SHEIK ABDUL KADIR MARAKAYAR & CO., *In re.*

45 of the Specific Relief Act is discretionary and that in the case of unreasonable and unexcused delay the Court would refuse to exercise it.

The Court therefore directs the Commissioner to state a case it not being seriously contended that there is not a substantial point of law involved. Costs of this application reserved.

N.R.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice, Mr. Justice Phillips, Mr. Justice Krishnan, Mr. Justice Beasley and Mr. Justice Madhavan Nayar.*

1926, February 15.

TIRUVENGADA MUDALI (ACCUSED)

v.

TRIPURASUNDARI AMMAL (COMPLAINANT)*

Defamation in a complaint not in good faith—Absolute privilege, if any—Sec. 499, exception VIII, Indian Penal Code—English Common Law not applicable.

According to exception VIII to section 499, Indian Penal Code, defamatory statements in complaints to Magistrates are not absolutely privileged. Unless they are made in good faith, the complainant is guilty of defamation. *In re Venkata Reddy*, (1913) I.L.R., 36 Mad., 216 (F.B.), overruled.

Held, further, that on matters specifically dealt with by the Penal Code, such as this, the English Common Law is not applicable.

Quære.—Whether any absolute privilege attaches to advocates and witnesses when charged criminally?

CASE referred to High Court under section 438, Criminal Procedure Code by the Sessions Judge of North Arcot in Calendar Cases Nos. 3 and 10 of 1925 before Sub-divisional Magistrate, Vellore.

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* Case Referred No. 66 of 1925.

The facts are given in the judgment.

This case coming on for hearing, the Court (WALLER and MADHAVAN NAYAR, JJ.) made the following:—

ORDER OF REFERENCE TO A FULL BENCH.

WALLER, J.—This is a reference by the Sessions Judge, North Arcot. Petitioner filed a complaint against three persons charging them with offences under sections 448 and 323, Indian Penal Code. In that complaint he described the first of them as being the paramour of the second, the description being quite unnecessary for the purpose of the complaint, which had itself been preferred as a counterblast to a prior complaint presented against the complainant by one of the persons defamed. Respondent thereupon charged petitioner with defamation. The Subdivisional Magistrate convicted him. The Sessions Judge has made a reference to this Court, pointing out that the conviction is illegal in view of the decision in *Re Muthusami Naidu*(1). That decision follows the well-known case in *In re Venkata Reddy*(2) in which it was ruled that neither party, witness, counsel nor Judge could be held liable for defamation on account of words written or spoken in any proceeding before a Court recognized by law. The Judges remarked:

"We do not think that a statement in a complaint which initiates a proceeding should be held to be entitled to less privilege than other statements made by parties in the subsequent stages of the proceeding. If the complaint is false, then the defendant would be entitled to prosecute the complainant for preferring a false charge."

I must confess that I am unable to see the force of the last argument in a case like this. This is not a case in which the charge is that the substance of the complaint itself is defamatory. What is charged is that, into a complaint of house trespass and hurt, a malicious and irrelevant libel has been introduced. To suggest that the defamed person's sole and sufficient remedy is to prosecute the complainant for bringing a false complaint of house trespass and hurt is to deprive him of any remedy whatever against the defamatory statement. The other argument is based on *In re Venkata Reddy*(2). I have elsewhere (in Criminal Appeal

(1) (1914) I.L.R., 37 Mad., 110. (2) (1913) I.L.R., 36 Mad., 216 (F.B.).

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No. 218 of 1925) expressed the view that it must now be held that the authority of that case has been severely shaken by a later ruling of this Court—*Gopal Naidu* v. *King-Emperor*(1). The earlier case was based on the Common Law of England; but it was pointed out in the later that the Criminal Law of India must be looked for in the Penal Code and that the Common Law of England should not be imported into it. The 8th exception to section 499, Indian Penal Code, refers to what are described as "accusations." The illustration appended to the exception shows that in that term are included complaints to Magistrates, which are therefore entitled to no more than the limited privilege granted by the exception. "It is the duty of a Court to accept, if that can be done, the illustrations given as being both of relevance and of value in the construction of the text." *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark*(2). Reading together exception VIII and its illustration, there can, I think, be no doubt as to the construction of the text that the privilege accorded to persons who make complaints to Magistrates is of a limited character. If the privilege accorded to the complaint itself is not absolute, libellous statements made in the course of it are entitled to no greater protection. The law has, in my opinion, been correctly laid down in *Satish Chandra Chakravarti* v. *Ram Doyal De*(3), which expressly differs from the view hitherto taken in this Court. It is not for us to overrule the decision of another Bench of this Court, but it seems to me that, in the light of *Gopal Naidu* v. *King-Emperor*(1), the decision relied on by the Sessions Judge requires reconsideration. I would therefore refer to a Full Bench the question whether a defamatory statement made in a complaint to a Magistrate is absolutely privileged.

MADHAVAN NAYAR, J.—I am also of the opinion that in view of the decision in *Gopal Naidu* v. *King-Emperor*(1), the case in *Re Muthusami Naidu*(4) requires reconsideration. I agree to the reference proposed by my learned brother.

ON THIS REFERENCE—

Public Prosecutor (*J. C. Adam*) for the Crown.—The accused cannot claim absolute privilege. The statement being *prima facie* defamatory, is an offence unless it comes within the

(1) (1923) I.L.R., 46 Mad., 605 (F.B.).
(2) (1916) 43 I.A., 256.
(3) (1921) I.L.R., 48 Calc., 388.
(4) (1914) I.L.R., 37 Mad., 110

8th exception to section 499, Indian Penal Code. What is given in that exception is only a qualified privilege. Since it has been found in this case that the accused did not act in good faith in making the defamatory statement that exception does not apply. It is not correct to say that the Penal Code has not dealt with cases of absolute privilege; *see* section 77 onwards.

As the Indian Penal Code has codified the law of offences including defamation, we must look only to the Penal Code for the law on such offences as it specifically deals with and cannot invoke the English Common Law under which Judges, advocates, parties and witnesses can claim absolute privilege from civil as well as criminal liability. See *Gopal Naidu* v. *King-Emperor*(1), which in effect overrules *In re Venkata Reddy*(2). See also *Satish Chandra Chakravarti* v. *Ram Doyal De*(3), the opinion of MOORE, J., in Weir's Criminal Rulings, Volume I, page 589, and *Isuri Prasad Singh* v. *Umrao Singh*(4). English or Indian cases holding that as regards civil liability there is absolute privilege in such matters are not to the point.

A. Sivakaminathan, amicus curiæ.—There is absolute privilege as laid down in *In re Venkata Reddy* (2). English Common Law (Criminal) was prevalent in India ever since the first Charter of 1726; see also the Charter of 1800 which established the Supreme Court in Madras for Madras and for the factories. As regards the mufassal, the Magistrates and Judges administered Muhammadan Criminal Law in so far as it was not inconsistent with English Common Law. Then we had the Penal Code in 1861. Article 30 of the Letters Patent of the Madras High Court and section 2 of Indian Penal Code deal only with punishments but not with offences. Indian Pena Code is not exhaustive of all offences and privileges. Under the English Common Law there is absolute privilege, in matters like this, given to Judges, advocates, parties and witnesses. *Barendra Kumar Ghosh* v. *Emperor*(5) holds that the Indian Penal Code must not be assumed to have abrogated the prior Criminal Law unless there is an express abrogation, or in cases where it is silent; see also *Surendra Nath Banerjee* v. *The Chief Justice and Judges of the High Court* (6), where it was held that the Indian Penal Code is silent as to contempts on Courts and that by the Common Law of England the High Court can

(1) (1923) I.L.R., 46 Mad., 605 (F.B.).
(2) (1913) I.L.R., 36 Mad., 216 (F.B.).
(3) (1921) I.L.R., 48 Calc., 388.
(4) (1900) I.L.R., 22 All., 234.
(5) (1925) I.L.R., 52 Calc., 197 (P.C.).
(6) (1884) I.L.R., 10 Calc., 109 (P.C.).

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punish for contempt. See also *In re Ramaswami Ayyar*(1). Cases of qualified privilege alone are dealt with in section 499. Cases of absolute privilege such as this are not dealt with by the Penal Code. Public policy requires the existence of absolute privilege in such cases as the present. Even section 77 does not give absolute privilege as regards criminal liability to Judges acting beyond their jurisdiction. That cannot be the law. Hence we must conclude that the English Common Law applies to cases like this.

OPINION.

In this case the petitioner filed a complaint against three persons charging them with offences of simple hurt and house trespass under sections 323 and 448 of the Indian Penal Code. In that complaint he described two of them as being paramours. Thereupon he was charged with the defamation and was convicted. The Sessions Judge referred the case to the High Court on the view that the decision in *Re Muthusami Naidu*(2) following *In re Venkata Reddy*(3), established the position that statements such as that on which the conviction was founded were absolutely privileged. The correctness of the ruling in *In re Venkata Reddy*(3) has undoubtedly been questioned in the Full Bench case, *Gopal Naidu* v. *King-Emperor*(4). The learned referring Judges therefore very rightly took the view that the matter should be settled and that a Full Bench should reconsider the question and decide whether *In re Venkata Reddy*(3) was rightly decided.

We do not think that any useful purpose would be served by an exhaustive examination of the authorities such as was made by MOOKERJEE, Offg. C.J., in *Satish Chandra Chakravarti* v. *Ram Doyal De*(5). It is not

(1) (1921) I.L.R., 44 Mad., 913. (2) (1914) I.L.R., 37 Mad., 110.
(3) (1913) I.L.R., 36 Mad., 216 (F.B). (4) (1923) I L.R., 46 Mad., 605 (F.B.).
(5) (1921) I.L.R., 48 Calc., 388.

contested that the general trend of the Madras and Bombay authorities is to regard such statements as absolutely privileged and that the Calcutta and Allahabad Courts have taken the opposite view that the privilege is qualified only and should be taken as confined to the exceptions appended to section 499 of the Indian Penal Code. The Rangoon Court also has recently in *McDonnell* v. *King-Emperor*(1) adopted the Calcutta view. Our task is to consider the words of the statute and to say whether it leaves it open to the accused to contend that it is not exhaustive of all the cases of privilege which can be put forward. The suggestion is that the statute only concerned itself with cases of qualified privilege and legislated for them, leaving intact the absolute privilege conferred by the English Common Law on Judges, advocates, parties and witnesses.

Two propositions appear to us to be indisputable on the facts of the case as stated. The first is that the petitioner cannot bring himself within any of the exceptions to section 499 for the simple reason that there is a finding against him that the statement that he made was not made in good faith. The only exception to the Indian section under which he could bring himself is the 8th and that expressly lays down that the privilege conferred by it on persons who prefer accusations against others extends only to those who make them in good faith. The second proposition (and the Crown does not contest it) is that, if the Common Law of England is to be held to apply to this case, the action of the petitioner would be absolutely privileged.

The words of the section itself as distinct from the explanations and exceptions are quite clear in their

(1) (1925) I.L.R., 3 Rang., 524.

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definition of what is *prima facie* to be regarded as defamatory :—

"Whoever . . . makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person is said, except in the cases hereinafter excepted, to defame that person."

We have next to consider the decision in *In re Venkata Reddy*(1) which was a considered pronouncement of the then Chief Justice Sir ARNOLD WHITE, and two other Judges and it lies upon us closely to scrutinize the grounds on which that decision was based before we venture to dissent from it. As we follow that reasoning it is based mainly on two considerations. The first is that it was not to be inferred that the framers of the Indian Penal Code intended to depart from the English Law which is substantially reproduced in the statute unless they did so expressly or by necessary implication ; the second, that, as the Code confined itself to dealing with cases of qualified privilege, it might be supposed that its authors intended to leave the provisions of the English Common Law regarding absolute privilege intact. The first line of reasoning is summarized in the observations of the learned CHIEF JUSTICE at page 222 of the report:

"It is not to be supposed that the framers of the Penal Code had not before their minds the doctrine of the English Law with regard to the question of absolute privilege ; and it seems to me that, in dealing with a matter of such importance, if they had intended to exclude its application, they would have made their intention clear and would not have left it to be a matter of negative inference."

The second line of reasoning is of course closely allied to the first but, as it seems to us, it is based on a misapprehension. Although section 499 is silent as to

(1) (1913) I.L.R., 36 Mad., 216 (F.B.).

absolute privilege, the Code as a whole is not; for it confers absolute privilege by section 77 on a Judge

"in the exercise of any power which is, or which in good faith he believes to be, given to him by law."

That perhaps is a wider privilege than is given to an English Judge, because there are expressions in the English cases which lend colour to the view that the existence in fact of jurisdiction and not merely the honest belief in the possession of jurisdiction is a condition precedent to the privilege.

But the first line of reasoning is not obnoxious to this objection and raises a question of gravity and importance. It is undoubtedly remarkable that the draftsman of the statute who must have been familiar with the English Common Law made no reference to the position of witnesses or advocates *nominatim* but confined himself to the perfectly general language of the 8th and 9th exceptions. The inference drawn in *In re Venkata Reddy*(1) was that it was inconceivable that the statute should have been silent on such obvious topics unless it meant to leave the English Common Law relating to them intact. That is a line of reasoning which seems to us to be wholly inapplicable to a codifying statute and the Indian Penal Code is obviously meant to be a codifying statute, an expression which may sufficiently for our present purposes be defined as a statute intended to be complete in itself with regard to the subject matter with which it deals. Indeed the very title "Indian Penal Code" involves the conception of a codifying statute. As we understand the principles of construction applicable to such matters, a codifying statute does not exclude reference to earlier case law on the subjects covered by the statute for the purpose

(1) (1913) I.L.R., 36 Mad., 216 (F.B.).

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of throwing light on the true interpretation of the words of the statute where they are, or can be contended to be, open to rival constructions. We are unaware of any instance other than the present where it has been argued that matter outside of the statute can be invoked not by way of construing its provisions but of adding something to it which is admittedly not to be found within it. We agree with Sir ARNOLD WHITE, Chief Justice, that these matters must have been present to the mind of the draftsman. We differ from him in the inference to be drawn from the silence of the statute regarding them. It seems to us inconceivable that that silence can be interpreted otherwise than as a deliberate refusal to incorporate that part of the Common Law of England into the law of India.

In re Ramaswami Ayyar(1), a decision to which one member of this Court was a party, was cited as authority for the proposition that the Common Law of England could be imported into the Indian Penal Code and render acts that would *prima facie* be offences under the Code into acts not criminal or punishable. That was a case of a conviction under section 341 of the Indian Penal Code for wrongful restraint and the restraint was held not to be wrongful within the meaning of the section because the restraint exercised in that case would not be civilly wrongful by the Common Law of England. The Court therefore thought itself entitled to treat the word "wrongfully" as meaning "tortiously" and it is not disputed that the law of this country with regard to torts must in the main be guided by principles derived from English Law and English cases. The English authorities relied upon in that case were relied upon merely for the proposition that a restraint in such

(1) (1921) I.L.R., 44 Mad., 913.

circumstances as there appeared would not be tortious in English Law. It may very well be that a consideration of English Law was excluded by the definition of "wrongful restraint" contained in section 339 of the Indian Penal Code, which was not brought to the notice of the Court and that therefore the case was decided on a wrong footing. Be that as it may, the case is not an authority for the proposition that the English Common Law can be imported into an Indian statute unless words are used which necessarily refer the Court for their interpretation to the English cases defining what is to be considered as a civil wrong.

We are therefore of opinion that the privilege defined by the exceptions to section 499 of the Indian Penal Code must be regarded as exhaustive as to the cases which they purport to cover and that recourse cannot be had to the English Common Law to add new grounds of exception to those contained in the statute. At the same time we desire to guard ourselves against laying down any principle wider than that necessitated by this reference. The reference relates to the position of a complainant and the 8th exception and the illustration to it show clearly that the exception was meant to apply to complainants. The question of privilege that may attach to an advocate or a witness is not before us and we express no opinion as to whether it might or might not be possible to distinguish their positions. In the next place the question referred relates solely to criminal proceedings against a complainant and we say nothing as to how far he may be protected from civil proceedings. It no doubt seems anomalous that it should be a possible view that a man should be protected against civil proceedings but still exposed to a criminal prosecution; but we do not exclude the possibility, should the question arise hereafter, of that being

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the necessary conclusion from the fact that the criminal law of India is codified and the law of civil wrongs is not. We refer this case back to the Divisional Bench with the expression of opinion that no absolute privilege attaches to the statement made in this case. It will be open to that bench, before whom the matter comes on revision, to consider whether the Subdivisional Magistrate was right, on the footing of qualified privilege alone attaching to the statement made in this complaint.

Finally we desire to say this, that the divergence of judicial opinion on the subject referred to us and the allied subjects discussed in the argument is so great that we venture to suggest that further legislation defining for this country the limits of privilege, whether absolute or qualified, is eminently desirable.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Madhavan Nayar.

1926, February 24.

CHITTURI VENKATARATNAM AND OTHERS (DEFENDANTS), APPELLANTS,

v.

SIRAM SUBBA RAO (PLAINTIFF), RESPONDENT.*

Indian Registration Act (XVI of 1908), ss. 17 and 49—Partnership—Release by a partner—Deed of release—Whether registration necessary—Partnership assets including immovable property—Unregistered release deed, whether

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* Letters Patent Appeal No. 42 of 1925.