

## ORIGINAL CIVIL.

( 22 )

*Before Sir M. R. Westropp, Kt., Chief Justice, and Sir C. Sargent, Kt., Justice.*

MEMON HAJEE HAROON MAHOMED (ORIGINAL PLAINTIFF), APPELLANT  
 v. MOLVI ABDUL KARIM AND MOOLA AHMED MOOLA ABDULLA,  
 (ORIGINAL DEFENDANTS), RESPONDENT.\*

1878  
*September 23.*

*Evidence Act (I of 1872), s. 126—Professional communications—Attorney and Client—Privilege.*

To be privileged under s. 126 of the Evidence Act (I of 1872) a communication by a party to his attorney must be of a confidential or private nature.

Where defendants at an interview, at which the plaintiff was present, admitted their partnership to their attorney who was then also acting as attorney for the plaintiff,

*Held* that the attorney was not precluded by s. 126 of the Evidence Act (I of 1872) from giving evidence of this admission to him. 1st, because the defendants' statements, having been made in presence and hearing of the plaintiff could not be regarded as confidential or private; 2nd, because those statements did not appear to have been made to the attorney exclusively in his character of attorney for the defendants but to have been addressed to him also as attorney for the plaintiff.

*Griffith v. Davies*, (1) *Baugh v. Cradocke*, (2) and *Perry v. Smith* (3) followed.

This was an appeal by the plaintiff against the decree of Pinhey, J. for the defendants made on 9th March 1878.

The plaintiff sued the defendants as partners for specific performance, or in the alternative for damages for breach of an agreement, dated the 2nd June 1877, entered into by them to execute to him a mortgage of a certain ship for the purchase of which he had lent them a sum of Rs. 15,000. The agreement was signed only by the first defendant, and he alleged that it had been subsequently cancelled. The second defendant denied that he was a partner with the first defendant, or had been in any way connected with the transaction.

The plaint contained an allegation to the effect that, on the 12th June 1877, the plaintiff went with both defendants to the office of Messrs. Rimington, Hore and Langley, who were the defendant's solicitors, and that, at the interview which then took place, the defendants repeatedly stated that they were partners in the transaction. At the hearing the plaintiff called Mr. Hore, who stated

\* Sait No. 530 of 1877, Appeal No. 362 of 1878.

(1) 5 B. &amp; Ad. 502.

(2) M. &amp; Rob. 182.

(3) 9 M. &amp; W. 651.

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that prior to the 12th June he had been the defendants' solicitor, and that on that day he began to act as solicitor for the plaintiff also. He said: "I remember the defendants coming to my office with the plaintiff on the 12th June. I saw them myself."

*Question.*—"What instructions did the defendants give you?"

Objected to under s. 126 of the Evidence Act, and disallowed. (Witness proceeded): "I began to act as plaintiff's solicitor on the 12th June."

*Question.*—"As solicitor for the plaintiff what communication took place on that day with reference to the agreement of the 2nd June between the parties?"

(Objected to, and disallowed on the ground that the witness was then solicitor for the defendants.)

*Question.*—"Are the statements in the plaint, of what occurred in your office on the 12th June, true?"

(Objected to and disallowed.)

The learned Judge found a verdict for the defendants.

The plaintiff appealed against the decree and against the decision rejecting the above evidence.

*Inverarity* and *Jardine* for the appellant.—The evidence of Mr. Hore and of his clerk as to what passed at the interview in question should have been received. Section 126 of the Evidence Act does not apply at all. The evidence we offer is of a communication made to the common solicitor of both parties, and in presence of the hostile party. It has been held that communications under such circumstances are admissible, because they cannot be said to be confidential communications: *Baugh v. Cradocke*, (1) *Gleve v. Powel*, (2) *Griffith v. Davies*, (3) *Perry v. Smith*, (4) *Shore v. Bedford*, (5) *Weeks v. Argent*, (6) *Reynell v. Sprye*. (7)

*Inverarity* was stopped by the Court.

*Starling* and *Telang* for the first respondent.—We rely on *Doe v. Watkins*, (8) *Taylor v. Blacklow*, (9) *Robson v. Kemp*, (10) *Doe v. Seaton*. (11)

(1) 1 M. & Rob 182. (2) *Id.* 228. (3) 5 B. & Ad. 502.

(4) 9 M. & W. 681. (5) 5 M. & Gr. 271. (6) 16 M. & W. 817.

(7) 10 Beav. 51. (8) 3 Bing. N. C. 421. (9) 3 Bing. N. C. 235.

(10) 4 Esp. 233 and 5 *Id.* 53. (11) 2 Ad. & E. 171.

*B. Tyabjee and Viccajee* for the second respondent.

WESTROPP, C.J.—The first question, objected to on behalf of the defendants, might include instructions given by the defendants to Mr. Hore as their solicitor previously to the occasion (the 12th June 1877) on which the conversation between him (the plaintiff) and the defendants occurred, and was, therefore, too wide, and was rightly disallowed by Mr. Justice Pinhey. The next and some subsequent questions, appearing to be limited to what occurred at that interview when Mr. Hore was acting as the solicitor of the plaintiff as well as of the defendants, and when what the defendants said was uttered by them in the presence and hearing of the plaintiff, were, we think, wrongly disallowed. For two reasons we hold that what the defendants then said to Mr. Hore was not privileged within the meaning of s. 126 of the Indian Evidence Act (I. of 1872). First: communications to be protected by that section must, we think, be confidential. The words used in it are, indeed, “any communication,” &c., but the word “disclose” shows and common sense seems to demand that the privileged communication must be confidential or private. In the present instance as between the plaintiff and defendants it is impossible to maintain that what was said by the latter to Mr. Hore (even if he then were the attorney for the defendants only) in the presence and hearing of the plaintiff could be deemed confidential or private. By acting, as the defendants then did, they themselves disclosed to the plaintiff what they now are endeavouring to withhold from the Court, although called for by the plaintiff. What they said in his presence was part and parcel of the *res gestæ* under investigation in this Court. Mr. Hore is only invited by the plaintiff to repeat in Court what the defendants have already disclosed to him (the plaintiff), and as between the present parties stands as respects such communications in the position of an ordinary witness. In *Griffith v. Davies* (1) it was held that a witness may be called upon by a party to a suit to state a conversation in which the opposite party proposed a compromise to the former, although the witness attended on that occasion as attorney for the party who proposed the com-

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promise. The Court held the conversation not to be confidential. And in *Shore v. Bedford*(1) Maule, J., said: "If two parties go to an attorney, can what is said by one of them in the presence of the other be considered as confidential?" The Court of Common Pleas unanimously held that it could not. And in *Weeks v. Argent*(2) the same conclusion was arrived at by the Court of Exchequer—Parke, B., there saying: "This communication was made in the presence of the defendant and his attorney; then, how could it be confidential." The second reason for our decision is the fact that what was then said by the defendants to Mr. Hore does not appear to have been mentioned to him exclusively in his character as attorney for the defendants. It was addressed to him quite as much in his capacity of attorney for the plaintiff. It was not merely, to use the words of s. 126, a "communication made to him for the purpose of his employment as attorney on behalf of his clients, the defendants, but also on behalf of the plaintiff; and although it certainly may be that, as between the defendants on one side and persons other than and not representing the plaintiff on the other, we should be bound to regard Mr. Hore's lips as sealed with respect to these communications, we do not think this to be so in litigation between the plaintiff and defendants themselves, as to matters to which those communications are relevant. And in this view we are fully supported by *Baugh v. Cradocke*(3) and *Perry v. Smith*(4). The decision in *Reynell v. Sprye* (5) points in the same direction.

For these reasons we hold not that the evidence proposed to be obtained from Mr. Hore constitutes an exception to the rule laid down in the 126th section of the Evidence Act, but rather that it does not at all fall within the scope of that rule. We, accordingly, shall now proceed to receive the evidence of the conversation on the 12th June 1876 which was excluded by Mr. Justice Pinhey.

SARGENT, J.—I agree that this evidence should have been received. With regard to what passed between the plaintiff and the defendants themselves at the interview in question, that is

(1) 5 M. &amp; G. 271—273.

(2) 16 M. &amp; W. 817—819.

(3) 1 Moo. &amp; Rob. 182.

(4) 9 M. &amp; W. 681.

(5) 10 Beav. 51.

clearly not privileged. The only question is as to the communications which passed between Mr. Hore and the defendants.

The use of the word "disclose" in s. 126 of the Evidence Act shows that the communications to be privileged must be of a confidential nature between a solicitor and his client. But here the communications sought to be excluded passed between Mr. Hore and the defendants in the presence and hearing of the plaintiff, and, therefore, could not have been intended to be confidential, as was observed by Tindal, C.J., under similar circumstances in *Shore v. Bedford*. (1)

Again, the evidence shows that Mr. Hore was acting as solicitor of both parties in the transaction; if, therefore, the privilege is to be allowed, it should be clear that the particular communications sought to be protected were made by the party to the solicitor as his own solicitor. In *Perry v. Smith* (2) Baron Parke says: "If the party employs an attorney who is also employed on the other side, the privilege is confined to such communications as are clearly made to him in the character of his own attorney." The same rule obtains in equity. In *Ross v. Gibbs* (3) Stuart, V. C., says: "It is clear that where a professional man prepares a mortgage deed on behalf of the mortgagor and mortgagee, and before a suit by the mortgagor to set aside the mortgage is present at interviews between the mortgagor and mortgagee during a period of a year and a half, as to the construction of the deed and the rights of both parties under it, and during these interviews is not present in the character of professional adviser exclusively of either of the parties, and the litigation is commenced after the last of the interviews at which he was present, none of the communications between him and the mortgagee antecedent to the last interview are privileged from production to the mortgagor in the suit to set aside the deed."

In the present case all the circumstances show that the communications were made to Mr. Hore in his character of solicitor for both parties. I am of opinion, therefore, that the evidence condemned in this case should have been admitted.

(1) 5 M. &amp; G. 271.

(2) 9. M. &amp; W. 681.

(3) L. R., S. Eq. 522.

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[The Appellate Court then proceeded to take Mr. Hore's evidence, and ultimately passed a decree for the appellant (plaintiff).]

Attorney for appellant.—*H. Bicknell.*

Attorneys for first respondent.—Messrs. *Lynch and Tobin.*

Attorney for second respondent.—*Khanderao Moroji.*

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ORIGINAL CIVIL.

( 23 )

*Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Green:*

SURUTRAM BHAYA, PLAINTIFF, v. THE GREAT INDIAN PENINSULA  
RAILWAY COMPANY, DEFENDANTS.\*

*Railway Company—Act XVIII of 1854, ss. 11 and 43—Carriers—  
Evidence—Burden of Proof.*

1878  
November  
29 and 30.

The defendants having made arrangements with the Madras Railway Company for the through carriage of goods, received from the plaintiff's agent at Pona thirty bags of *jowari* to be conveyed thence to Bellary and delivered to the plaintiff's agent there. The "goods consignment note," which was signed by the plaintiff's agent at Pona, contained the following condition, of which he had due notice:—"The Company receive goods for conveyance to stations on other railways with which they have made arrangements to book through, *subject to the rules and regulations and rates and fares of the respective Companies over whose lines the goods may pass.*" On reaching Raichore the bags of *jowari* were transferred from the defendants' waggon, in which they had left Poona, into a waggon of the Madras Railway Company. One bag was subsequently lost; but the remaining twenty-nine arrived, and were unloaded in good condition at Bellary on the 19th September 1877. No steps were taken, either by the defendants or by the Madras Railway Company, to give information of the arrival of the bags to the consignee, and he never received them. The plaintiff sued to recover their value. The defendant pleaded, 1st, that, under a rule of the Madras Railway Company in force at the time of the making of the contract between the plaintiff and the defendants, delivery was complete the instant the bags were unloaded at Bellary; and (2) that the plaintiff's agent at Bellary did not apply for the goods, but allowed them to remain in the station-yard until they became rotten by rain, and were destroyed by order of the Collector some time in November. The Madras Railway Company had issued a public notice of the above rule in the following terms:—"The Madras Railway Company hereby give public notice that they will not be responsible for loss of, or damage to grain after it has been unloaded from the Company's waggons." The defendants sought to incorporate this notice into their contract with the plaintiff by virtue of the condition printed in their "goods consignment note"

*Held* that the said public notice afforded no protection to the defendants, on the ground that it was invalid as a regulation for non-compliance with the provisions of sec. 43 of Act XVIII of 1854, inasmuch as it had not been sanctioned by the

\*Small Cause Court Reference, Suit No, 1608 of 1878.