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proper limits, I must disallow the prayer of defendants Nos. 6 to 11 for the determination in this suit of their right to a partition of the property which forms its subject-matter. It is open to the said defendants, if they choose, to file a suit for partition. Defendants Nos. 6 to 11 must pay to defendants Nos. 1 to 5 the costs of and incidental to this application.

Attorneys for the plaintiff: *Messrs. Jehangir & Seervai.*

Attorneys for defendants: *Messrs. Thakurdas & Co.* and *Captain & Vaidya.*

R. R.

CRIMINAL APPELLATE.

Before Mr. Justice Batty and Mr. Justice Heaton.

1907.
January 11.

EMPEROR *v.* ABDOOL WADOOD AHMED.*

Indian Penal Code (Act XLV of 1860), section 499, Exceptions, 3, 6, 9, sections 500, 52—Defamation—Comment—Right of fair comment—Comment should be suggested by and confined to the work under review—Good faith, tests of—Malice, interpretation of the term.

The word "malice" in the legal use of that term is not limited to hostility of feeling, but by virtue of its etymological origin, extends to any state of the mind which is wrong or faulty (whether evidenced in action by excess or defect), such as would be unjustifiable in the circumstances and incompatible with thoroughly innocent intentions. It is not necessary that such impropriety of feeling should in all cases be established by evidence extrinsic to the comment which is the subject of the complaint. For whether fair comment is to be regarded as falling under a branch of the law of privilege or not, it cannot excuse an injury arising, not from the mere act of criticism, but from a state of mind in the critic which is in itself unjustifiable and the excuse may be so forfeited either by reason of an evil intent in him, or by reason of mere recklessness in making an unwarrantable assertion. For then the comment would not be fair comment at all. Apart from extrinsic evidence of malice, protection must be withheld even from what purports to be criticism, if it states as a fact to be inferred from the book criticised, an imputation for which the book itself contains absolutely no foundation whatever.

The right of fair comment involves two essentials, first that the imputation should be comment on the work criticised, and second that it should be "fair"—that is to say, that if it professes to be an inference drawn from the contents of that work, it must be an inference which it is possible to draw therefrom.

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"Good faith" requires not, indeed, logical infallibility but due care and attention. But how far erroneous actions or statements are to be imputed to want of due care and caution must, in each case, be considered with reference to the general circumstances and the capacity and intelligence of the person whose conduct is in question. It is only to be expected that the honest conclusions of a calm and philosophical mind may differ very largely from the honest conclusions of a person excited by sectarian zeal and untrained to habits of precise reasoning. At the same time it must be borne in mind that good faith in the formation or expression of an opinion, can afford no protection to an imputation which does not purport to be based on that which is the legitimate subject of public comment.

The object of exception 6 to section 499 of the Indian Penal Code (Act XLV of 1860) is that the public should be aided by comment in its judgment of the public performance submitted to its judgment. Comment otherwise defamatory is justified on this ground alone. The comment must, therefore, make it clear to the public that decision is invited only on such evidence as is supplied by the public performance. It follows that an imputation on an author made by a critic without reference, express or implied, to the work under criticism, if in terms so general as to be capable of conveying an unfavourable impression of him apart from what appears in his work, cannot be justified by the critic on the ground that his intention was to base his imputation solely on the work reviewed, and that he had in his mind passages therein supporting the imputation. The responsibility of the critic is to be gauged by the effect which his comment is calculated to produce and not by what he says was his intention. It is not enough that he should intend to form his opinion on the work before him: he is also bound in the words of the exceptions to express his opinion with due care and caution, and to give the public no ground for supposing that he is speaking of anything but the performance submitted to its judgment.

APPEAL from conviction and sentence recorded by P. H. Dastur, Second Presidency Magistrate of Bombay.

The accused was prosecuted for an offence punishable under section 500 of the Indian Penal Code (Act XLV of 1860). He was a follower of the Pesh Imam of the Minarawalla Mosque in Bombay. This Pesh Imam published in about 1905 a pamphlet called "Namoozaj," in which he deplored the low condition to which the Mahomedan community had fallen as compared with the other communities in India and exhorted the Mahomedans to wake up.

In reply to this, the complainant, Kazi Ismail bin Kazi Goolamali Mehri, a Moulvi of Bombay, published a pamphlet called "Izhar-ul-Huk." This pamphlet, it was alleged, contained

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misquotations, mistranslations and misstatements of what the Pesh Imam had preached in the "Namoozaj".

The accused, therefore, published by way of rejoinder a third pamphlet named "Al Aaku-a-Haku Ainyoottabu." It called attention to certain passages from "Namoozaj" which the complainant had misquoted and mistranslated. Besides being a defence of the doctrines preached in the first pamphlet, it was on the whole a criticism of the views expressed in the second pamphlet.

The complainant contended that the accused had in the third pamphlet exceeded the limits of fair criticism and had allowed his criticism to degenerate into a personal and malicious abuse far outside the scope of his pamphlet. The complainant, therefore, instituted proceedings against the accused for the offence of defamation.

The nature of the imputations made against the complainant by the accused sufficiently appears from the passages quoted in the judgment.

The accused was convicted of the offence of defamation and was sentenced to suffer simple imprisonment for one month and to pay a fine of Rs. 1,000.

Lowndes and *Jinnah*, with *Captain S. Vaidya*, for the accused.

Scott, Advocate General, with *S. G. Vellinkar*, for the complainant.

BATTY, J.—In this case we have been obliged to await an officialised translation of the pamphlet which forms the subject of the charge, exceptions having been taken to the accuracy of that which accompanied the record. The charge against the accused is one under section 500, Indian Penal Code, of defamation. The alleged defamatory imputations are contained in a pamphlet which the present appellant admittedly wrote as an answer to certain criticisms written and circulated by the complainant on discourses compiled by a religious teacher designated in the pamphlet as the Khutba.

As the appellant does not disown the authorship of the defamatory pamphlet, the only question which arises in this appeal

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is whether the passages cited in the charge, amount to defamation. The main contention of the appellant's counsel is that whatever imputations are made in the passages cited in the charge, fall within the 3rd, 6th and 9th exceptions to section 499 of the Indian Penal Code, that is to say, it is contended that those passages either express an opinion in good faith respecting the character of the complainant so far as it appears in his conduct touching a public question and the merits of the Fatwa or criticism published by him and no further, or an imputation made in good faith, in reply to attack, for the protection of the person attacked, or for the public good. It is also contended for the appellant that the meaning and application of various passages in the pamphlet have been distorted and misrepresented by the prosecution,—either through incorrect translation or the perverse suggestion of constructions which the appellant did not intend and could not have intended those passages to bear. The Advocate General, who supported the conviction, relied on *Thomas* v. *Bradbury, Agnew & Co., Limited*[1] as showing that the right of fair comment set up for the defence could not avail to protect malicious attack under the cloak of criticism. *Fisher* v. *Clement*[2] was cited by the Advocate General, as showing that the ambiguity of the language used, would not avail the accused whatever his alleged intention, if the actual tendency of that language was defamatory.

With reference to the case of *Thomas* v. *Bradbury, Agnew & Co., Limited*[1] it is to be noted that the question there raised and determined was whether in an action for libel, when the defence is that the writing complained of is fair comment, evidence that the defendant was actuated by malice towards the plaintiff was admissible.

That question does not arise in the present case. For no evidence has been adduced of actual malice in the accused, extrinsic to the pamphlet alleged to be defamatory. The appellant disclaims and the prosecution does not aver any such personal animosity in the accused as would be connoted by the word malice in the ordinary colloquial use of that word. But the

(1) [1906] 2 K. B. 627. (2) (1830) 10 B. & C. 472.

word "malice" in the legal use of that term is not limited to hostility of feeling, but by virtue of its etymological origin, extends to any state of the mind which is wrong or faulty (whether evinced in action by excess or defect), such as would be unjustifiable in the circumstances and incompatible with thoroughly innocent intentions.

It is not necessary that such impropriety of feeling should in all cases be established by evidence extrinsic to the comment which is the subject of the complaint. For whether fair comment is to be regarded as falling under a branch of the law of privilege or not, it cannot excuse an injury arising not from the mere act of criticism, but from a state of mind in the critic which is in itself unjustifiable. And the excuse may be so forfeited either by reason of an evil intent in him, or by reason of mere recklessness in making an unwarrantable assertion. For then the comment would not be fair comment at all. This clearly follows from the language of the exceptions to section 499, Indian Penal Code, which by requiring the "good faith," defined in section 52, excludes all that is done without due care and attention as well as all that is done with injurious intention.

Thus the protection given by these exceptions corresponds with the right of fair comment described in *Thomas* v. *Bradbury, Agnew & Co., Limited*[1]. "The right," says the Court of Appeal, "arises to criticize honestly, however adversely," (page 639) "it does not extend to cover mis-statements of fact however *bonâ fide*." The Court of Appeal questions whether if the comment be malicious, it can then be described as comment at all (page 638).

It is clear from a later passage in that judgment (page 643) that, apart from extrinsic evidence of malice, protection must be withheld even from what purports to be criticism, if it states as a fact to be inferred from the book criticised, an imputation for which the book itself contains absolutely no foundation whatever. In *Merivale* v. *Carson* [2], Bowen, L. J., said: "The writer would be travelling out of the region of fair criticism ...

(1) [1906] 2 K. B. 627 p. 638. (2) (1887) 20 Q. B. D. 275 p. 284.

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if he imputes to the author that he has written something which in fact he has not written."

Thus the right involves two essentials, first that the imputation should be comment on the work criticised, and second that it should be "fair"—that is to say, that if it professes to be an inference drawn from the contents of that work, it must be an inference which it is possible to draw therefrom. It would be monstrous, for instance, for a critic to suggest as an inference from a mere grammatical inaccuracy in a work, that its author was a swindler or a libertine. For that would be a recklessness of inconsequence, excluded by the requisites of good faith. Good faith requires not, indeed, logical infallibility but due care and attention. But how far erroneous actions or statements are to be imputed to want of due care and caution must, as indicated in *Bhawoo Jivaji* v. *Mulji Dayal*[1] in each case be considered with reference to the general circumstances and the capacity and intelligence of the person whose conduct is in question. It is only to be expected that the honest conclusions of a calm and philosophical mind, may differ very largely from the honest conclusions of a person excited by sectarian zeal and untrained to habits of precise reasoning. At the same time it must be borne in mind that good faith in the formation or expression of an opinion, can afford no protection to an imputation which does not purport to be based on that which is the legitimate subject of public comment. The object of the exception on which the defence mainly relies is that the public should be aided by comment in its judgment of the public performance submitted to its judgment. Comment otherwise defamatory is justified on this ground alone. The comment must, therefore, make it clear to the public that decision is invited only on such evidence as is supplied by the public performance. It follows that an imputation on an author made by a critic without reference, express or implied, to the work under criticism, if in terms so general as to be capable of conveying an unfavourable impression of him apart from what appears in his work, cannot be justified by the critic on the ground that his *intention* was to base his imputation solely on

(1) (1888) 12 Bom. 377 p. 393.

the work reviewed, and that he had in his mind passages therein supporting the imputation. In such case the reading public is not left to decide for itself on evidence legitimately before it, and the tendency of the comment is to suggest that the imputation is based on some conduct of the author other than that appearing in his work. In such a case the ruling in *Fisher* v. *Clement*[1] might apply, and the responsibility of the critic is to be gauged by the effect which his comment is calculated to produce and not by what he says was his intention. It is not enough that he should intend to form his opinion on the work before him; he is also bound in the words of the exceptions to *express* his opinion with due care and caution, and to give the public no ground for supposing that he is speaking of anything but the performance submitted to its judgment.

It has been necessary to state at some length the principles which we conceive to be applicable in such a case as the present, partly because the latitude allowed by law to literary comment seems to have received somewhat scant consideration in the judgment under appeal, and partly because the arguments for the appellant, on the other hand, claim that all passages in the charge are equally defensible as based solely on the work criticised and have no reference to anything extrinsic thereto, and that admitting impropriety, coarseness, vehemence in expression and weakness of reasoning, they must be ascribed to want of literary culture, the heat of sectarian polemics and the tone in which the controversy was started.

We have therefore endeavoured before dealing seriatim with the passages in the charge, to indicate the tests which we conceive the Indian Penal Code requires us to apply. We now proceed to apply those tests accordingly.

The first passage is that beginning—

"Kazi Saheb did not give up his habit."

There has been much contest as to the precise meaning of the words *naphse amara* which follow in this passage. The officialised translation renders them—"the evil promptings of the soul"—

(1) (1830) 10 B. & C. 472.

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while in the charge the reading is "sensual appetite or lust". Richardson, p. 1325 gives the phrase as meaning "inordinate appetite or concupiscence". The Court interpreter translated the phrase "appetite for bad works." From a passage cited in argument from a commentary on the Koran, the defence urges the phrase means no more than the evil tendency of unregenerate human nature: the carnal mind as opposed to the spiritual. And if it were absolutely necessary to decide between these varying interpretations, we should hesitate to ascribe to the phrase a more opprobrious connotation, seeing that one of the witnesses Kazi Mahomed Ismail Chilmai classes the frequenting a club, keeping late hours, playing billiards and the like, as among the habits to which the spiritual condition indicated tends, while another witness Kazi Mahomed Ali Morgay says *naphse amara* would prompt a man not to go to a mosque but to spend his nights at a theatre, and Kazi Ismail Mehri who says it means animal passion, the spirit which tends towards evil and serious vices, admits (page 93) that he has himself applied the term in criticism of an opponent's literary style. The expression in whichever of these senses it be taken, does not appear to imply any grave moral turpitude but rather the absence of spiritual excellence—and so much at least the defence would apparently concede. It may be that as applied to an ordinary layman no imputation seriously calculated to lower him in the eyes of his secular brethren would be conveyed by the phrase. We understand that no hierarchical rank is claimable by the complainant. But he deposes, and it appears also from Exhibit A, that he has been appealed to as a Mufti and Moulvi Kazi (*i. e.* as an expounder of and an authority learned in the law), for a pronouncement on the orthodoxy of the Khatib. We think the phrases used cannot but be regarded as implying that the person indicated is unfit to give the counsel for which some at least of his coreligionists look up to him, and the language used would, therefore, we think, be defamatory as applied to him unless justified as fair comment on a public performance of his then under review. That the phrase *naphse amara* was intended to be depreciatory is confirmed by the words that follow; "having shelved (or laid aside) the fear of God, shame and modesty, &c.".

It may be that no mere layman has a right to complain at not being credited with spiritual excellence, but no one can have a right gratuitously to denounce his neighbours as having laid aside all sense of shame and modesty. The only question, therefore, is does this denunciation purport to relate only to the conduct of the complainant so far as it appears in the tractate or Fatwa under review? We should be prepared to give the accused the benefit of all doubt on this point, on the ground that the next sentence mentions the complainant's work under review, and thus suggests that work as the source from which the critic was about to cite justifications for his invective. But this view seems hardly possible in face of the opening words of the passage, "How astonishing it is that even at such a troublesome time the Kazi did not give up or could not refrain from his habits". The word "habits" certainly must refer to a course of conduct previously pursued, and therefore to matter distinct from the performance under review. What are the previous habits imputed as not given up in the Fatwa—the reader is left to gather from the passages which immediately precede and follow. The last preceding sentence imputes indifference both to the love and the condemnation of God and to the souls of his fellowmen. "The dead may go to heaven or hell". And this imputation is introduced with the words "who is ignorant of his qualities?". The sentence which follows alleges that the Kazi has abandoned all fear of God and all shame and modesty. Such being the characteristics imputed, they are spoken of not merely as apparent in the Fatwa but as habitual in the Kazi and as already known to all. This we think places the passage on the footing of illustration (*e*) to the 6th exception in section 499. The clear effect of the passage is "The Kazi has long been known to be such a man as is here described, and this work shows he has not improved." There is no attempt to show from the *work itself* that the previous life of the Kazi was marked by the blemishes appearing in his Fatwa, and the reader can only infer that the traits are imputed as having been evinced by something in his earlier career.

It might perhaps be suggested that the accused refers to the Fatwa as indicating what the past history of the Kazi must have

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been, in the words "In fact the Fatwa appears to be, as it were, the register of the actions of a wretch eternally doomed." But unfortunately the accused does not appeal to the Fatwa alone as containing the grounds for his imputations about the Kazi's habits in the past. For it is by an appeal to their alleged notoriety that he introduces those imputations "who is unaware of his qualities? he has no regard, &c., he could not refrain from his habits." Thus it is the alleged notoriety of the Kazi's habits that is cited as accounting for the character of the book. It is not the character of the book that is given as the evidence of the past life. And this is precisely the distinction between illustrations (*d*) and (*e*) to the exception. We think, moreover, that in the criticism of a public performance, an inference, as to the present character of the performer is the utmost that is allowable, and a conjecture as to his previous mode of life is irrelevant and therefore unjustifiable.

The next sentence in the charge "he has awakened sedition," does not appear to us defamatory. The word translated "sedition" evidently means only "rupture" or "schism", and it is quite within the proper limits of criticism to point out that a controversial work is calculated to excite violent difference of opinion.

The reference in the succeeding sentence to "audacious forgery," we think would be more reasonably taken as an anticipation of the remarks that follow about garbled extracts from the Khatib's tractate. This imputes only a literary misdemeanour and is fair controversial comment.

The assertion that the Kazi was misleading his readers and undermining their faith, is made only as the legitimate result of an attempt to show that the views expressed in the Fatwa are erroneous, and a controversialist is necessarily at liberty to question the accuracy of his opponent's views.

On the whole then we think there are only two passages cited in the charge which unquestionably contain aspersions on the Kazi apart from the Fatwa under review, *viz.* the passage translated in the charge as beginning "Kazi Saheb did not give up his habit" from page 2 of the pamphlet:—and the sentence

translated in the charge "This is an inborn habit of Kazi Meheri Saheb; deception is a part of his nature" from page 10 of the pamphlet. These it is impossible to regard as anything else than a general imputation on the complainant, purporting to be based on his supposed general conduct and not solely on what appears in the Fatwa. And we therefore think that the accused cannot be wholly acquitted of defamation. But having regard to the very vehement nature of the attack in exhibit A on a religious teacher, to which the pamphlet of the accused is a reply, and to the absence of any motive in accused except that of defending from insult the character of the teacher whom he revered, the sentence passed by the Magistrate is unduly severe, and we accordingly modify it by setting aside the sentence of imprisonment altogether and reducing the fine to one of Rs. 200.

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APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice and Mr. Justice Beaman.

HANMANT RAGHAVENDRA (ORIGINAL DEFENDANT 3), APPLICANT, v. SHANKAR RAVJI APTE (ORIGINAL PLAINTIFF), OPPONENT.*

1907. *February* 21.

Limitation Act (XV of 1877), sch. II, art. 164—Civil Procedure Code (Act XIV of 1882), sec. 108—Ex parte *decree against more defendants than one—Execution against some of the defendants—Application by the other defendants to set aside the decree—Limitation.*

When a decree is passed against more defendants than one, and the decree is executed against some of the defendants only, that is not a process for enforcing the judgment as against the other defendants, within the meaning of article 164, schedule II of the Limitation Act (XV of 1877).

Ravji Ramchandra v. *Ramji Bhikaji*(1) followed.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the order of T. D. Fry, District Judge of Dhárwár, confirming the order

* Application No. 236 of 1906 under extraordinary jurisdiction.

(1) (1888) P. J. p. 56.