1925, and direct him to restore to file the petition, dated 22nd August 1925, and to dispose of it in the light of the foregoing observations. If the counter-petitioner fails to show that the petitioner is now disentitled to maintenance under sub-section (5), it will be for the court to consider with effect from what date the payment of arrears should be enforced. Under the second proviso to section 488 (3) the court's power extends to the recovery of arrears falling due over a period of one year next before the date of application, that date being 22nd August 1925, but it does not follow that the power should be fully exercised, and I observe that the petitioner herself only asked for the recovery of eleven months' arrears.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Wallace.

MIR ANWARRUDIN (PETITIONER), COMPLAINANT IN BOTH CASES, *v.*

FATHIM BAI ABIDIN AND ANOTHER (ACCUSED), RESPONDENTS.*

1926, December 2.

Indian Penal Code, sec. 499, exception 9—Statements by a lawyer acting in course of professional duties prima facie defamatory—Necessary in interests of client—Presumption of good faith—Proof of malice, overrides presumption—Absolute privilege, if available in India.

When a lawyer is acting in the course of his professional duties and is thus compelled, to put forward everything that may assist his client, good faith is to be presumed, and bad faith is not to be presumed merely because the statement is *prima facie* defamatory, but there must be some independent allegation and proof of private malice from which, in the circumstances of the case, the Court considers itself justified in

* Criminal Revision Case No. 615 of 1926 and No. 700 of 1926.

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inferring, that the statement was made, not because it was necessary in the interests of the client, but that the occasion was wantonly seized as an opportunity to vent private malice. Even the presence of malice will not override the presumption of good faith, when the statement made was obviously necessary in the interests of the client, and where the lawyer could not omit to make it without gravely imperilling the interests of his client, and would, in fact, not be discharging his duty to his client unless he made it.

In re Nagarji Trikamji, (1895) I.L.R., 19 Bom., 341, *Nikunja Behari Sen* v. *Harendra Chandra Sinha*, (1914) I.L.R., 41 Calc., 514, *Niren Narayan Singh* v. *Emperor*, (1927) 27 Cr.L.J., 1090, *McDonnel* v. *Emperor*, (1927) 27 Cr.L.J., 321, followed.

Dubitante: The Indian law on the subject being found within the four corners of the Indian Penal Code, whether a complaint for defamation against a lawyer for matters uttered in Court in the course of his professional duties cannot be entertained. *Sullivan* v. *Norton*, (1887) I.L.R., 10 Mad., 28 (F.B.), questioned. *Tiruvengada Mudali* v. *Tirupurasundara Ammal*, (1926) I.L.R., 49 Mad., 728 (F.B.), referred to.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure, 1891, praying the High Court to revise the orders of the Court of the Chief Presidency Magistrate, Egmore, dated 22nd July 1926, and 29th July 1926, and passed in Application No. 2618 of 1926, and the orders of the said Court, dated 30th July 1926, 12th August 1926, 13th August 1926, and 24th August 1926, and passed in Application No. 1770 of 1926.

The facts necessary for this report appear in the judgment.

Petitioner in person.

K. P. Krishna Menon for Crown Prosecutor for the Crown.

A. S. Natarajan for respondent in Criminal Revision Case No. 615 of 1926.

V. L. Ethiraj for respondent in Criminal Revision Case No. 700 of 1926.

JUDGMENT.

These are two petitions to revise the orders of the Chief Presidency Magistrate dismissing under section 203 of the Criminal Procedure Code two complaints by the petitioner for defamation. The counter-petitioner in Criminal Revision Case No. 700 is a vakil of this Court. The petitioner, who is an advocate of this Court, was prosecuting in his own name two cases of defamation, one against Murad Ali and one against Fathim Bai Abidin the statements complained of being both of the same nature, to the effect that the complainant had infected his wife with venereal disease. In the course of his argument for the defence in Murad Ali's case, his vakil, the counter-petitioner in case No. 700, made an oral statement that the defamatory statement was in substance true and had been set out as a fact in a judgment of this Court reported in *In the matter of an Advocate*(1). In the course of his argument for the defence in the other case, the same vakil put in to the Magistrate written notes of defence arguments which contained the same statement. The petitioner charged the vakil for defamation on the footing of this oral statement and these written notes of arguments, and charged also the accused in the "notes of argument" case for defamation in that she had instructed her vakil to publish in his argument for the defence the defamatory matter. These complaints have been dismissed and the petitioner comes up in revision.

The second case No. 615 of 1926 may be shortly disposed of. There is no evidence to show what the instructions of the lady to her vakil were and this Court cannot assume against her that she instructed him in the definite terms used by the vakil in his argument.

(1) (1923) I.L.R., 46 Mad., 903.

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That complaint was therefore rightly dismissed and I dismiss Criminal R.C. No. 615.

As to case No. 700, the Magistrate has dismissed that complaint mainly on his view of the law as it stands at present that a complaint for defamation against a lawyer for matters uttered in Court in the course of his professional duties cannot be entertained. In an early Full Bench case in this Court *Sullivan* v. *Norton*(1) it was laid down that such utterances by a lawyer in the course of his professional duties and required by his duty to his client are absolutely privileged. This Full Bench ruling has not been overruled, but, undoubtedly, another Full Bench decision in *Tiruvengada Mudali* v. *Tirpurasundari Ammal*(2) though not referring to this Full Bench case, had doubted the correctness of the application to Criminal Law in India of the English common law doctrine of absolute privilege. If I may say so with respect, I share that doubt and am of opinion that the Indian Law on the subject is to be found within the four corners of the Indian Penal Code. I am, however, sitting as a single Judge, bound by the 10 Madras Full Bench case, which has not been overruled, and have two alternative courses open to me, either to dismiss the petition on the ground that it is covered by the Full Bench case or to refer the Full Bench case for reconsideration. The latter I am not prepared to do in this case because it appears to me that, even on the interpretation of the Indian law of defamation as set out by various High Courts in reported rulings, the present complaint is not maintainable. There is a course of such decisions which, interpreting the ninth exception to section 499, Indian Penal Code, definitely lays down that, when a lawyer is acting in the course of his professional duties

(1) (1887) I.L.R., 10 Mad., 28. (2) (1926) I.L.R., 49 Mad., 728.

and is thus compelled, subject to the disciplinary action of the Court, to put forward everything which may assist his client, good faith is to be presumed, and bad faith is not to be assumed merely because the statement is *prima facie* defamatory, but that there must be some independent allegation and proof of private malice from which in the circumstances of the case the Court considers itself justified in inferring that the statement was not made because it was necessary in the interests of the client but that the occasion was wantonly seized as an opportunity to vent private malice. This is the general principle to be gathered from the decisions of the High Court of Bombay, *In re Nayarji Trikamji*(1) of Calcutta, *Nikunja Behari Sen* v. *Harendra Chandra Sinha*(2), of Patna, *Niren Narayan Singh* v. *Emperor of Burma*(3), and *McDonnel* v. *Emperor*(4). I entirely agree with this exposition of the law.

I take it that this principle implies and carries with it this other principle, that even the presence of malice will not override the presumption of good faith, where the statement made was obviously necessary in the interests of the client, and where the lawyer could not omit to make it without gravely imperilling the interests of his client and would in fact not be discharging his duty to his client unless he made it; that is, that, even though some private malice is gratified by the publication of the statement, if such publication was imperatively called for in the interests of his duty to his client, the presence of such malice will not negative the presumption of good faith.

That principle seems to me to apply directly to the present case. The petitioner complains that the Magistrate has not heard all the evidence that he was

(1) (1895) I.L.R., 19 Bom. 341.
(2) (1914) I.L.R., 41 Calc., 514.
(3) (1927) 27 Cr. L.J., 1090.
(4) (1927) 27 Cr.L.J., 321.

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prepared to adduce on the matter of independent malice due to personal enmity. I am prepared to assume that to be so. Even so, if counter-petitioner's duty to his client imperatively demanded that the statement should be made, good faith is present, sufficient good faith to remove the offence out of the category of defamation. That the counter-petitioner's duty to his client imperatively demanded that the statement should be made, seems to me unquestionable. The truth of the statement complained of in the cases in which he was appearing for the defence was an essential element of the defence, and the vakil would have been gravely lacking in his duty to his client if, when he had the truth of that statement definitely set out in a public Law Report, he omitted to bring that to the notice of the Court before whom he was arguing. It has of course been pointed out that the Law Report merely deals with the "matter of Mr. A." without setting out the present petitioner's name in full. But the petitioner has never argued that the report does not refer to him, nor in the circumstances of the case was such an argument possible. The case was fully reported in the newspapers at the time and no Court could or would have listened to an argument that the Law Report did not refer to the present petitioner. I am clearly of opinion therefore that the publications complained of were imperatively necessary for the conduct of the defence in the cases in which the counter-petitioner was appearing professionally and that therefore they were made in good faith and cannot be made the subject of a charge for defamation. I am therefore not prepared to interfere, and dismiss this petition also.

B.C.S.