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In Re: an Attorney

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SooperKanoon Citation : sooperkanoon.com/338867

Court : Mumbai

Decided On : Aug-11-1924

Reported in : AIR1925Bom1; (1924)26BOMLR887; 84Ind.Cas.353

Judge : Lallubhai Shah, Kt., Acting C.J., ;Kajiji and ;Kincaid, JJ.

Appellant : In Re: an Attorney

Judgement :

Lallubhai Shah Kt., Acting C.J.

1. In this case a rule nisi was issued against an attorney of this Court at the instance of the Advocate General to show cause why he should not be dealt with under Clause 10 of the Amended Letters Patent for his alleged professional misconduct. The proceedings were, in the first instance, started against him by Bai Javerbai, who made an application for disciplinary action against the attorney, and for restraining him from further disclosing any communications. On that application, a rule was issued, and the learned Judge sitting in Chambers, after hearing the parties, was of opinion that further investigation in the matter was necessary. As a result of that inquiry by the learned Judge, the learned Advocate General moved the Court for taking notice of the conduct of the attorney, and on that application the rule, to which I have referred, was issued. Though before us there are two rules, one on the learned Advocate General's application, and the other on the original application of the private party, we think that substantially it is one rule, namely, that obtained by the Advocate General. After hearing the parties

on the rule obtained by the Advocate General, we heard Mr. Bahadurji for Bai Javerbai in support of the original rule. Though in this case we have heard Mr. Bahadurji, I do not desire to be understood as holding that he was entitled to be heard. It is not desirable to lay down any general rule as to the necessity of hearing a private party after the proceedings have been taken by the Advocate General in a matter of this kind. It must depend upon the discretion of the Court, having regard to the circumstances of the case, to decide whether a private party may be heard or not.

2. At the outset, I desire to observe that there has been undue delay in bringing on this rule for hearing. In proceedings of this nature, which affect an officer of this Court personally, it is necessary that the rule should be brought on for hearing as quickly as possible. Generally speaking, as regards the procedure to be observed in such cases, I may add that I respectfully agree with the observations of Jenkins C.J. at the close of his judgment in In re an Attorney. I.L.R. (1913) Cal. 113. I only desire to add that where the Advocate General has not moved the Court at the instance of the Incorporated Law Society, the rule should be served upon that Society also in order that they may have an opportunity of representing to the Court, if so advised, the point of view of the profession. In dealing with the case on the merits,' as pointed out by the learned Chief Justice in the above case, 'though many objections of a somewhat technical character have been placed in the forefront of the attorney's answer (to the application of the learned Advocate General), it would be neither safe nor just to make against the attorney himself any adverse presumption, on this account, or to treat the conduct of the case as indicating a lack of confidence in his own defence on the merits.' I have not overlooked the observations at p. 128 of the report in the said case as to the nature of the proof required in considering the case against the attorney.

3. It is necessary to state a few facts to understand the grounds of the complaint against the attorney. Bai Javerbai's husband Keshavji died in 1901, leaving a large estate. He left no issue. He had business firms in Cutch, Bombay and Zanzibar. The firms were carried on in the name of Damodar Jairam or Keshavji Damodar. Keshavji left a sister named Hirabai. She was married to one Chaturbhuj, and had two sons Manubhai alias Chhabildas and Baburao. Manubhai had an infant son

Snehkant in the year 1919. Chaturbhuj had a brother named Jairam. At Zanzibar the firm of Damodar Jairam had incurred heavy losses, when that firm was looked after by Javerbai's brother. In 1918 Javerbai apparently wanted to raise a loan on the mortgage of some of the properties, and on that occasion the attorney acted both for the mortgagor and the mortgagee. At that time apparently counsel's opinion was taken as to the liability of the estate of Javerbai's husband for certain debts which were incurred in Zanzibar by the firm of Damodar Jairam. A part of the complaint against the attorney relates to certain evidence which he gave in 1923, to which I shall refer later in connection with this mortgage transaction. At this time apparently Gordhandas, who was the Munim of Javerbai in Bombay, and Jairam, the brother of Chaturbhuj, husband of Hirabai, attended on behalf of Javerbai in connection with the mortgage.

4. About October 1, 1919, apparently Javerbai called her legal adviser named Revashankar from Cutch to Bombay; and on that day, i. e., October 1, both Revashankar and Jairam (brother of Chaturbhuj) went to the attorney to take advice as to the adoption which Javerbai is said to have intended to make. Apparently at the time a document which was not signed, but which is said to have been a draft of the will made by the deceased husband of Javerbai, was shown to the attorney, and the question appears to have been whether Baburao, the son of the sister of Javerbai's husband, or her grandson, i. e., Manubhai's infant son Snehkant, would be eligible for adoption. There were also some questions connected with the debts due by the, firm at Zanzibar. At the request of Revashanker and Jairam, the attorney held a consultation with counsel, and thereafter, he prepared a draft, agreement. As a result of some further consultations with counsel ultimately the final agreement, which is Ex. 9 in the case, with ragard to this adoption was drawn up on October 13. This document was attested by the attorney. Thereafter the infant boy Snehkant, the son of Manubhai alias Chhabildas, was adopted and the adoption deed was executed on November 13, 1919. Manubhai was appointed the legal guardian of the adopted boy Snehkant in March 1920.

5. A suit was filed by the Standard Bank of South Africa against the firm of Damodar Jairam, the minor Snehkant, who was named Haridas in his adoptive

family, represented by his natural father Manubhai, and Hirabai, in H.B. M's Court for Zanzibar. In that suit the Standard Bank of South Africa claimed the sum of Rs. 6,00,000 and odd on certain securities, and a declaration that the adoption of defendant No. 2 was invalid, that it ought to be set aside, and that in any event the claim made by them was good and valid as against the assets of the deceased Keshavji Damodar Jairam. In connection with the adoption the case made by the Bank in the plaint was that it was not the result of free will of the widow, but was brought about by coercion, false representation and undue influence of the third defendant, the grandmother, Manubhai Chaturbhuj, the natural father, and Jairam Vasanji, the grand-uncle of the adopted boy, and without independent advice. In connection with this a commission was issued by the Zanzibar Court to this Court. In the commission matter the same attorney was engaged by Manubhai, the guardian of the minor boy, who was defendant No. 2 in the case, in September 1921. Later on in October 1922 Javerbai filed suit No. 4742 of 1922 on the Original Side of this Court against Snehkant, the son of Manubhai. The allegations with regard to this adoption are set forth in paragraphs 7 and 8 of the plaint, and among the several relief's claimed by her. the most important was a declaration that the adoption of the second defendant was invalid in law and not binding on the plaintiff. The same attorney was engaged in this suit on behalf of the adopted boy against Javerbai. It may be mentioned that the case for the attorney, as now made, is that he ceased to act for Javerbai after the adoption, while according to Javerbai he continued to act for her with reference to other matters up to March 1922. According to her, when she found that her interests were not looked after by the attorney, she engaged other solicitors.

6. This was the state of affairs when in May 1923 the Prothonotary of this Court, as Commissioner in the Zanzibar suit, recorded the evidence of the attorney. Mr. Ferreira, who was the solicitor for Bai Javerbai, was present, but he did not appear before the Commissioner on behalf of any party. Defendants Nos. 1 and 3 in the Zanzibar suit were not present; but the plaintiffs and defendant No. 2 were represented. Before the Prothonotary, the attorney was examined on May 14 and 15, 1923. In the course of his examination and cross-examination the attorney produced certain papers connected with the adoption deed showing his consultations with counsel, and the drafts of the proposed agreement for adoption

which ultimately resulted in the final agreement in relation to this adoption on October 13. He also made certain statements connected with these documents and the consultations and instructions that he had from and on behalf of Javerbai in connection with this adoption. He also made certain statements with regard to the mortgage transaction of 1918. These several statements, in respect of which Javerbai alleged improper disclosure on the part of the attorney, are indicated and separately numbered. But briefly stated, the complaint against the attorney is that in contravention of the provisions of Section 126 of the Indian Evidence Act, he disclosed without the consent of Javerbai communications made to him in the course and for the purpose of his employment as such attorney by or on behalf of Javerbai, and stated the contents or conditions of documents with which he became acquainted in the course and for the purpose of his professional employment on her behalf.

7. I shall first deal with the case made against the attorney as regards the disclosure of matters in connection with the mortgage transaction. The statements are marked 11 A and 11B in the evidence of the attorney. It may be at once stated that no privilege is claimed with reference to the mortgage deed, and no privilege can be claimed with respect to it. That document is attested by the attorney and is registered Besides he has not stated anything with reference to this transaction which is not contained by way of recital in the document. The point made against the attorney is that he stated that counsel had given a certain opinion with regard to the debts incurred by the firm of Damodar Jairam in 1916 and thereafter. It appears, however, from the affidavits in the case and the letter dated June 10, 1919, which has been put in. that this opinion was already communicated to the firm at Zanzibar by Chaturbhuj. After a consideration of the arguments on both sides on this question, I have come to the conclusion that the attorney has not stated anything which can be said to contravene the provisions of Section 126. As regards the opinion of counsel, which he had obtained in the course of his employment as an attorney for Javerbai and which could not be disclosed by him without the consent of his client, it appears that long before he gave evidence the opinion was already a disclosed fact. There was no dispute between Javerbai and Manubhai at the time: and the attorney must be deemed to have acted then with the consent of Javerbai. I am not prepared to hold that in making the statement

that the attorney has made with reference to this transaction he has contravened the provisions of Section 126.

8. The principal ground of the present application is in relation to the statements made by the attorney as regards the adoption of Snehkant. It is clear from the evidence of the attorney in 1923 that though he knew already that there was a dispute as to this adoption between Javerbai and the adopted son, he gave evidence disclosing facts which came to his knowledge in the course of his employment as an attorney in connection with this adoption. He disclosed what happened from October 1 to October 13, 1919, and stated all he knew about the documents relating to his consultations with counsel, his draft of the agreement, the settlement of that draft and the final agreement which was drawn up for approval on October 9. At that stage apparently on the suggestion of counsel it was considered desirable to have this draft approved independently on behalf of the minor boy, and with that view Messrs. Payne & Co. were engaged by Manubhai, who was then the natural guardian of the boy to be adopted. That agreement was approved of by Messrs. Payne & Co. with certain alterations, and ultimately the agreement was executed on October 13. It is quite clear that so far as this document dated October 13 is concerned, there is no privilege attaching to it It is claimed by the learned Advocate General that the attorney acted very improperly and contrary to the provisions of Section 126 of the Indian Evidence Act in disclosing all the matters connected with the adoption and with the various documents which are put in (Exs. 2 to 7). It is not necessary to refer to the various statements which relate to this part of the case in detail. They are marked Nos. 1 to 19 in the evidence of the attorney, and if we exclude the statements which relate to the mortgage transaction of 1918, all the rest really relate to the disclosures said to have been made with reference to the adoption. It is quite clear, and it is not disputed, that if the attorney was acting for Javerbai alone, such disclosures would be contrary to the provisions of Section 126 of the Indian Evidence Act, and that position appears to me to be beyond question.

9. It is urged, however, by way of reply on behalf of the attorney that he was not engaged only on behalf of Javerbai on October 1, but acted both for Javerbai and for the boy to be adopted, as represented by Manubhai, the natural father of

Snehkant, and the brother of Baburao It is urged that as he was engaged on behalf of both parties, and as the statements were made in the presence not only of Javerbai's agent Kevashankar, but in the presence of Manubhai and Jairam, and were known to both parties, it was open to the attorney to state what he has in fact stated in his evidence as to what transpired in relation to this agreement between him and the counsel, also between him and Javerbai, and between him and Javerbai's agent Revashankar and Jairam who apparently attended to this matter. It is pointed out that Manubhai was present at some of the interviews, and from the beginning the engagement was on behalf of both Javerbai and the boy to be adopted. It is also urged that if the Court is not satisfied that the attorney was engaged on behalf of both sides, still as Jairam and Manubhai are shown to have been present at these interviews and to have known what was passing between the attorney and Javerbai, there was no communication of a confidential and private nature within the meaning of Section 126 which could not be disclosed.

10. It is also urged that these documents were in fact handed over by the attorney to Manubhai as the guardian of the adopted boy, and that in fact those documents were produced by the attorney in the course of his evidence as they were returned to him in connection with this commission matter by Manubhai. It is urged that the documents having been thus transferred by him to the other side, there can be no privilege about these documents, and that the opinion of counsel connected with these documents could be properly disclosed by him.

11. Before dealing with these contentions, it is necessary to decide for the purposes of this application, on the evidence such as it is, certain facts which are in dispute. As regards the alleged presence of Manubhai at the time of the engagement of the attorney, and the subsequent consultations with the attorney from October 1 to October 9, it may be mentioned that the attorney himself does not refer to the presence of Manubhai in his evidence before the Prothonotary. In the beginning of his evidence he has stated that at the time he was engaged on October 1, Revashankar and Jairam went to him. He does not mention Manubhai, and further on in cross-examination when he was asked, he said that he might have seen Manubhai in his office, but could not swear that he did not. With reference to this statement it is urged by the learned counsel for the attorney that

that cannot refer to the period with which we are concerned. I am not sure that it does not. But I am willing to allow that the statement is not clear on this point. Taking the evidence of the attorney before the Prothonotary as a whole, it is fairly clear that though he has mentioned that Revashankar and Jairam attended his office and gave instructions to him and consulted him in connection with this adoption on behalf of Javerbai, he does not mention the name of Manubhai anywhere in his evidence. No doubt when the present proceedings were initiated he stated that Manubhai was present. But in view of the attorney's own evidence before the Prothonotary I am not satisfied beyond reasonable doubt that Manubhai was present when the attorney was engaged and consulted in connection with this adoption by Revashankar and Jairam.

12. The second question of fact is whether the engagement must be taken to have been on behalf of Javerbai alone or on behalf of both Javerbai and the boy to be adopted. On this point unfortunately, the contemporaneous documents do not throw any light, except Ex. 2, from which it would appear that he was acting as the attorney for Javerbai. The docket (Ex. 2) shows that Javerbai was the querist and he had signed it as the querist's attorney. In the other documents there is nothing to show one way or the other whether at that time he was acting for both. The letter which the attorney wrote to Messrs. Payne & Co. on October 9 does not suggest that the engagement was for both. The letter is in those terms:--

We bog to send you herewith fair draft agreement for adoption. We are informed that you represent the natural Jather and mother of the minor proposed to be taken in adoption by our client Bai Javerbai, widow of Keshavji Damodar, and we are therefore instructed to send the draft agreement for your approval on behalf of your said clients.

13. That letter rather suggests that the engagement was on behalf of Javerbai. The fact that Revashankar and Jairam were present does not go to show that there was any joint engagement. At the same time I recognise that as soon as a point was made by Javerbai that he was improperly disclosing matters of a confidential and private nature contrary to the provisions of Section 126, the attorney wrote on May 21, 1923, to Messrs. Ferreira and Vallabhdas that he acted

also for the minor until he went to Messrs. Payne & Co. on being advised so to do by the counsel consulted by him, and he has adhered to that position in the reply affidavits. On these materials I cannot say that I am quite satisfied that the engagement was on behalf of both, though I am willing to deal with the case on that footing.

14. The other question of fact, about which there has been argument before us, is whether the documents were in fact handed over by the attorney to Manubhai or not. On this point also unfortunately the contemporaneous documents, which would throw any light on the question, are not forthcoming. There is no diary, and no copy of the bill of costs can be found. In the course of the argument it is shown that the amount of the bill of costs was paid by Javerbai in May 1920; and it is said on behalf of the attorney that about this time the documents were handed over to the guardian of the adopted son. Unfortunately there is no record of it, and there is no indication in the affidavits as to when the documents were given over. We are asked to presume that they must have been given about the time when the money was paid.

15. As against these considerations, there are the statements in the affidavits of the attorney and Manubhai and Jairam that the documents were so handed over to Manubhai. Here again though the conflicting considerations do not leave the matter in a satisfactory and assuring condition, I am prepared to accept the position that the attorney gave the documents for some time, we do not know when and how long, to Manubhai. But the fact remains that they were produced by him at the time when he gave his evidence. Though much stress was laid upon the circumstance that the documents were parted with, and therefore, could not be privileged, I do not think that in the result it matters whether the documents were thus handed over in fact by the attorney to Manubhai or not.

16. I shall now deal with the question of attorney's conduct on the facts as they appear. It is an undoubted fact that he was engaged on behalf of Javerbai. It is not clear as to whether he was engaged on behalf of the boy to be adopted at the time. But assuming that there was joint engagement on behalf of both, it was not open to him to disclose facts relating to these documents in the Zanzibar suit. That

was a suit brought by a. third party against the firm of Damodar Jairam and the adopted boy. Javerbai was not a party to that suit, and he was clearly giving evidence in a proceeding between a third party and one of his clients, taking his case on this point at its highest. In such a case, under Section 126 of the Indian Evidence Act, he cannot disclose any communication made to him in the course and fur the purpose of his employment by or on behalf of his clients or to state the contents or conditions of the documents with which he has become acquainted in the course of his professional employment without the consent of both these clients. It may be, and it is undoubtedly the case, as pointed out in Memon Hajee Haroon Mahomed v. Molvi Ahtbul Karim I L R. (1878) 3 Bom. 91 that as between the two parties who engage the solicitor there can be no secrecy or privilege But it is also clear from that case that as between a third party and any one of the two parties who engaged him his lips are sealed with respect to communications made to him in the course and for the purpose of his employment as a solicitor. In the course of a clear and forceful argument Mr. Desai has attempted to show that if once it is conceded that as between the adopted boy and Javerbai there can be no secrecy with reference to these communications; the attorney was entitled to disclose them in the Zanzibar suit according to the ratio decvlendi in Memon Hajee Haroon Mahomed, v. Mnlvi Abdll Karim. It seems to me that the concluding observations of Westropp C.J. are distinctly against his contention.

17. On principle the position appears to me to be fairly clear. If the engagement was on behalf of Javerbai alone it is clear that he could not disclose these matters to any other person without her consent. Similarly if the engagement was on behalf of both, whatever the position of the attorney may be with reference to these communications as between the two persons, he could not disclose these communications to any one beyond those persona without the consent of both. In Doe dem. Strode v. Seaton (1834) 2 A. & E. 171 it has been pointed out by Taunton J that in that case Palmer, who held the draft, was the joint agent of both vendor and vendee with respect to it. He could not produce it without the consent of both In the same case Patteson J. observes as follows (p. 180):--

Now, if an attorney keeps a draft, he must keep it according to the nature of his original employment, and subject to the rights of both the parties (if two) by whom

he was employed. One or the other of them has a right to say that he shall not produce it.

18. That seems to me to be the view taken by Sir Michael Westropp C.J. in the case to which I have referred. On the basis of the joint engagement, as to which, I repeat, I am not satisfied beyond reasonable doubt, the position of the attorney in making these disclosures cannot be justified.

19. It is further argued that even if there was no joint engagement on behalf of both parties, at least Jairam, who was the grand-uncle of the adopted boy, was present, and he is not shown to be the agent of Javerbai. It is urged on the strength of the observations in the same case to which I have referred, that there can be no privilege or secrecy as Jairam would himself be a competent witness to depose to these communications. I may say at once that Jairam's presence has been deposed to by the attorney from the beginning, and I do not feel any doubt that both Revashankar and Jairam went to the attorney on October 1. But Jairam, as I have pointed out, used to attend with Gordhandas in connection with the mortgage transaction, and apparently in October 1919 when Jairam went with Revashankar, it is not at all clear that he went on behalf of the adopted boy. It cannot be assumed, and I see nothing in the circumstances of the case to justify the contention, that he went to the attorney not as the agent or friend of Javerbai, but on behalf of the adopted boy as distinguished from Javerbai. It seems to me that both he. and Revashanker went to the attorney really on behalf of Javerbai, and Jairam's presence in this matter with reference to the communications was not the presence of a stranger or that of the other party, but the presence of a friend and practically of the agent of Javerbai. When the real nature of Jairam's relation with Javerbai in connection with this matter is realised, it is not difficult to hold that that cannot affect the obligation of the attorney not to disclose the communications made to him in the course and for the purpose of his employment. Mr. Desai has very strongly relied upon the observations in Memon Hajee Maroon Mahomed's case, and he has contended that as in that case the other side was present and the communication ceased to be secret or privileged for the purposes of Section 126, similarly here Jairam's presence puts an end to the obligation to keep any secrecy about the communications. I am unable to accept this contention. The

observations of the learned Chief Justice there refer to the presence of the opposite party as such, and the presence of a friend on the same side cannot possibly be treated as relieving an attorney from the obligation to keep undisclosed communications which were made to him in the course and for the purpose of his employment, nor was he at liberty to disclose the contents or the conditions of the documents.

20. It has been urged that the evidence given by the attorney is purely formal, and if the documents are otherwise available to the adopted boy, there can be no contravention of Section 126 in giving the evidence which the attorney has given. I am unable to accept this contention. The section prohibits any statement being made with regard to the contents or conditions of the documents, and taking the statements made by the attorney as a whole, it is not reasonably possible to hold that his evidence is purely formal. His statements about the condition of the documents--and I am here referring only to the documents other than the final agreement and the deed of adoption---and his statements containing communications made during the course and for the purpose of his employment, must be treated as being of a confidential and private nature.

21. It is necessary to refer to two points which have been made by the attorney in his affidavit dated July 26, 1924. The attorney seems to be under the impression that Section 126 of the Indian Evidence Act prohibits disclosure of any advice given by the professional adviser in the course and for the purpose of his employment, and does not apply to the disclosure by an attorney of advice given by another person such as a barrister attorney etc. It is not possible to accept this view, and the learned counsel for the attorney has not attempted to justify it. At another place in the affidavit, he suggests that as there was no litigation then pending or in contemplation, there can be no privilege with regard to these communications. The explanation to Section 126 clearly provides that the obligation continues after the employment has ceased. So whether the employment ceased on October 13, 1919, or later on somewhere in 1922 on behalf of Javerbai, the obligation under Section 126 not to disclose communications within the scope of Section 126 continued. The section itself contains no such limitation as is suggested by him, and it is enough to refer to the

observations of Lord Selborne in Minet v. Morgan (1873) L.R. 8 Ch. 361 which clearly show that the obligation to keep undisclosed matters which ought not to be disclosed, has nothing to do with the question whether at the time when the communications were made, there was any pending litigation or any prospect of it

22. I refer to these points made in the affidavit of the attorney as indicating that his general outlook with reference to his obligations under Section 126 appears to me to be wrong. I am willing to assume in favour of the attorney that when he gave the evidence, he did not fully realise the scope of the prohibition under Section 126, but I cannot appreciate or understand his attitude in maintaining on such grounds as I have already indicated, that he was justified in doing what he did.

23. I am satisfied on a consideration of all the arguments and the materials placed before us that the attorney has disclosed matters in the Zanzibar suit contrary to the provisions of Section 126. The attorney was fully aware of the conflict of interest between Javerbai and the adopted boy in 1923. When he gave evidence in the Zanzibar suit, he had good reason to advert with due care and attention to the question of his obligation to Javerbai under Section 126. There is nothing in his affidavits to show whether he made any real effort to enlighten himself and whether after proper attention to the point he came honestly, though mistakenly, to the conclusion that he could act as he did. The affidavits disclose more a desire for special pleading to justify the position taken up by him than a desire to regard the rights of others, such as may be expected in an officer of the Court of his standing. Such transgression of Section 126 is a serious matter and cannot be lightly passed over.

24. It is rather unfortunate that these proceedings have arisen while the two suits are pending. I desire to make it clear that we express no opinion as to any points that may arise either in the Zanzibar suit or in Javerbai's suit in this Court. The evidence has not been tested by cross-examination of witnesses, and our conclusions in these proceedings must be taken to be limited by the scope of this inquiry.

25. We hold that the attorney has been guilty of professional misconduct.

26. We order him to be suspended from practice for three months, and direct him to pay the costs of the rule on the Advocate General's application, and the costs of the rule on Javerbai's application up to and inclusive of the hearing before Mr. Justice Kemp. We make no order as to further costs on that rule.

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