

ORIGINAL CIVIL.

Before Mr. Justice Robertson.

NAMUBAI (PLAINTIFF) v. DAJI GOVIND WARANG (DEFENDANT).*

1910.

September 24.

*Civil Procedure Code (Act V of 1908), Order XXV, rule 1—Woman plaintiff—
Application for security for costs—Suit for defamation—Court's discretion.*

N, a widow, brought an action against D, praying that D might be restrained from repeating or publishing certain defamatory statements concerning N, and that D might be ordered to pay Rs. 5,000 or such other sum as the Court should think fit as damages. D took out a summons in Chambers calling upon N to show cause why she should not give security for the payment of D's costs under Order XXV, rule 1, Civil Procedure Code (Act V of 1908).

Held, that under the circumstances of the case it would be a wrong use of the Court's discretion if the Court practically defeated the suit at that stage when it was almost, if not quite, ripe for hearing, by ordering the plaintiff to lodge security.

Held, further, that the Court was entitled, as a discretion was given it under the section, to exercise that discretion only upon certain terms which it was entitled to impose on the plaintiff.

THE plaintiff, a young widow of the Agri community, sued the defendant for defamation, alleging that on or about the 24th June 1910 the defendant falsely and maliciously without just cause or excuse and with the intent to disparage the reputation of the plaintiff said in Bombay that the plaintiff was in illicit intercourse with one Waman Hari Mahatre.

The plaintiff further alleged that on or about the 27th day of June 1910 the defendant falsely and maliciously without just cause or excuse and with the intent to disparage the reputation of the plaintiff repeated in Bombay in the presence of others the said defamatory and false statement.

In consequence of these statements the plaintiff received a letter dated 12th July 1910 from the *panch* of her community which was as follows:—

The undersigned sends greetings to the whole of the Wadhkar Agri community. On hearing a very bad report, the details of which are given below, we pass the following resolution:—

“Daji Govind Warang, liquor vendor in a shop at Wadala, is circulating a report that Namubai, the widow of Bapuji Ballaji Thakur, is in illicit intercourse

* Suit No. 640 of 1910.

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with Waman Hari Mahatre, a resident of the same place. Under these circumstances, unless the lady gets the matter cleared up either through the community or the Courts, we the members of the community residing in this village will not be able to decide as to the truth or falsity of this report. We the *panch* of the community have informed Namubai of this, fearing that the community will be polluted in case the report is true: so from today she and all the members of the family together with the children should not associate with the caste. If they do so associate they will be responsible to the community. They should not associate in any caste dinner or ceremony. Until this charge is cleared up the members of the family of the lady whose names are Mahdeo Bapuji Thakur and Sadashiv Bapuji Thakur with their families are all excommunicated from the community."

On receipt of this letter the plaintiff through her attorneys called upon the defendant to tender an unconditional apology, but the defendant refused to do so. The plaintiff thereupon filed the suit praying that the defendant might be restrained from repeating or publishing the said defamatory statements about the plaintiff, that the defendant might be ordered to pay to the plaintiff as and by way of damages the sum of Rs. 5,000 or such other sum as the Court might deem fit and that pending the final disposal of the suit the defendant might be restrained from repeating or publishing the said defamatory statement.

The defendant by his written statement denied that he made the allegations complained of or that he repeated the same. He further denied that the plaintiff had been excommunicated. On 15th September 1910 the defendant took out a Chamber summons calling upon the plaintiff to show cause why she should not give security for the payment of all costs incurred and likely to be incurred by the defendant.

This summons came on for argument before Robertson, J., in Chambers on 24th September 1911.

Shortt for the defendant in support of the summons.

Mirza for the plaintiff showed cause.

ROBERTSON, J. :—This is a summons taken out by the defendant calling upon the plaintiff to show cause why she should not deposit security for the defendant's costs under Order XXV, rule 1.

The discretion given by that rule is one of the most difficult that a Court can be called upon to exercise. On the one hand it is clear that to refuse to make the order would in a number of cases open the door to very great injustice being done to the defendant, who would be put in the position of having either to defend the suit at his own costs or to pay something to the plaintiff to settle the suit. On the other hand it is perfectly clear that a rigid application of the power to order security to all cases, except the very narrow class, which was suggested by the defendant's counsel in this case, might very often result in nothing less than an entire denial of justice to the plaintiff merely on the ground that he or she had not sufficient money to prosecute the suit.

In this case practically the only test I can apply to see whether I ought to make this order or not is the test of *bona fides*. Is this a *bona fide* suit brought by this lady for the vindication of her honour and incidentally for the protection of her right to be paid maintenance? She is a Hindu widow and if she sits down under this accusation of unchastity, it is clear that it will not be long before steps are taken to deprive her of her maintenance. For the purpose of seeing whether it is a *bona fide* suit or not, it appears to me that Exhibit B to the plaint is a most important document. That purports to be a decision of a meeting of the caste, which took place on the 12th of July last. It is signed by six of the leading members of the caste and states: "On hearing a very bad report the details of which are given below we pass the following resolution: Daji Govind Warang, liquor vendor in a shop at Wadala, is circulating a report that Namubai (that is the plaintiff), the widow of Bapu Balaji Thakur, is in illicit intercourse with Waman Hari Mahatre, a resident of the same place." I am not dealing with the point whether or not that is in any way evidence against Daji Govind Warang that he actually did circulate that report; but it shows that those who are in the best position to know were of opinion that he had been circulating the report, and therefore there is not the slightest reason for doubting the plaintiff's *bona fides* in believing that it was Daji Govind Warang who did circulate the report. I do not think that the

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letter of the 16th of July 1910, written by his solicitors on behalf of the defendant, is couched in such terms as would be likely to remove the strong suspicion that it was the defendant who had circulated this report, which would arise on the perusal of Exhibit B to the plaint; further I do not think myself that the written statement of the defendant is altogether so free from ambiguity as his counsel has suggested it is.

Under these circumstances without in the least expressing an opinion of what the result will finally be, it appears to me beyond all reasonable doubt that the plaintiff in filing this suit has been actuated by perfectly *bond fide* motives, and that it is filed in the *bond fide* belief that the defendant is the person who circulated this report, and for the *bond fide* purpose of protecting her right to maintenance, and defending herself against the gravest charges of immorality.

Under these circumstances, it appears to me that it would be a wrong exercise of the discretion that I have under Order XXV, rule 1, if I were to practically defeat the suit at this stage when it is almost, if not quite, ripe for hearing, by ordering the plaintiff to lodge security. At the same time I think that I am entitled, as a discretion is given me under the section, to exercise that discretion only upon certain terms, which I think I am entitled to impose upon the plaintiff. And I only refuse this application on the distinct undertaking by the plaintiff that she will abandon all Police Court proceedings, which she has instituted against the defendant. If she does not do that, then I shall be prepared to hear any renewed application that the defendant may make for the exercise of my discretion under Order XXV, rule 1. In the meantime I think that the defendant, having regard to the Police proceedings, which were taken against him, was excused for coming here to make this application. No doubt the summons was taken out before the defendant knew anything about the Police Court proceedings; but the Police Court proceedings having been taken out, it is quite clear he would on its coming to his notice be entitled to come to this Court for protection from concurrent proceedings in the Police Court and in this Court,

by a confessedly impecunious party. I, therefore, direct that the costs of this summons be costs in the cause; but the summons itself will be discharged. Counsel certified.

Attorneys for the plaintiff: Messrs. *Sabnis* and *Goregankar*.

Attorneys for the defendant: Messrs. *Smetham, Byrne & Co.*

Summons discharged.

B. N. L.

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ORIGINAL CIVIL.

Before Sir Basil Scott, Chief Justice.

THE WEST END WATCH COMPANY (PLAINTIFFS) v. THE BERNA
WATCH COMPANY (DEFENDANTS)*

1910.

November 22.

Trade-mark—Imitation—Abandonment—Intention—Defendants improperly representing that their business to be business carried on by plaintiffs—Injunction—Raising of issues—Practice—Procedure.

The plaintiffs had since the year 1887 been importing into and selling in India watches manufactured at the St. Imier Factory in Switzerland. These watches bore the name 'Berna' on the dial. In 1907 the plaintiffs complained of the watches supplied by the St. Imier Factory and began to import watches largely from other manufacturers, while they ceased giving orders to the St. Imier Factory. In the year 1908 the St. Imier Factory was purchased by the defendants and at the time of purchase the defendants asked the plaintiffs whether the defendants could positively count upon the plaintiffs to be their regular customers for the articles previously taken from the St. Imier Factory. The plaintiffs replied that they were willing in principle to reserve a part of their orders for the defendants, but that it would first be necessary for the latter to give an idea of what they were going to manufacture and the improvements they were going to make in the quality of the watches. In one of their catalogues printed in 1907 the plaintiffs announced:—

"We take this opportunity of informing our customers that the name 'Berna' will be changed to 'Service' as soon as our present stock of these watches is sold out. The trade-mark will in other respects remain unaltered. The alteration of the name is done to secure a trade-mark which cannot be imitated in India or elsewhere."

On the 6th of November 1908 the defendants opened a place of business in Bombay and issued a circular, dated February 1909, in which, on behalf of the

* Original Suit No. 297 of 1909.