NAGPUR HIGH COURT

Vishnu Wasudeo Joshi

Vs

T.L.H. Smith Pearse

(Mudholkar, J.)

08.09.1948

JUDGMENT

Mudholkar, J.

1. This is a plaintiff's appeal arising out of a suit for damages in respect of a civil wrong done to him.

2. The appellant was an Electrician in the employment of the Rajkumar College, Raipur, while the respondent was the Principal of this College at the material time. The appellant's case is that the respondent suspended him on one occasion and while taking charge of the College property, which was till then in his charge, the respondent kicked him once or twice in the ribs. This act caused mental and physical anguish to him and lowered him in the estimation of others. He, therefore, claimed L 100 as damages.

3. The respondent partially admits the facts. According to him, the appellant was asked by him to bowl along an electric coil like a hoop from the Electrical Godown to the College Stores, like himself, but the appellant feigned fainting. To ascertain whether the appellant had actually fainted he gently touched with his foot (the toe of his shoe) that portion of the plaintiff's (appellant's) body which is covered by the middle ribs just over the waist. He denied having intended to cause any bodily or mental injury or humiliation to the appellant.

4. It may further be mentioned that the appellant had given the respondent notice under Section 80, Civil Procedure Code, but he instituted the suit before the expiry of the period of two months contemplated by that section. The respondent asserts that he being a member of the Indian Educational Service was a "public officer," though his services had been lent to the Rajkumar College and as the suit was instituted before the expiry of the period of two months contemplated by Section 80, Civil Procedure Code, it is premature.

5. The trial Court passed a decree for L 25 but the lower appellate Court dismissed the suit on the ground that it was barred by Section 80, Civil Procedure Code

6. The question to be first decided is whether the respondent was a "public officer" as defined in Section 2(17), Civil Procedure Code The relevant portion of that provision reads thus:

> Public officer' means a person falling under any of the following descriptions, namely
> (a) every Judge;
> (b) every member of the Indian Civil Service;
> (c) every commissioned or gazetted officer in the military or naval forces of His Majesty, including His Majesty's Indian Marine Service, while serving under the Government,
> * * * * *
> (e) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;
> * * * * *
> (g) every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government or to make any survey, assessment or contract on behalf or the Government, or to execute any revenue-process, or to investigate or to report on any matter affecting the pecuniary interests of the Government, or to make, authenticate or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government; and
> (h) every officer in the service or pay of the Government, or remunerated by fees or commission for the performance of any publics duty.
> Though the respondent was at that time on deputation to the Rajkumar College and received his pay from that institution, he did not cease to be in the service of the Grown by reason of his deputation. The respondent could, therefore, come under Sub-clause (h) of the provision and must be held to be a public officer.

7. The next question is whether his act was done in his capacity as public officer. According to his learned Counsel, the respondent was at that time taking charge of certain stock from the appellant and therefore he was acting in his capacity as a public officer. Whatever he did at that time must, therefore, according to counsel, be deemed to have been done in his capacity as a public officer. In support of his contention he places reliance on *S.Y. Patil v. Vyankatswami*[1] *Syed Abdul Hadi v. D.P. Misra*[2] and *Shyamrao v. King-Emperor*[3]

8. In the first two cases the question related to the interpretation of the words "while acting or purporting to act" as a public servant. In the former case it was held that they included an act done by a public servant under the cloak of his official position even though it was not a part of his duties. In the latter case it was held:

> We are not concerned with the act itself so much as the capacity In which the act was performed.

[1] A.I.R. (24) 1937 Nag. 293 [3] A.I.R. (35) 1948 Nag. 274
[2] A.I.R. (22) 1935 Nag. 52

> In the third case it was held that if an act lay within the sphere of duty of a public officer, negligent performance of it did not deprive him of the protection offered by Section 270(1), Government of India Act.

9. The words interpreted in the two decisions, one of this Court and another that of the late Court of the Judicial Commissioner, came up for consideration in two cases before the Federal Court. The decisions of that Court have recently been considered by their Lordships of the Privy Council in *Gill v. King-Emperor*[4] This is what their Lordships say at page 12:

> Their Lordships, while admitting the cogency of the argument that in the circumstances prevailing in India a large measure of protection from harassing proceedings may be necessary for public officials, cannot accede to the view that the relevant words have the scope that has in some cases been given to them. A public servant can only be said to act or to purport to act in the discharge of his official duty, if Ms act is such as to lie within the scope of his official duty. Thus a Judge neither acts nor purports to act as a Judge in receiving a bribe, though the judgment which he delivers may be such an act : nor does a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office.

10. This view of their Lordships, which must prevail over that of other tribunals in India, runs counter to the decisions in *S.Y. Patil v. Vyankatswami*[5] and *Syed Abdul Hadi v. D.P. Misra*[6] I am therefore bound by it. So it can no longer be said that what is important is the capacity and not the act. The true position is that the act must be such as to lie within the scope of the official's duty.

11. What I must then determine is whether the kick or the "gentle" prod administered by the respondent was an act which lay within the sphere of his official duty. Prodding or kicking a person is not a normal incident of the process of taking charge of property. Even the respondent has not suggested that it is. On the contrary, calling it a "gentle" touch he justifies it on humanitarian grounds. Apart from the fact that this is a piece of sheer effrontery, this attitude makes it clear that whatever the respondent did had nothing to do with his official duty. In the circumstances there was no need for a notice under Section 80, Civil Procedure Code

12. The respondent's counsel then argues that in the absence of proof that what he did was due to an improper motive, no liability can arise. This contention is not correct. The leading case of *Allen v. Flood*[7] lays down that as a general rule a bad motive is not an essential condition of liability for a civil wrong except in cases like malicious prosecution, defamation and conspiracy. What has ordinarily to be seen is whether the act itself is unlawful. If it is so, then motive with which it was done is of little significance. In this case, however, it has been held that the act must

[4] A.I.R. (35) 1948 P.C. 128
[5] A.I.R. (24) 1937 Nag. 293
[6] A.I.R. (22) 1935 Nag. 52
[7](1898) A.C. 1 at P. 92

be presumed to have been intended by the respondent to cause mental and bodily distress to the appellant. I agree with this view, Therefore, the respondent cannot escape liability for the wrong which he has committed.

13. What remains to be considered is the quantum of damages. The trial Court awarded only L

25 on the ground that that is the amount which the appellant spent for "purifying" himself. Such expenses can be awarded only by way of special damages. In this case, what the appellant has claimed is general damages. He says that he is entitled to get L 1000 but, probably because his means are limited, he claimed only L 100. In my opinion, this sum is really an inadequate compensation for the insulting and high-handed behaviour of the respondent.

14. For these reasons I set aside the decree of the lower appellate Court and instead pass a decree in favour of the appellant for the full amount claimed by him together with the costs in all the three Courts. Counsel's fees shall be as per certificate.
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