
(2013) 02 KL CK 0088

In the High Court Of Kerala

Case No : Writ Petition (C) No's. 3704 and 3705 of 2013

Nagaraj P.

APPELLANT

Vs

Bar Council of Kerala and Another

RESPONDENT

Date of Decision : 12-02-2013

Acts Referred:

Advocates Act, 1961 — Section 35, 35(1), 35(3)

Bar Councils Act, 1926 — Section 10

Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2013) 1 ILR (Ker) 952 : (2013) 1 KHC 687 : (2013) 1 KLJ 843 :
(2013) 1 KLT 734

Hon'ble Judges : Antony Dominic, J

Bench : Single Bench

Advocate : Ayyappan Sankar, Sri Jayan John and Smt. S. Hridya, for the Appellant; Gracious Kuriakose , Sri V.V. Nandagopal Nambiar, Sri Sivaraman and Sri Suman Chakravarthy, for the Respondent

Final Decision : Dismissed

Judgement

Antony Dominic, J.—Issues raised in these writ petitions are common. Therefore, these cases were heard together and are disposed of by this common judgment. I heard the learned counsel appearing for the petitioner, learned senior counsel appearing for the 1st respondent, the Bar Council of Kerala and the learned counsel appearing for the 2nd respondent in these cases.

2. Petitioner is an Advocate practicing in the District Courts Centre, Thiruvananthapuram and at Neyyattinkara. He claims to be a public spirited citizen, who has filed several complaints in public interest against acts of corruption, nepotism and maladministration on the part of persons holding public offices.

3. In W.P. (C) No. 3704/13, it is stated that the petitioner filed Crl. M.P. 2123/10 in the Court of the Enquiry Commissioner and Special Judge, Thiruvananthapuram against the 2nd respondent and another person alleging

offences under the Indian Penal Code and the Prevention of Corruption Act. A copy of the complaint is Ext. P-1. The complaint was rejected by the Commissioner on the ground that the averments therein did not disclose any offence against the respondents herein. Subsequently, the 2nd respondent filed Ext. P-2 complaint before the 1st respondent u/s 35 of the Advocates Act for appropriate action against the petitioner.

4. Insofar as it is relevant, Ext. P-2 complaint reads thus:

The petitioner Adv. Nagaraj had produced several documents along with the complaint, including a press cutting from "Flash" newspaper dated 17th July 2010 and "Kerala Kaumudi" dated 18th July 2010. The newspaper reports contain defamatory matter, against me.

The petitioner Adv. Nagaraj has been filing several "Public Interest Litigation" complaints before the various Criminal Courts in Thiruvananthapuram. Details of some of the complaints filed by Adv. Nagaraj are given below:

1. Cr. M.P. No. 1045/2009/ECT dated 20-7-2009 (against Shri E.K. Prakash, Director, Treasuries).
2. Cr. M.P. No. 1149/2009 dt. 30-11-2009 (against Shri V. Murukesh, Dy. Commissioner, Sales Tax).
3. Cr. M.P. No. 08/2010/ECT dated 1-3-2010 (against Shri P.K. Pocker, Director, State Institute of Language).
4. Cr. M.P. No. 2027/2010/ECT dated 27-11-2010 (against Shri Premachandran, Addl. Director and some others, Soil Survey Dept.).

Apart from the above Adv. Nagaraj has filed similar private complaints against Sri T.K. Raveendran, Former Secretary, Thiruvananthapuram Municipal Corporation, Shri C.K. Guptan, Former President of Travancore Devaswom Board, Shri V. Surendran Pillai, Minister, Shri K.S. Prathapachandran, Dy. Tahsildar, Thiruvananthapuram and several other public servants.

Adv. Nagaraj, misusing his privileges as an Advocate, has been appearing in Court as "Party in Person", even though the matter and contents of the complaint are not within his personal knowledge, he has been acting as an agent of persons with vested interest, in order to harass public servants. By such action he has violated the code of conduct for an Advocate, and liable to be dealt with by the Disciplinary Committee of the Bar Council. Such action on the part of Adv. Nagaraj has lowered the profession of an Advocate, before the public, and public servants.

5. The 1st respondent referred the complaint to the Disciplinary Committee, which registered the case as DC 48/2012. The Disciplinary Committee issued Ext. P-3 notice and the petitioner appeared before the Committee and filed Ext. P-4 defence statement. Subsequently, the proceedings continued, but however, on account of his absence on 30-12-2012, the Disciplinary Committee declared the

petitioner ex parte. Thereafter, the petitioner filed an application to set aside the order declaring him ex parte and the Disciplinary Committee passed Ext. P-5 order setting aside the ex parte order subject to the petitioner paying Rs. 2,500 towards costs. It was at that stage this writ petition was filed seeking to quash the proceedings in DC 48/2012 as also Ext. P-5 order imposing costs for setting aside the ex parte order.

6. Senior counsel appearing for the 1st respondent states on instructions that, on receipt of the complaint, the 1st respondent issued notice to the petitioner. He filed his version which was also made available to the 2nd respondent, the complainant. The complainant filed his reply. Thereafter the matter was considered by the Bar Council in its meeting and it thereafter being satisfied that a case for proceedings u/s 35(1) of the Advocates Act was made out, referred the complaint to the Disciplinary Committee on 15-7-2012. Counsel appearing for the 2nd respondent endorsed the submission made on behalf of the 1st respondent. He further says that he too has filed his pleadings before the Bar Council and that in lieu of his evidence in chief, he has filed a proof affidavit before the Disciplinary Committee. It is stated that the case now stands at the stage of framing charges against the petitioner.

7. Insofar as W.P. (C) No. 3705/13 is concerned, this writ petition is also filed by the same petitioner and here also, he has filed CrI. M.P. 608/11 before the Enquiry Commissioner and Special Judge, Thiruvananthapuram against the 2nd respondent and 41 others. Copy of the complaint is Ext. P-1. In this complaint, it was alleged that the respondents therein have committed offences punishable under the provisions of the Prevention of Corruption Act, 1988 and the Indian Penal Code. However, in Ext. P-2 order passed by the Enquiry Commissioner, it took the view that the averments in the petition did not contain any specific allegation against the 2nd respondent herein and some others in Ext. P-1. Therefore, the Commissioner referred the complaint u/s 156(3) to the Director, Vigilance and Anti Corruption Bureau for conducting enquiry into the allegations made against respondents 3 to 12 in the petition alone.

8. Thereupon the 2nd respondent, a State Committee Member of the CPI (M), who was also the President of the District Panchayat, filed Ext. P-3 complaint before the 1st respondent. It is alleged in Ext. P-3 that he was the candidate representing the Left Democratic Front in Parasala Assembly Constituency and that Ext. P-1 complaint was filed on the eve of the election. In the complaint, it is also alleged that the petitioner filed Ext. P-1 complaint on the influence of the rivals of the 2nd respondent and on accepting money from them and on coming to know that he was contesting the election. According to him, the complaint was intended to mislead the voters and was filed misusing his capacity as an Advocate.

9. The relevant allegations contained in para 7 and 8 of Ext. P-3 reads thus:

10. Here also the complaint was referred to the Disciplinary Committee and the

Committee issued Ext. P-4 notice to the petitioner. The petitioner filed Ext. P-5 defence statement and charges were framed as per Ext. P-6. Subsequently, on 30-12-2012, he was declared ex parte and on an application made by the petitioner, that order was set aside as per Ext. P-7, imposing cost of Rs. 2,500. It was at that stage this writ petition was filed seeking to quash the proceedings in DC 46/12 and Ext. P-7 order passed by the Committee imposing costs.

11. Senior counsel for the 1st respondent explained that the proceedings in this case also were completed as in the case of W.P. (C) No. 3704/13. Counsel appearing for the 2nd respondent also confirmed that he has filed his proof affidavit and that the complainant was examined in chief by the Disciplinary Authority on 30-12-2012.

12. The first contention raised by the learned counsel for the petitioner was that Section 35 of the Advocates Act contemplates reference to the Disciplinary Committee only if the State Bar Council has "reason to believe" that any Advocate on its roll has been guilty of "professional or other misconduct". It is stated that, there was absolutely no material before the 1st respondent to believe that the petitioner had committed any professional or other misconduct, justifying reference of the complaints to the Disciplinary Committee.

13. Section 35 is in Chapter V of the Advocates Act, 1961, which deals with the conduct of advocates. This section providing for punishment of advocates for misconduct reads thus:

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 to 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 and shall cause 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 period 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 practising 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.

14. A reading of Section 35(1) shows that, 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 to its disciplinary committee. Once the Disciplinary Committee concludes the proceedings, orders to be passed by the Disciplinary Committee are those enumerated in Clauses (a) to (d) of Section 35 (3).

15. Thus the State Bar Council gets power to make reference to the Disciplinary Committee only if it has reason to believe that an Advocate on its roll is guilty of professional or other misconduct. The expression "reason to believe" occurring in Section 35 of the Advocates Act has come up for consideration of the Apex Court in the judgment in N.G. Dastane Vs. Shrikant S. Shivde and Another, , where in paras 22 and 23, it has been held thus:

22. When the Bar Council in its wider scope of supervision over the conduct of Advocates in their professional duties comes across any instance of such misconduct it is the duty of the Bar Council concerned to refer the matter to its Disciplinary Committee. The expression "reason to believe" is employed in S. 35 of the Act only for the limited purpose of using it as a filter for excluding frivolous complaints against Advocates. If the complaint is genuine and if the complaint is not lodged with the sole purpose of harassing an Advocate or if it is not actuated by mala fides, the Bar Council has a statutory duty to forward the complaint to the Disciplinary Committee.

23. In Bar Council of The Bar Council of Maharashtra Vs. M.V. Dabholkar and Others, a four Judges Bench of this Court had held that the requirement of "reason to believe" cannot be converted into a formalised procedural road block, it being essentially a barrier against frivolous enquiries.

16. Therefore, the requirement of "reason to believe" only contemplates satisfaction of the Bar Council that the complaint is a genuine one and that the complaint is not lodged with the purpose of harassing the Advocate and that it is not actuated by mala fides. The Supreme Court also has cautioned that the requirement of "reason to believe" cannot be converted into a formalised procedural road block and therefore, this requirement cannot be made use of to frustrate the proceedings against an Advocate. In this context, it should also be clarified that the Bar Council is not statutorily required to record the reasons for its belief that the advocate concerned is guilty of misconduct. The Bar Council is

also not undertaking any adjudicatory exercise, but is only considering the matter for its satisfaction that the complaint is not frivolous and that it is not intended to harass the advocate concerned.

17. In so far as these cases are concerned, submission made on behalf of the 1st respondent Bar Council shows that, on receipt of the complaints from the 2nd respondent in these writ petitions, Bar Council issued notice to the petitioner and he filed his statements. The statements were served on the complainants and they also filed their rejoinders. Thereafter the Bar Council considered the matter in its full meeting and based on the decision taken in that meeting, the Bar Council referred the matter to the Disciplinary Committee. This process that was undertaken by the Bar Council itself demonstrates that on the materials that were available before it, it had reason to believe that the petitioner was prima facie guilty of professional or other misconducts justifying reference of the complaints to the Disciplinary Committee. In other words, the contention of the petitioner that on receipt of the complaints, without any application of mind and without complying with the requirements of Section 35(1) of the Advocates Act, the 1st respondent referred the complaints to its Disciplinary Committee is factually and legally incorrect.

18. Second contention raised by the learned counsel for the petitioner is that to be a professional or other misconduct as envisaged in Section 35(1) of the Advocates Act, the misconduct committed by the Advocate must be related to his duties as an Advocate. According to the petitioner, the complaints filed by him before the Court of Enquiry Commissioner and Special Judge are unrelated to his capacity as an advocate and therefore, there is no misconduct within the scope of Section 35 of the Advocates Act. On this basis, it was argued that the complaints are totally untenable and the Bar Council acted without jurisdiction in having taken cognizance of the same.

19. To substantiate the aforesaid argument, learned counsel for the petitioner relied on two Apex Court judgments. *R. Janardhana Rao Vs. G. Lingappa*, was a case where the appellant, an Advocate, persuaded the respondent against whom he was appearing in a civil suit, to give him a hand loan of Rs. 3,000 against a postdated cheque, which on presentation, bounced. On a complaint made by the respondent, the State Bar Council and the Bar Council of India held the appellant guilty of professional misconduct. The Apex Court held that the misconduct alleged is not a professional misconduct and concluded thus:

It is pertinent to note that the appellant, while taking the loan from the respondent on any pretext, was not acting in his professional capacity qua the complainant. He was acting as a needy person and persuaded the creditor to give him an amount of Rs. 3000. If that amount was not paid back, civil remedy was available to the complainant and if the cheque had bounced after the coming into force of S. 138 of the Negotiable Instruments Act, 1881, it might have resulted in criminal litigation, but, however, so far as the professional misconduct is concerned, we fail to appreciate as to how the Disciplinary Committee of the

State Bar Council held that the appellant qua the complainant had committed any professional misconduct because he had taken a hand loan from the complainant--respondent and not repaid it.

20. Learned counsel for the petitioner then relied on the Apex Court judgment in *Noratanmal Chouraria Vs. M.R. Murli and Another*, . In that case, the Advocate concerned was the tenant of the respondent and there was litigation between the parties. The landlord approached the Bar Council alleging that on three occasions, the Advocate assaulted him by himself and his henchmen. Bar Council of Tamil Nadu initiated proceedings on the complaint and referred the matter to the Bar Council of India which found that the factum of occurrence of the incidents were not reliable. That order was challenged and the Apex Court examined the matter and took the view that professional or other misconduct committed by the member of a profession should ordinarily be judged qua profession. Thereafter examining the tenability of the complaint, the Apex Court upheld the order passed by the Bar Council of India.

21. Both these judgments show that the Apex Court has only held that the misconduct alleged against an advocate must ordinarily be judged qua profession. In these judgments, the Apex Court has not laid down any principle that conducts of an advocate which are not commensurate with the nobility of the legal profession, and which renders him unworthy of the confidence of the community in him as an officer of the Court, do not fall within the expression "other misconducts" occurring in Section 35(1) of the Advocates Act. In my view, having regard to the plain language of Section 35(1), such a principle could not have been laid down also.

22. While interpreting Section 35 of the Advocates Act, this Court cannot be oblivious of the necessity of the standard and ethics that a member of the legal profession should maintain, to retain the nobility of this profession. Any contrary approach to the issue would prove Clarence Darrow's statement, "the trouble with law is lawyers" true. In this context, it is relevant to refer to few judgments rendered by the Apex Court. First is *Satish Kumar Sharma Vs. The Bar Council of Himachal Pradesh*, , where in paragraph 10, it was held thus:

10. The profession of law is called a noble profession. It does not remain noble merely by calling it as such unless there is a continued, corresponding and expected performance of a noble profession. Its nobility has to be preserved, protected and promoted. An institution cannot survive in its name or on its past glory alone. The glory and greatness of an institution depends on its continued and meaningful performance with grace and dignity. The profession of law being noble and honourable one, it has to continue its meaningful, useful and purposeful performance inspired by and keeping in view the high and rich, traditions consistent with its grace, dignity, utility and prestige. Hence the provisions of the Act and Rules made thereunder inter alia aimed at to achieve the same ought to be given effect to in their true spirit and letter to maintain clean and efficient Bar in the country to serve cause of justice which again is

noble one.

23. Second is Dhanraj Singh Choudahry Vs. Nathulal Vishwakarma, , in which the Court held thus:

23. 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.

24. In V.C. Rangadurai v. D. Gopalan Krishna Iyer, J. stated (SCC p. 311, para 5)

5. Law's nobility as a profession lasts only so long as the members maintain their commitment to integrity and service to the community.

25. Any compromise with the law's nobility as a profession is bound to affect the faith of the people in the rule of law and, therefore, unprofessional conduct by an advocate has to be viewed seriously. A person practising law has an obligation to maintain probity and high standard of professional ethics and morality.

24. Having referred to these judgments, I shall refer to N.G. Dastane Vs. Shrikant S. Shivde and Another, , where the scope of Section 35 was examined and the Apex Court held thus:

15. Chapter V of the Advocates Act, 1961 (for short, "the Act") contains provisions for dealing with the conduct of Advocates. The word "misconduct" is not defined in the Act. S. 35 of the Act indicates that the misconduct referred to therein is of a much wider import. This can be noticed from the wordings employed in sub-s. (1) of S. 35 of that section. It is extracted herein:

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 to its disciplinary committee.

16. The collocation of the words "guilty of professional or other misconduct" has been used for the purpose of conferring power on the Disciplinary Committee of the State Bar Council. It is for equipping the Bar Council with the binocular as well as whip to be on the qui vive for tracing out delinquent Advocates who transgress the norms or standards expected of them in the discharge of their professional duties. The central function of the legal profession is to help promotion of administration of justice. Any misdemeanor or misdeed or misbehaviour can become an act of delinquency, if it infringes such norms or standards and it can be regarded as misconduct.

17. In Black's Law Dictionary "misconduct" is defined as "a transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behaviour, willful in character, improper or wrong behaviour, its synonyms are misdemeanor, misdeed, misbehaviour, delinquency, impropriety, mismanagement, offence, but not negligence or carelessness".

18. The expression "professional misconduct" was attempted to be defined by Darling J. in *A Solicitor exp the Law Society, in re* (1912) 1 KB 302 in the following terms.

If it is shown that an Advocate in the pursuit of his profession has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to say that he is guilty of professional misconduct.

19. In *R.D. Saxena Vs. Balram Prasad Sharma*, this Court has quoted the above definition rendered by Darling J., which was subsequently approved by the Privy Council in AIR 1936 224 (Privy Council) and then observed thus:

Misconduct envisaged in S. 35 of the Advocates Act is not defined. The section uses the expression "misconduct, professional or otherwise". The word "misconduct" is a relative term. It has to be considered with reference to the subject-matter and the context wherein such term occurs. It literally means wrong conduct or improper conduct.

25. In *Baldev Singh Dhingra and Others Vs. Madan Lal Gupta and Others*, , the principles laid down in the judgment in *In the matter of D, an Advocate of the Supreme Court In Re: D an Advocate of The Supreme Court*, , which arose in the context of the *pari materia* provision contained in Section 10 of the Indian Bar Councils Act were reiterated and the Apex Court has held thus:

8. Learned counsel for the respondent was right when he contended placing reliance upon a judgment of this Court *In the matter of D, an Advocate of the Supreme Court In Re: D an Advocate of The Supreme Court*, , that the words "professional or other misconduct" would includes misconduct committed by an advocate not in his capacity as a professional but in any other capacity. The said decision was rendered in the light of Section 10 of the Bar Councils Act, 1926 which contains *pari materia* provision dealing with "professional or other misconduct" of advocates. Interpreting the phrase "professional or other misconduct", it was held by this court as under;

The Indian Legislature by using the words "professional or other misconduct" in Section 10, Indian Bar Councils Act intend to confer on the Court disciplinary jurisdiction to take action in all cases of misconduct whether in a professional or other capacity leaving to the discretion of Court to take action only in suitable cases.

it must be noted that the aforesaid observations were made in the light of factual matrix in the case wherein an advocate of the Bombay High Court is said to have committed breach of Bombay Prohibition Act by consuming illicit liquor. It is obvious that the said misconduct of the advocate was not in his "professional" capacity but in "other" capacity as a responsible citizen while he was active practitioner of law. He had not consumed liquor after ceasing to practise as an advocate. Section 10 of the Bar Councils Act, 1926 therefore conferred

disciplinary jurisdiction on the High Court in such cases of misconduct of advocates.

9. It is in the light of the aforesaid facts that the said decision of this Court was rendered. Therefore, we must proceed on the basis that "professional misconduct" as laid down in Section 35(1) of the Act can rope in practising advocates who commit either "professional misconduct" or "other misconduct".

26. Thus, from what is discussed above, it can be seen that the expression "misconduct" is not defined in the Advocates Act and should be construed and understood bearing in mind that the Advocates Act is to regulate a privileged class of persons, who because of their privileged status are subject to certain disabilities and rigid rules of professional conduct. Further, the words "guilty of professional and other misconduct" have been used in Section 35(1) of the Act for the purpose of conferring power on the State Bar Council to trace out delinquent advocates who transgress the norms and standards befitting the high and honourable profession to whose privileges they have been admitted. Apart from the plain language of Section 35(1), the judgment in Bal Dev Singh Dhingra's case (supra) clarifies that Section 35(1) will rope in practicing advocates who commit professional misconducts and also other misconducts which render them unworthy to wear the robes of this noble profession.

27. It is in this background one has to look at the allegations in the complaints made against the petitioner which are now pending consideration of the Disciplinary Committee of the Bar Council. A reading of Ext. P-2 complaint in W.P. (C) No. 3704/13 shows that it is the specific case of the complainant that the petitioner has filed the complaint against him acting as an agent of persons with vested interest in order to harass public servants. He has also given the details of several other complaints filed by the petitioner against similarly situated persons. Insofar as Ext P-3 complaint in W.P. (C) No. 3705/13 is concerned, specific allegation has been levelled that the petitioner has filed the complaint before the Enquiry Commissioner accepting the monetary considerations from the rivals of the complainant only to spoil his chances as a candidate in the assembly elections. These allegations, if proved, would certainly show that the petitioner was not maintaining the standard expected of him, being a member of the noble profession. Therefore, on the material available before this Court, I am unable to accept the case of the petitioner that the pleadings in the complaints do not prima facie disclose a case of misconduct against him. In these circumstances, both the contentions raised by the learned counsel for the petitioner are rejected. It is clarified that nothing stated in this judgment shall be construed as a pronouncement on the merits of the allegations against the petitioner and that it is for the parties concerned to prove their respective cases before the Disciplinary Committee. In so far as the second prayer in the writ petitions are concerned, the prayer sought is to quash the orders passed by the Disciplinary Committee setting aside the ex parte orders to the extent it imposed costs of Rs. 2,500 each. Imposition of costs is entirely in the discretion of the authority which

passes the order and unless the order is shown to be perverse or that the costs imposed is disproportionate, this Court will not be justified in interfering with the exercise of such discretion. On facts, I am not persuaded to think that Rs. 2,500 each imposed as costs is vitiated on any of these grounds justifying interference in a Writ Petition.

Writ Petitions therefore fail and are dismissed. No costs.