FULL BENCH.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, Mr. Justice Candy, Mr. Justice Fulton, and Mr. Justice Chandavarkar.

DAMODAR VENKATESH, APPLICANT, *v.* BHAVANISHANKAR MANGESH, OPPONENT.* 1902. *January* 16.

Pleader—Professional conduct—Disciplinary jurisdiction—Pleader making use in later proceedings against A of information obtained by him in an earlier case in which A was his client.

With regard to its disciplinary jurisdiction over pleaders, the High Court of Bombay will follow the rule laid down by Blackburn, J., in the case of *re Cutts* (1) which was as follows:

"Those things which an attorney learns from his client or in consequence of his employment by his client, he is forbidden to disclose, and any betrayal of his confidence would be visited by the Court as gross misconduct. But if he learns matters relating to his client under such circumstances, that if questioned about them in a Court of justice he could not refuse to answer them, he is not within our jurisdiction."

This rule should not be taken by pleaders as the standard by which to regulate their professional behaviour. It serves only to indicate the extreme low-water mark of professional conduct.

REFERENCE by F. X. DeSouza, District Judge of Kánara, bringing to notice the alleged professional misconduct of a pleader.

The opponent, Bhavanishankar, was a pleader practising in the Court of Kumta in the Kánara District, and this was an application by the applicant Damodar alleging that Bhavanishankar had been guilty of professional misconduct, and praying for the exercise of the High Court's disciplinary jurisdiction in the matter.

Certain land held under a *mulgeni* lease by the Totlu family was bought at an execution sale by one Venkatesh, the father of the applicant Damodar. Venkatesh leased this land in *chalgeni* to one Timmanna, who subsequently refused to pay him the stipulated rent and claimed to be the owner. In 1882 Venkatesh

* Reference, Kánara District Judge's letter No. 2050 of 1901.

(1) (1867) 16 L. T. (N. S.) 715.

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filed a suit (No. 390 of 1882) against him in the Court of the Subordinate Judge of Kumta to recover possession and for arrears of rent, and obtained a decree. The opponent Bhavanishankar drafted the plaint for Venkatesh in that suit and appeared as his pleader at the hearing.

Damodar now alleged that Bhavanishankar, while engaged in that suit on behalf of Venkatesh (Damodar's father), became acquainted with certain defects in the title of Venkatesh to the land in question.

Venkatesh died and his son, the applicant Damodar, remained in undisturbed possession of the land until 1897. In that year certain persons carried away the crop in the said land, and Damodar instituted criminal proceedings against them in the Court of the First Class Magistrate of Kánara. Bhavanishankar appeared as their pleader and, in the course of the case, cross-examined Damodar, and (it was alleged) in doing so made use of the knowledge as to the title to the land which he had obtained as pleader for Venkatesh in the suit in 1882.

Damodar subsequently brought the facts to the notice of the District Judge, who asked for a report from the Magistrate and called upon Bhavanishankar for an explanation. Bhavanishankar stated that, besides having signed the Vaklatnama and having drafted the plaint in the civil suit of 1882, he had done nothing in that suit, he being then a pleader of only one year's standing; that he had retained no recollection of that suit, when, after an interval of fifteen years, he had appeared for the accused in the criminal proceedings in 1897; and that as soon as the fact of his having signed the Vaklatnama in the civil suit was brought to his notice, he had ceased to appear for the accused in those criminal proceedings.

The Judge then sent for the proceedings in the criminal matter, and after examining Damodar and some other witnesses he made a report to the High Court, of which the following is an extract:

> What exactly were the communications made by the applicant's father to the opponent cannot be proved by direct evidence, as the applicant's father is dead and the applicant himself was then a boy in leading strings. It has, indeed, been contended that in the absence of such evidence the present proceedings should cease—a contention, if carried to its logical conclusion, would mean that dead men's

confidences may be betrayed with impunity. It is, however, not difficult to gather from the pleadings what the substance of plaintiff's instructions was. Plaintiff alleged that the endowment.....of Totlu Dudku, the *mulgeni* of the Totlu family, the purchase by him of that *mulgeni* interest at a Court sale, and the sub-lease to the defendant are the several ingredients constituting his title. Defendant, on the other hand, denied the fact of the plaintiff's exclusive possession, no less than his right to such possession. Is it then hazardous to assert that the plaintiff must have disclosed what title-deeds were in his possession, and so doing must have informed him that he did not possess the original deed creating the endowment in favour of the god Hanuman, nor the *mulgeni* lease executed to the Totlu family, nor even the certificate of sale proving his purchase at the auction sale? Can it be reasonably doubted that he also showed him at the same time what few documents evidencing title were actually in his possession, including among others the *kabjapatti*, *i.e.* the memorandum of delivery of possession, passed by the bailiff and the receipts obtained by him from the trustees of the temple for the amounts of *mulgeni* rent yearly paid to them?

If, then, this was the tenor of the instructions confidentially imparted by the father of the applicant to his pleader, Mr. Bhavanishankar, in suit No. 390 of 1882, there cannot be a shadow of doubt that by accepting the engagement on behalf of the accused in criminal case No. 5 of 1898, Mr. Bhavanishankar put himself in a position where he was under a strong temptation to promote the interests of his new clients by using these instructions for their benefit; and the sequel, as disclosed by the record of the criminal case and the written statement of the defendant in the civil suit, ran on virtually the same lines. Both denied the separate existence and the alleged endowment ..... of the plot Totlu Dudku, both impugned its exclusive possession by the applicant's father and after him by the applicant, both set up a joint possession in common by all *hasgidars* (*i.e.* coparceners), and both vehemently repudiated the applicant's position as quasi-coparcener in the *ghazni* by virtue of his lease in perpetuity. Mr. Bhavanishankar had championed the title of the father in the civil suit; he now undertook to demolish that of the son. To him the task was easy. The father had in all confidence laid bare to him the weak points in his armour; what more simple than to aim his shafts at these weak points, now that the armour was worn by the son? This is precisely what we find Mr. Bhavanishankar did in conducting the defence of the accused in the criminal case. Judged by results, his cross-examination of the applicant, the complainant in that case (*vide* Exhibit C), is a masterpiece; as if by instinct, he seemed to lay his hands on the flaws in the applicant's title-deeds; without apparent effort, he elicited from him that he was not in possession of the endowment deed, nor of the *mulgeni* lease, nor of the certificate of the sale. He compelled him to produce the *kabjapatti*, the genuineness of which he had maintained in the civil suit, but now sought to discredit it by questioning him as to the difference in the ink in the signatures of the bailiff and of the attesting witnesses; the receipts from the temple trustees on which he had relied as the sheet-anchor of his client's title in the civil suit, he now endeavoured to impugn by summoning attesting witnesses to those receipts and

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eliciting from them statements at variance with their contents as well as impugning an admission by Venkatesh that he had never been put in possession of the lands in dispute. The weapons which the father had confidingly placed in his hands for his defence, he did not hesitate to convert into the main weapons of offence against the son.

The High Court called upon Bhavanishankar for an explanation.

Inverarity (with *Mahadev B. Chaubal*) for the applicant Damodar.

Branson (with *Shamrav Vithal* and *Ganpat S. Mulgaonkar*) for Bhavanishankar.

JENKINS, C.J.:—In this case we are asked to deal under our disciplinary jurisdiction with Mr. Bhavanishankar, a pleader of Kumta in the district of Kánara, on the ground that he has been guilty of professional misconduct.

The facts material to the case are shortly these. In the táluka of Kumta there is a tract of *ghazni* or marshy land known as Totlu Dudku and comprising survey No. 1 and parts of survey Nos. 126, 127 and 128, and held by several sharers, who dedicated it to a religious endowment. The dedicated land was granted in *mulgeni* to the Totlu family, whose interest was subsequently bought at an execution sale by one Venkatesh, the father of Damodar, who complains in this case of Mr. Bhavanishankar's conduct. Venkatesh leased the land in *chalgeni* to Timmanna (one of the Totlu family), who later refused to pay the stipulated rent, with the result that a suit was brought against him by Venkatesh in the Mámlatdár's Court. Failing, however, in that suit, Venkatesh brought against Timmanna suit No. 390 of 1882 in the Civil Court, and in this he succeeded.

The allegation is that in those suits Bhavanishankar acted for Venkatesh and so became acquainted with certain flaws in his title. In 1897 two men, Shivu and Dewu, with some forty others, carried away the crop on the land, and thereupon Damodar commenced criminal proceedings against them. They were defended by Bhavanishankar, who in the course of the case cross-examined Damodar, making use, it is said, for that purpose of the flaws in title of which he had become aware in the manner we have indicated.

In proof of this Mr. Inverarity, who with conspicuous fairness and moderation has supported the charge of misconduct, has relied on the grounds set forth in the report of the District Judge, and also, as being even more important, on another circumstance with which we will first deal.

It seems that in 1879 there had been a partition between the members of Venkatesh's family, and for the purpose of carrying it into effect separate lists or statements for each member or branch were prepared. Venkatesh's list in error purported to include only survey No. 128. It is said that this was learnt by Bhavanishankar in the course of his employment, and that he made use of it in his cross-examination of Damodar in the criminal proceedings. To establish this Mr. Inverarity read to us the following passages from that cross-examination in November, 1897, and January, 1898:

In 1879 there was a partition of the estate through the Collector. In 1871 there was a partition suit between members of our family. The Totlu Dudku was a part of the estate. It was divided along with the other estate. Statements of the different shares have been made and my father and my uncle Keshav got one-twelfth of the estate. Survey No. 128 alone out of those referred to in the complaint was in my father and uncle's share.

In the Kárwár Subordinate Judge's Court in 1871 there was a suit No. 570 for partition. In 1876 a decree was passed and the estate was divided in 1879. A part of Totlu Dudku is included in the division. I do not know whether it came to be divided as a part of the joint estate or separate estate. My father and uncle got the part. It is denoted by survey No. 128 and the area is given as 3 acres and assessed at Rs. 6. My father has not got survey Nos. 1, 126 and 127 in the statement, that is, he has not got the *mulgeni* right. I have not applied hitherto to get it.

There can be no doubt that this point of the cross-examination was directed to showing that survey No. 128 alone was included in Venkatesh's list. Bhavanishankar's explanation is that his cross-examination in November was founded on information he received from his clients and one Pundlik, a sharer under the partition, and also on the inferences he drew from a certified copy of a statement of a sharer other than Venkatesh, and he says that prior to his cross-examination in January, 1898, he had seen a private copy of the statement relating to Venkatesh's share. He further has declared that his cross-examination was not based on information he obtained as legal adviser of

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Venkatesh. This is the only evidence on the point, and though we think Bhavanishankar has, in his attempt wholly to dissociate himself from suit No. 390 of 1882, shown a want of candour that calls for a jealous scrutiny of his explanation, we are not satisfied (more especially when we have regard to the time that has elapsed since the suit) that the charge on this head is made out with sufficient clearness to justify us in holding that his cross-examination was an abuse of the confidence reposed in him as Venkatesh's pleader.

We now deal with those grounds on which the District Judge relied. It is conceded by Mr. Inverarity, and indeed is obvious, that the rule of conduct expounded by the District Judge cannot be supported so far as he regards it as a test by which we should determine whether to exercise our disciplinary powers. He has enunciated a counsel of perfection that would be impracticable in the work of a pleader. The mere fact that Bhavanishankar had been employed by Venkatesh in relation to the particular piece of land should not alone make it misbehaviour to appear for the defendants in the criminal proceedings. Nor has Damodar in this respect any ground of complaint; for he did not endeavour to retain Bhavanishankar as his pleader in the criminal proceedings. The gravamen of the charge is to be found in the following passage:

> Judged by results his cross-examination of the applicant, the complainant in that case (*vide* Exhibit C), is a masterpiece; as if by instinct, he seemed to lay his hands on the flaws in the applicant's title-deeds; without apparent effort, he elicited from him that he was not in possession of the endowment deed, nor of the *mulgeni* lease, nor of the certificate of sale. He compelled him to produce the *kabjapatti*, the genuineness of which he had maintained in the civil suit, but now sought to discredit by questioning him as to the difference in the ink in the signatures of the bailiff and of the attesting witnesses; the receipts from the temple trustees on which he had relied as the sheet-anchor of his client's title in the civil suit, he now endeavoured to impugn by summoning the attesting witnesses to those receipts and eliciting from them statements at variance with their contents as well as statements implying an admission by Venkatesh that he had never been put in possession of the lands in dispute. The weapons which the father had confidingly placed in his hands for his defence, he did not hesitate to convert into the main weapons of offence against the son.

In one point the District Judge is in error as to the facts. Bhavanishankar did not compel Damodar to produce the *kabjapatti*: it was produced in the examination-in-chief.

Now it has been contended that, even if Bhavanishankar did learn in the course of his employment in suit No. 390 of 1882 that Venkatesh was not in possession of the endowment deed or of the *mulgeni* lease or the certificate of sale, and made use of that knowledge for the purpose of his cross-examination of Damodar, still it could not, under the circumstances, be misbehaviour on his part calling for our intervention; for in that suit these facts had become public property. It seems that Venkatesh had been questioned as to these documents under section 131 of the Civil Procedure Code of 1877 by his opponent, and he had been compelled to admit in answer that they were not in his possession: therefore, it is said Bhavanishankar has not been guilty of any breach of privilege, for the privilege, if it ever existed, came to an end on the disclosure made by Venkatesh's answer. As an authority for this proposition our attention has been called to what was said by Sir Raymond West as Judge of the Sadar Court in Sind in the case of *Reg.* v. *Bezonji* (a report whereof is set forth at page 91 of I. L. R. 12 Bom.). The learned Judge there said: "The distinction between such a case and that of a solicitor dismissed for no misconduct has always been recognized. In the latter case the client who has voluntarily parted with his solicitor cannot complain of his going into the adversary's service. All he can claim is that his own secrets shall still be religiously guarded against disclosure. It may be that there never were any secrets. It may be that what once were secrets have since become knowledge available to all through proceedings in Court or by other means. In such cases no reasonable objection can be raised." This is not an authority binding on this Court, but as it has somehow found its way into the Reports, it would be difficult to treat as misbehaviour conduct which is there described as not open to objection. On this ground we cannot treat what Bhavanishankar did (even on the assumption adverse to himself made by Mr. Branson) as rendering him liable to disciplinary punishment. A case somewhat similar to the present came before Blackburn and Lush, JJ., (*re Cults*[1]) and it was there laid down that the test for determining whether the Court has or has not jurisdiction is whether if the attorney

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had been called as a witness the Court would or would not have held him justified in refusing to answer on the ground of privilege. Blackburn, J., said:

> Those things which an attorney learns from his client, or in consequence of his employment by his client, he is forbidden to disclose, and any betrayal of his confidence would be visited by the Court as gross misconduct. But if he learns matters relating to his client under such circumstances that if questioned about them in a Court of Justice he could not refuse to answer them, he is not within our jurisdiction. It may be very bad of him, both as a man and a gentleman, to have acted thus, but it does not affect him as an attorney. We do not sit to punish personal, but professional misconduct.

This is a sound and clear rule, and we cite it here not because we intend to decide this case by reference to it, but because (subject to any contrary decision by which we may be bound) the rule enunciated is one which we propose to follow in future.

It must, however, be borne in mind that though this is the rule by which, in our opinion, the Court should be guided in cases of this class, it serves only to indicate the extreme low-water mark of professional conduct. It will, we trust, not be taken by the pleaders of this Presidency as the standard by which to regulate their professional behaviour. Bhavanishankar has himself to thank for the position in which he is in these proceedings, for he has shown neither the candour nor nicety of behaviour one could wish. That, however, is not a ground for punishment or reprimand, or for anything more than the expression of a regret that he should have acted in the way he did.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Crowe.

1902. *January* 21.

NARMADABAI (ORIGINAL PLAINTIFF), APPLICANT, *v.* BHAVANI-SHANKAR (ORIGINAL DEFENDANT), OPPONENT.*

Limitation Act (XV of 1877), schedule II, articles 48, 49 and 145—Deposit—Suit to recover property deposited for safe custody.

In October, 1897, the plaintiff's mother deposited ornaments, clothes and money with the defendant for safe custody. In April, 1898, she demanded

* Application No. 187 of 1901 under Extraordinary Jurisdiction.