

BOMBAY HIGH COURT

Tulsidas Amanmal Karani

Vs

S.F. Billimoria

(Baker, C.J. Broomfield, J.)

08.03.1932

JUDGMENT

Broomfield, J.

1. This is an application for revision of an order of the Chief Presidency Magistrate made on November 17, 1931, discharging a notice and dismissing a complaint of defamation under Section 600 of the Indian Penal Code, The complainant was Mr. Tulsidas Amanmal Karani, who is a solicitor, and the accused was Khan Bahadur S.B. Billimoria, who is an advocate.

2. The material facts are briefly these. One Bharmal or his son-it is not clear which-had rented a certain room in a chawl and the landlord sued the son to recover arrears of rent. A decree was obtained ex parte and in execution of it a warrant was issued for the arrest of the defendant, i.e., the son of Bharmal. The bailiff, however, arrested Bharmal himself on the representation that he was the real tenant and debtor. Bharmal was temporarily released by the Registrar of the Small Causes Court on the ground that he was not named in the warrant. He was given time to apply to the Court. Instead of that, however, he filed a criminal complaint in the Mazagaon Police Court against Bhagwandas, the plaintiff in the suit, and other persons for wrongful arrest, In the meantime the plaintiff in the suit made an application under Order I, Rule 10, of the Civil Procedure Code, in the Small Causes Court to get the decree rectified by substituting Bharmal's name for the name of his son. Notice was issued to Bharmal and it came on for hearing before the Small Causes Court Judge Mr. Kurwa on September 11, 1931, An advocate Mr. Oks appeared for Bharmal and Khan Bahadur Billimoria for the judgment creditor, and it was on this occasion that the alleged defamatory statement was made. It should be mentioned that Mr. Tulsidas was not personally concerned in these proceedings, at any rate in this sense that he was neither a party nor a witness. But Bharmal was living with him at the time of the execution of the warrant and it appears that he accompanied Bharmal and supported him before the Registrar of the Small Causes Court. He was also called and examined as a witness in the criminal case in the Mazagaon Police Court, and, in the opinion of the learned Chief Presidency Magistrate, his

conduct had shown that he was interesting himself in the proceedings on Bharmal's behalf.

3. At the hearing of the notice the Judge suggested that the case might be compromised. Bharmal, however, was unwilling to accept the terms offered, and according to Mr. Billimoria's version of what happened, he said that he wanted to consult Mr. Tulsidas, who was not actually present in Court but in the Library. When Bharmal said this it is alleged that Mr. Billimoria stated as follows:-Bharmal who is an insolvent is put up by the attorney (meaning Mr. Tulsidas) who is also an insolvent.

4. Mr. Oka protested against these remarks and asked Mr. Billimoria to withdraw them ; but he declined to do so. On the next day, September 12, a solicitor's letter was sent to Mr. Billimoria calling upon him formally to withdraw the allegations, and Mr. Billimoria replied that he had not stated that Bharmal was put up by Mr. Tulsidas to take proceedings, and as regards the statement as to Mr. Tulsidas' insolvency, that he had made it on instructions received from his clients and that it was relevant to the matter in hand. After that Mr. Tulsidas filed a complaint of defamation, and after issuing a notice to the accused and holding rather an elaborate inquiry the learned Magistrate finally refused to issue process and dismissed the complaint.

5. There has been some dispute as to the exact words which were used by Mr. Billimoria, and the Magistrate has found as a fact that he did not say that Bharmal was put up by Mr. Tulsidas to take proceedings. On the other hand, it is admitted that he did say that Mr. Tulsidas was an insolvent, This allegation is not true in fact The real facts appear to be that Mr. Tulsidas' father was carrying on a business at Karachi in the name and style of his son Tulsidas Amanmal Karani. Certain creditors of the firm got it adjudicated insolvent and Mr. Tulsidas was adjudicated an insolvent on the supposition that he was one of the partners. That was in 1922. Mr. Tulsidas appealed against the order of adjudication and it was annulled by the appellate Court in November 1924 All this was explained by Mr. Tulsidas when he gave evidence in the Mazagaon Police Court on August 6, but on that occasion Mr. Billimoria was not present.

6. It cannot be disputed, I think, that this statement is a defamatory statement, and the question then arises whether the case is covered by exception 9 to Section 499 of the Indian Penal Code. That raises the larger question of the extent of the privilege of an advocate. It is not a new question, and in view of the authorities, most of which have been cited by the learned Magistrate, there does not seem to be very much doubt about the answer.

7. It is clear in the first place that a member of the bar in this country has no absolute privilege. Strictly speaking an advocate who makes defamatory statements in the conduct of a case has no wider protection than a layman; that is to say, he has to bring his case within the terms of exception 9 to Section 499, and under Section 105 of the Indian Evidence Act the burden of

proof would normally be upon him. But in practice the Courts have held on grounds of public policy that an advocate is entitled to special protection, and that if an advocate is called in question in respect of defamatory statements made by him in the course of his duties as an advocate, the Court ought to presume that he acted in good faith and upon instructions and ought to require the other party to prove express malice.

8. There are two decisions of this High Court on that point. One is *In re Nagarji Trikamji* (1894) I.L.R. 19 Bom. 340. In that case a pleader who had been convicted of defamation was acquitted on the ground that in the absence of express malice which was not to be presumed the accused as a pleader was protected by exception 9 to Section 499. The Court said that in considering whether there was good faith (i.e. due care and attention) the position of the person making the imputation must be taken into consideration. In the case of an advocate, where express malice is absent, a Court having due regard to public policy would be extremely cautious before depriving him of the protection of exception 9 to Section 499. In *Emperor v. Purshottamdas*¹ it was held that when a pleader is charged with defamation in respect of words spoken or written while performing his duty as a pleader, the Court ought to presume good faith and not hold him criminally liable, unless there is satisfactory evidence of actual malice and unless there is cogent proof that unfair advantage was taken of his position as pleader for an indirect purpose.

9. There are decisions of other High Courts to the same effect: *Nikunja Behari Sen v. Harendra Chandra Sinha*² *Mir Anwarudin v. Fathim Bai Abiding*³ *McDonnell v. King-Emperor*⁴ and *Nirsu Narayan Singh v. King Emperor*⁵

10. Now the findings of fact in this case are that the statement 11 to Mr. Tulsidas' insolvency was made by Mr. Billimoria on instructions received from his clients, and, secondly, that there was no malice on his part, The learned Magistrate says :-

There is therefore no evidence before me to show that Mr. Billimoria did not make that statement under instructions from his clients. Mr. Billimoria did not know the complainant before and he could not have known anything about the Karachi firm.

11. And a little further on :

I therefore hold on the evidence that Mr. Billimoria's statement in his reply to the complainant's letter remains unchallenged and uncontravened.

12. As regards malice he says:

In the present case there is not a tittle of evidence to show that Mr. Billimoria was actuated by express malice or that he took an unfair advantage of his position.

13. This being a revision application, these findings of fact must, I think, be accepted, and speaking for myself I can see no reason whatever for doubting the correctness of the findings,

14. I think, however, that there is one aspect of the case which calls for some comment. There are undoubtedly limits to the advocate's privilege, as the Chief Justice pointed out in *Ramkrishna v. Davar*⁶:—Counsel has a very valuable privilege in that he is not liable in other than exceptional circumstances to civil or criminal proceedings on account of anything which he may say in Court on behalf of his clients. But that privilege imposes a corresponding responsibility and counsel has to be very careful not to make any attack upon parties or witnesses engaged in the case, which goes beyond what is fairly necessary for the presentation of his own client's case.

15. A fortiori that is so where the person against whom the imputations are made is neither a party nor a witness. I think perhaps the learned Magistrate has rather overlooked or at any rate not sufficiently commented on the fact that Mr. Billimoria did not withdraw the defamatory statement when it was made clear to him that it was untrue. An advocate of his experience presumably knows that instructions given by clients are not infallible. One ought to be cautious about making defamatory statements, particularly about people who are not parties or witnesses, on the strength of instructions which one has had no time to verify; and if one has been misled into making such a statement which turns out to be untrue, then I take it the duty of an advocate cannot be less than the duty of any other gentleman in similar circumstances. I consider that the statement in this case ought to have been withdrawn when it was made clear that the order of adjudication had been cancelled by the Court of Appeal. But that after all is not the real point before us in these proceedings. It cannot be said that the failure to withdraw the statement or to apologise for it relates back to the time of the original statement, and I am not satisfied that there was in this case any repetition of the defamatory statement after the facts were brought fully to the knowledge, of Mr. Billimoria. It is noteworthy, I think, that the formal notice sent to him on September 12 did not mention the fact of the cancelling of the adjudication order.

16. Mr. O'Gorman who appears for the applicant put forward a subsidiary point based on the case of *Gulabbai Baburao v. Finan*⁷. He contended that the Magistrate was not justified in dismissing the complaint under Section 203 of, the Criminal Procedure Code without issuing formal process. The case cited deals with the old controversy as to the legality of the preliminary procedure by notice which is followed in the Courts of the Presidency Magistrates, I do not consider that the decision assists Mr. O'Gorman materially because the Court held there that there was no legal evidence on which it could be found that the case came within the exception pleaded by the accused, and it was, therefore, ordered that process should be issued and that the accused should be called upon to substantiate his defence. In the present case I think there was legal evidence on which the Magistrate was entitled to find that a case of defamation had not

been made out prima facie.

17. For these reasons, I consider that the Magistrate was justified in dismissing the complaint, and I would discharge the rule.

Baker, J.

18. I agree and have practically nothing to add. The applicability of the cases which have been quoted in the judgment of the learned Magistrate has not been disputed. But the learned Counsel who appears for the applicant has endeavoured to draw a distinction between cases in which the alleged defamation was of a party or a witness, and the present case in which it is stated that the applicant Mr. Tulsidas was not in any way connected with the case in question, It will appear, however, from the previous history of this case which has been repeated in extense in the arguments before us that Mr. Tulsidas as a matter of fact had taken a prominent part in the previous proceedings in the Small Causes Court and also in the criminal case, and he himself had admitted in his deposition that the plaintiffs, i.e., Mr. Billimoria's clients, believed that he had been instrumental in getting Bharmal to file the criminal complaint. That being the admitted state of mind of the plaintiffs, Mr. Billimoria's clients, it was natural that they should, as far as possible, endeavour to settle the matter with Bharmal without giving him an opportunity of consulting Mr. Tulsidas, and it is with that object, therefore, that the statements with which we are now concerned were made. That being so and the statements having been made under the instructions of his clients, I do not think it can be said that these statements were made gratuitously and with respect to a person who had no connection whatever with the case which was pending at the time in the Small Causes Court.

19. The rest of the case has been fully dealt with by my learned brother and I have nothing further to add, I agree that the rule should be discharged.

Cases Referred.

1(1807) 9 Bom. L.R. 1287

2(1913) I.L.R. 41 Cal. 614

3(1926) I.L.R. 50 Mad. 667

4(1925) I.L.R. 3 Kan. 524

5(1926) I.L.R. 6 Pat. 224

6(1931) 34 Bom. L.R. 443 (p. 445)

7(1931) I.L.R. 55 Bom. 770 : s.c. 33 Bom. L.R.1182