

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

&

THE HONOURABLE MR.JUSTICE T.V.ANILKUMAR

TUESDAY ,THE 15TH DAY OF JANUARY 2019 / 25TH POUSHA, 1940

OP (FC).No. 228 of 2018

AGAINST THE COMMON ORDER DATED 16.04.2018 IN I.A.NO.1833/2018 &
I.A.No.1832/2018 in I.A.No.802/2018 IN OP 337/2017 of FAMILY
COURT,THRISSUR

PETITIONER/RESPONDENT IN O.P.:

RESHMA MAJEED
AGED 24 YEARS, D/O. ABDUL MAJEED, RAYAMARAKKAR
HOUSE,THOZHIIYOUR DESOM, AND P.O, POOKKODE VILLAGE,
CHAVAKAD TALUK, THRISSUR DISTRICT.

BY ADVS.
SRI.C.S.AJITH PRAKASH
SRI.T.K.DEVARAJAN

RESPONDENT/PETITIONER IN O.P.:

SHAMEER BABU
AGED 36 YEARS, S/O. MUHAMMED, 67/11, MULAKKAL HOUSE,
(SHABEER MANSIL), VAROD DESOM AND P.O, OTTAPALAM
VILLAGE AND TALUK, PALAKKAD DISTRICT, REPRESENTED BY
POWER OF ATTORNEY HOLDER,MUHAMMED, AGED 66 YEARS,
S/O. MOIDEENKUTTY, 67/11, MULAKKAL HOUSE, (SHABEER,
MANSIL), VARODE DESOM AND P.O, OTTAPALAM VILLAGE AND
TALUK,PALAKKAD DISTRICT.

BY ADVS.
SRI.DINESH R.SHENOY
SRI.R.SREEHARI
SRI.SACHIN VYAS

THIS OP (FAMILY COURT) HAVING BEEN FINALLY HEARD ON 13.11.2018,
THE COURT ON 15.1.2019 PASSED THE FOLLOWING:

'CR'

**C.K.ABDUL REHIM
&
T.V.ANILKUMAR, JJ.**

O.P.(FC)No.228 of 2018

Dated this the 15th day of January 2019

J U D G M E N T

T.V.ANILKUMAR,J.

Challenge in the above proceedings instituted under Article 227 of the Constitution of India is against a common order passed by the Family Court, Thrissur in I.A. Nos.1832/2018 and 1833/2018 in I.A. No.802/2018 in O.P. No.337/2017 dated 16th April 2018.

2. The petitioner herein is the mother of a minor child, who was opposing O.P.337/2017 filed by the respondent(father) before the Family Court seeking permanent custody of the child. While the said O.P was pending, the parties have settled the issues involved therein, along with other litigations to which they were parties. A mediation agreement was drawn on 21.8.2017. The terms of the agreement, *inter alia* consisted of entrustment of the minor child in the

permanent custody of one of the parents. Accepting the mediation agreement, all the litigations, including O.P.337/2017, were disposed of by the Family Court. The petitioner later came to understand that the mediation agreement signed by her did not reflect the true consensus arrived at between the parties and it was only as a result of a fraud played on her. She therefore, filed I.A. No.802/2018 before the Family Court, Thrissur for setting aside the mediation agreement on the ground of fraud by invoking the proviso to Order XXIII Rule 3 of CPC.

3. Her case is that, she subscribed her signature in the mediation agreement without understanding the true contents thereof and neither the lawyers nor the mediator who prepared the agreement had explained to her the terms and conditions in the agreement, before her signature was obtained. She assumed while signing the agreement that, it contained the same terms and stipulations already agreed upon between parties in the course of the mediation. Her lawyer too signed the mediation agreement very mechanically and without trying to understand the terms therein. No attempt was made by her lawyer to explain to her the terms of agreement.

4. The respondent herein denied the allegations of fraud raised

by the petitioner and sought to sustain the agreement as lawfully executed and binding on the parties. The petitioner herein was examined in I.A.802/2018 as PW1 and her examination was completed also. After completion of her examination, the respondent filed I.A. No.1832/2018 to recall and re-examine her with respect to certain matters omitted to be put to her in the course of the examination. Simultaneously, he filed I.A.No.1833/2018 seeking to summon and examine the petitioner's former lawyer as a witness in the proceeding. Both these petitions were opposed by the petitioner herein. The court below, overruling the objections raised by the petitioner, passed the impugned order accepting the request of the respondent. Objection to the summoning of the lawyer as a witness was raised by placing reliance on the legal bar contained in Section 126 of the Indian Evidence Act, 1872 (for short the Act). Objection to recalling PW1 was that the respondent already availed sufficient opportunity and therefore re-examination of PW1 would only amount to repeated harassment.

5. The main question to be considered here is whether the order of the court below summoning the lawyer of the petitioner could be said to be illegal and the request to summon the lawyer of the

opposite party if allowed would offend Section 126 of the Act.

6. Heard both sides.

7. Section 126 of the Evidence Act reads as follows:

“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.”

8. Section 126 of the Evidence Act *inter alia* seeks to prohibit

the lawyers from disclosing professional communications made to them by the clients in the course of their engagement, except with their consent. This protection solely meant for the clients, however, operates subject only to the proviso to Section 126 of the Act. The legal position appears to be that, a lawyer has no obligation to withhold or keep professional communications as confidential when the client himself consents him to disclose. Such a consensus is presumed or implied when the client himself opts to summon the lawyer as his own witness. When a lawyer is cited as a witness by the opposite party, the position, however, changes since no client in such a case could be presumed to consent to disclose what Section 126 of the Act prohibits. Nonetheless the bar under Section 126 ought not to be mistaken as prohibiting the lawyer of opposite party from being summoned as his own witness, in cases where his examination is justified by the circumstances. In such cases, the client's right to protection against disclosure extends only to matters communicated for the purpose of as well as in connection with the engagement of the lawyer. The lawyer has a legal obligation to preserve the information, knowledge and communications gained by him during the subsistence of his engagement as confidential and undisclosed, even after the

engagement either ceased or discontinued. Going by the strict letter of Section 126, the bar to disclosure applies only to such information and communications that are purely professional and made to the lawyer for effective conduct of the litigation of the party who engaged him.

9. None of the decisions cited at the bar and reported in ***An Attorney-In re.[AIR 1925 Bombay High Court (Full Bench)], In Re. Chathukutty, [1959 KLJ 436], M/s. Marikar (Motors) Ltd., Trivandrum v. M.I.Rayikumar and Others [(AIR) 1989 KERALA 244], Sankaran V. Dr.Ambulakshan Nair (1989 (2) KLT 570), N.Yovas and another V. Immanueal Jose and others (AIR 1996, Kerala (1))*** lays down that a lawyer of an opposite party cannot be summoned under any circumstances. All these decisions only said that, the professional communications made to the lawyers by their clients should not be divulged to anyone except with the consent of the party who engaged him.

10. It appears from the materials on record that, the examination of petitioner's lawyer as a witness in the present proceeding is meant for eliciting certain essential facts in disproof of allegations of fraud. The essential facts include the answers of the lawyer as to whether

the client signed in her presence and she had explained to her the terms and conditions of the agreement before it was signed. The witness, in our opinion, cannot withhold such essential answers claiming privilege under Section 126 of the Act. Such information are very valuable for the decision of the matter in dispute before the Family court and can never be taken as offending the bar against disclosure of the professional communications saved by law. They do not have any bearing or relevance to the matters connected with the engagement of a lawyer for conduct of the litigation.

11. The impugned order of the lower court in I.A. 1833/2018 permitting examination of petitioner's lawyer cannot therefore, be said to suffer from any illegality warranting our interference. Same is the view that we take in respect of order on I.A. 1832/2018 also as we deem it just and proper to give the respondent one more opportunity to re-examine PW1 with respect to the facts he had omitted during her former examination.

12. Learned counsel for the petitioner submitted that, if the courts tend to allow the parties to cite and examine the lawyer on the opposite side as witness, it would be very embarrassing and also demeaning to the practitioners of law. We are of the clear view that

the courts have necessarily to avoid such embarrassment being caused to the lawyers and this could be ensured by permitting examination of lawyers only in cases where their testimony in court is absolutely essential and inevitable. The court shall be circumspect in summoning lawyers cited as witnesses, whether by their own clients or opposite parties, except when their examination is unavoidable. The request for examination should not be granted mechanically and for mere asking. If a particular matter or information could be effectively proved by other evidence, the courts could certainly decline to order examination of the lawyer to the extent possible. No hard and fast rule, however, could be laid in this respect and it is ultimately what a court informed by prudence and wisdom would decide in a particular case before it, depending on the facts and circumstances of each case.

13. In the case before us, we are fully satisfied that the examination of petitioner's lawyer is absolutely necessary and the order passed by the lower court in this respect calls for no interference. The lower court will ensure when the examination of the lawyer proceeds that the answers given in evidence do not offend Section 126 of the Evidence Act and thus affect the interests of the

client.

14. We, in the circumstances aforementioned, confirm the impugned order.

The O.P(FC) accordingly fails and is hereby dismissed.

Sd/-

**C.K.ABDUL REHIM,
JUDGE**

Sd/-

**T.V.ANILKUMAR,
JUDGE**

AI/-

APPENDIX

PETITIONER'S/S EXHIBITS:

- EXHIBIT P1 A TRUE COPY OF THE MEDIATION AGREEMENT,
DATED 21.8.2017 PREPARED AND SIGNED.
- EXHIBIT P2 A TRUE COPY OF I.A NO.6557/2017 IN
O.PNO.337/2017 SIGNED DATED 11.12.2017.
- EXHIBIT P3 A TRUE COPY OF THE JUDGMENT DATED
19.01.2018 IN OP(FC) NO.20/2018.
- EXHIBIT P4 A TRUE COPY OF I.A NO.802/2018 OP.
NO.337/2017 SIGNED.
- EXHIBIT P5 A TRUE COPY OF THE OBJECTION FILED BY THE
RESPONDENT.
- EXHIBIT P6 A TRUE COPY OF THE OBJECTION FILED BY THE
PETITIONER.
- EXHIBIT P7 A TRUE COPY OF I.A NO.1832/2018.
- EXHIBIT P8 A TRUE COPY OF THE LIST OF WITNESS FILED BY
THE RESPONDENT.
- EXHIBIT P9 A TRUE COPY OF I.A NO.1833/2018.
- EXHIBIT P10 A TRUE COPY OF THE COMMON ORDER DATED
16.04.2018 OF THE FAMILY COURT, THRISSUR.

RESPONDENTS EXHIBITS

EXT.R1 ; TRUE PHOTOCOPY OF THE MARK LIST OF THE PETITIONER IN THE SENIOR SCHOOL
CERTIFICATE EXAMINATION, 2011.

EXT.R2 : TRUE PHOTOCOPY OF LETTER DATED 13.8.2017 RECEIVED AND ACKNOWLEDGED BY
HER ON 28.8.2017.

TRUE COPY

P.S TO JUDGE

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