IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3359 OF 2015

Anil Vishnu Anturkar
Age adult Occ:- Senior Advocate
Residing at :- Flat No. 2, 1st Floor,
Shri Radhey Apartment, Plot No. 44,
United Western Society,
Vitthal Mandir Road, Karve Nagar,
Pune-411 053 ... Petitioner

Vs.

1. Chandrakumar Popatlal Baldota
Age Adult Occ:- Not known
R/at 2417-A, Exhibition Road, Pune-411 0001.

2. Shri D. E. Bharucha
Age Adult Occ:- Not Known

3. Aban Dara Bharucha
Age Adult Occ: Not Known
No. 2 to 5 are resident of
4, Dr. Coyaji Road, Pune-411 001. … Respondents

Mr. A. A. Kumbhakoni, Senior Advocate with Mr. Sandeep Phatak and Mr. Sugandh Deshmukh for petitioner.
Mr. S. N. Chandrachood for respondent no.1.

CORAM: ABHAY AHUJA J.
DATE : 21st DECEMBER 2022

JUDGMENT:-

1. By this petition filed under Article 227 of the Constitution of India, the Petitioner who is a designated Senior Advocate of this Court is impugning the issuance of witness summons dated 23rd March, 2015

directing Petitioner to remain present on 27th March, 2015 at 11.00 a.m. before the Civil Judge, Senior Division, Pune for giving evidence in Special Civil Suit No. 1209 of 2004, which date was at the time of filing of this petition fixed for 4th April, 2015. Petitioner is seeking to quash and set aside the said witness summons by this petition. By an ad-interim order dated 31st March, 2015, continued from time to time, the impugned witness summons has been stayed in terms of prayer clause [B] to the petition.

2. Mr. Kumbhakoni, learned senior counsel for the Petitioner would submit that the impugned witness summons at Exhibit-D, page 22 to the petition requires Petitioner to remain present before the Civil judge, Senior Division, Pune and produce an office copy of the letter dated 11th January, 2004 written by the petitioner to his client Shri Dara Bharucha, residing at 4. Dr. Coyaji Road, Pune-411 001, a photocopy whereof has been produced by the respondent no.1 in Special Civil Suit No. 1209 of 2004. The said communication has been annexed at Exhibit B to the writ petition. Learned Senior Counsel states, on instructions, that Mr. Dara Bharucha already dead.

3. Learned senior counsel would submit that the said communication is a professional communication, an opinion which is protected as a privileged communication under Section 126 of the Indian Evidence Act, 1872 (the "Evidence Act"). He would submit that the application for issuance of witness summons has been made by the respondent no.1 to this petition. Learned Senior Counsel submits that till date no copy of the plaint in the said civil suit has been received by Petitioner. He would submit that although it appears that respondent no.1 is a plaintiff to the said Special Civil Suit No. 1209 of 2004, however, since Petitioner is not having copy of the plaint of the said Special Suit, Petitioner is not in a position to say for what purpose the said special suit has been filed against Shri Bharucha. That petitioner is also not aware of the other defendants in the said suit. That the names and addresses have been taken from the website.

4. Mr. Kumbhakoni, would further submit that a photocopy of the letter written by Petitioner to his client Shri Dara Bharucha on 11th January, 2004 has been produced by respondent no.1, which has been annexed as Exhibit B to the petition. Learned Senior Counsel submits that the said communication being an opinion/advice from a senior lawyer to

his client is a “privileged communication” as per the provisions of Section 126 of the Evidence Act. He draws the attention of this Court to Section 126 of the Act to submit that no barrister, attorney, pleader or vakil shall at any time be permitted to disclose any communication made to him in the course and for the purposes of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, to disclose any advice given by him to his client, unless he has his client’s express consent to disclose. Mr. Kumbhakoni, would submit that this is a two way prohibition, one is of the communication made by the client to the professional and other is the communication made by the professional to his client. Both are prohibited, unless the client has expressly consented to disclosure of such communication. Learned senior counsel would submit that this obligation continues even after the employment has ceased. Learned Senior Counsel submits that Petitioner has neither at any point in time received any such consent from his client Shri Dara Bharucha to disclose the communication dated 11th January, 2004 being Exhibit B to the petition nor is he aware of the purpose for which the said opinion is sought to be produced in the said suit. He

submits that now that Shri Dara Bharucha is no more, neither he can be examined nor can any such consent ex-post facto be obtained. Learned Senior Counsel therefore, submits that the said communication being privileged cannot be produced in the suit proceedings and therefore petitioner cannot be compelled to produce the office copy thereof nor verify his signature thereon.

5. Learned Senior Counsel, therefore, urges this Court to set aside the said witness summons.

6. On the other hand, Mr. Chandrachood, learned counsel for the respondent no.1 would submit that the petitioner has, only been requested to remain present before the trial court and confirm his signature to the communication dated 11th January, 2004. He submits that there is no prohibition in doing so, as the said communication is already out in the open and has been annexed as Exhibit-B to the petition, so also annexed to the witness summons received by the petitioner, and therefore, is no longer a privileged communication.

7. I have heard Shri Kumbhakoni, the learned Senior Counsel for the parties as well as Shri S. N. Chandrachood, learned counsel for the

Respondent No.1-Shri Dara Bharucha and with their able assistance, I, have perused the papers and proceedings and given my thoughtful consideration to the rival contentions.

8. The issue involved in this petition involves a legal quotation as to whether petitioner can claim privilege with respect of communication dated 11th January, 2004 and whether such communication can be produced and considered in the said special civil suit in the face of the clear provisions of Section 126 of the Evidence Act.

9. Before proceeding further, it would be apposite to set out Section 126 of the Evidence Act as under:-

> *"126. Professional communications:- No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:*
>
> *Provided that nothing in this section shall protect from disclosure-*
>
> *(1) any such communication made in furtherance of any illegal purpose;*
>
> *(2) any fact observed by any barrister, pleader, attorney or vakil,*

> *in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.*
> *It is immaterial whether the attention of such barrister, pleader, attorney or vakil was or was not directed to such fact by or on behalf of his client.*
> *Explanation – The obligation stated in this section continues after the employment has ceased."*
>
> *(emphasis supplied)*

10. A bare perusal of the said provision clearly indicates that no barrister, attorney, pleader or vakil can disclose any professional communication viz. any communication received by him in the course of engagement by a client or any communication or advice rendered by the professional to his client, without the express consent of his client to disclose. The explanation clearly suggests that the obligation not to disclose without the express permission/consent of the client continues even after the engagement/employment has ceased. Of Course, there are exceptions as noted in the proviso above, to this privilege in case of communication made in furtherance of any illegal purpose or upon observation of any fact showing any crime or fraud committed in which case, the protection from disclosure shall not be available. There is also no suggestion in the facts, that this case falls under the exceptions to the rule of privileged communication.

11. It may also be worthwhile here to refer to Section 129 of the Evidence Act which relates to privileged communications of another type which are confidential communications between client and his legal adviser, which is quoted as under:-

> *"129. Confidential communications with legal advisers-*
> *No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others."*
>
> (emphasis supplied)

12. This is a client's privilege (not a professional's privilege claimed on the basis of prohibition on the professional as in Section 126) that a client cannot be compelled to disclose any confidential communication which has taken place between him and his legal professional adviser unless he offers himself as a witness. The question in the context of this case that would therefore arise would be whether the communication dated 11th January, 2004 can be considered as confidential communication and as it is only in respect of some confidential information that a client cannot be compelled to disclose unless he offers himself as a witness. In the facts of this case, it would have been Mr. Dara Bharucha's privilege unless he had offered himself as a witness. It has been neither been stated in the

impugned witness summons nor counsel for the respondent no.1 has at any time suggested that the said communication is confidential or that Shri Dara Bharucha offered himself as a witness in any case including special civil suit no. 1209 of 2004 pending before the Civil Judge, Senior Division, Pune. Therefore, disclosure with respect to Section 129 is best left as it is as the same is not in question here and also does not have any bearing on the issue before me, which relates to professional communications under Section 126 and not to confidential information under Section 129 of the Evidence Act, though both fall under the same class, viz. privileged communications.

13. At this stage, it would also be pertinent to refer to the following observations in decision of this Court in the case of ***Larsen & Toubro Limited Vs. Prime Displays Pvt. Ltd. & Ors, 2002 SCC OnLine Bom 267***:-

> *"25. Perusal of the provisions of Section 126 of the Evidence Act shows that it injuncts a lawyer from disclosing without his client's express consent any communication made to him in the course and for the purpose of his employment as such lawyer. Obviously, the injunction contained in Section 126 of the Evidence Act against a lawyer is for the benefit of a client. Thus, a client is entitled to prohibit his lawyer from disclosing any communication made to such lawyer in the course and for the purpose of his employment as a lawyer. Section 129 has been enacted to protect the client from being forced to disclose this communication. The Supreme Court in its judgment in the case of (State of Punjab v.*

Sodhi Sukhdev Singh), A.I.R. 1961 S. C. 493, has observed thus :

> *"It has been acknowledged generally, with some exceptions, that the Indian Evidence Act was intended to and did, in fact, consolidate the English Law of Evidence. It has also often been stated with justification that Sir James Stephen has attempted to crystallise the principles contained in Taylor's work into substantive propositions. In case of doubt or ambiguity over the interpretation of any of the sections of the Evidence Act, we can with profit look to the relevant English common law for ascertaining their true meaning."*

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27. Section 126 and 129 the Evidence Act protect the communications between a lawyer and client made during the employment of the lawyer. In my opinion, these provisions by necessary implication protect the documents prepared by the client in anticipation of litigation either for seeking legal advice or for using them in that litigation.

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30. Shri Jethmalani, the learned counsel appearing for the respondents, refers to the provision of Section 5 of the Evidence Act, which reeds as under :

> *"5. Evidence may be given of facts in issue and relevant facts -- Evidence may be given in the suit or proceedings of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others."*

31. Thus, it is clear from the provisions of Section 5 of the Evidence Act quoted above that evidence can be given of the existence or non-existence of relevant facts. It is nobody's case that these documents are not relevant. The debate is on production of these documents. In my opinion, the documents, which are covered by or which are privileged in view of the

provisions of Section 126 and 129 of the Evidence Act, though relevant, cannot be produced. In a sense, the provisions of Section 126 and 126 operate as an exception to the provision of Section 5 of the Evidence Act. In other words, evidence of a relevant document under Section 5 of the Evidence Act cannot be given if that document is privileged because of the provisions of Section 126 and 129 of the Evidence Act. The Supreme Court in its judgment in the case of (Pooranmal v. Director of Inspection (Investigation), New Delhi (1974) 1 SCC 345, after taking resume of the law on the point in force in India and England has observed thus in paragraph 24 of its judgment:

> *"It would thus be seen that in India, as in England, where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law evidence obtained as a result of illegal search or seizure is not liable to be shut out."*

32. It is thus clear that introduction of relevant material can be shut out if by a law in force, introduction of such material is prohibited. The Supreme Court has considered this aspect of the matter in relation to the provisions of Section 123 of the Evidence Act, which, accords privilege to information derived from unpublished official records relating to any affairs of the State, in its judgment in the case of (State of UP v. Raj Narain) AIR 1974 SC 865 and has observed thus :

33. Evidence is admissible and should be received by the court to which it is tendered unless there is a legal reason for its rejection. Admissibility presupposes relevancy. Admissibility also denotes the absence of any applicable rule of exclusion. Facts should not be received in evidence unless they are both relevant and admissible. The principal rules of exclusion under which evidence becomes inadmissible are two-fold. First, evidence of relevant facts is inadmissible when its reception offends against public policy or a particular rule of law. Some matters are privileged from disclosure. A party is sometimes estopped from proving facts, and these facts are, therefore, inadmissible. The exclusion of evidence of opinion and of extrinsic evidence of the contents of some documents is again a rule of law. Second, relevant facts are, subject to recognised exceptions, inadmissible,

unless they are proved by the best or the prescribed evidence.

> *"25. A witness, though competent generally to give evidence, may, in certain cases, claim privilege as a ground for refusing to disclose matter which is relevant to the issue, Secrets of State, State papers, confidential official documents and communications between the Government and its officers or between such officers are privileged from production on the ground of public policy or as being detrimental to the public interest or service."*

34. It is thus, absolutely clear that a document to which privilege attaches because of the provisions of Sections 126 and 129, though relevant, cannot be received in evidence."

(emphasis supplied)

14. Evidence is admissible and should be received by the Court to which it is tendered unless there is a legal reason for its rejection. Facts should not be received in evidence unless they are both relevant and admissible. Admissibility presupposes relevancy. Admissibility also denotes the absence of any applicable rule of exclusion. In view of the above, elucidation, it is clear that documents, which are privileged in view of Sections 126 or 129 of the Evidence Act, though relevant cannot be produced or received in evidence. Therefore, a witness, though competent generally to give evidence, may in certain cases claim privilege as a ground for refusing to disclose matter which is relevant to the issue.

15. It is not in dispute that the communication dated 11th January, 2004 is a professional communication in the nature of a legal opinion/advice from Petitioner to Shri Dara Bharucha in respect of First Appeal No. 92 of 2001 between Shri Dara Bharucha and others v/s Mr. Mehra Hommiji and Anr. It has been submitted on behalf of Petitioner that Petitioner neither had nor has any consent, let alone an expressione to disclose this communication. Therefore, the said communication is a privileged communication and Petitioner is prohibited from disclosing or producing such privileged communication. Therefore, in view of the clear language of Section 126 of the Evidence Act that no barrister, attorney, pleader or vakil shall at any time be permitted to disclose any advice given by him to his client, unless he has his client's express consent to disclose, in the absence of any such consent, the communication dated 11th January, 2004 is a privileged communication, its disclosure being prohibited under Section 126 of the Act, in view of the above elucidation, cannot be allowed to be produced in Special Civil Suit No. 1209 of 2004. That being the case, the impugned witness summons dated 23rd March, 2015 deserves to be quashed and set aside.

16. Therefore, even though the communication dated 11th January, 2004 between Petitioner and his client Shri Dara Bharucha, now deceased, is already disclosed to the trial court and also annexed to the petition at Exhibit-B, however, in view of the clear bar in Section 126 of the Evidence Act, and the said communication being privileged, cannot be produced nor admissible in evidence in Special Civil Suit No. 1209 of 2004. Therefore, Petitioner cannot be compelled to attend the trial court for the purposes of confirming the communication dated 11th January, 2004 or for identifying his signatures to the said communication. And in view of the Explanation to Section 126 of the Evidence Act, which explains, that the obligations not to disclose in the said section continue even after the employment of the professional has ceased, the said prohibition would continue even though Shri Dara Bharucha is no more.

17. In this view of the matter, the impugned witness summons dated 16th February, 2015 is hereby quashed and set aside .

18. Petition is allowed in the above terms. No order as to costs.

(ABHAY AHUJA, J.)