

JUDGMENT.

SARGENT, C. J.—The production of the receipt by the plaintiff was sufficient to shift the burden of proof to the defendant, and the question to be determined was whether the defendant had proved that the statement contained in the receipt to the [298] effect that the decree in suit No. 434 of 1867 had been satisfied was an incorrect statement. It would be impossible, on the evidence on the record, for any Court to come to the conclusion that the defendant had displaced the burden which is imposed upon him by the existence of the receipt. We, therefore, reverse the decree of the District Court, and restore that of the Subordinate Judge. Costs on defendant throughout.

Decree reversed.

4 B. 298=5 Ind. Jur. 210.

APPELLATE CRIMINAL.

Before Mr. Justice M. Melwill, Mr. Justice Pinhey and Mr. Justice F. D. Melwill.

IMPERATRIX v. B. KAKDE.* [12th February, 1880.]

Defamation—Good-faith—Public good—Indian Penal Code (Act XLV of 1860), s. 499, Exceptions 2 and 9.

The accused person, an editor of a newspaper, published an article in which the following passage, admittedly referring to the complainant occurred:—"Has his (the complainant's) character been inquired into? Does no one remember that this very man was sent by the Subordinate Judge of Sholapur to be prosecuted? Are not the proceedings instituted by the Subordinate Judge to be found on the record?" The Magistrate found that it was literally true that the complainant had been sent to be prosecuted, but that it was also true that the prosecution had, to the accused's knowledge, been ordered to be withdrawn by the District Judge.

Held that, although the statement contained only the truth, it was incomplete and misleading; and that, as the accused was well aware that the prosecution referred to had been withdrawn, and did not injuriously affect the complainant's character, he could not plead that the imputation made by him on the complainant's character was made in good faith, or for the public good.

THE accused was convicted by A. B. Steward, Magistrate (First Class) at Sholapur, of defamation, and sentenced to pay a fine of Rs. 100, or, in default, to suffer two months' simple imprisonment.

The accused Kakde was the editor, printer and publisher of a weekly Marathi newspaper in Sholapur, called the *Kalpataru*. In one of its issues he published an article in which he stated that the Collector of Sholapur had made a rule not to employ a person in the Government service, unless he had passed the public-service examination and then proceeded to comment upon an [299] appointment recently made by the head accountant to the Collector, in the treasury department of his office, of a karkun who had not passed the examination. The karkun was not named, but his personal appearance was so described as to leave no doubt that the article referred to one Bhimrav Shrinivas. The article next alluded to Bhimrav's character in words which, translated into English, run as follows:—"Has his (the complainant's) character been inquired into? Does

* Criminal Application, No. 265 of 1879.

1880
FEB. 3.
APPEL-
LATE
CIVIL.
4 B. 298-
5 Ind. Jur.
150.

1880
FEB. 12.
—
APPEL-
LATE
CRIMINAL.
—
4 B 298=
5 Ind. Jur.
210.

no one remember that this very man was sent by the Subordinate Judge of Sholapur to be prosecuted? Are not the proceedings instituted by the Subordinate Judge to be found on the record? Who bore testimony as to his character? Had he been a candidate of unpretending appearance he would have pained the eyes of all like a log of wood, and would, have passed unnoticed, but this man has a fair complexion, and is handsome, and wears whiskers. He wears a gold bracelet besides: who then does question?"

The article attracted the notice of the Collector, and Bhimrav was officially called on for an explanation. He was subsequently dismissed.

After his dismissal Bhimrav charged Kakde with defamation in respect of the foregoing article. Mr. Steward held that "the remarks made by the accused in his article, to the effect that the appointment of the complainant to the office of karkun was made in direct contravention of this order, were perfectly called for and an honest expression of his opinion on the subject," but that "the reference to the personal appearance of the complainant at once introduces a private element into the criticism." He further held that "he ventured beyond the limits of fair criticism in calling attention to the character of the complainant." He, therefore, found the accused guilty of defamation.

The Joint Sessions Judge at Sholapur, Mr. J. W. Walker, upheld both the conviction and the sentence.

The case was heard by Pinrey and F. D. Melvill, JJ.

Manekshah Jehangirshah, for the accused.—The facts held proved by the Magistrate do not constitute defamation. The Magistrate was wrong in holding that the accused made any [300] personal imputation against the complainant in connection with his employment as a public servant. The Magistrate in his finding says: "I do not think that the complainant should have been appointed to officiate as karkun, even temporarily, and, so far as the writer confined himself to this point, there is nothing to say against the article." What the accused did, was in strict performance of his duties as a journalist. In good faith he called the attention of the authorities and the public to the unauthorized employment of an unpassed person in the public service. That this was for the public good, is conclusively shown by the fact held proved by the Magistrate, viz., that the article resulted in the dismissal of Bhimrav. The reflections, if any, were rather against Bhimrav's employer than himself.

Namabhai Haridas (Government Pleader), for the Crown.—This Court is bound to accept findings of fact, and can only deal with questions of law in this case. It has been found as a fact that the accused has exceeded the limits of fair criticism, and that he wrote, not for the public good, but with interested motives to serve private ends. The accused had himself published an article in which he expressed satisfaction at the order made by the District Judge for withdrawing the criminal prosecution of the complainant. He must, therefore, have known that the insinuations he was making in his present article were unfounded. This shows conclusively that his remarks were not made with due care and attention, and, therefore, not made in good faith, and cannot have been for the public good. There is evidence to show that Bhimrav was dismissed because he had overstayed his leave. Under these circumstances the Court has no power to interfere with the conviction.

JUDGMENT.

PINHEY, J.—The accused has been convicted of defamation by Mr. Steward, First Class Magistrate at Sholapur, in that, as publisher of a newspaper called the *Kalpataru*, he published an article containing defamatory matter in regard to the complainant, Bhimrav Shrinivas. The article begins with comments on the strictness with which the Collector of Sholapur insisted on only passed men being employed in the public service, and then goes on to ask, how it has come about that a man who has not passed [301] the public-service examination has been lately appointed to a karkun's place in the treasury. The article then asks whether this man has been appointed because he is good-looking, has long whiskers, and wears a gold bracelet, whether any inquiry has been made as to his character, and whether it is remembered that this very man was sent by the Subordinate Judge to the Magistrate for prosecution. There can be no doubt that Bhimrav Shrinivas is the person here referred to. He was appointed by his relative, the head accountant at Sholapur, to a karkun's place in the treasury without the sanction of the Collector or Deputy Collector, which ought to have been obtained. He has not passed the public-service examination, and was on this account dismissed (rightly the trying Magistrate considered) from the office to which his relative had appointed him, twenty-three days after he was appointed, apparently from the fact of his improper appointment having been brought to public notice by the article in the *Kalpataru*. It follows, then, that Bhimrav was improperly appointed, as the Magistrate held, and was dismissed because he had not passed the requisite examination. The Magistrate considered that, so far as the article referred to the impropriety of Bhimrav's appointment by reason of his being an unpassed man, it did not pass the bounds of legitimate criticism; but he held that the rest of the article was defamatory, that is, the part that referred to Bhimrav's personal appearance and his gold bracelet, and that inquired whether his character had been ascertained, and whether the criminal prosecution ordered by the Subordinate Judge was remembered. As to the beauty of Bhimrav, there is no evidence whatever. He admits that he wears a gold bracelet. He admits that the Subordinate Judge ordered his prosecution before a Magistrate, but adds, that the prosecution was allowed to drop, as the District Judge considered that a departmental, and not a criminal, offence had been committed by Bhimrav, whom the District Judge dismissed.

As a matter of law I hold that the sarcastic reference to the beauty of Bhimrav's countenance and the length of his whiskers cannot be held to be defamatory; nor can the allusion to the gold bracelet, which Bhimrav admits that he constantly wears, be defamatory; and it seems to me impossible to hold, that the [302] question asked about the criminal prosecution ordered by the Subordinate Judge is defamatory, in the face of the admission of Bhimrav that the prosecution was ordered, and that he was dismissed from the public service for the act for which a prosecution was ordered, and when it is remembered that the object of the writer was to bring to public notice the re-appointment to the Government service of this once dismissed man. Bhimrav in his evidence told the Magistrate that he did not complain of the article until he had sustained injury from it by his dismissal; but his dismissal was caused by the fact that he had not passed the qualifying examination; and he went on to say that he did not consider that the article was written or actuated by any ill-will or malice that the accused had towards him, and that he and the editor of

1880

FEB. 12.

APPEL-
LATE

CRIMINAL.

4 B. 298-

5 Ind. Jur.

210.

1880
 FEB. 12.
 —
 APPEL-
 LATE
 CRIMINAL.
 —
 4 B. 298 =
 3 Ind. Jur.
 210.

the paper scarcely knew each other. I think, therefore, that the article complained of was a true statement of facts which was published for the interest of the Collector, and for the interest of the public, and was such an article as an honest editor might and ought to publish, and is within the ninth exception to s. 499 of the Indian Penal Code.

I would, therefore, reverse the conviction and sentence recorded by the Magistrate as contrary to law; but as my brother Melvill does not agree with me in this view of the case, the case must go before another Judge under s. 271-B of the Code of Criminal Procedure (Act X of 1872).

F. D. MELVILL, J.—It has been found as a matter of fact that certain parts of the article did exceed the limits of fair criticism, and that they formed at issue of reflections upon the character of the complainant. The trying Magistrate was clearly of opinion that their publication was not justified in any way. It has been urged before us that the accused was justified by the fact that he was writing for the public good. But this is a question of fact which has been virtually decided against the accused, and which we, as we are not sitting as a Court of Appeal, cannot go into. I would, therefore, without going into the merits of the case, reject the application.

The case was referred to M. Melvill, J., who delivered the following judgment:—

[303] M. MELVILL, J.—In considering this case I propose to confine my attention to the following passage in the newspaper article complained of:—“Has his (the complainant’s) character been inquired into? Does no one remember that this very man was sent by the Subordinate Judge of Sholapur to be prosecuted? Are not the proceedings instituted by the Subordinate Judge to be found on the record?” The insinuation which I understand to be conveyed by this passage is, that the complainant was a man of questionable character, because he had been criminally prosecuted, and that he ought not to have been employed in the public service, until the circumstances of the prosecution had been inquired into, and the suspicion created by the prosecution had been removed. Now, it was, no doubt, literally true that the complainant had been charged by the Subordinate Judge before a Magistrate with misconduct in the performance of his duties as a member of the nazir’s establishment. But, it was also true, that the charge had been withdrawn by order of the District Judge, who was the superior authority to whom the Subordinate Judge was subordinate, and, who held, that there were no grounds for the prosecution which the Subordinate Judge had ordered. It is clear, therefore, that the fact of the prosecution afforded no ground for any imputation upon the character of the complainant, and that there was no reason for demanding any inquiry into the circumstances of the prosecution, as a preliminary to the employment of the complainant in the public service.

It further appears, that the accused editor was fully aware of the withdrawal of the criminal charge and of the reasons for such withdrawal, for he had at the time inserted an article in his newspaper, in which he mentioned the circumstances under which the prosecution had been stayed, and expressed his satisfaction with the result. Under these circumstances I hold that the accused was not justified in insinuating that the complainant was a person of doubtful character, because he had been criminally prosecuted. I consider that the accused is not entitled to the benefit, which he claims, of the second and ninth exceptions to s. 499 of the Indian Penal Code, which refer to opinions and imputations

expressed and made in good faith, and for the public good. The opinion expressed by the accused, that the character [304] of the complainant required investigation, because he had been criminally prosecuted, was not expressed in good faith, because the accused knew that the circumstances of the prosecution called for no inquiry; and, although the statement made by the accused contained only the truth, yet it contained only half the truth, and it was not for the public good that an imputation should be conveyed by a statement which was misleading because it was incomplete.

For these reasons I concur with Mr. Justice F. D. Melvill in thinking that we should not interfere with the Magistrate's order.

I have not thought it necessary to consider whether that portion of the article complained of, which refers to the dismissal of the complainant from the office of bailiff, is or is not defamatory. But I may observe that Mr. Justice Pinhey appears to be mistaken in supposing that the complainant was dismissed for the same act for which the criminal prosecution had been ordered. The complainant was dismissed merely because he had overstayed his leave; and dismissal for such a cause would be no ground for any imputation upon the complainant's character, and perhaps could scarcely affect the question of his fitness for re-employment in the service of Government.

Petition rejected.

4 B. 305.

[305] ORIGINAL CIVIL.

Before Sir Charles Sargent, Justice.

JIVANJI NOORBHOY (*Plaintiff*) v. COORJI LILLADHAR AND OTHERS
(*Defendants*).^{*} [4th and 14th April, 1879.]

Marine insurance—Insurable interest—“Interest or no interest” effect of these words in a policy—Stat. 19, Geo. II, c. 37—Loan on ‘avung’—Insurance effected after loss of subject matter of insurance—Meaning and effect of the words “lost or not lost” in a policy.

Policies of insurance between Natives of India (those, at least, which do not contain the words “interest or no interest”) are to be construed in the same way as such instruments have been uniformly construed by the general law merchant in Western Europe, *viz.*, as contracts of indemnity.

A certain trade is carried on between native merchants in Western India with the coast of Africa and Madagascar by means of native vessels which leave the Indian ports early in the year, and after remaining in the ports of Africa and Madagascar for four or five months, leave on the return voyage about August or September. This trade consists in shipping goods at the Indian ports, to be disposed of at the African and Madagascar ports, and purchasing with the proceeds fresh goods to be similarly disposed of in the home ports. To enable traders to embark in this venture, it is their practice to borrow money of merchants on what is termed ‘*avung*’; that is, money borrowed on the condition that it is not to be repaid except in case of the safe arrival of the goods in the home ports on the return voyage, in which event the loan becomes repayable with interest at a high rate.

Held. that, having regard to the long-established practice, in the port of Bombay of insuring such risks, the interest of the lender of such a loan, in the goods on board a ship on her return voyage to India, is an insurable interest.

Semble—That an *avung* loan does not give the lender a charge on the goods.

^{*} Suit No. 772 of 1877.