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Court : Kolkata

Decided On : Dec-12-1912

Reported in : (1913)ILR40Cal433

Judge : Sharfuddin and ;Coxe, JJ.

Appellant : Kari Singh

Respondent : Emperor

Judgement :

Sharfuddin and Coxe, JJ.

1. The accused in this case has been convicted of defaming one, Mr. Macpherson. It appears that in a former case lie applied to the District Magistrate for a transfer, and in that application he stated that Mr. Macpherson had brought to Court the manager of the Majhoul Factory, who was the trying Magistrate's tenant, and had had a private talk with the trying Magistrate. He inferred that this was done to put pressure on the trying Magistrate, and to induce him to convict the petitioner.

2. It appears that this was all pure invention. The manager of the Majhoul Factory was not brought to Court at all, and Mr. Macpherson had no private talk with the trying Magistrate. The assertion clearly amounted to an accusation against Mr. Macpherson that he had attempted to corrupt justice, and it cannot be gainsaid that it was defamatory, and made in bad faith.

3. The petitioner has obtained a rule on the Magistrate to show cause why the conviction should not be set aside, on the ground that the statement in the application for transfer was absolutely privileged.

4. It is evident on reference to the terms of the, section itself that statements made in bad faith are not protected. But it is argued by the learned pleader who appeal's in support of this rule, following the decision in Potaraju Venkata Reddy v. Emperor (1912) 13 Or. L. J. 275 that the English common law doctrine of absolute privilege is also law in this country. Speaking with the utmost respect for that decision, we are unable ourselves to take this view. The learned pleader has not shown us any authority, historical or otherwise, for holding that the English common law ever had any application to the Indian mofussil, and despite some casual expressions, in certain decisions, we are unable to understand how it could ever have had any application. It is argued, however, that as the Exceptions in Section 499 of the Penal Code correspond only to the classes of qualified privilege in English law, and as there is no reference in the Penal Code to the cases of absolute privilege, it must be assumed that the framers of the Code, who were introducing the English law into this country, cannot have intended to exclude that portion of it. The rule laid down in Bank of England v. Vagliano [18011 A. C. 107 quoted in Norendra Nath Sircar v. Kamalbasini Dasi (1896) I.L.R. 23 Calc. 563 was that the proper course to adopt in construing an Act was to ascertain the natural meaning of its language, and not to assume that it was intended to leave the existing law unaltered, except when that intention was stated. This decision is distinguished on the ground that Lord Herschell, in laying down that rule, was dealing With an Act codifying the existing law, and not with an Act introducing new law. It seems to us that the distinction tells rather against the appellant than for him. If it is wrong to assume that in codifying existing law the Legislature intended to leave it unaltered, unless that intention is expressly stated, it seems to us that it would be more, and not less, wrong-to assume that in introducing a foreign law into a country the Legislature intended to introduce the whole of it, unless the contrary is expressly stated. It was held in Gokul Mandar v. Pudmanund Singh (1902) I. L. K. 29 Calc. 707 that it is ' the essence of a Code to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment, according to its true

construction.' The Penal Code certainly declares the law in respect of defamation. It contains a definition of defamation, and sets out a number of Exceptions. It appears to us that it must be regarded as exhaustive on the point. Section 2 enacts that every person shall be liable to punishment under this Code, and not otherwise, for their acts. If there are a number of Exceptions to the offence of defamation, other than those contained in Section 499, it appears to us that an offender must be liable to punishment for defamation otherwise than under the Code. On principle, therefore, it would seem to us that Section 499 is exhaustive, and that if a defamatory statement does not come within the specified Exceptions, it is not privileged.

5. It appears to us also that in Bengal the matter is concluded by authority. The cases of Greene v. Delanney (1870) 14 W. R. Cr 27 Augada Ram Shaha v. Nemai Chand Shaha (1896) I.L.R. 23 Calc. 867 Kali Nath Gupta v. Gobinda Chandra Basu (1900) 5. C. W. N. 293 seem to us clear authority for holding that the question of privilege must be decided by the terms of Section 499. The decisions of this Court that have been cited on behalf of the appellant are, in our opinion, distinguishable. The first case relied on is that of Baboo Gunnesh Dutt Singh v. Mugneeram Chowdhry (1872) 11 B. L. R. 321. There it was held that, on principles of public policy, a witness cannot be sued for damages in respect of defamatory evidence given by him in a judicial proceeding. But there their Lordships were dealing with a civil suit, and not with a criminal prosecution; and were not considering the effect of Section 499 of the Penal Code. This is a real distinction, because, while the law of crimes has been codified and offences have been defined by Statute, the codification, of the Law of Torts was abandoned, and actionable wrongs are not defined by Statute. It is likely enough that, if the Law of Torts had been codified, some provisions would have been introduced, such as exists in the Contract Act, by which suits opposed to public policy would have been barred. But this has not been done, and the question, what is or is not an actionable wrong, has to be gathered from case law, and considerations of justice, equity and good conscience, and not from a statutory definition. It is, therefore, possible in such cases to apply principles of the English law which are consonant with justice, equity and good conscience, which would have no application if actionable wrongs had been defined by Statute. Secondly, it is clear that a

voluntary statement by an accused is different from a statement made by a witness who is compelled to answer the questions put to him. The distinction may be fine, but it has been recognised and acted upon by this Court. We may refer again to the case of Kali Nath Gupta v. Gobinda Chandra Basu (1900) 5 C. W. N. 293 quoted above. And in Haidar Ali v. Abru Mia (1905) I.L.R. 32 Calc. 756 the learned Judges refused to extend the privilege even to a witness when the statement was not made in answer to a question that the witness was bound to answer, but was volunteered.

6. In Bhikumber Singh v. Becharam Sircar (1888) I.L.R. 15 Calc. 264 it was held that a statement made by a witness was absolutely privileged. That was a suit for damages' and the case goes no further than Baboo Gunnesh Butt Singh v. Mugneeram Chowdhry (1872) 11 B. L. R. 321 already discussed. The same may be said of Woolfun Bibi v. Jesarat Sheikh (1899) I.L.R. 27 Calc. 262. In Golap Jan v. Bholanath Khettry (1911) I.L.R. 38 Calc. 880 the statement was made by a complainant and not by a witness, but the privilege was claimed not in a criminal prosecution but in a suit for damages. That also was a case within the original jurisdiction of this Court, where the application of English law might be supported by arguments that would be inapplicable to a case in the mofussil.

7. It seems to us, therefore, clear, both on principle and authority, that in Bengal there is no absolute privilege for a statement like that now Tinder consideration, when made in bad faith. It has been pressed upon us that, in the analogous case Kari Singh v. Emperor. Criminal Revision No. 1219 of 1912.

Cuitty and Richardson JJ.

8. In this case the accused, Kari Singh, who is the petitioner before us, was put on his trial before Maulvi Najimuddin, an Honorary Magistrate, on a charge under Section 147 of the Indian Penal Code. In the course of that trial he presented a petition to the District Magistrate of Monghyr for a transfer of the case to another Court, on the ground that ho would not get a fair and impartial trial before the Honorary Magistrate. Paragraph (5) of that petition was as follows:

That on the 17th June last, on the date fixed for hearing of this case, Mr. Macpherson and the manager of Majhoul Kothi, where some properties of the trying Honorary Magistrate have been leased out, came to the Court of the trying Magistrate and had some private talk with the Honorary Magistrate, and the petitioner apprehends that the manager of the Maghonl Kothi was brought to put additional pressure on the trying Magistrate to induce him to convict the petitioner, and that he cannot get a fair and impartial trial in that Court, or in any other Court in Bengal.

The accused was charged under Section 499 of the Indian Penal Code with defaming Mr. Macpherson and also the manager of Majhoul Kothi (Mr. Finch), and has been in eacli case convicted and sentenced to pay a fine, of Rs. 100, or in default to undergo 3 months' simple imprisonment. The accused made two applications to this Court in revision, one in each case. For some reason a Rule was issued only in Mr. Finch's case, the question in Mr. Macpherson's case being left over for further consideration until after the disposal of the Rub so issued.

It has been found as a fact that the allegation above set out was untrue to the knowledge of the accused, inasmuch as neither of the gentlemen in fact came to Begusarai on the day alleged, or had any conversation with the trying Magistrate.

The only question before us is whether the statement of the petitioner must be judged only by the provisions of Section 499 of the Indian Penal Code, or whether it was absolutely privileged, of the trying Magistrate and had some private talk with the Honorary Magistrate, and the petitioner apprehends that the manager of the Maghonl Kothi was brought to put additional pressure on the trying Magistrate to induce him to convict the petitioner, and that he cannot get a fair and impartial trial in that Court, or in any other Court in Bengal.

The accused was charged under Section 499 of the Indian Penal Code with defaming Mr. Macpherson and also the manager of Majhoul Kothi (Mr. Finch), and has been in each case convicted and sentenced to pay a fine, of Rs. 100, or in default to undergo 3 months' simple imprisonment. The accused made two applications to this Court in revision, one in each case. For some reason a Rule was issued only in Mr. Finch's case, the question in Mr. Macpherson's case being

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The only question before us is whether the statement of the petitioner must be judged only by the provisions of Section 499 of the Indian Penal Code, or whether it was absolutely privileged.

The question in its broadest aspect has been the subject of a largo number of judicial decisions in the High Courts of India, and in no one of the Courts have such decisions been entirely uniforn.

The statement here is not the statement of a person who is a mere witness, or who is a party to a civil suit. It is the statement made by an accused person in the course of his trial upon a criminal charge. In view of the decisions to which we have been referred, that fact may not be without its importance. It certainly makes it pertinent to observe that in the very recent case of Potaraju Venkata Reddy v. Emperor (1912) 13 Cr. L. J. 275 not yet reported in the Indian Law Reports, a Full Bench of the Madras High Court, after a careful examination of the authorites, has held that the statement of an accused person in answer to a question by the trying Court is absolutely privileged. In another recent case in tin's Court, Golap Jan v. Bholanath Khettry (1911) I.L.R. 38 Calc. 880 where the defamatory statement was made in a complaint preferred under the Criminal Procedure Code, the Chief Justice remarked (p. 888), 'but even if the complaint to the Magistrate was defamatory, still the complainant was entitled to protection from suit, and tin's protection is the absolute privilege accorded in the public interest to those who make statements to the Courts in the course of, and in relation to, judicial proceedings. 'The remark would apply with as great, or even greater, force to a statement made by an accused person.

We have said that the statement here was made in the course of criminal proceedings, but it was not made in the Court of the trying Magistrate by way of answer to the charge. It was made in the Court of the District Magistrate to support

an application for transfer. 'Die order we are about to make must not be understood as in any degree implying that we desire to weaken the sense of responsibility which such applications entail. Sometimes they may be justified. Sometimes they may be mere devices for delaying justice. Or again, they may be resorted to because it is thought that the trial Judge or Magistrate has, not improperly, from personal bias or from extraneous information, but on the bench and judicially, as the ease proceeded before him, formed, or provisionally formed, an opinion on the merits, favourable or unfavourable, to one side or the other.

The authorities have been examined so often, and with such differing results, that we do not think that it would serve any useful purpose to traverse the same ground again upon this Rule. The controversy is of a character which can only be finally settled by an authoritative ruling of the Privy Council or by the Legislature. We refrain, therefore, from expressing unqualified opinion upon the question of principle involved, and we content ourselves with saying that, in view of the two cases which we have specifically cited, the propriety of the conviction is at least open to serious doubt. In that view of the matter, we make the Rule absolute, set aside the conviction and sentence, and direct that the fine, if paid, be refunded.

A Rule in the same terms must be issued in Mr. Macpherson's case. brought by the manager of the Majhoul Factory, a Bench of this Court set aside the conviction, and it has been suggested that we should refer the matter to a Full Bench. But we can only refer to a Full Bench a decision from which we dissent on a point of law, and we do not so dissent from any decision that has been laid before us. In the analogous case the learned Judges expressly declined to lay down any principle of law, and set aside the conviction, because, in view of the two cases cited by them Potaraju Venkata Redely v. Emperor (1912) 13 Cr. L. J. 275 and Golap Jan v. Bholanath Khettry (1911) I.L.R. 38 Calc. 880 the propriety of the conviction was open to serious doubt. But speaking with all respect we are unable to share the doubts of the learned Judges as to what is at present the law on this point in this province.

9. The Rule is discharged.