating agency which was directed by learned Magistrate to carry out the investigation under Section 156(3) CrPC. His only fault is that he could not get the acknowledgment.

16. Ms. K. Sarda Devi, learned counsel for the respondent, per contra, would urge that the case of the respondent is squarely covered by the dictum of the Constitution Bench

inasmuch as the Disciplinary Committee of the Bar Council of India has held that there was gross-negligence on the part of the appellant.

17. On a studied scrutiny of the evidence in this context, the factual score, the act of the present appellant cannot be treated to be in the realm of gross negligence. It would be only one of negligence. The tenor of the impugned order, as we notice, puts the blame on the appellant on the foundation that he had not received the acknowledgment. He has offered an explanation that he had given the cheque to the police. There has been no delineation in that regard. That apart, there is no clear cut analysis on deliberation on gross negligence by the advocate. The Disciplinary Committee found the appellant guilty of gross-negligence as he had failed to get the acknowledgment from the complainant-respondent. The examples given by the Constitution Bench are of different nature. In the obtaining factual matrix, therefore, we are unable to accept the conclusion arrived at by the Disciplinary Authority of the Bar Council of India that the negligence is gross. Hence we are impelled not to accept the submission advanced by

learned counsel for the respondent.

18. Thus analysed, we are disposed to allow the appeal and accordingly, we so direct and the order passed by the Disciplinary Committee of the Bar Council of India is set aside. Though we have set aside the order, on a suggestion being made, Mr. Sanjay Parikh, learned counsel for the appellant, agreed that the amount paid to the complainant need not be refunded. The amount that has been deposited to the Bar Council of India shall be refunded by the Bar Council of India. There shall be no order as to costs.

.....J.
(Dipak Misra)

.....J.
(R. Banumathi)

New Delhi;
February 16, 2017.