Before Mr. Justice Sen and Mr. Justice Niamat-Ullah.

RAHIM BAKHSH (DEFENDANT) *v.* BACHCHA LAL (PLAINTIFF).*

1928 *December*, 12.

Defamation—Slander—Suit for damages—Imputation of dishonesty against tradesman—Special damage, whether necessary—Malice, whether necessary ingredient—Privilege—Defamatory remark interjected by counsel during examination of witness by another counsel—Costs, when allowable in full although claim only partially decreed.

A complaint of cheating was brought by *C* against *B*, a partner in a trading firm, in respect of a transaction with the firm. During the trial *C* was asked in cross-examination by *B's* vakil whether *B's* firm was the biggest firm of grain dealers in the city, and *C* said yes. Thereupon *R*, the mukhtar who was appearing for *C* in the case, interjected the remark, audible to several persons in court, that *B's* firm were also the most dishonest people in the city. The case terminated in a dismissal of the complaints. *B* then sued *R* for damages for slander.

Held, that the distinction in English law between slander being actionable *per se* in certain cases and not being actionable in other cases without proof of special damage has not been recognized or followed with unanimity by the Indian High Courts. Even under the common law of England, slander or oral defamation is actionable in certain cases without proof of special damage, and one of such cases is where the plaintiff was affected by the words in his office, profession or trade. In such a case special damage, in the sense that actual and temporal loss has in fact occurred, need not be proved.

The remark interjected by the mukhtar was entirely uncalled for and could not be regarded as being either in furtherance of the interests of his client in the case or in the discharge of his professional duty towards his client, and could not in any sense be deemed to be privileged, and was actionable.

A malicious intent or an intent to damage the reputation of a person is not a necessary ingredient of actionable slander.

* First Appeal No. 70 of 1926, from a decree of J. N. Dikshit, Subordinate Judge of Banda, dated the 27th of January, 1926.

1928

RAHIM BAKHSH v. BACHCHA LAL.

Costs of suit were allowed to the plaintiff in full, although he had valued his claim for damages at Rs. 5,100 and the court had allowed only Rs. 200, in the absence of evidence to establish either loss of trade or any other actual loss.

THE facts of the case fully appear from the judgement of the Court.

Maulvi *Iqbal Ahmad* and Mr. *T. A. K. Sherwani*, for the appellant.

Dr. *Kailas Nath Katju*, for the respondent.

SEN and NIAMAT-ULLAH, JJ. :—This is an appeal by the defendant from the judgement and decree of the Subordinate Judge of Banda in a suit for damages founded upon slander.

Plaintiff Bachcha Lal is a partner in the firm of Mulchand Ram Prasad, which carries on extensive business at Banda as commission agents and in the purchase and sale of grain. In 1924, one Chhedi Brahman had agreed to purchase from the plaintiff's firm through Bachcha Lal 200 bags of gram of a particular kind and quality and had paid Bachcha Lal Rs. 200 by way of earnest money. This transaction led to a criminal complaint, which was filed by Chhedi against Bachcha Lal under section 420 of the Indian Penal Code. The trial of the case was in progress and while the cross-examination of Chhedi was proceeding, Babu Kesho Chandra Singh, a vakil for Bachcha Lal, asked Chhedi, the complainant, whether the plaintiff's firm was the biggest arhatia firm for grain in the city or not. Chhedi answered that question in the affirmative. Rahim Bakhsh, who was a mukhtar for Chhedi in the criminal case and who was sitting close to Babu Kesho Chandra Singh, immediately upon hearing that answer by the complainant is said to have interjected the observation that "they were the most dishonest men also in the city." The original words were "*Bande men sab se bare be-iman hain.*" It

is said that Kesho Chandra Singh immediately protested and asked the Magistrate to make a record of this statement having been made by the defendant, but the Magistrate said that he had not heard the remark in question and did not record the same in his proceedings. Plaintiff alleges that the complaint of Chhedi was thrown out on the 21st of January, 1925, as false. It is not disputed before us that the complaint was dismissed.

Bachcha Lal instituted the suit which has given rise to the present appeal against Munshi Rahim Bakhsh, mukhtar, on the 9th of April, 1925, for recovery of Rs. 5,100 on account of damages sustained by him by the slanderous words uttered by Rahim Bakhsh in the court of the Magistrate. The defendant denies having uttered the words which are imputed to him. In the alternative he claims privilege.

The court below held on the evidence that the words imputed to the defendant were actually used by him and that the said words were of a defamatory character for which no privilege could be claimed by the defendants as a legal practitioner in the discharge of his duty to his client and therefore the action for slander was maintainable against the defendant. The court below gave the plaintiff a decree for Rs. 200 as damages, with proportionate costs and the defendant was directed to bear his own costs in the court below. In appeal before us, it has not been seriously contended that the words ascribed to the defendant were not uttered by him In view of the evidence which was produced in the court below, consisting of the statement of Babu Kesho Chandra Singh, a gentleman of respectability and position, and the corroborative evidence of Gaya Prasad and Babu Prabhu Dayal, it was not possible for the court below to arrive at a different conclusion. We hold that the defendant did utter those words in the court of the Magistrate on the 6th of January, 1925, and that the said words

1928

RAHIM BAKHSH v. BACHCHA LAL.

were heard by Kesho Chandra Singh and certain other persons in the court room.

It has been contended that the words were not uttered with any malicious intent, that they were not actionable *per se* and that the defendant in his capacity of mukhtar in the case of Chhedi against the plaintiff was absolutely privileged and no suit was maintainable for damages against him by reason of his uttering those words.

The law in British India relating to civil liability in actions founded upon tort has not been settled by legislature. The English common law of tort is not applicable to India in its entirety and rules of English common law as enunciated or recognized by English courts ought not to be applied to this country with inflexibility without regard to the dissimilarity in the two countries with reference to their customs and usages, the state of society and the conditions of things to be found therein.

The common law of England has rarely been applied in deciding cases relating to slander outside the Presidency towns. In the absence of any statutory provision, suits for damages founded upon tort and more especially those which are based upon slander have to be decided according to the principles of justice, equity and good conscience and in the light of judicial principles to be found in the decisions of eminent English Judges and recognized jurists which are broad based upon human nature and common experience of mankind.

The distinction between slander being actionable *per se* in certain cases and not being actionable in other cases without proof of special damage has not been recognized or followed with unanimity by the Indian High Courts.

As a principle of equity, every man is entitled to have his reputation preserved intact; and any words

1928

RAHIM BAKHSH v. BACHCHA LAL.

calculated to infringe this right afford a good cause of action. As was observed by MALINS, V. C., in *Dixon* v. *Holden* (1), a man's reputation is his property and if possible more valuable than other properties. Even under the common law of England, slander or oral defamation is actionable in certain cases without proof of special damage and one of such cases is where the plaintiff was affected by the words in his office, profession or trade. In such a case special damage, in the sense that actual and temporal loss has, in fact, occurred need not be proved: *Foulger* v. *Newcomb* (2). In *Dawan Singh* v. *Mahip Singh* (3) MAHMOOD, J., has laid down the following propositions:—

"(1) That whilst the English law of defamation recognizes no distinction between defamation as such and personal insult in civil liability, the law of British India recognizes personal insult conveyed by abusive language as actionable *per se* without proof of special or actual damage.

(2) That such abusive and insulting language, unless excused or protected by any other rule of law, is in itself a substantive cause of action and a civil injury apart from defamation."

The words used by the defendant in this case which are the subject of dispute are not capable of being construed *mitiori sensu* and are indeed incapable of being interpreted in an innocent sense. The test is how will the words be understood by a man of ordinary intelligence where the person against whom the imputation is levelled is a merchant or a tradesman. The question that arises for determination is whether the words have a natural tendency to harm him in his occupation. The words uttered should not be taken out of the setting in view of the place, the occasion and the circumstance when the

(1) (1869) L.R., 7 Eq., 488 (492). (2) (1867) L.R., 2 Ex., 327.
(3) (1888) I.L.R., 10 All., 425 (456).

1928

RAHIM BAKHSH v. BACHCHA LAL.

words were used. The defendant was the mukhtar of Chhedi in the case under section 420 of the Indian Penal Code. He is entirely within his rights to make any observation about the conduct, character or status of Bachcha Lal which might have been necessary or called for in the prosecution of the case which was then under inquiry. We have got to take into consideration the circumstance under which the words were used. The institution of a complaint under section 420 of the Indian Penal Code against a merchant of the respectability and position of Bachcha Lal was not only a serious menace to his liberty but it was by itself a circumstance calculated to prejudice his personal reputation as a man and his credit in the market. Babu Kesho Chandra Singh was trying to vindicate the character and position of his client Bachcha Lal. He put the question to the complainant as to whether or not the firm of which Bachcha Lal was a member was the biggest firm at Banda. The answer to that question was a categorical affirmative. The defendant Rahim Bakhsh was sitting in court very close to Babu Kesho Chandra Singh; the remark made by him that the firm of which Bachcha Lal was a member was also the most dishonest firm in Banda, was a remark which was entirely uncalled for. It was a remark singularly inopportune, because it was calculated to create an atmosphere of distrust about Bachcha Lal, about the time when his commercial honesty was itself a question in issue before a criminal court. It is significant that the remark was not addressed to the court. It could not be contended that the observation was made by Rahim Bakhsh in any way either in furtherance of the interests of his client in the case or in the discharge of his professional duty towards his client. The remark was evidently made for the illumination or edification of such of the persons who happened to be present in the court room in the immediate vicinity of Rahim Bakhsh. The learned

advocate for the appellant relies on *Munster* v. *Lamb* (1) in support of the proposition that the statement in controversy bore the seal of privilege and could not form the basis of a civil action. It was held in that case that "words spoken by an advocate *in the course of the defence of his client*, however defamatory they may be of the prosecutor, are not actionable, provided they be relevant to the matter in hand, and spoken in good faith. An advocate has been allowed very extensive latitude in the matter of the freedom of his speech before a court concerning the action in which he is employed." MATHEW, J., observes as follows (at page 594): "It may be inconvenient to individuals that advocates should be at liberty to abuse their privilege of free speech subject only to animadversion of punishment from the presiding Judge. But it would be a far greater inconvenience to suitors, if advocates were embarrassed or enfeebled in endeavouring *to perform their duty* by the fear of subsequent litigation. This consequence would follow, that no advocates could be as independent as those whose circumstances rendered it useless to bring actions against them. The passage in *Seaman* v. *Netherlift* upon which Mr. Waddy relied was not, it seems to me, intended to qualify the statement of the law contained in the earlier judgements relied upon by the defendant. All that was to be laid down was, that for defamatory statements made by an advocate *outside his office of advocate and with no reference to the subject before the court, and which therefore were necessarily made in bad faith and were irrelevant*, a counsel might be proceeded against in an action." These observations are a clear authority against the contention of the appellant. In the present case the words used by the defendant were not and could not in any sense be recognized as privileged and a suit for damages was clearly maintainable.

(1) (1883) 11 Q.B.D., 588.

1928

RAHIM BAKHSH v. BACHCHA LAL.

It is next contended that the words were not used with a malicious intent and therefore no suit for damages could be instituted against the defendant. In *Dawan Singh* v. *Mahip Singh* (1), MAHMOOD, J., observes (at page 456) that "malice is an element of liability for abusive and insulting language." With great respect, we are not prepared to subscribe to this proposition in its entirety. Malicious intent or an intent to damage the reputation of a particular person is not one of the ingredients of actionable slander. Bigelow, in his Law of Torts, second edition, 1903, page 151, observes as follows:—"The plaintiff in an action for defamation is entitled to recover upon proof of the publication (with special damage, if the case does not fall under one of the four heads); proof of malice, in other words, malice as an entity, is not necessary in any sense of the term to make a case. It has indeed been common to say that malice is presumed or implied upon proof of the publication, but that means nothing and is only misleading, for the presumption or implication cannot be overturned by evidence of want of malice. Malice touching to making a *prima facie* case is only a name arbitrarily applied; it is simply a fiction."

We are in complete accord with this view. The law in this respect has been clearly enunciated by Sir Hugh Fraser in his Principles and Practice of the Law of Libel and Slander, 6th edition, 1925, at page 62: "It is no defence that the defendant did not *intend* to refer to, or defame, the plaintiff; and the defendant will not be excused merely because he published the words complained of in the honest belief that they were true, unless the occasion of publication was one of qualified privilege or without negligence (unless he took only a subordinate part in such publication and was not the author, printer or original publisher of the words), or by accident or

(1) (1888) I.L.R., 10 All., 425.

mistake or in jest." No facts have been brought out to bring the case of the appellant within one of the recognized exceptions referred to above. The words appear to have been uttered by the defendant with due deliberation in an audible voice and without any regard for the consequences that were to ensue. In *E. Hulton and Co.* v. *Jones* (1) Lord LOREBURN is reported to have said: A person charged with libel cannot defend himself by showing that he intended in his own breast to defame, or that he intended not to defame the plaintiff, if, in fact, he did both." As we have stated already the true test is, were the words of such a nature and character as in the natural course of things were calculated to harm the plaintiff's reputation? The correct principle has been laid down by Clement Gatley in his Law and Practice of Libel and Slander in a Civil Action, 1924, at page 66: "Any words which have a tendency to hurt or prejudice a man in the exercise of his trade or business are actionable without proof of special damage . . . thus it is actionable to say of a merchant or a tradesman that he has cheated in his trade or that he has nothing but rotten goods in his shop, or that he adulterates his goods or delivers inferior goods to those purchased, or keeps false books of accounts, or uses false scales or weights or takes the goods of his customers and pawns them." We are clearly of opinion that an imputation of dishonesty to the plaintiff who is a tradesman is actionable *per se* and a suit for damages was maintainable without any regard to any question either about the *bona fides* or the intent of the defendant at the time when he used the words.

It follows from what we have stated above that this appeal is devoid of substance and we do hereby dismiss it with costs. The plaintiff has retorted by filing a cross-objection, which he has valued at Rs. 1,586. The trial

(1) (1910) A.C., 20.

1928

RAHIM BAKHSH v. BACHCHA LAL.

court gave the plaintiff a decree for Rs. 200 only as damages for defamation and allowed him only porportionate costs. What the plaintiff claims is a higher sum than what he was allowed by the court below. He ought to have led some evidence to show what was the extent of damage sustained by him by reason of the slander. The plaintiff has not produced any evidence whatsoever to establish either loss of trade or any other actual loss in any shape or form. Under these circumstances we are not prepared to differ from the trial court in its assessment of damages.

We do not think that the court below has exercised a sound discretion in allowing the plaintiff costs proportionate to the claim allowed by it. The plaintiff's cause of action was well-founded. The defendant was clearly a wrong-doer. We think that in a case where it was extremely difficult for the plaintiff to value his claim at a particular figure, he was justified in assessing his claim at Rs. 5,100. We are of opinion that the plaintiff is entitled to his full costs of the court below, and to this extent we modify the decree of the court below. We allow the plaintiff costs proportionate to his success in his cross-objection, namely Rs. 586-1-6. The defendant appellant will have to bear his own costs throughout.