

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

MATI LAL RAHA

v.

INDRA NATH BANNERJEE.*

1909
May 26.

Libel—Master and Servant—Publication—Libel by Servant—Scope of Employment—Trade Libel—Libel on Firm—Parties—Privilege—Privileged Occasion—Malice—Evidence of Malice.

A master is liable for a libel written and published by his servant within the scope of his employment.

Citizens' Life Assurance Co. v. Brown (1) followed.

In a suit for libel defamatory of a firm, all the partners should join as plaintiffs.

Le Fanu v. Malcolmson (2) and *Robinson v. Marchant* (3) referred to.

Where there co-exists an interest in the subject-matter of a communication, both in the party making it and in the party to whom it is made, the occasion is a privileged one.

Hunt v. Great Northern Railway Co. (4) followed.

Where the occasion is privileged, the burden of proving actual malice, lies on the plaintiff.

Hebditch v. MacIlwaine (5) referred to.

To prove malice, extrinsic evidence of malice is not necessary. The words of the libel and the circumstances attending its publication may themselves afford evidence of malice.

Clark v. Molyneux (6), *Laughton v. The Bishop of Sodor and Man* (7), *Nevill v. Fine Arts and General Insurance Co.* (8) and *Gilpin v. Fowler* (9) referred to.

ORIGINAL SUIT.

THIS action was instituted by the plaintiffs, Mati Lal Raha and William Joseph Mumford, partners in the Asansol Coal Syndicate, against Indra Nath Bannerjee and his son, Atindra Nath Bannerjee, for a libel alleged to have been published on the 25th July 1908.

* Original Civil Suit No. 748 of 1908.

(1) [1904] A. C. 423.

(5) [1894] 2 Q. B. 54, 58.

(2) (1848) 1 H. L. C. 637.

(6) (1877) L. R. 3 Q. B. D. 237, 245.

(3) (1845) 7 Q. B. 918.

(7) (1872) L. R. 4 P. C. 495, 508.

(4) [1891] 2 Q. B. 189, 191.

(8) [1895] 2 Q. B. 156, 170.

(9) (1854) 9 Ex. 615.

1909
 MATI LAL
 RAHA
 v.
 INDRA NATH
 BANNERJEE.

It appears that in 1902 Indra Nath Bannerjee opened a colliery in the mouza Jote Janki, since which date his coal was sold and known in the market as "Jote Janki" coal. In close proximity to his colliery were situated two other collieries, one belonging to the Singaran Co. and the other to one P. K. Chatterjee—the coal from these collieries being known as "Toposi" and "New Toposi," respectively. The coal produced from all three collieries was known in the market as "second class" coal. It was established in evidence, however, that the coal produced from Indra Nath's pit was superior to the coal produced from the other two pits, and that the "Toposi" coals were about the worst on the market.

In May and June 1908, the Eastern Bengal State Railway called for tenders for the supply of coal for use on their Railway. Indra Nath Bannerjee's firm, Messrs. Bannerjee Santan, tendered for the coal, and in accordance with the practice of the Railway, two wagon loads of "Jote Janki" coal were supplied for the purpose of testing. The coal was duly tested and found to be satisfactory. The result of the test was reported to head-quarters on the 28th June 1908.

On the 30th June 1908, the plaintiffs submitted their tender including therein 30,000 tons of "Jote Janki" coal, at a price 3 annas a ton less than that quoted by Bannerjee Santan. No sample of the coal tendered was delivered to the Railway at the time, nor offered to them until after the date of the alleged libel. It, moreover, appears that on the 30th June 1908 the plaintiffs had no coal coming from the mouza Jote Janki. On the 1st July 1908, however, they entered into a contract with P. K. Chatterjee for the purchase of 24,000 tons of "steam coal from Jote Janki Colliery."

On the 20th July 1908, the Railway authorities accepted the plaintiffs' tender to the extent of 24,000 tons and Bannerjee Santan's tender to the extent of 6,000 tons. It was established in evidence that the Railway authorities accepted the plaintiffs' tender without test, owing to the very satisfactory test Bannerjee Santan's coal had stood and in the belief that the coal tendered for by the plaintiffs was coal of the same quality.

On the 25th July 1908, the following letter, which was the libel complained of, was written and despatched by Bannerjee Santan to the Railway authorities :—

“ 4, Ram Hari Ghose's Lane,
Chambatollah, Calcutta,
25th July 1908.

1000
MATTI LAL
RAMA
S.
INDRA NATH
BANNERJEE.

“ BANERJEE SANTAN,
Colliery Proprietors and Zemindars.

“ To the Manager, E. B. S. Railway,

DEAR SIR,

We beg to bring to your goodself's notice that the Asansol Coal Syndicate have no colliery at or near Jote Janki. We have to inform you that there is no other colliery in Jote Janki, save what we are working. We beg to enclose herewith copy of our letter of date to the Asansol Coal Syndicate. We wonder how the Railway authorities have accepted their tender without making enquiries about the parties and also without trying their coal. We are compelled to write this letter just to safeguard our interest for these people will buy and supply any and every sort of cheap coal to make some profit with the contract in the name of Jote Janki coal, and there will consequently be bad reports on the quality and the name of our Jote Janki coal will be spoiled in your Railway.

Thanking you in anticipation for your prompt action in the matter.

Yours faithfully,
Bannerjee Santan.”

This letter was actually written by Atindra Nath Bannerjee who was engaged in the Calcutta Office of the firm of Bannerjee Santan, and whose duty it was to do such of the correspondence as was required to be done in English. Atindra was originally joined as a defendant, but died during the pendency of the suit.

On receipt of the above letter, the Railway authorities caused enquiries to be made, and discovered that the Asansol Coal Syndicate had no colliery at Jote Janki. Thereupon on the 1st August 1908 the Locomotive Superintendent of the Eastern Bengal State Railway wrote to the plaintiffs, enclosing Bannerjee and Santan's letter, and the result of the enquiries instituted thereon, and calling on the plaintiffs to show cause why the contract for 24,000 tons of Jote Janki steam coal should not be annulled under the circumstances. The Railway never in fact took delivery of the coal contracted to be delivered by the plaintiffs.

This suit was instituted on the 10th August 1908. The plaintiffs alleged that the defendants falsely and maliciously

1909
 MATI LAL
 RAHA
 v.
 INDRA NATH
 BANNERJEE.

wrote and published of the plaintiffs in the way of their trade as colliery proprietors and agents and coal merchants, the words contained in the letter of the 25th July 1908, meaning thereby that the plaintiffs cheated or were guilty of fraudulent practices in their trade, and that by reason of the publication of the libel the plaintiffs had been injured in their business and had suffered loss of credit and reputation; and they claimed Rs. 50,000 as damages.

Several pleas were taken in defence. It was submitted that the suit was bad and defective for non-joinder of necessary plaintiffs, inasmuch as one Alf Ogilvie and one P. B. Ghose, who were partners in the Asansol Coal Syndicate, had not been joined as plaintiffs. Without admitting the writing and publication of the letter complained of, the defendant alleged that the words therein contained were true in substance and in fact, and denied the meaning sought to be put on them by the plaintiffs. He further pleaded that the statements were privileged, and were made in good faith on a privileged occasion for the protection of his own interest to a person also interested. Finally, he denied that the plaintiffs had suffered any damage.

Mr. Buckland and *Mr. Stokes*, for the plaintiffs.

Mr. B. C. Mitter and *Mr. Pugh*, for the defendant, Indra Nath Bannerjee.

Cur. adv. vult.

FLETCHER J. In this suit the plaintiffs seek to recover damages from the defendants for libel.

It appears that the defendant, Indra Nath Bannerjee, is the owner of a colliery in the mouza Jote Janki. In close proximity to his colliery are situated two other collieries, one belonging to the Singaran Colliery Co. and the other to P. K. Chatterjee, the latter of which is or was until recently called the New Toposi Colliery. In or about the year 1902 the defendant Indra Nath opened up this colliery, and his coal was sold in the market as 'Jote Janki' coal. From the evidence given on behalf of the defendant, which I accept, it appears that the seam

worked by Indra Nath was a superior coal to that worked by the Singaran Co. and P. K. Chatterjee. The coal produced from all three pits is, however, coal that is known in the market as 'second class coal.' There can be little doubt, but that the coal from Indra Nath's pit had become known in the Calcutta market amongst people who deal in this class of coal as 'Jote Janki.' The coal from the Singaran Co.'s pit and P. K. Chatterjee's pit being known as 'Toposi' and 'New Toposi.' The evidence on behalf of the defendant Indra Nath, especially the evidence of Mr. Bowrey of Messrs. Macleod & Co., the Managing Agents of the Singaran Co., is clear as to this. It is also in evidence, as stated by one of the plaintiffs' witnesses, that 'Toposi' coals are about the worst on the market.

I have, therefore, come to the conclusion that in the year 1908 coal from Indra Nath's pit had become well recognised in the market amongst people who deal in second class coal as 'Jote Janki' coal.

In May and June 1908 the Eastern Bengal State Railway was calling for tenders for the supply of coal for use on the Railway.

Indra Nath's firm, Bannerjee Santan, sent in a tender to the Railway, and in accordance with the practice of the Railway Bannerjee Santan supplied to the Railway two wagon-loads of their 'Jote Janki' coal for the purpose of testing. The coal was duly tested in the locomotives of the Railway and found to be satisfactory. The result of the test was reported to head-quarters on June 28th.

Two days later, on the 30th June 1908, the plaintiffs tendered for coal to the Railway. The tender included 30,000 tons of 'Jote Janki' coal.

Now, on the 30th June the plaintiffs had no coal coming from the mouza Jote Janki. On the 1st July, however, they entered into a contract with P. K. Chatterjee for the purchase of 24,000 tons of "Steam^o coal from Jote Janki Colliery." No sample of the coal tendered was delivered to the Railway nor offered to them by the plaintiffs until after the date of the libel complained of.

1909

MATI LAL
RAHA

v.

INDRA NATH
BANNERJEE.

FLETCHER J.

1909
 MATH LAL
 RAHA
 v.
 INDRA NATH
 BANNERJEE.
 ———
 FLETCHER J.

The price in the tender sent in by the plaintiffs was less than that in tender of Bannerjee Santan by 3 annas per ton.

On the 20th July, the Railway authorities accepted the plaintiffs' tender and also the defendants' tender to the extent of 6,000 tons.

The plaintiffs have not thought fit to call any person in authority from the Railway. But from the evidence of the Superintendent of the State Railway in the coal-field as to the enquiries that he was directed to make, there can be little doubt that the Railway authorities accepted the plaintiffs' tender without a test of the coal, owing to the very satisfactory test the defendant's coal had stood and in the belief that the coal tendered for by the plaintiffs was coal of the same quality. On the 25th July, the defendant's firm wrote to the Eastern Bengal State Railway the libel complained of. The letter itself was written by Indra Nath's son, Atindra, who was originally joined as a defendant but who died during the pendency of the suit. Atindra was engaged in the Calcutta Office of the firm of Bannerjee Santan. It was his duty to do such of the correspondence as was required to be done in English. It is said that he was not well acquainted with the English language and that his words must not be too closely looked at. To this I am unable to assent. If a firm choose to employ as their correspondent a person insufficiently acquainted with the language in which he is to correspond, they must bear the consequences. To complete the story: on the 1st August, the Locomotive Superintendent of the Eastern Bengal State Railway wrote to the plaintiffs calling on them to show cause why the contract given to them for 'Jote Janki' coal should not be cancelled. To this the plaintiffs replied by their letter of the 5th August.

This suit was instituted on the 10th August.

The Railway have never taken delivery of the coal contracted to be delivered by the plaintiffs.

Now, the first point taken by the defendant is that the plaintiffs have failed to prove publication. It is said that there is nothing to show that any one in the Railway offices

had read both the tender and the libel, and without reading them both no one would understand that the libel referred to the plaintiffs.

To this argument I am unable to assent. It appears from the letters that have been produced that the tender and the letter both came in the usual course to the knowledge of the Railway authorities. But then it is said that even if this be so, yet as Indra Nath takes no active part in his business and the libel was written without the consent or knowledge of Indra Nath, he is not liable in respect thereof. This point is, however, I think, covered by the decision of the Privy Council in *Citizens' Life Assurance Co. v. Brown* (1). The scope of the servant's authority is the same as the scope of his employment, and it was the duty of Atindra under the defendant's manager to conduct the English correspondence. I think, therefore, that the defendant is liable for this letter published by Atindra in the course of his employment.

Next, it is said that one P. B. Ghosh ought to have been joined as a co-plaintiff. The libel sued for in the present case is a libel defamatory of the firm. The damages, therefore, sued for are for the injury to the joint business, and all the partners should join in such a suit: *Le Fanu v. Malcolmson* (2), *Robinson v. Marchant* (3); see also Lindley on Partnership, p. 315. Does then the evidence show that P. B. Ghosh was a partner in the plaintiffs' firm? Now, condition 1 of the General Conditions printed on the form of tender of the Eastern Bengal State Railway is as follows:—"In the event of the tender being submitted by a firm, it must be signed separately by each member thereof." The tender was signed by the plaintiffs and P. B. Ghosh—the latter signing above the signature of the plaintiff M. L. Raha. The plaintiff Mumford, who gave evidence, says that P. B. Ghosh signed as the person sending in the tender. He was, however, challenged to produce the letter containing the terms of the partnership of the Asansol

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(3) [1845] 7 Q. B. 918.

1909
 MATTI LAL
 RAHA
 v.
 INDRA NATH
 BANERJEE.
 ———
 FLETCHER J.

1909
 MATI LAL
 RAHA
 v.
 INDRA NATH
 BANNERJEE.
 ———
 FLETCHER J.

Coal Syndicate. Counsel for the plaintiffs were also challenged to call P. B. Ghosh who was sitting in Court along with Mumford. The letter of partnership was not produced nor was Ghosh called. I think, therefore, that in the absence of this evidence, and having regard to the fact that any person reading the contract would think that P. B. Ghosh signed as a partner, the inference is that P. B. Ghosh is a partner and I hold accordingly.

We next come to the plea of justification. After the evidence of Indra Nath Bannerjee it cannot be seriously urged that the defendant has succeeded on this plea. The statement that "these people will buy and supply any and every sort of the cheap coal to make some profit with the contract in the name of Jote Janki coal" is, I think, a statement of fact and not a comment, and such words are libellous *per se*.

At the same time if it had become necessary for me to assess the damages in respect of this libel, I should have had to take into consideration the conduct of the plaintiffs. The plaintiffs in their letter of the 5th August 1908, to the Eastern Bengal State Railway, do not allege that they or any one else had ever bought P. K. Chatterjee's coal as Jote Janki coal; all they say is that Chatterjee's coal had been sent by rail from the West Jote Janki Colliery siding. This falls far short of showing that Chatterjee's coal was known as Jote Janki. Moreover, the defendant Indra Nath complained to the Railway authorities of the use by P. K. Chatterjee of the name of West Jote Janki Colliery siding as the name of P. K. Chatterjee's siding, and the Railway Co. altered the name of the siding. In addition to this there is the fact, as I hold the evidence proves, that the defendant's coal was known in the market as "Jote Janki" coal, and that P. K. Chatterjee has not produced any contract prior to that with the plaintiffs on 1st July 1908, under which he sold his coal as "Jote Janki" coal. I think, therefore, that the conduct of the plaintiffs, however innocent it may have been, was largely responsible in provoking the libel, and if it had become necessary for me to assess the damages, I should have had to take such conduct into account,

The main controversy, however, in this case has been upon the plea raised by the defendant that the occasion on which the libel was published was a privileged occasion. The case of privilege on behalf of the defendant is put on the ground that the defendant had an interest in the subject-matter of the communication, and that the Railway authorities had an interest or duty in connection with the same matter.

Now, that the defendant had an interest in protecting the name of their Jote Janki coal cannot be doubted, and that the communication was sent to protect this interest appears on the face of it, for the letter says "we have been compelled to write this letter just to safeguard our interest." The Eastern Bengal State Railway had an interest to obtain what they had contracted for with the plaintiffs, *viz.*, "Jote Janki" coal.

If this be so, there can be no doubt that the communication was made on a privileged occasion.

"The occasion had arisen if the communication was of such a nature that it could fairly be said that those who made it had an interest in making such a communication, and those to whom it was made had a corresponding interest in having it made to them. When these two things co-exist, the occasion is a privileged one, and the question whether it was or was not misused is an entirely different one." *Hunt v. Great Northern Railway Co.* (1).

I accordingly hold that the occasion on which the communication was made was a privileged one.

This being so, the burden of proving actual malice is cast upon the plaintiffs: *Hebditch v. MacIlwaine* (2). The plaintiff need not, however, adduce extrinsic evidence of malice as he may rely upon the words of the libel and the circumstances attending its publication. "It is sometimes difficult to determine when defamatory words in a letter may be considered by themselves as affording evidence of malice": per Bramwell, L.J., in *Clark v. Molyneux* (3). If the language used is "much too violent for the occasion and circumstances to which it is applied"

1909
 MATY LAL
 RAHA
 v.
 INDRA NATH
 BANNERJEE.
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 FLETCHER J.

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1909
 MATI LAL
 RAHA
 v.
 INDRA NATH
 BANNERJEE.
 ———
 FLETCHER J.

or “utterly beyond or disproportionate to the facts,” there is evidence of malice to go to the jury. On the other hand, “to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat, the protection which the law throws over privileged communications”: *Laughton v. The Bishop of Sodor and Man* (1). Or as Lord Esher said “a man may use excessive language and yet have no malice in his mind”: *Nevill v. Fine Arts and General Insurance Co.* (2). Having given the best consideration I can to the facts in this case, I have come to the conclusion that the words used in the libel are not so “utterly beyond and disproportionate to the facts” [*Gilpin v. Fowler* (3)] that the letter by itself is sufficient to prove malice. There being no other evidence as to malice, I accordingly hold that the plaintiffs have not discharged the onus that is on them of proving that the defendant was actuated by malice in publishing the libel complained of. In the result, therefore, the present suit fails and must be dismissed with costs on scale No. 2.

Suit dismissed.

Attorneys for the plaintiffs: *Leslie and Hinds.*

Attorney for the defendant: *K. K. De.*

J. C.

(1) (1872) L. R. 4 F. C. 495, 508.

(2) [1895] 2 Q. B. 156, 170.

(3) (1854) 9 Ex. 615.