

21. The further question that arises for consideration is what is the appropriate course to be followed in a suit which was filed by the creditor against the debtor before the debtor made the application to the Tahsildar seeking relief under the Act, should it be dismissed immediately on filing or should it be suspended/stayed till the Tahsildar disposes of the application filed by the debtor. It is our view that in such a case the proper and reasonable course to be followed is to stay the proceeding in the suit till the Tahsildar/appellate authority disposes of the proceeding under the statute. If it is held in that proceeding that the debtor is not entitled to the benefit under the Act then the civil suit may be proceeded with, if on the other hand it is held that the debtor is entitled to the benefits provided in the Act then the suit has to be dismissed under S. 4. In no case can it be held that by filing a civil suit for realisation of the mortgage amount the proceeding pending before the Tahsildar or the appellate authority is to be dismissed without adjudication.

22. On the discussions in the foregoing paragraphs the inescapable conclusion is that the judgment of the learned single Judge as confirmed by the Division Bench is unsustainable. Accordingly, the appeal is allowed. The judgment under challenge is set aside. Hearing fee is assessed at Rs. 10,000/.

23. We are beholden to Shri S. Ganesh, Senior Advocate for the assistance rendered to us in the case.

Appeal allowed.

AIR 2002 SUPREME COURT 47

D. P. MOHAPATRA AND
SHIVARAJ V. PATIL, JJ.

C.A. No. 6304 of 1998,* D/- 31-10-2001.

Bhupinder Kumar Sharma, Appellant v.
Bar Association, Pathankot, Respondent.

**Advocates Act (25 of 1961), S. 35 —
Professional misconduct — Proof and punishment — Advocate alleged to be carrying photocopying centre in Court**

*From Judgment and Order of Bar Council of India, New Delhi, in DCA No. 18 of 1996, D/- 14-11-1998.

KS/KS/S200155/2001/VVG/RTT/26599/2001

premises, PCO and other business even after enrolment — Plea by Advocate that after his enrolment business was carried on by his brother and father — Evidence of Telephone Deptt. and S.D.O. showing that P.C.O. and lease of photo-copying centre are continuing in name of Advocate even after his enrolment — Finding that Advocate is guilty of misconduct — Cannot be said to be based on no evidence — Or on evidence not of standard required in quasi-criminal case — However, considering nature of misconduct and taking note of the handicap of the Advocate debarring him for practising for all time held was too harsh.

(Paras 12, 17, 18)

R. Venkataramani, Sr. Advocate and Vinay Kumar Garg, Advocate, with him, for Appellant; Anoop Choudhary, Sr. Advocate, Sudhir Walia, Sanjay Sarin, Advocate for Mahinder Singh Dahiya Advocate/Advocates with him for Respondent.

SHIVARAJ V. PATIL, J. :— The appellant has filed this appeal, under Section 38 of the Advocates Act, 1961 (hereinafter referred to as 'the Act') against the judgment and order dated 4-11-1998 passed by the Disciplinary Committee of the Bar Council of India, confirming the order passed by the Disciplinary Committee of Bar Council of Punjab and Haryana removing the name of the appellant from the State's Roll of Advocates under Section 35(3)(d) of the Act.

2. The appellant was enrolled with the State Bar Council as an Advocate on 16-9-1994 vide enrolment No. P/771/94. On 9-9-1995, the respondent-association made a written complaint to the State Bar Council making allegations of misconduct against the appellant. The State Bar Council took cognizance of the complaint and referred the complaint to its Disciplinary Committee. After the completion of the proceedings in D.C.E. No. 1/1996, order was passed by the Disciplinary Committee of State Bar Council to remove the name of the appellant from the State Roll of the Advocate and the same was confirmed by the Disciplinary Committee of the Bar Council of India, in appeal. Hence, this appeal.

3. The learned Senior Counsel for the appellant strongly contended that the allegations made in the complaint were not established or proved, judged by the stand-

ard of proof required in a case like this, the appellant was not actually carrying on business and the evidence on this point was not properly appreciated; at any rate, the punishment imposed on the appellant is grossly disproportionate even assuming that the misconduct was proved.

4. Per contra, the learned Senior Counsel for the respondent made submissions supporting the impugned order. He drew our attention to the evidence brought on record to show how the findings recorded against the appellant are justified. He also strongly contended that the misconduct of the appellant before and even after filing of the appeals before the Bar Council of India and this Court in continuing the business cannot be condoned; further in spite of giving undertaking before this Court, he is still continuing his business as is supported by the report of the Sub-Judge made to this Court. According to him, the punishment imposed on the appellant is proper in the absence of any good ground to take any lenient view.

5. We have carefully considered these submissions.

6. The complaint contained allegations of misconduct against the appellant for the period prior to the date of enrolment as an Advocate and also subsequent to his enrolment. Since the Disciplinary Committee of the State Bar Council did not go into the allegations of misconduct pertaining to the period prior to the date of enrolment, it is unnecessary to refer to them.

7. According to the complainant, the appellant was guilty of professional misconduct as he was carrying on and continued his business and business activities even after his enrolment as an Advocate, stating thus:—

“(i) He was running a photocopier documentation center in the Court compound, Pathankot, and the space for the same was allotted to the appellant in his personal capacity on account of his being handicap :

(ii) He was running a PCO/STD booth which was allotted in his name from the P and T Department under handicap quota :

(iii) He was proprietor/General Manager of the Punjab Coal Briquettes, Pathankot, a private concern and he was pursuing the business/his interest in the said business even on the date when his statement was

recorded by the Disciplinary Committee on 12-5-1996.”

8. The defence of the appellant was that although he was running business prior to his enrolment, he did not continue the same after his enrolment as an Advocate and he ceased to have any business interest, and that it is his father and brother who were carrying on the business after he became an Advocate under some oral arrangement. The Disciplinary Committee of the State Bar Council, after considering the evidence placed on record, both oral and documentary, recorded a finding that the appellant was guilty of professional misconduct in carrying on business in the aforementioned concerns even after his enrolment as an Advocate and passed order to remove his name from the State's Roll of Advocates under Sectin 35(3)(d) of the Act and debarred him from practising as an Advocate. The Disciplinary Committee of the Bar Council of India, in the appeal filed by the appellant on re-appreciation of the material on record, concurred with the finding recorded by the Disciplinary Committee of the State Bar Council and held that the appellant was guilty of professional misconduct and that the punishment imposed on him debarring the appellant from practising for all time was just. Hence, dismissed the appeal.

9. In the impugned order, it is also noticed that the appellant submitted his application form for enrolment. Column No. 12 of the application form reads :

“12. Whether or not applicant engaged or has ever been engaged in any trade, business or profession, if so the nature of such trade, business/profession and the place where it is or was carried on. The answer submitted by appellant advocate is as under:

“No, not applicable .”

10. According to the Disciplinary Committee of Bar Council of India, the appellant had not only procured enrolment by submitting the false declaration but also suppressed the material fact; otherwise the appellant would not have been enrolled at all. In the said order, it is further stated that as a matter of fact, besides it being the case of misconduct, it is also a case where the name of the appellant could be removed for suppression the material fact; anyhow since the reference had not been made for the same,

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it is left open to the State Bar Council to take such action under Section 26 of the Act.

11. CW-1, Shri Manohar Lal, Senior Telecommunication Office Assistant, has deposed that STD/PCO has been allotted to appellant on 6-4-1992 in the handicap quota and the same is continuing in the name of the appellant as per the record even after his enrolment as an Advocate; no intimation was given by the appellant to the Department to transfer STD/PCO in the name of his brother Satish Mohan. CW-3, Shri Vipin Tripathi, a clerk in the office of S.D.O. in his evidence has stated that space for kiosk for installation of photocopy machine on payment of Rs. 120/- per month, was allotted on lease basis on 6-5-1991 by Dy. Commissioner, Gurdaspur, to the appellant in handicap quota; there was no intimation to change lease in favour of anybody and there is no transfer of lease in favour of any other person; the lease amount is paid even after appellant's enrolment as an Advocate in his name. CW-3, H.S. Pathania, in his evidence has supported the allegations made in the complaint. The appellant in his evidence has stated that he has no concern with the business of STD/PCO and Photostat machine. RW-2, Satish Mohan, the brother of the appellant has stated that he has no arrangement with the appellant regarding PCO. In his cross-examination he has admitted that he is still in the service of sugar mills, Dasuya. Hence, it was rightly concluded that STD/PCO business is being run by the appellant himself even after becoming an Advocate. RW-3, Shri Puran Chand Sharma, the father of the appellant in his evidence has admitted that the appellant is having his office in the same cabin where photocopier machine is installed. In the evidence led on behalf of the complainant, it is stated that the site of kiosk for running the photostat business is still in the name of the appellant and lease money is also being paid by the appellant and in the absence of the appellant giving intimation to the Department/authorities concerned regarding handing over of business to Shri Puran Chand Sharma or Satish Mohan, the assertion regarding the oral agreement was not believed by the Disciplinary Committee of the State Bar Council and rightly so in our opinion. The Disciplinary Committee of the State Bar Council in its order has objec-

tively considered the evidence brought on record. As ready stated above, the Disciplinary Committee of the Bar Council of India on re-appreciation of the evidence has concurred with the finding recorded by the Disciplinary Committee of the State Bar Council based on oral and documentary evidence.

12. Having perused both the orders and the evidence placed on record, we are of the view that the finding recorded holding the appellant guilty of professional misconduct is supported by and based on cogent and convincing evidence even judged by the standard required to establish misconduct as required to prove a charge in a quasi-criminal case beyond reasonable doubt. We do not find any merit in the argument that the misconduct alleged against the appellant was not properly proved by the standard required to prove such a misconduct. There is also no merit in the contention that the evidence was not properly appreciated by both the Disciplinary Committees; nothing was brought on record to discredit the evidence led on behalf of the complaint and no material was placed to support the allegation of the appellant that the members of the respondent-Association had any grudge or ill-will against the appellant.

13. It is to be further noticed that this Court on 26-2-1999 passed the following order :—

"Learned counsel for the appellant wants to file an affidavit in the form of an undertaking that the petitioner is not personally engaging himself in any of the family businesses. Adjourned for two weeks."

14. Pursuant to the said order, the appellant has filed affidavit/undertaking. Para 3 of the affidavit/undertaking reads :—

"I state on oath before this Hon'ble Court that since the day of my enrolment as an Advocate, I have not engaged myself in any business except my practice of the law as an Advocate and I undertake before this Hon'ble Court that I shall not ever engage either actively or otherwise, in any other business or profession while I continue my enrolment as an Advocate."

15. The order made by this Court on 2-9-1999 reads :—

"Mr. Sudhir Walia, learned counsel appearing for the Bar Association, Pathankot placed before us the photographs of the cabin where the photocopying machine is

installed. The photograph discloses the name board of the petitioner and also an inscription in Punjabi language "Bhupindra Photostat Centre". The learned counsel appearing for the Bar Association, Pathankot says that these photographs placed before us have been taken yesterday only. It is contended that, therefore, the undertaking filed in this Court that the petitioner was not conducting any business in his name, could not be accepted. This fact is disputed by learned Senior Counsel appearing for the petitioner.

We are, therefore, constrained to call for a report from the learned Sub-Judge at Pathankot as to whether the cabin in which the photocopying machine is installed contains, apart from the name board of the petitioner an inscription "Bhupindra Photostat Centre" and whether such inscription was there till yesterday and is continuing as of today. The learned Sub-Judge shall also furnish the details regarding the allotment of the place within the Court compound wherein this cabin has been put up. The report will be submitted within four weeks from today. A copy of this order will be sent to the learned Sub-Judge at Pathankot today itself.

List the matter after the report from the learned Sub-Judge at Pathankot is received."

16. Pursuant to the same, the Sub-Judge submitted a report, which also goes against the appellant.

17. We are unable to say that the concurrent finding recorded by both the Disciplinary Committees against the appellant as to his professional misconduct, is a finding based on no evidence or is based on mere conjecture and unwarranted inference. Hence, the same cannot be disturbed.

18. What remains to be seen is whether the punishment imposed on the appellant is grossly disproportionate. Having regard to the nature of misconduct and taking note of the handicap of the appellant, in our opinion, debarring him from practising for all time is too harsh. We consider it just and appropriate to modify the punishment to debar the appellant from practising upto end of December 2006. Except the modification of punishment as stated above, the im-

pugned order remains undisturbed in all other respects. The appeal is disposed of in the above terms. No costs.

Order accordingly.

AIR 2002 SUPREME COURT 50

(From : Madhya Pradesh)*

R. C. LAHOTI,

P. VENKATARAMA REDDI, JJ.

Criminal Appeal No. 707 of 2000, D/- 31-10-2001.

Sewaka alias Ramsewak, Appellant v. State of M. P. and another, Respondents.

(A) Penal Code (45 of 1860), S. 300 — Time of occurrence — Murder — Identification of accused — Deceased and his wife were sleeping in their courtyard — Incident alleged to have been occurred in month of July in courtyard of deceased, a little later after midnight — Wife of deceased on seeing her husband being fatally shot at, got up and grappled with assailants who were of same village and assailants made good their escape — She having identified assailants in moonlight stated their names to her father-in-law and cousin brother — Plea by defence by reference to almanac that moon would have set at about 2 to 3 a.m. on that night and, therefore, at time of occurrence moonlight might not have been there — Held, not tenable in view of fact that wife of deceased a rustic woman was not wearing wrist watch and time of occurrence given by her was an estimated one, but she was very sure of moonlight existing then — This identification of accused by her cannot be doubted.

Evidence Act (1 of 1872), S. 9.

(Para 4)

(B) Penal Code (45 of 1860), S. 300 — Murder — Accused persons out of enmity fired shot from Katta, a country made pistol — Caused death of deceased when he along with his wife was sleeping in his courtyard — Wife on seeing her husband being fatally shot at, got up and grappled with assailants who were of same village who made good their escape — Wife identified

*Cri. A. No. 198 of 1985, D/- 12-5-2000 (Madh Pra).

KS/KS/S200156/2001/VNP/DPV/26192/2001