Privy Council Appeal No. 5 of 1954

Rajasooria – – – – – – – – – – *Appellant*

v.

Disciplinary Committee – – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF THE FEDERATION OF MALAYA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH MARCH, 1955

Present at the Hearing :

LORD TUCKER
LORD COHEN
LORD SOMERVELL OF HARROW
MR. L. M. D. DE SILVA

[*Delivered by* LORD COHEN]

The appellant is an advocate and solicitor practising in the Federation of Malaya. He appeals against an Order of the Supreme Court of the Federation dated the 27th August, 1953, suspending him from practice for a period of six months in respect of each of two charges brought against him but directing that in each case the period of suspension was to commence from the date of the Order.

The Order was made under section 26 of the Advocates and Solicitors Ordinance, 1947 (No. 4 of 1947). It is, so far as material, in the following terms :—

> " Section 26.—(1) Every advocate and solicitor shall be subject to the control of the Court and shall be liable on due cause shown to have his admission revoked and to be struck off the roll of the Court or to be suspended from practice for any period not exceeding two years or to be censured.
>
> (2) Such due cause may be shown by proof that such advocate and solicitor—
>
> * * * * * * *
>
> (*b*) has been guilty of fraudulent or grossly improper conduct in the discharge of his professional duty . . ."

The question at issue is as to the meaning to be placed on the words " grossly improper conduct in the discharge of his professional duty ". It is unnecessary to set out in full the other provisions of the Ordinance. Suffice it to say that under section 27 any complaint of the conduct of an advocate and solicitor in his professional capacity must be made in the first place to the appropriate Local Bar Committee who, if they consider that a full investigation of the complaint is necessary, have to apply in writing to the Chief Justice to appoint a Disciplinary Committee to hear and investigate the complaint.

Under section 29 the Disciplinary Committee have to record their findings as to the facts of the case and their opinion as to the conduct of the advocate and solicitor and as to whether the facts of the case constitute due cause for disciplinary action under section 26. They draw

up their findings in the form of a report, a copy of which is forwarded to the Chief Justice and to the Bar Council. The advocate and solicitor concerned and the person who made the complaint is entitled to a copy of the repont on application.

By section 31 it is provided that an application for an Order under section 26 should be made by originating motion *ex parte* for an Order calling upon the advocate and solicitor to show cause why an Order should not be made under the section. The order is served on the practitioner concerned and the application is then heard by a Court of three judges of whom the Chief Justice must be one. From the decision of that Court there is no appeal to any Court in the Malayan Union but it is provided that for the purposes of an appeal to this Board an Order made under the sub-section is to be deemed an Order of the Court of Appeal.

The complaint in the present case arose out of the affairs of the Foh Hup Omnibus Company, a company incorporated under the Malayan Companies Ordinance 1940 (No. 49 of 1940). On the 2nd June, 1952, there were held the Annual General Meeting and an Extraordinary General Meeting of the company at which a number of shareholders expressed dissatisfaction with the conduct of its affairs.

Between the 2nd June and the 10th June three undated documents in identical terms were prepared calling for an Extraordinary General Meeting of the company to enable the signatories of the documents "to protest against the unconstitutional manner in which the General Meeting on the 2nd June was held and to pass a vote of no confidence on the secretaries, Messrs. Lim Tam Chong & Company, and the directors holding office at present and hold a General Meeting constitutionally for election of office bearers." The three documents were signed by 24, 29 and 37 shareholders respectively. A copy of the three documents was produced before the Disciplinary Committee, the original not being available, and is referred to in its report as exhibit A.

On or about the 10th June, 1952, 15 of the said signatories brought the three documents to the appellant's office. The appellant, who according to his evidence before the Disciplinary Committee had no previous experience with company work, went to the office of the Registrar of Companies in Kuala Lumpur accompanied by three of his clients and taking with him the said three documents. According to the appellant the Registrar or someone in his office called the appellant's attention to section 115 of the Companies Ordinance and advised him to tell his clients to decide among themselves who were to be the new directors and secretaries. Neither the Registrar or anyone from his office gave evidence at the hearing by the Disciplinary Committee.

It is convenient here to mention that section 115 imposes on the directors of a company the obligation, on the requisition of members of the company holding at the date of the deposit of the requisition of not less than one-tenth of such of the paid-up capital of the company as at the date of the deposit carries the right of voting at general meetings of the company, to proceed duly to convene an Extraordinary General Meeting. Sub-section (2) of the section provides that the requisition must state the objects of the meeting and must be signed by the requisitionists and must be deposited at the registered office of the company but adds that it may consist of several documents in like form, each signed by one or more requisitionists.

Having received this advice from the Registrar the appellant asked the three requisitionists who had accompanied him to get for him the names of the proposed new office holders. They in due course handed to him documents containing this information.

On the 16th June the appellant wrote to the secretaries of the company stating the instructions he said he had received from the dissatisfied shareholders and asking among other things for a copy of the minutes of the meetings held on the 2nd June. He concluded by saying that he would forward the requisitions signed by 90 shareholders on receiving

such minutes. His letter appears to have been handed to the company's solicitors, Messrs. Shearn, Delamore & Co., who on the 17th June wrote confirming that on receiving proper documents the directors would comply with their obligations under section 115.

In view of the advice that, according to the appellant, he had received from the Registrar, the appellant then prepared a revised requisition (exhibit C (4) of the documents before the Disciplinary Committee). This set out four resolutions (1) to remove the then Board of directors; (2) to appoint a new Board consisting of the persons named to him as mentioned above; (3) to appoint a sub-committee to inquire into and investigate certain irregularities; and (4) to remove the then secretaries and replace them by the proposed new secretaries. This document was unsigned but there was inserted at the bottom the following "(Sgd.) Kong Sin Kee and 89 other shareholders, Foh Hup Omnibus Co., Ltd., (owning between them share i.e. not less than one-tenth of the issued capital of the Company)."

On the 5th August the appellant wrote to the then secretaries of the company stating that he had been instructed by 90 shareholders to forward a copy of the signed requisition for an Extraordinary General Meeting of the company and adding that the secretaries might have inspection of the requisition at the Registrar of Companies to whom he was forwarding the original list. The letter contained at the bottom a statement "Copy to Registrar of Companies, Kuala Lumpur". It is not clear exactly what documents were sent to the secretaries and the Registrar respectively but this much is, their Lordships think, established—namely that the appellant sent to the company a copy of C (4) and to the Registrar the original of the documents comprised in exhibit A, i.e. the original documents signed by the requisitionists. Whether or not he also sent to the Registrar a copy of C (4) is not clear.

On the 8th August the Registrar returned the requisition i.e. the original of exhibit A and requested the appellant to deposit it at the registered office of the company, once more calling his attention to section 115 of the Companies Ordinance. On the 11th August the appellant sent the original requisition to the secretaries of the company who again handed the correspondence to the company's solicitors.

On the 20th August the solicitors wrote to the appellant pointing out that document C (4) did not comply with section 115 as it was only a copy of the alleged requisition and that the documents enclosed in the appellant's letter of the 11th August in no way made good the omission since they bore no relation to the copy requisition C (4).

On the 22nd August the appellant wrote to the company's solicitors stating that it was never intended that the Extraordinary General Meeting should be called on the resolutions set out in the original documents signed by the requisitionists. His letter continued as follows:—

> "I sent a copy of the resolution in prescribed form to the registered office of the Company concerned but overlooked enclosing the original signatures and forwarded them to the Registrar of Companies for reasons which are no doubt obvious to you. The motive for so doing were doubts in my clients' minds but not in mine.
>
> The resolutions in my letter of the 5th instant is to be the basis of the resolution and not what is contained in the documents containing the signatures. If this explanation and clarification is not sufficient may I request the return of all the documents and I shall get the signatures anew. This you will no doubt agree will be prolonging the 'agony' for all parties concerned."

On the 25th August the company's solicitors returned to the appellant the original documents signed by the requisitionists and stated: "The present position is therefore that no valid requisition is outstanding but if a valid requisition is served in the future it will be complied with".

Their Lordships consider that reading this answer in the light of his letter of the 22nd August, the appellant must have understood that

the solicitors were calling upon him to get the signatures of the requisitionists to document C (4) and relodge it if he wished the directors of the company to act on it.

On the 27th August the appellant wrote to the company's secretaries as follows:—

> "I am forwarding herewith a signed Requisition for an Extraordinary General Meeting of Foh Hup Omnibus Co., Ltd., by 90 shareholders for favour of necessary action."

What was enclosed were three documents the wording of each of which above the signatures was identical with that in C (4) save that the date instead of "July 1952" was the "27th August 1952". Each of these documents was made to appear to be signed by some of the 90 shareholders. This was effected by cutting from the original documents of requisition the signatures affixed thereto and pasting one of them on to each of the new documents. The appellant himself signed his name across the joint of each of the three composite documents.

The appellant stated that before depositing the said documents he obtained the assurance from five shareholders that all the 90 signatories were still shareholders of the company.

It was these composite documents which formed the basis of the complaint against the appellant.

On the 13th September the company sent out a notice of an Extraordinary General Meeting to consider the resolutions set forth in the documents of the 27th August.

On the 26th September the company's solicitors wrote to the appellant calling attention to the fact that the portion of the document which bore the signatures of the shareholders who were supposed to have signed the requisition had been pasted on to the sheets on which the requisition was typed. This, they said, made it appear that the portions on which the signatures appeared had been cut off some other document. For this reason they asked the appellant to confirm that all the persons who signed the piece of paper which had been pasted on to the requisition signed the paper only after it was pasted on to the sheet which contained the requisitions. They added that this was a serious matter because investigation shows that on the date of the requisition, the 27th August, 1952, certain of the signatories were not members of the company. The last paragraph of their letter was in the following terms:—

> "We cannot imagine that you would paste signatures on to a document and we are sure that you will confirm that the signatures were definitely fixed to the requisition after it had been typed, this supposition is strengthened by the fact that Mr. Rajasooria himself has signed across the place where the pieces of paper containing the signatures are joined on to the requisition."

The appellant replied to that letter on the 29th September, 1952. The material portion of his reply is as follows:—

> "Reference your letter of the 26th the signatures on the requisition were obtained after I was instructed to act and call for an Extraordinary Meeting. I saw the Registrar of Companies and showed him the original requisition. It was on his advice that the amended form of requisition was typed and attached to the original documents. I am satisfied that each and every signature appearing on the documents was affixed with the sole purpose of requisitioning an Extraordinary Meeting."

On the 1st October, 1952, the company's solicitors wrote to the appellant stating that they read the first paragraph of the appellant's letter of the 29th September as meaning, (1) that a requisition convening an Extraordinary General Meeting was prepared and signed; (2) that it was decided to amend this requisition whereupon a new form was prepared and the signatures to the old form were detached from the old and

attached to the new form; (3) that this was done on the advice of the Registrar of Companies.

Their Lordships think that this construction was the only reasonable construction that could be placed on the first paragraph of the appellant's letter of the 29th September. No answer was received by the company's solicitors to their letter of the 1st October. Accordingly on the 27th October they wrote to the Registrar of Companies enclosing copies of the letters of the 26th and 29th September and the 1st October and asking the Registrar if he was in a position to confirm that it was on his advice that the amended form of the requisition was typed and attached to the original documents. To this letter the Registrar replied on the 29th October stating that so far as he could trace his department had nothing to do with the second requisition, i.e. the requisition of the 27th August.

On the 4th November the secretaries of the company wrote to the secretary of the Bar Committee of Selangor and Negri Sembilan lodging a complaint against the appellant. The substance of the complaint was the formation of the composite documents and the statement which the complainant said the appellant had made in his letter of the 29th September that his action in pasting the signatures to the new requisition had been taken on the advice of the Registrar, a statement which was denied by the Registrar. The Bar Committee notified the appellant of this complaint and on the 11th December the appellant wrote answering the charge. Their Lordships do not find it necessary to refer to the details of that answer. The Bar Committee, after completing its investigation, applied to the Chief Justice to appoint a Disciplinary Committee under section 27 of the Advocates and Solicitors Ordinance and on the 12th March, 1953, the Chief Justice appointed a Disciplinary Committee. On the 7th May, 1953, the Disciplinary Committee held a hearing into the complaint. The appellant was present and gave evidence. During the opening statement by counsel for the complainants, the appellant admitted that the composite documents were made by cutting out the signatures at the bottom of the original requisitions and affixing copies of C (4) to each of the portions thus obtained. He also admitted that this was not done on the Registrar's advice, but in his opening statement he said that it was done *bona fide* and after obtaining the assurance of five shareholders who acted as spokesmen of the whole 90 signatories that every one of the signatories was still a shareholder on the 27th August. He added on oath that four of the five shareholders who gave him this assurance were actually present and witnessed the excision and pasting.

He was cross-examined as to his failure to answer the company's solicitors' letter of the 1st October. His evidence on this point is not quite clear but it would appear that his explanation was (*a*) that he did not feel any obligation to defend himself against a firm of solicitors who chose to be insulting and to accuse him of unprofessional conduct and (*b*) that his instructions were withdrawn and given to Lovelace and Hastings on the 1st or 2nd October. Their Lordships pause here to observe that at the hearing before this Board an application was made for leave to adduce further evidence directed to establishing that the letter in question, though dated the 1st October, was not delivered at the appellant's office until the 4th October, that on that date the appellant was away from Kuala Lumpur on other business and did not return until the 7th October before which date the file containing all the papers had been handed to Messrs. Lovelace and Hastings.

On the 11th June, 1953, the Disciplinary Committee made their report and forwarded a copy to the Chief Justice and to the Bar Committee in accordance with section 29 of the Advocates and Solicitors Ordinance. They pointed out that the complaint was really a double one (*a*) that the appellant cut off the signatures from the original requisitions and later attached them by pasting on to the new or amended requisitions (complaint No. 1); and (*b*) that he informed the company's solicitors

that he had done this on the advice of the Registrar of Companies who, on enquiry being made from him, denied having given any such advice (complaint No. 2). After setting out the material facts and recording the appellant's evidence as to the cutting off of the signatures and pasting them below the new wording, and his statement that he had done so in the *bona fide* belief that nothing unprofessional was being done and that was why he signed across the joint in the documents, the Disciplinary Committee expressed their conclusions as follows:—(1) in relation to the matters alleged in complaint No. 1 the appellant was guilty of grossly improper conduct as an advocate and solicitor but he did not act with intention to deceive; and (2) with regard to complaint No. 2 that the letter was written with the intention of justifying the action the subject of complaint No. 1, and that it was definitely intended to mislead. The Disciplinary Committee therefore found that the appellant's conduct in writing it and further in not replying to the letter of the 1st October from the company's solicitors amounted to grossly improper conduct and that he had given no satisfactory explanation thereof. They concluded by expressing the opinion that the facts proved or admitted constituted due cause for disciplinary action under section 26.

An originating motion was duly issued pursuant to section 31 and on the 20th July, 1953, an order was made summoning the appellant to appear before a court of three judges on the 10th August, 1953, to show cause why an Order should not be made against him under section 26 (1) of the Advocates and Solicitors Ordinance, 1947. The case was heard before Pretheroe, Acting Chief Justice of the Federation of Malaya, Murray-Aynsley, Chief Justice of Singapore and Briggs, J. On the 27th August, 1953, they gave judgment accepting the findings of the Disciplinary Committee and suspending the appellant from practising for a period of six months on each charge as stated in the Order to which reference has already been made.

Pretheroe, C.J., first considered the meaning of the expression "grossly improper conduct" in section 26 and accepted as the test the definition that it means conduct which is dishonourable to the appellant as a man and dishonourable in his profession. He took this test from the judgment of Lord Esher, M.R., in *Re G. Mayor Cooke* (1889) 5 T.L.R. 407 at 408 and added that it seemed to him perfectly clear that for an advocate and solicitor knowingly and deliberately to submit a false document, and intend it to be acted upon, was both dishonourable to himself and to his profession. Dealing with the first complaint he accepted the finding of the Disciplinary Committee that the appellant did not act with the intention to deceive when sending to the secretary of the company on the 22nd August the composite documents to which their Lordships have already referred but said that it seemed to him probable that the appellant adopted this course in order to avoid the labour necessarily required to obtain the signatures of between eighty and ninety persons living in different parts of two States. The learned Judge however added "But even if there was no intention to deceive the plain fact remains that the document was a false document and might have deceived both the Registrar of Companies and the company itself if the signatures of three persons, who had recently ceased to be shareholders, had not been observed". On complaint No. 2 Pretheroe, C.J., expressed his agreement with the Disciplinary Committee that the statement in the letter of the 29th September was definitely intended to mislead. He says "Having carefully considered the whole of the correspondence exhibited in this case I regret to say that I have reached the same conclusion. Even when the matter was put to the respondent with complete clarity in the letter addressed to him by Messrs. Shearn, Delamore & Co. on the 1st of October, 1952, he did not even answer the letter".

Murray-Aynsley, C.J., agreed. As regards the first complaint he says:—

> "As regards the first charge, I do not think that it is possible to deny the seriousness of the matter. The document sent in on August 27th was one intended to have legal consequences and it

was a false document. Though the matter was done with a complete lack of contrivance and was obvious to anyone examining the document, and the Committee have found that there was not an intention to deceive, I agree with the finding of the Committee that it constituted grossly improper conduct on the part of an advocate and solicitor and that it brings the Respondent within Section 26 (2) of Cap. 41 (Ordinance No. 4 of 1947)."

As regards the second charge it is to be observed that he does not place any reliance on the failure to reply to the letter of the 1st October. He says :—

"I do not think that any reasonable person reading the letter of September 29th could have construed it as meaning anything but that the Registrar of Companies had advised the pasting together of the two pieces of paper and I think it is impossible to resist the inference that it was intended to convey that impression."

Briggs, J., also accepts the findings of the Disciplinary Committee. As regards the first complaint he says that to cut a signature from one document and affix it to another might in very special circumstances be permissible but no such circumstances existed in this case. On the other hand he says that the appellant must have been aware that in the interval of two months some at least of the original signatories might have changed their minds and not wish to sign the new requisition. He considered that the precautions taken in this respect by the appellant were wholly insufficient and that it was grossly improper conduct in his behalf to transfer the signatures unless each and every one of the signatories had expressly authorised him to do so. As regards the second charge he places a benevolent construction on the appellant's letter of the 29th September saying that it was not literally untrue but was likely to mislead the solicitors for the company and he bases his agreement with the Disciplinary Committee on the failure of the appellant to correct the misapprehension after receiving the letter of the 1st October, 1952.

It is from this Order of the 27th August, 1953, that the appellant appeals to this Board. While the appeal to this Board was being prepared it was discovered that the letter dated the 1st October, 1952, had not in fact been delivered to the appellant's office until the 4th October, 1952. In view particularly of the judgment of Briggs, J., who bases his judgment on complaint No. 2 entirely on the failure to answer this letter, the appellant's counsel applied for leave to adduce further evidence to establish the facts to which their Lordships have already referred. Those facts, if established, would necessarily involve that the appellant had never seen the letter in question and could not therefore be blamed for failure to deal with it. Before their Lordships could admit this evidence they would require to be satisfied on two points: (1) that it could not with reasonable diligence have been made available either before the Disciplinary Committee or before the Supreme Court and (2) that it would have formed a determining factor in, or had an important influence on, the result. Their Lordships do not find it necessary to consider whether the first of these conditions is complied with since they are satisfied that the evidence, if produced, would not have affected the result either before the Disciplinary Committee or in the Supreme Court. Their Lordships are unable to place on the letter of the 29th September the benevolent construction adopted by Briggs, J. They agree with Murray-Aynsley, C.J., that no reasonable person reading that letter could have construed it as meaning anything but that the Registrar of Companies had advised the pasting together of the two pieces of paper, and they agree with him that it is impossible to resist the inference that it was intended to convey that impression. Mr. Gillis suggested that the evidence might have affected the sentence even if it did not affect the finding of grossly improper conduct but their Lordships are satisfied for the reason they have stated that this is not a case where they should admit fresh evidence and they see nothing to lead them to the conclusion that the sentence imposed was unduly severe.

Their Lordships turn therefore to complaint No. 1. Mr. Gillis argued with force that once the Disciplinary Committee had found that there was no intention to deceive it necessarily followed that the Supreme Court could not properly find that there was grossly improper conduct. He relied on the passage already cited from the judgment of Lord Esher in *Re G. Mayor Cooke* (supra). He suggested that the appellant could not be said to have done anything dishonourable to him as a man if he did what he did without any intention to deceive. Their Lordships however agree with Pretheroe, acting C.J., that for an advocate and solicitor knowingly and deliberately to submit a false document intending it to be acted upon, is dishonourable both to himself and to his profession. This in itself involves an element of "deceit." The Committee no doubt meant that the appellant believed his clients would have signed the new requisition if given the opportunity. Their Lordships do not read into Lord Esher's words a statement that a finding that intention to deceive is always an essential element in grossly improper conduct. It is to be observed that in *Allinson* v. *General Council of Medical Education and Registration* [1894] 1 Q.B. 750 at p. 760, dealing with the case of a medical man, Lord Esher approved the test suggested by Lopes, L.J., as follows:—

> "'If it is shown that a medical man, 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 the General Medical Council to say that he has been guilty of 'infamous conduct in a professional respect'."

For the reasons they have stated their Lordships find themselves in complete agreement with the Supreme Court but they would add that had they felt any hesitation in the matter they would require a very strong case before they substituted their own opinion of what is professional misconduct in the Federation for the conclusion reached by the Disciplinary Committee and the Supreme Court. As Darling, J., said in relation to England in *In re a Solicitor Ex parte The Law Society* [1912] 1 K.B. 302 at p. 312:—

> "The Law Society are very good judges of what is professional misconduct as a solicitor, just as the General Medical Council are very good judges of what is misconduct as a medical man."

For these reasons their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

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In the Privy Council

RAJASOORIA

v.

DISCIPLINARY COMMITTEE

DELIVERED BY LORD COHEN

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