APPELLATE CIVIL.

Before Ghose and Mukherjea JJ.

1939

Feb. 16, 17, 20.

MADHAB CHANDRA GHOSH

v.

NIRODE CHANDRA GHOSH*.

Defamation—Report to police and evidence in Court—Immunity from civil liability.

There is an absolute privilege and immunity from civil liability for libel and slander in respect of : (*i*) report sent to the police alleging commission of crime, and (*ii*) evidence given in judicial proceedings in support of the same, even though the statements made in the report and the evidence may be false and malicious.

The principle of absolute privilege in this respect recognised by English law is applicable to India.

Section 499 of the Indian Penal Code cannot be taken as a criterion for determining the extent of the privilege so far as immunity from civil liability is concerned.

Observations of Mookerjee J. in *Satish Chandra Chakravarti* v. *Ram Doyal De* (1) approved.

Gunnesh Dutt Singh v. *Mugneeram Chowdhry* (2) and *Watson* v. *M' Ewan* (3) relied on.

Beresford v. *White* (4); *Dawkins* v. *Lord Rokeby* (5); *Seaman* v. *Netherclift* (6) and *Dawan Singh* v. *Mahip Singh* (7) relied on.

Augada Ram Shaha v. *Nemai Chand Shaha* (8); *H. P. Sandyal* v. *Bhaba Sundari Debi* (9) and observations of Beachcroft J. in *Crowdy* v. *Reilly* (10) disapproved.

APPEAL from Appellate Decree by the defendants.

The facts of the case are sufficiently stated in the judgment.

*Appeal from Appellate Decree, No. 83 of 1937, against the decree of Nikunja Bihari Banerji, Second Subordinate Judge of Sylhet, dated Nov. 30, 1936, affirming the decree of Jogendra Nath Das Gupta, Second Munsif of Moulvi Bazar, dated June 15, 1936.

(1) (1920) I. L. R. 48 Cal. 388.
(2) (1872) 11 B. L. R. 321.
(3) [1905] A. C. 480.
(4) (1914) 30 T. L. R. 591.
(5) (1873) L. R. 8 Q. B. 255.
(6) (1876) 2 C. P. D. 53.
(7) (1888) I. L. R. 10 All. 425.
(8) (1896) I. L. R. 23 Cal. 867.
(9) (1910) 15 C. W. N. 995.
(10) (1912) 17 C. W. N. 554.

Hemendra Kumar Das for the appellants. A civil suit for damages for defamation in respect of statements made in judicial proceedings or occasions leading to such judicial proceedings does not lie. The law on the subject has been summarised in *Satish Chandra Chakravarti* v. *Ram Doyal De* (1); *Gunnesh Dutt Singh* v. *Mugneeram Chowdhry* (2); and other cases.

Paresh Lal Shome for the respondents. The statements in the report to the police were gratuitous and voluntary and were not occasioned by any necessity. Therefore, even if the evidence in the judicial proceeding that followed may be privileged, no such privilege can be claimed for the defamatory statements made in the report to the police, which have been found to be false. *Augada Ram Shaha* v. *Nemai Chand Shaha* (3); *H. P. Sandyal* v. *Bhaba Sundari Debi* (4) and observations of Beachcroft J. in *Crowdy* v. *Reilly* (5). At best the appellants can claim only a qualified privilege, but as the question of privilege was not raised at the trial they cannot raise it here for the first time.

Cur. adv. vult.

GHOSE J. This is a Second Appeal by the defendants in a suit for recovery of Rs. 500 as damages on the ground that they had made certain defamatory statements against the plaintiff by sending certain reports to the police and giving false evidence in two criminal cases. Shortly stated, the allegations are these:—

On November 21, 1934, the defendant No. 3 sent a report to the officer of the Moulvi Bazar Police Station alleging that one Alhadini, a widow, had given birth to a child, that Nirode Chandra Ghosh, the plaintiff, was responsible for the illicit pregnancy of the woman, and that the child had been killed. This report was followed up by two other reports

(1) (1920) I. L. R. 48 Cal. 388.
(2) (1872) 11 B. L. R. 321.
(3) (1896) I. L. R. 23 Cal. 867.
(4) (1910) 15 C. W. N. 995.
(5) (1912) 17 C. W. N. 554.

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which were sent by defendant No. 1 and defendant No. 3 to the police. As the result, the police-officer started investigation. It is said that, during the investigation, the police-officers were resisted by the plaintiff and his party. The result was that the Sub-inspector of Police, Gopal Chandra Ghosh, instituted a case under s. 147 and other sections of the Indian Penal Code against the plaintiff and others. The police also sent up Alhadini and others on charges under s. 302 read with other sections of the Indian Penal Code. The defendants Nos. 1 to 5 deposed in those two cases. Ultimately, in both the cases, the accused were acquitted. The plaintiff has, therefore, brought the suit for damages, basing his claim on the statements made to the police and in the depositions in the aforesaid judicial proceedings. The defence substantially is that the defendant acted in good faith and that the allegations are true. The trial Court has found that the defendants conspired with one another, that the informations given to the police were false, that the depositions made by the defendants in the aforesaid cases were also false, and that, as the result, the plaintiff has been lowered in the estimation of the public. On these findings, the trial Court gave a decree for a sum of Rs. 200 against the defendants Nos. 1 to 5. On appeal, the lower appellate Court agreed with the trial Court. Hence this Second Appeal.

The contention in behalf of the appellants in this appeal is that the suit must be taken as one for damages for defamation and not for malicious prosecution and that a civil suit for damages for defamation in respect of statements in judicial proceedings or occasions leading to such judicial proceedings does not lie. The law on the subject is summarised by Sir Asutosh Mookerjee in the case of *Satish Chandra Chakravarti* v. *Ram Doyal De* (1). That was a criminal matter, but Mookerjee J.

(1) (1920) I.L.R. 48 Cal. 388, 425.

considered the distinction between civil liability and criminal liability with regard to a claim for damages for defamation. He points out that, as regards civil liability, there is no codified law in India and that as regards criminal liability the relevant provisions are to be found in the Indian Penal Code. The position then, as he says, is that the questions relating to civil liability for damages for defamation must be determined with reference to either the rules of English Common Law where they are shown to be applicable and with reference to the principles of justice, equity and good conscience in all other cases. It will be instructive to quote the head note of the same case in 24 C. W. N. 982 :—

If a party to a judicial proceeding is sued in a civil Court for damages for defamation in respect of a statement made therein on oath or otherwise, his liability in the absence of statutory rules applicable to the subject must be determined with reference to principles of justice, equity and good conscience. There is a large preponderance of judicial opinion in favour of the view that the principles of justice, equity and good conscience applicable in such circumstances should be identical with the corresponding relevant rules of the Common Law of England. A small minority favours the view that the principles of justice, equity and good conscience should be identical with the rules embodied in the Indian Penal Code.

The view favoured by Mookerjee J. with regard to civil liability finds support in the observations of the Judicial Committee in the case of *Gunnesh Dutt Singh* v. *Mugneeram Chowdhry* (1) :—

Their Lordships hold this maxim which certainly has been recognised by all the Courts of this country to be one based upon principles of public policy. The ground of it is this, that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of justice should not have before their eyes the fear of being harassed by suits for damages ; but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury.

With regard to the absolute judicial privilege which is applicable to statements made by witnesses, the relevant English law may be stated thus :—

No action for libel or slander lies, whether against judge, counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any Court recognised by law, and this though the words were written or spoken maliciously without any justification or excuse, and from personal ill-will and anger against the person defamed. This absolute

(1) (1872) 11 B. L. R. 321, 328, 329.

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privilege has been conceded on the grounds of public policy to ensure freedom of speech where it is essential that freedom of speech should exist, and with the knowledge that Courts of justice are presided over by those who from their high character are not likely to abuse the privilege, and who have the power and ought to have the will to check any abuse of it by those who appear before them.

See, Salmond on the Law of Torts, 9th Ed., p. 421, where the relevant authorities are quoted. It will be useful to refer to the case of *Watson* v. *M'Ewan* (1), where the matter has been taken a little further. That was a case relating to statements by the defendant to his client and solicitor in an intended action. It was held that the privilege which protects the evidence in the witness-box also protects statements made to the client and the solicitor in preparing the proof for trial. Lord Halsbury referred to the immunity from responsibility in an action when evidence has been given in a Court of justice as being too well-established to be shaken. With regard to the argument that no such protection should exist in respect of statements made to the solicitor, Lord Halsbury characterised the suggestion as ingenious. He pointed out that it should follow from the immunity given to the witness in the box that there should be immunity given to his statements made to persons who were engaged in the conduct of proceedings in Court when what was intended to be stated in Court was stated to them; for otherwise—

> The object for which the privilege exists is gone, because then no witness could be called; no one would know whether what he was going to say was relevant to the question in a debate between the parties.

Lord Halsbury took it to be—

> An overwhelming consideration that a witness must be protected for a preliminary statement or he has no protection at all.

As was pointed out by Mookerjee J. in the Full Bench case, the same view has been taken in a large number of cases decided in this Court. Some of these cases arose out of criminal proceedings, but it is not necessary for our purpose to make a distinction between a criminal and a civil liability so far as the present matter is concerned. See the cases of

(1) [1905] A. C. 480, 487-8.

Bhikumber Singh v. *Becharam Sircar* (1); *Golap Jan* v. *Bholanath Khettry* (2); In re: *P. Venkata Reddy* (3); *Chunni Lal* v. *Narsingh Das* (4); *Náthji Muleshvar* v. *Lálbhái Ravidat* (5) and *Ma Mya Shwe* v. *Maung Maung* (6). The minority view as stated by Mookerjee J. in the Full Bench case may be said to be represented by Beachcroft J. in the case of *Crowdy* v. *Reilly* (7). There he says that witnesses and parties stand on a different footing and a party making a defamatory statement in course of judicial proceeding does not enjoy the absolute privilege of immunity from prosecution recognised by English law. This view of his is based on the ground, first, that a party is distinct from a witness and, secondly, that Indian conditions are different. It may be said, however, that when a party comes to depose on oath there can be no distinction with regard to his liability to answer questions as between him and any other witness, and the same must be said with regard to statements preparatory to giving evidence on oath. As to Indian conditions being different from conditions in England, I do not consider that the difference is so great that it should outweigh the propriety of applying to India those broad principles of justice upon which the English view as quoted above is based. The same must be said with regard to the decided cases referred to by Beachcroft J. in support of his view. On the other side, there is the high authority of Jenkins C. J. and Woodroffe J. in the case of *Golap Jan* v. *Bholanath Khettry* (*supra*). That was a case of a person who lodged a complaint before a Magistrate and had followed it up by statements to the police to whom the matter had been referred for investigation. It was held that the complaint, even if defamatory, was absolutely privileged.

(1) (1888) I. L. R. 15 Cal. 264.
(2) (1911) I. L. R. 38 Cal. 880.
(3) (1912) I. L. R. 36 Mad. 216.
(4) (1917) I. L. R. 40 All. 341.
(5) (1889) I. L. R. 14 Bom. 97.
(6) (1924) I. L. R. 2 Ran. 333.
(7) (1912) 17 C. W. N. 554.

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With regard to the question whether statements to the police as distinct from statements in Court are protected, I have already pointed out that the settled law in England is that statements made with a view to repeating them on oath in a subsequent judicial proceeding are similarly protected. In a sense, statements made to the police appear to be in this respect on stronger ground than statements made to the solicitor as reported in the case of *Watson* v. *M'Ewan* (1); or *Beresford* v. *White* (2). For statements made to a solicitor may or may not be followed up by judicial proceeding, the matter being at the option of the party consulting such solicitor, in which case the statements would slumber in the office of the solicitor, as Lord Halsbury said. But the party lodging information before the police has no option and the police are empowered to go on with the matter and investigate, leading to other results. It has been held in the case of complaints to a Magistrate followed by statements to the police to whom the Magistrate may have referred the matter for investigation that such statements are absolutely privileged and no action for defamation is maintainable. See the case of *P. Sanjivi Reddy* v. *K. Koneri Reddi* (3).

It seems to me, therefore, that on the question of absolute privilege it makes no difference in this case if some of the defendants are parties and some are both witnesses and parties. It is contended for the respondent that the question of privilege should have been raised at the trial. Had it been a question of qualified privilege raising a mixed question of law and fact it might be necessary to refer the matter for further investigation. But the question raised is one of absolute privilege. It appears to have been raised as a ground of appeal before the lower appellate Court. That Court disposed of the matter in one sentence. "There is nothing to show that the actions "of defendants Nos. 1 to 5 were *bona fide* or

(1) ([1905] A. C. 480. (2) (1914) 30 T. L. R. 591.
(3) (1925) I. L. R. 49 Mad. 315.

"privileged." It is also contended for the respondent that the statements upon which the claim is founded were gratuitous, but this contention cannot be supported for the statements were obviously material to the prosecution which was intended.

Then it is contended that this is really a suit for malicious prosecution. But in a suit for malicious prosecution it has been pointed out by Mookerjee J. in the case of *Crowdy* v. *Reilly* (1) that it will be necessary to raise the issue that there was absence of probable cause for a criminal proceeding, but no such issue was raised at the trial. As a matter of fact, in one of the two criminal cases, the present plaintiff was not prosecuted at all. In the other case, the prosecutor was a sub-inspector of police and the present defendants were not the prosecutors. It is not the contention for the respondent that here there is a wrong done to the plaintiff for which he has no remedy, for it is conceded by the learned advocate for the respondent in this Court that the criminal law was open to the plaintiff.

My conclusion is that the contention in support of this Second Appeal must be accepted and the statements upon which the present suit is founded must be taken to be absolutely privileged.

The result is that the appeal succeeds and the suit stands dismissed. Each party will bear its own costs throughout.

MUKHERJEA J. I agree. The plaintiff respondant based his right to sue for damages first of all on certain reports which were sent to the police by defendants Nos. 3 and 5 and which accused the plaintiff of being in illegal intimacy with one Alhadini Ghosh, a young widow, who was alleged to have given birth to an illegitimate child, and, secondly, on the statements made by all these defendants as witnesses in the two criminal cases which were

(1) (1912) 17 C. W. N. 554.

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started subsequent to the reports mentioned above. The statements in the reports as well as in the depositions of the defendants are undoubtedly defamatory and they have been held to be false by both the Courts below. The whole controversy centres round the short point which has been raised by Mr. Das on behalf of the appellants that the statements are absolutely privileged and could not constitute the foundation of a claim for libel. The plea was not taken in so many words in the written statement, but it was raised before the lower appellate Court and there is a specific ground taken on this point in the memorandum of appeal presented to this Court. As the question raised was one of absolute privilege, no investigation of fresh facts is necessary and it cannot be said that the respondent was in any way taken by surprise. I agree, therefore, in overruling the contention of the learned advocate for the respondent, that the appellant should not be allowed to raise this point before us.

Now, it is an well-established principle of English law that a witness is absolutely privileged to the extent of what he says in his evidence in course of a judicial proceeding and no action is maintainable in respect of the evidence so given. "The authorities "are clear, uniform and conclusive", as was observed in the case of *Dawkins* v. *Lord Rokeby* (1) :—

> No action for libel or slander lies whether against judges, counsel, witnesses or parties, for words written or spoken in the ordinary course of any proceeding before any Court recognised by law.

See also the cases of *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* (2) and *Seaman* v. *Netherclift* (3). This principle was applied in India by the Judicial Committee as early as the year 1872. *Vide Gunnesh Dutt Singh* v. *Mugneeram Chowdhry* (4) and it has been followed since then by the other High Courts in India. See the case of *Bhikumber Singh* v. *Becharam Sircar* (5);

(1) (1873) L. R. 8 Q. B. 255, 263.
(2) [1893] 1 Q. B. 431, 451.
(3) (1876) 2 C. P. D. 53.
(4) (1872) 11 B. L. R. 321.
(5) (1888) I. L. R. 15 Cal. 264.

and *Dawan Singh* v. *Mahip Singh* (1). Their Lordships of the Judicial Committee explained in the case noted above the ground of public policy upon which immunity of witnesses from any action in respect of anything said in the witness-box was based. The judgment runs thus :—

> The ground of it is this that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of justice should not have before their eyes the fear of being harassed by suits for damages; but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury.

No action for defamation, therefore, lies in respect of the statements made by the defendants as witnesses in the criminal case even though the statements were false and malicious. The question now arises as to whether this immunity can be claimed in respect of the statements contained in the reports Exs. 1 and 2 which were sent to the police by defendants Nos. 3 and 5. It has been argued by the learned advocate for the respondent that these statements are not privileged as they were untrue statements made by parties quite voluntarily and not by witnesses who have often no choice in the matter and are compelled to answer questions put to them. Reliance was placed upon certain decisions of this Court in the cases of *Augada Ram Shaha* v. *Nemai Chand Shaha* (2); *H. P. Sandyal* v. *Bhaba Sundari Debi* (3); and the observation of Beachcroft J. in the case of *Crowdy* v. *Reilly* (4). These authorities lay down the proposition that statements contained in the pleadings of the parties are not absolutely privileged as in English law, but enjoy only a qualified privilege. This view, which has been justly characterised as the minority view by Sir Asutosh Mookerjee in the case of *Satish Chandra Chakravarti* v. *Ram Doyal De* (5), is not shared by the majority of decisions in India. The reasoning upon which it

(1) (1888) I. L. R. 10 All. 425.
(2) (1896) I. L. R. 23 Cal. 867.
(3) (1910) 15 C. W. N. 995.
(4) (1912) 17 C. W. N. 554.
(5) (1920) I. L. R. 48 Cal. 388.

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is based is that, there being no codified law relating to torts in British India, it is not always proper or safe to import in its entirety the rules of English law on the subject as principles of equity, justice and good conscience. The Court may very well look to the provisions of s. 499 of the Indian Penal Code as the rule to be followed even in a civil action for libel. No doubt, something can be said in support of this view and it is to some extent anomalous if certain statements are held to be privileged in civil Courts, though no such defence can be raised in criminal proceedings. I think, however, that it is not possible to pursue this line of reasoning, having regard to the pronouncement of the Judicial Committee in the case reported in 11 B. L. R. 321 referred to above. There, the Judicial Committee definitely invoked the principles of English law and held that the statements of the defendants as witnesses in the box were absolutely privileged and could not form the foundation of a libel suit. They did not take the provision of the Indian Penal Code as criterion for determining as to what should be the extent of the privilege, for the witnesses under s. 499, Indian Penal Code, do not enjoy an absolute immunity. Once the principle of English law is held applicable, I do not think that there is any justification for making a distinction between witnesses and parties. The reasoning of Beachcroft J. in the case of *Crowdy* v. *Reilly* (*supra*) that the pleadings in this country are often full of grossly exaggerated and untrue statements does not appeal to me. In the Privy Council case stated above, the defendants or at least two of them were prosecutors and it was held expressly by the Judicial Committee that a suit for malicious prosecution would lie against them. But nevertheless the suit for libel was dismissed on the ground that their statements as defendants and parties in the witness-box were absolutely privileged. I do not think, therefore, that I can accept the argument of the learned

advocate for the respondent that the statements as contained in the police report were not privileged simply because they were made by parties and not by witnesses.

Another argument can indeed be advanced as to the statements contained in the reports on the ground that these statements were not made in the course of any judicial proceeding but were made only before a police officer. A complaint made before a Magistrate is undoubtedly privileged. *Vide* the case of *Golap Jan* v. *Bholanath Khettry* (1). The complainant can be prosecuted for lodging a false complaint, but cannot be made liable as a defendant in a libel suit. In the case of *P. Sanjivi Reddy* v. *Koneri Reddi* (2); there was a complaint made before the Magistrate under s. 107 of the Code of Criminal Procedure. The Magistrate referred the matter for enquiry to the police and the statement made before the police officer was held to be absolutely privileged. The learned Judges relied upon the decision of the House of Lords in the case of *Watson* v. *M'Ewan* (3) and held that statements made by potential witnesses as preliminary to going into the witness-box are equally privileged as the statements actually made in the witness-box. In *Watson* v. *M'Ewan* there was a suit for libel upon certain statements which were made by the defendants preparatory to their deposing in Court. One of the statements was before a solicitor and was covered by the privilege which the solicitor enjoyed but the other was made to a lay man. Even then it was held by Lord Halsbury that the statement was absolutely privileged. It was observed by his Lordship :—

> It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which is a step towards and is part of the administration of justice—namely, the preliminary examination of witnesses to find out what they can prove.

(1) (1911) I. L. R. 38 Cal. 880. (2) (1925) I. L. R. 49 Mad. 315.
(3) [1905] A. C. 480, 487.

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His Lordship was not unmindful of the fact that to some extent it might cause hardship in individual cases, but, after all, as it was observed in the judgment, this hardship was not to be compared with that which would arise if it were impossible to administer justice, because people would be afraid to give their testimony.

The result is that I agree with my learned brother that this appeal should be allowed and the plaintiff's suit dismissed.

Appeal allowed, suit dismissed.

A. A.