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R.D. SAXENA

v.

BALRAM PRASAD SHARMA

AUGUST 22, 2000

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[K.T. THOMAS AND R.P. SETHI, JJ.]

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Advocates Act, 1961—Section 35—Professional misconduct—Case file of client withheld by Advocate for non-payment of fees—Bar Council debarred him from practice for 18 months and imposed fine of Rs. 1000—Considering it to be a professional misconduct—On appeal—Held, case files cannot be equated with “goods” or “goods bailed” as they have no marketability—Cause of litigant far more important than right of an Advocate for his remuneration—Such a practice can never be permitted—However, an Advocate may adopt alternate legal remedies to recover his fees—It is not only a legal duty but it is also morally imperative to return the case file as a litigant is free to engage any Advocate—Punishment reduced to a reprimand, not to be counted as precedent, as law on this question was unsettled—Indian Contract Act, 1872—Sections 148 and 171.

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Constitution of India—Article 22(1)—The right of an accused to consult and be defended by counsel of his choice—Given status of a fundamental right—Code of Civil Procedure—Order 3, Rule 4(1).

F

Bar Council of India Rules—Rules 24, 28 and 29—Advocate specifically prohibited from adjusting his fees against his own personal liability to the client—No lien provided on the litigation files kept with the advocate—Any such lien, if permitted, would be susceptible to great abuses and exploitation.

Words and Phrases—“Misconduct, professional or otherwise”—Meaning of in the context of the Advocates Act, 1961—Section 35.

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Appellant was Legal Advisor of a Bank, which requested him to return all the case files after termination of his retainership. He informed the Bank that Rs. 91,700 was due towards his fees and that the files would be returned only after it was settled. The dispute remained unresolved. So a complaint was filed before the State Bar Council. Appellant submitted that he had a right to retain the files by exercising his right of lien and offered to return the files as soon as payment was made. The proceedings were transferred to Bar Council of India whose Disciplinary Committee

held the appellant guilty of professional misconduct and debarred him from practice for a period of 18 months and imposed a fine of Rs. 1000. Hence this appeal.

Appellant contended that the Bar Council of India did not appreciate that he had a lien over his client's file in lieu of his unpaid fees, and that the files could be equated with the "goods" referred to in Section 171 of the Indian Contract Act.

Respondent contended that there was no amount payable and an inflated amount had been shown as fees; that an Advocate cannot retain the files after the client terminated his engagement and that there is no lien on such files.

Disposing of the appeal, the Court

HELD : Per Thomas, J. :

1. Files containing copies of the records cannot be equated with "goods" referred to in section 171 of the Indian Contract Act. The advocate keeping the files cannot amount to "goods bailed". In the case of litigation papers in the hands of an Advocate there is neither delivery of goods nor any contract that they shall be returned or otherwise disposed of. The word "goods" mentioned in Section 171 is to be understood in the sense in which that word is defined in the Sale of Goods Act. "Goods" to fall within the purview of Section 171 of the Contract Act should have marketability and the person to whom it is bailed should be in a position to dispose it of in consideration of money. There is no scope for converting the case files into money, nor can they be sold to any third party.[606-E-H]

2. Before India attained independence different High Courts in India had adopted different views regarding the question whether an Advocate has a lien over the litigation files kept with him. After independence, when the new Bar Council of India came into existence it framed Rules called the Bar Council of India Rules as empowered by the Advocates Act and contain provisions specifically prohibiting an Advocate from adjusting the fees payable to him by a client against his own personal liability to the client. These rules, even after providing a right for an Advocate to deduct the fees out of any money of the client remaining in his hand at the termination of the proceeding for which the Advocate was engaged, provides no lien on the litigation files kept with him. In the conditions prevail-

A ing in India with lots of illiterate people among the litigant public it may not be advisable also to permit the counsel to retain the case bundle for the fees claimed by him. Any such lien, if permitted, would become susceptible to great abuses and exploitation. [607-E; 608-A-B; F]

B *P. Krishnamachariar v. The Official Assignee of Madras*, A.I.R. (1932) Madras 256; *Tyabji Dayabhai & Co. v. Jetha Devji & Co.*, A.I.R. (1927) Bombay 542; *In re B.N. Advocate in the Matter of Misc. Judl. Case No. 18/33* A.I.R. (1933) Pat. 571, referred to.

Halsbury's Laws of England, Volume 44, para 226, referred to.

C 3. The cause in a court/tribunal is far more important for all concerned than the right of the legal practitioner for his remuneration in respect of the services rendered for espousing the cause on behalf of the litigant. If a need arises for the litigant to change his counsel pendente lite, that which is more important should have its even course flowed unimpeded.
D Retention of records for the unpaid remuneration of the Advocate would impede such course and the cause pending judicial disposal would be badly impaired. No professional can be given the right to withhold the returnable records relating to the work done by him with his client's matter on the strength of any claim for unpaid remuneration. The alternative is that the professional concerned can resort to other legal remedies for such unpaid
E remuneration. [608-G-H; 609-A-B]

F 4. A litigant must have the freedom to change his Advocate when he feels that the Advocate engaged by him is not capable of espousing his cause efficiently or that his conduct is prejudicial to the interest involved in the lis, or for any other reason. For whatever reason, if a client does not want to continue the engagement of a particular Advocate it would be a professional requirement consistent with the dignity of the profession that he should return the brief to the client. Such an obligation is not only a legal duty but a moral imperative. [609-C-D]

G *State of Madhya Pradesh v. Shobharam and Ors.*, A.I.R. (1966) SC 1910, relied on.

H 5. If a party terminates the engagement of an Advocate before the culmination of the proceedings that party must have the entire file with him to engage another Advocate. But if the Advocate who is changed midway adopts the stand that he would not return the file until the fees

claimed by him are paid, the situation may turn to dangerous proportions. There may be cases when a party has no resource to pay the huge amount claimed by the Advocate as his remuneration. A party in a litigation may have a version that he has already paid for the legitimate fee to the Advocate. At any rate if the litigation is pending the party has the right to get the papers from the Advocate whom he has changed so that the new counsel can be briefed by him effectively. In either case it is impermissible for the erstwhile counsel to retain the case bundle on the premise that fees is yet to be paid. [609-G-H; 610-A-B]

6. Even if there is no lien on the litigation papers of his client an Advocate is not without remedies to realise the fee which he is legitimately entitled to. But if he has a duty to return the files to his client on being discharged the litigant too has a right to have the files returned to him, more so when the remaining part of the lis has to be fought in the court. This right of the litigant is to be read as the corresponding counterpart of the professional duty of the Advocate. [610-C]

7. Misconduct envisaged in Section 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. [610-D]

Corpus Juris Secundum, Volume 7, page 740, referred to.

In re A Solicitor ex parte the Law Society [1912] 1 KB 302 and *George Frier Grahame v. Attorney-General, Fiji*, [1936] PC 224, referred to.

8. The refusal to return the files to the client when he demanded the same amounts to misconduct under Section 35 of the Act and the appellant is liable to punishment. Two broad aspects have to be considered regarding quantum of punishment (1) this court has not pronounced, so far, on the question whether Advocate has a lien on the files for his fees. (2) the appellant would have *bona fide* believed, in the light of decisions of certain High Courts, that he did have a lien. In such circumstances, it is not necessary to inflict a harsh punishment and a reprimand would be sufficient in the interest of justice on the special facts of this case. It is made clear that if any Advocate commits this type of professional misconduct in future he would be liable to such quantum of punishment as the Bar

A Council would determine and the lesser punishment imposed now need not be counted as a precedent. [611-B-D]

B 9. In Civil cases under Order 3, Rule 4 (1) CPC the appointment of an Advocate by a party would be deemed to be in force until it is determined with the leave of the court. In criminal cases, every person accused of an offence has the right to consult and be defended by a legal practitioner of his choice which is now made a fundamental right under Article 22(1) of the Constitution. The said right is absolute in itself and it does not depend on other laws. The words "of his choice" in Article 22(1) indicate that the right of the accused to change an Advocate whom he once engaged in the same case cannot be whittled down by that advocate by withholding the case bundle on the premise that he has to get the fees for the services already rendered to the client. [609-E-F]

D *State of Madhya Pradesh v. Shobharam and Ors.*, AIR (1966) SC 1910, relied on.

Per Sethi, J. (Supplementing) :

E 1. While dealing with the moneys or any other article or document entrusted, an Advocate is expected to always keep in mind the high standards of profession and its values adopted and practiced for centuries. 'Professional obligations' of a lawyer are distinguished from the 'business commitments' followed by trading community. The legal profession owes social obligations to the society in discharge of the professional service to the litigants. [611-G]

F 2. Even under the common law no lien can be claimed with respect to the case file and such documents which are necessary for the further progress of the lis filed in the Court. Even in England the right of retention has been much diluted by various exceptions created by decisions, chiefly by the courts of equity on the basis of what may be just and equitable as between the parties with conflicting interests. [614-G-H]

G *Cordery "On Solicitors" 7th Edition; Halsbury's Laws of England, Volume 44(1), 1995 Edition Law of lien by Alfred H. Silver town; Professional Practice Handbook, Young Lawyers Section, law Institute of Victoria 1982, referred to.*

H *Barratt v. Gough-Thomas*, [1950] 2 All. ER 1048, referred to.

3. In modern India, the rights of an Advocate to appear in court are referable to his enrolment as such under the Statute governing the enrolment. The lawyer's rights, obligations and disabilities are governed either by the contract or by the Statute. He has the right to sue his client for his fees, if not paid, like any other professional. The rights and obligations of an Advocate ought to be regulated by keeping the high standards and exalted position of the profession by not treating the lawyers as ordinary merchants. Reference to "goods" in Section 171 of the Contract Act cannot, by any imagination, be stretched to mean the case papers, entitling their retention by the lawyer as his lien for the purposes of releasing his fee. It cannot be said that the case papers entrusted by the client to his counsel are goods in his hand upon which he can claim a retaining lien till his fee or other charges incurred are not paid. [615-E-F]

Union of India & Anr. v. Delhi Cloth and General Mills Co. Ltd., A.I.R. (1963) SC 791; *Collector of Central Excise, Calcutta-I v. M/s Eastend Paper Industries Ltd.*, [1989] 4 SCC 244; '*G*' a Senior Advocate of the Supreme Court A.I.R. (1954) SC 557; *In re M. an advocate* A.I.R. (1957) SC 149, relied on.

Bailey's Large Dictionary of 1732, referred to.

4. In our country, it is a social duty cast upon the legal profession to show the people beckon light by their conduct and actions. The poor, uneducated and exploited mass of the people need a helping hand from the legal profession, admittedly, acknowledged as a most respectable profession. No effort should be made or allowed to be made by which a litigant could be deprived of his rights, statutory as well as constitutional, by an Advocate only on account of the exalted position conferred upon him under the judicial system prevalent in the country. It is true that an Advocate is competent to settle the terms of his engagement and his fee by private agreement with his client but it is equally true that if such fee is not paid he has no right to retain the case papers and other documents belonging to his client. Like any other citizen, an Advocate has a right to recover the fee or other amounts payable to him by the litigant by way of legal proceedings but subject to such restrictions as may be imposed by law or the rules made in that behalf. It is high time for the legal profession to join hands and evolve a Code for themselves in addition to the mandate of the Advocates Act, Rules made thereunder and the Rules made by various High Courts and

A this Court, for strengthening the belief of the common man in the institution of judiciary in general and in their profession in particular. Creation of such a faith and confidence would not only strengthen the rule of law but also result in reaching excellence in the profession. [617-D-G]

B CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1938 of 2000.

From the Judgment and Order dated 24.7.99 of the Disciplinary Committee of the Bar Council of India, New Delhi in BCI.T.R.C. No. 21 of 1996.

WITH

C Contempt Petition (C) No. 147 of 2000.

R.K. Virmani for the Appellant.

R.K. Munjral, Sushil Kr. Jain and Ms. Pratibha Jain for the Respondent.

D The Judgments of the Court were delivered by

E **THOMAS, J.** The main issue posed in this appeal has sequential importance for members of the legal profession. The issue is this: Has the advocate a lien for his fees on the litigation papers entrusted to him by his client? In this case the Bar Council of India, without deciding the above crucial issue, has chosen to impose punishment on a delinquent advocate debarring him from practicing for a period of 18 months and a fine of Rs.1000. The advocate concerned was further directed to return all the case bundles which he got from his client - respondent - without any delay. This appeal is filed by the said advocate under Section 38 of the Advocates Act, 1961.

F As the question involved in this appeal has topical importance for the legal profession we heard learned counsel at length. To appreciate the contentions we would present the factual backdrop as under:

G Appellant, now a septuagenarian, has been practicing as an advocate mostly in the courts at Bhopal, after enrolling himself as a legal practitioner with the State Bar Council of Madhya Pradesh. According to him, he was appointed as legal advisor to the Madhya Pradesh State Co-operative Bank Ltd. ('Bank', for short) in 1990 and the Bank continued to retain him in that capacity during the succeeding years. He was also engaged by the said Bank to conduct cases in which the Bank was a party. However, the said retainership did not
H last long. On 17.7.1993 the Bank terminated the retainership of the appellant

and requested him to return all the case files relating to the Bank. Instead of returning the files the appellant forwarded a consolidated bill to the Bank showing an amount of Rs.97,100 as the balance payable by the Bank towards the legal remuneration to which he is entitled. He informed the Bank that the files would be returned only after settling his dues.

Correspondence went on between the appellant and the Bank regarding the amount, if any, payable to the appellant as the balance due to him. Respondent Bank disclaimed any liability outstanding from them to the appellant. The dispute remained unresolved and the case bundles never passed from appellant's hands. As the cases were pending the Bank was anxious to have the files for continuing the proceedings before the courts/tribunals concerned. At the same time the Bank was not disposed to capitulate to the terms dictated by the appellant which they regarded as grossly unreasonable. A complaint was hence filed by the Managing Director of the Bank, before the State Bar Council (Madhya Pradesh) on 3.2.1994. It was alleged in the complaint that appellant is guilty of professional misconduct by not returning the files to his client.

In the reply which the appellant submitted before the Bar Council he admitted that the files were not returned but claimed that he has a right to retain such files by exercising his right of lien and offered to return the files as soon as payment is made to him.

The complaint was then forwarded to the Disciplinary Committee of the District Bar Council. The State Bar Council failed to dispose of the complaint even after the expiry of one year. So under Section 36-B of the Advocates Act the proceedings stood transferred to the Bar Council of India. After holding inquiry the Disciplinary Committee of the Bar Council of India reached the conclusion that appellant is guilty of professional misconduct. The Disciplinary Committee has stated the following in the impugned order:

“On the basis of the complaint as well as the documents available on record we are of the opinion that the Respondent is guilty of professional misconduct and thereby he is liable for punishment. The complainant is a public institution. It was the duty of the Respondent to return the briefs to the Bank and also to appear before the committee to revert his allegations made in application dated 8.11.95. No such attempt was made by him.”

In this appeal learned counsel for the appellant contended that the failure

- A of the Bar Council of India to consider the singular defence set up by the appellant i.e. he has a lien over the files for his unpaid fees due to him, has resulted in miscarriage of justice. The Bank contended that there was no fee payable to the appellant and the amount shown by him was on account of inflating the fees. Alternatively, the respondent contended that an advocate cannot retain the files after the client terminated his engagement and that there is no lien on such files.

We would first examine whether an advocate has lien on the files entrusted to him by the client. Learned counsel for the appellant endeavoured to base his contention on Section 171 of the Indian Contract Act which reads thus:

- C “Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.”

- E Files containing copies of the records (perhaps some original documents also) cannot be equated with the “goods” referred to in the section. The advocate keeping the files cannot amount to “goods bailed”. The word “bailment” is defined in Section 148 of the Contract Act as the delivery of goods by one person to another for some purpose, upon a contract that they shall be returned or otherwise disposed of according to the directions of the person delivering them, when the purpose is accomplished. In the case of litigation papers in the hands of the advocate there is neither delivery of goods nor any contract that they shall be returned or otherwise disposed of. That apart, the word “goods” mentioned in Section 171 is to be understood in the sense in which that word is defined in the Sale of Goods Act. It must be remembered that Chapter-VII of the Contract Act, comprising sections 76 to 123, had been wholly replaced by the Sale of Goods Act, 1930. The word “goods” is defined in Section 2(7) of the Sale of Goods Act as “every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached, to or forming part of the land which are agreed to be severed before sale or under the contract of sale.”

- H Thus understood “goods” to fall within the purview of Section 171 of the Contract Act should have marketability and the person to whom it is bailed should be in a position to dispose it of in consideration of money. In other

words the goods referred to in Section 171 of the Contract Act are saleable goods. There is no scope for converting the case files into money, nor can they be sold to any third party. Hence, the reliance placed on Section 171 of the Contract Act has no merit.

In England the solicitor had a right to retain any deed, paper or chattel which has come into his possession during the course of his employment. It was the position in common law and it later recognized as the solicitor's right under Solicitors Act, 1860. In Halsbury's Laws of England, it is stated thus (vide paragraph 226 in volume 44):

"226. Solicitor's rights. At common law a solicitor has two rights which are termed liens. The first is a right to retain property already in his possession until he is paid costs due to him in his professional capacity, and the second is a right to ask the court to direct that personal property recovered under a judgment obtained by his exertions stand as security for his costs of such recovery. In addition, a solicitor has by statute a right to apply to the court for a charging order on property recovered or preserved through his instrumentality in respect of his taxed costs of the suit, matter or proceeding prosecuted or defended by him."

Before India attained independence different High Courts in India had adopted different views regarding the question whether an advocate has a lien over the litigation files kept with him. In *P. Krishnamachariar v. The Official Assignee of Madras*, AIR (1932) Madras 256, a Division Bench held that an advocate could not have such a lien unless there was an express agreement to the contrary. The Division Bench has distinguished an earlier decision of the Bombay High Court in *Tyabji Dayabhai & Co. v. Jetha Devji & Co.*, AIR (1927) Bombay 542, wherein the English law relating to the solicitors lien was followed. Subsequently, a Full Bench of the Madras High Court in 1943 followed the decision of the Division Bench. A Full Bench of the Patna High Court in *In re B.N. Advocate in the matter of Misc. Judl. Case No.18/33* AIR (1933) Pat 571, held the view that an advocate could not claim a right to retain the certified copy of the judgment obtained by him on the premise that an appeal was to be filed against it. Of course the Bench said that if the client had specifically instructed him to do so it is open to him to keep it.

After independence the position would have continued until the enactment of the Advocates Act, 1961 which has repealed a host of enactments

A including Indian Bar Council Act. When the new Bar Council of India came into existence it framed Rules called the Bar Council of India Rules as empowered by the Advocates Act. Such Rules contain provision specifically prohibiting an advocate from adjusting the fees payable to him by a client against his own personal liability to the client. As a rule an Advocate shall not do anything whereby he abuses or takes advantage of the confidence reposed in him by his client, (vide Rule 24). In this context a reference can be made to Rules 28 and 29 which are extracted below:

C “28. After the termination of the proceeding, the Advocate shall be at liberty to appropriate towards the settled fee due to him, any sum remaining unexpended out of the amount paid or sent to him for expenses, or any amount that has come into his hands in that proceeding.”

D “29. Where the fee has been left unsettled, the Advocate shall be entitled to deduct, out of any moneys of the client remaining in his hands, at the termination of the proceeding for which he had been engaged, the fee payable under the rules of the Court, in force for the time being, or by then settled and the balance, if any, shall be refunded to the client.”

E Thus, even after providing a right for an advocate to deduct the fees out of any money of the client remaining in his hand at the termination of the proceeding for which the advocate was engaged, it is important to notice that no lien is provided on the litigation files kept with him. In the conditions prevailing in India with lots of illiterate people among the litigant public it may not be advisable also to permit the counsel to retain the case bundle for the fees claimed by him. Any such lien if permitted would become susceptible to great abuses and exploitation.

G There is yet another reason which dissuades us from giving approval to any such lien. We are sure that nobody would dispute the proposition that the cause in a court/tribunal is far more important for all concerned than the right of the legal practitioner for his remuneration in respect of the services rendered for espousing the cause on behalf of the litigant. If a need arises for the litigant to change his counsel pendente lite, that which is more important should have its even course flowed unimpeded. Retention of records for the unpaid remuneration of the advocate would impede such course and the cause pending judicial disposal would be badly impaired. If a medical practitioner is allowed

a legal right to withhold the papers relating to the treatment of his patient which he thus far administered to him for securing the unpaid bill, that would lead to dangerous consequences for the uncured patient who is wanting to change his doctor. Perhaps the said illustration may be an over-statement as a necessary corollary for approving the lien claimed by the legal practitioner. Yet the illustration is not too far-fetched. No professional can be given the right to withhold the returnable records relating to the work done by him with his client's matter on the strength of any claim for unpaid remuneration. The alternative is that the professional concerned can resort to other legal remedies for such unpaid remuneration.

A litigant must have the freedom to change his advocate when he feels that the advocate engaged by him is not capable of espousing his cause efficiently or that his conduct is prejudicial to the interest involved in the lis, or for any other reason. For whatever reason, if a client does not want to continue the engagement of a particular advocate it would be a professional requirement consistent with the dignity of the profession that he should return the brief to the client. It is time to hold that such obligation is not only a legal duty but a moral imperative.

In civil cases, the appointment of an advocate by a party would be deemed to be in force until it is determined with the leave of the court, (vide order 3, Rule 4(1) of the Code of Civil Procedure). In criminal cases, every person accused of an offence has the right to consult and be defended by a legal practitioner of his choice which is now made a fundamental right under Article 22(1) of the Constitution. The said right is absolute in itself and it does not depend on other laws. In this context reference can be made to the decision of this Court in *State of Madhya Pradesh v. Shobharam and Ors.*, AIR (1966) SC 1910. The words "of his choice" in Article 22(1) indicate that the right of the accused to change an advocate whom he once engaged in the same case, cannot be whittled down by that advocate by withholding the case bundle on the premise that he has to get the fees for the services already rendered to the client.

If a party terminates the engagement of an advocate before the culmination of the proceedings that party must have the entire file with him to engage another advocate. But if the advocate who is changed midway adopts the stand that he would not return the file until the fees claimed by him is paid, the situation perhaps may turn to dangerous proportion. There may be cases when a party has no resource to pay the huge amount claimed by the advocate as his remuneration. A party in a litigation may have a version that he has already

A paid the legitimate fee to the advocate. At any rate if the litigation is pending the party has the right to get the papers from the advocate whom he has changed so that the new counsel can be briefed by him effectively. In either case it is impermissible for the erstwhile counsel to retain the case bundle on the premise that fees is yet to be paid.

B Even if there is no lien on the litigation papers of his client an advocate is not without remedies to realise the fee which he is legitimately entitled to. But if he has a duty to return the files to his client on being discharged the litigant too has a right to have the files returned to him, more so when the remaining part of the lis has to be fought in the court. This right of the litigant is to be read as the corresponding counterpart of the professional duty of the advocate.

C

Misconduct envisaged in Section 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.

D

Corpus Juris Secundum, contains the following passage at page 740 (vol.7):

E "Professional misconduct may consist in betraying the confidence of a client, in attempting by any means to practise a fraud or impose on or deceive the court or the adverse party or his counsel, and in fact in any conduct which tends to bring reproach on the legal profession or to alienate the favourable opinion which the public should entertain concerning it."

F The expression "professional misconduct" was attempted to be defined by Darling, J., in *In re A Solicitor ex parte the Law Society* [1912] 1 KB 302 in the following terms:

G "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."

H In this context it is to be mentioned that the aforesaid definition secured approval by the Privy Council in *George Frier Grahame v. Attorney-General*,

Fiji, (1936) PC 224. We are also inclined to take that wide canvass for understanding the import of the expression “misconduct” in the context in which it is referred to in Section 35 of the Advocates Act. .

We, therefore, hold that the refusal to return the files to the client when he demanded the same amounted to misconduct under Section 35 of the Act. Hence, the appellant in the present case is liable to punishment for such misconduct.

However, regarding the quantum of punishment we are disposed to take into account two broad aspects: (1) this court has not pronounced, so far, on the question whether advocate has a lien on the files for his fees. (2) the appellant would have *bona fide* believed, in the light of decisions of certain High Courts, that he did have a lien. In such circumstances it is not necessary to inflict a harsh punishment on the appellant. A reprimand would be sufficient in the interest of justice on the special facts of this case.

We, therefore, alter the punishment to one of reprimanding the appellant. However, we make it clear that if any advocate commits this type of professional misconduct in future he would be liable to such quantum of punishment as the Bar Council will determine and the lesser punishment imposed now need not be counted as a precedent.

Appeal is disposed of accordingly.

SETHI, J. I had the privilege of going through the lucid and informative judgment prepared by my esteemed brother Thomas J. I agree both with the reasoning and the conclusions. However, realising by the importance of the issue involved and its implication on the legal profession in relation with litigant public, I wish to add a few words by my own to this judgment.

While dealing with the moneys or any other article or document entrusted, an advocate is expected to always keep in mind the high standards of profession and its values adopted and practiced for centuries. ‘Professional obligations’ of a lawyer are distinguished from the ‘business commitments’ followed by trading community. The legal profession owes social obligations to the society in discharge of the profession services to the litigants. The Bar Council of India Rules say that :

“An advocate shall, if at all times, compose himself in a manner befitting his status as an officer of the court, a privileged member of the community and a gentleman, bearing in mind that what may be

A lawful and moral for a person who is not a member of the Bar or for a member of the Bar in his non-professional capacity may still be improper for an advocate.”

B According to the ancient traditions, the professional services rendered by the lawyers were honorary and the reward given to him was not a compensation for discharge of his legal obligations or legal assistance but in the nature of gratitude in recognition of the honorary services rendered by him. Among the Romans, it was one of the duties, which the patrician as patron owed to the plebeian to give protection to the latter in his law suits. For those who rendered legal assistance, Gibbon says in his book “Decline and Fall of Roman Empire” :

D “On the public days of market, or assembly, the masters of the art were seen walking in the forum ready to impart the needful advice to the meanest of their citizens from whose votes on a future occasion they might solicit a grateful return. As their years and honors increased, they seated themselves at home, on a chair or throne, to expect with patient gravity the visits of their clients, who at the dawn of day, from the town and country, began to thunder at their doors.”

E However, with the passage of time professional assistance ceased to be gratuitous. With the multiplicity of the proceedings, increase in litigation and complications of law, the legal assistance could not be in the nature of a mere social obligation and the services rendered as honorary, because a great deal of time was needed by a lawyer to equip himself with the laws, which prevented him from earning his livelihood from other sources. The ancient tradition having ceased to exist, the profession of law could have flourished only if those who pursued it were allowed remuneration for the services rendered.

G In England also, a belief existed from the earliest time that the lawyer’s fees is not a compensation to him for discharge of legal obligations but a gratuity or an honorarium which the client bestowed on him in token of his gratitude. The lawyers were considered as an officer of the Court, the tradition being that the law was an honorary occupation and not a means of livelihood. Early advocates were generally persons in holy orders who rendered their services to the weak and afflicted without charge and as an act of pity.

H Under common law, the rights of a solicitor are called as liens, which are of two types namely : (1) a ‘retaining lien’, i.e. a right to retain property already

in his possession until he has been paid costs due to him in his professional character; and a 'lien on property recovered or preserved', i.e., a right to ask the court to direct that personal property recovered under a judgment obtained by his exertions stand as security for his costs of such recovery.

According to Cordery "On Solicitors" - Seventh Edition, the retaining lien is founded on the general law of lien which springs from possession and is governed by the same rules as other cases of possessory lien. Per Evershed MR in *Barratt v. Gough-Thomas* (1950) 2 All ER 1048 observed :

"It is a right at common law depending (it has been said) upon implied agreement. It has not the character of an incumbrance or equitable charge. It is merely passive and possessory - that is to say, the solicitor has no right of actively enforcing his demand. It confers upon him merely the right to withhold possession of the documents or other personal property of his client or former client.... It is wholly derived from and therefore co-extensive with the rights of the client to the documents or other property."

According to Cordery the property upon which lien can be claimed is in the form of deeds, papers or other personal property which comes into solicitor's possession in the course of his professional employment with the sanction of the client and/or client's property, such as bill of exchange, application of shares, share certificates, a debenture trust deed, a policy of assurance, letters of administration or money. After referring to various authorities of English Courts, the law relating to lien and its retention has been summarised in Halsbury's Laws of England, Vol.44(1), 1995 Edition, as under :

"*Property affected by retaining lien* - The general rule is that the retaining lien extends to any deed, paper or personal chattel which has come into the solicitor's possession in the course of his employment and in his capacity as solicitor with the client's sanction and which is the client's property. The following may thus be subject to a retaining lien :

- (1) a bill of exchange;
- (2) a Cheque;
- (3) a policy of assurance;
- (4) a share certificate;

- A (5) an application for shares;
(6) a debenture trust deed;
(7) letters patent;
(8) letters of administration;
- B (9) money, including money in a client account, although only the amount due to the solicitor, and maintenance received by a solicitor if not subject to an order as to its application or bound to be applied, in effect, as trust money, or;
- (10) documents in a drawer of which the solicitor is given the key.
- C The lien does not extend to (a) a client's original will; or (b) a deed in favour of the solicitor but reserving a life interest and power of revocation to the client; or (c) original court records; or (d) documents which did not come into the solicitor's hands in his capacity as solicitor for the person against whom the lien is claimed or his successor, but as mortgages, steward of a manor or trustee. Moreover, where documents are delivered to a solicitor for a particular purpose under a special agreement which does not make express provision for a lien in favour of the solicitor, as perhaps the raising of money, or money is paid to the solicitor for a particular purpose so that he becomes a trustee of the money, no lien arises over those documents or that money unless subsequently left in the solicitor's possession for general purposes. Otherwise the lien extends to the property whatever the occasion of delivery, except that where a solicitor acts for both mortgagor and mortgagee and the mortgage is redeemed the solicitor cannot set up a lien on the deeds against the mortgagor."
- D
- E
- F It is further stated that such a lien extends only to the solicitor's taxable costs, charges and expenses incurred on the instructions of the client against whom the lien is claimed and for which the client is personally liable including the costs of recovering the remuneration by action or upon a taxation.
- G It follows, therefore, that even under the common law no lien can be claimed with respect to the case file and such documents which are necessary for the further progress of the lis filed in the court. Even in England the right of retention has been much diluted by various exceptions created by decisions, chiefly by the courts of equity on the basis of what may be just and equitable as between the parties with conflicting interests.
- H

Alfred H. Silvertown in "The Law of Lien" stated that where documents are delivered by a client to a solicitor for a specific purpose, then no lien is created unless there is an agreement to the contrary. The retaining lien extends only to the extent of solicitor's taxable costs and expenses arising from the instructions of the client, for which the client is personally liable. The lien does not embrace fees and expenses which are due to the solicitor in some other capacity. To attract the solicitor's lien on a document of his client, it has to be specifically shown that the client had agreed with respect to the creation of lien upon the document in case of his failure to pay the solicitor's fee.

The "Professional Practice Handbook, Young Lawyers Section, Law Institute of Victoria 1982" prescribes that it is the duty of a solicitor, when called upon by his client, to deliver him the documents in his charge. The Solicitor is subject to the ordinary law of bailee of client's papers in his possession. The bailment is a bailment at will which, depending upon the circumstances, may be gratuitous or for reward. In either case the bailee-solicitor is under a duty to re-deliver, upon demand, the client's papers certainly within the period during which a solicitor may be regarded as owing a duty not to destroy papers having regard to the limitations of Actions Act, 1958.

In modern India, the rights of an advocate to appear in the Court are referable to his enrolment as such under the Statute governing the enrolment. The lawyer's rights, obligations and disabilities are, therefore, governed either by the contract or by the Statute. He has the right to sue his client for his fees, if not paid, like any other professional. The rights and obligations of an advocate ought to be regulated keeping the high standards and exalted position of the profession by not treating the lawyers as ordinary merchants. Thomas, J. has very elaborately dealt with and concluded that the provisions of Section 171 of the Contract Act cannot be pressed into services by an advocate for retention of documents of his client purportedly in exercise of his lien over such case-file papers.

Reference to "goods" in Section 171 of the Contract Act cannot, by any imagination, be stretched to mean the case papers, entitling their retention by the lawyer as his lien for the purposes of realising his fee. Besides the meaning attached to the "goods" under Section 2(7) of the Sale of Goods Act, under the General Law the "goods" have been defined in Bailey's Large Dictionary of 1732 as "merchandise" and by Johnson, who followed as the next lexicographer, it is defined to be movables in a house; personal or immovable estates;

A wares, freight, merchandise. Webster defines the word “goods” thus :

“Goods, noun, plural; (1) movables; household furniture; (2) Personal or movable estate, as horses, cattle, utensils, etc. (3) wares; merchandise; commodities bought and sold by merchants and traders.”

B The Court in *Union of India & Anr. v. Delhi Cloth and General Mills Co. Ltd.*, AIR (1963) SC 791 held that to become “goods” an article must be something which can ordinarily come to the markets to be bought and sold. In *Collector of Central Excise, Calcutta-I v. M/s. Eastend Paper Industries Ltd.*, [1989] 4 SCC 244 it was stated that goods are understood to mean as identifiable articles known in the markets as goods and marketed and marketable in the market as such. Where the Act does not define “goods”, the legislature should be presumed to have used that word in its ordinary dictionary meaning i.e. to become goods it must be something which can ordinarily come to the market to be bought and sold and is known to the market as such.

D Thus, looking from any angle, it cannot be said that the case papers entrusted by the client to his counsel are the goods in his hand upon which he can claim a retaining lien till his fee or other charges incurred are not paid. In the matter of ‘G’ a *Senior Advocate of the Supreme Court*, AIR (1954) SC 557 this Court observed that it was highly reprehensible for an advocate to stipulate for or receive a remuneration proportioned to the result of litigation or a claim whether in the form of a share in the subject matter, a percentage or otherwise. An advocate is expected, at all times, to conduct himself in a manner befitting his status as an officer and gentleman by upholding the high and honourable profession to whose privilege he has been admitted after his enrolment. If an advocate departs from the high standards which the profession has set for itself and conducts in a manner which is not fair, reasonable and according to law, he is liable to disciplinary action. In re *M.an advocate*, AIR (1957) SC 149 this Court observed :

G “As has been laid down by this Court in the matter of ‘G’ a *Senior Advocate of the Supreme Court* (supra) the Court, in dealing with cases of professional misconduct is “not concerned with ordinary legal rights, but with the special and rigid rules of professional conduct expected of and applied to a specially privileged class of persons who, because of their privileged status, are subject to certain disabilities which do not attach to other men and which do not attach even to them in a non-professional character.....he (a legal practitioner) is bound

to conduct himself in a manner befitting the high and honourable profession to whose privileges he has so long been admitted; and if he departs from the high standards which that profession has set for itself and demands of him in professional matters, he is liable to disciplinary action". It appears to us that the fact of there being no specific rules governing the particular situation, which we are dealing with, on the facts found by us, is not any reason for accepting a less rigid standard. If any, the absence of rules increases the responsibility of the members of the profession attached to this Court as to how they should conduct themselves in such situations, having regard to the very high privilege that an Advocate of this Court now enjoys as one entitled, under the law, to practice in all the courts in India."

In our country, admittedly, a social duty is cast upon the legal profession to show the people beckon light by their conduct and actions. The poor, uneducated and exploited mass of the people need a helping hand from the legal profession, admittedly, acknowledge as a most respectable profession. No effort should be made or allowed to be made by which a litigant could be deprived of his rights, statutory as well as constitutional, by an advocate only on account of the exalted position conferred upon him under the judicial system prevalent in the country. It is true that an advocate is competent to settle the terms of his engagement and his fee by private agreement with his client but it is equally true that if such fee is not paid he has no right to retain the case papers and other documents belonging to his client. Like any other citizen, an advocate has a right to recover the fee or other amounts payable to him by the litigant by way of legal proceedings but subject to such restrictions as may be imposed by law or the rules made in that behalf. It is high time for the legal profession to join heads and evolve a Code for themselves in addition to the mandate of the Advocates Act, Rules made thereunder and the Rules made by various High Courts and this Court, for strengthening the belief of the common man in the institution of judiciary in general and in their profession in particular. Creation of such a faith and confidence would not only strengthen the rule of law but also result in reaching the excellence in the profession.

A.Q.

Appeal disposed of.