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Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Middleton.

Dec. 9, 1909

NARAYANEN *v.* SMITH *et al.*

D. C., Kandy, 18,880.

Communication made to proctor by client—Fraud—Privilege—Evidence Ordinance, s. 126.

A proctor is only entitled to refuse the disclosure without his client's express consent of any communication made to him in the course of, and for the purpose of, his employment as such proctor; he is not protected from disclosing a communication made in furtherance of an illegal purpose, or any fact showing that fraud has been committed.

THE plaintiff, a kangany, obtained a discharge note from the second defendant (Samuel, conductor) by giving him a cheque for Rs. 754.77 drawn in favour of the first defendant (Smith, superintendent), which was Rs. 400 in excess of what the plaintiff owed the first defendant's estate. He sued the first defendant for the refund of the excess sum of Rs. 400.

The first defendant pleaded that the second defendant, who forwarded him the cheque, claimed the money as belonging to him (second defendant). The first defendant brought the money into Court, to abide its decision as to whether it belonged to the plaintiff or to second defendant.

The second defendant intervened and claimed the money as his, alleging that the plaintiff had paid him the Rs. 400, and got back from him a promissory note, which the plaintiff had granted to him in acknowledgment of his indebtedness. At the trial the plaintiff

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denied that he ever granted the defendant such a note. The second defendant called Mr. E. G. Jonklaas, who was at one time plaintiff's proctor, as his witness.

The following questions, *inter alia*, were put to him, and he declined to answer them, on the ground that he could not do so without disclosing statements made to him by his client, the plaintiff:—

Question 1.—Did the plaintiff ask you to get back from the second defendant his promissory note for some Rs. 400 odd ?

Question 2.—Do you remember asking the second defendant to return to the plaintiff a promissory note for Rs. 400 odd ?

The learned District Judge ruled that Mr. Jonklaas was not bound to answer the questions. He gave judgment for plaintiff against the first defendant, and dismissed the second defendant's claim with costs.

The defendants appealed.

Bawa, for the appellants.—The learned District Judge was wrong in ruling that Mr. Jonklaas was not bound to answer the questions. See *Ameer Ali and Woodroffe (Law of Evidence), p. 903, 2nd ed.; Griffith v. Davies;*[1] *Perry v. Smith.*[2]

Van Langenberg, for the respondent.—The authorities do not apply to the present case. In *Griffith v. Davies* [1] it was an accident that the solicitor was present when a conversation took place between the parties to that case. In the other case the attorney was acting for both parties.

Cur. adv. vult.

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[His Lordship set out the facts, and continued.]

It seems to me that under the circumstances the first defendant had good reasons for not paying the balance to either one party or the other, and although perhaps he ought to have adopted the procedure laid down by the Civil Procedure Code, chapter XLII., it does not appear to me that his neglect to do so has thereby caused the plaintiff any further expenditure for litigation than he would have incurred in contesting his claim with the second defendant in an interpleader action, and in my opinion the first defendant ought not to have been condemned to pay the plaintiff's costs. If, then, the first defendant was not bound to pay the plaintiff this balance sum on demand, it becomes of importance to determine in this action, as it at present stands, to whom the money should be paid, i.e., to the plaintiff or the second defendant.

[1] *(1833) 5B & A 502.*

[2] *(1842) 9 Meeson & Welsby 681.*

The evidence which would apparently have been decisive of this question is that of Mr. E. G. Jonklaas, a proctor at one time acting for the plaintiff, whose evidence the District Judge has upon two questions, at pages 16-51, 52, and 23-24, 74-75, ruled inadmissible. In my opinion under section 126 the ruling of the learned Judge cannot be supported, and it is admitted by counsel for the respondent that he cannot support the Judge's ruling at pages 23-24 and 74-75. The proctor is only entitled to refuse to disclose without his client's express consent any communication made to him in the course of, and for the purpose of, his employment as such proctor, nor is he protected from disclosing a communication made in furtherance of an illegal purpose, or any fact showing fraud has been committed. It seems to me that if plaintiff told Mr. Jonklaas at one time to get back the note for Rs. 400 from the second defendant, and is now found denying on oath that he had ever given the second defendant such a note, this is a fact showing fraud on the part of the plaintiff, his client, which the proctor is bound to disclose.

I therefore think the case should go back for the examination of Mr. Jonklass and the recording of his evidence, which should be forwarded to this Court. The order therefore will be that the case be remitted to the District Court for the Judge to record the evidence of Mr. E. G. Jonklass with reference to the statements made to him by the plaintiff on the subject of the promissory note for Rs. 400, alleged by the second defendant to have been given to him by the plaintiff and subsequently returned to the plaintiff, and also the statements made by the second defendant to him on the same subject, refused admission by the District Judge. Mr. Jonklass will, of course, be subject to cross-examination by the plaintiff's advocate, and the Judge will observe the terms of sections 126 of the Evidence Ordinance.

HUTCHINSON C.J.—I agree.

Appeal allowed; case remitted.