ap. 25 of 1917
ap. 56 of 1916
Suit No. 337 of 1916
Coram Batchelor J
delivered on 5-11-17

This is an appeal under cl. 15 of the Letters Patent from a decree of a Bench of this Court consisting of the C.J. and Heaton J. These learned Judges having differed in opinion, it was held that the judgment of the C.J. must prevail, that is, that the suit must be dismissed. The pltf consequently brings the present appeal.

The pltf is a voter of this Court, and the suit was filed to obtain damages for libel alleged to be contained in two articles which appeared in the Bombay Chronicle and were admittedly written by the editor of that journal, the 1st deft. To him I shall refer in future as the deft, as the substantial defence is made on his behalf.

The circumstances in which the articles complained of came to be written, are as follows. Among the pltf's clients were two well-to-do men, one Dada

and

and one Tatia Saheb Holkar. In 1912 Dada, in the name of his mother, Rakhmibai, entered into an agreement with Holkar for the purchase of a valuable house, the property of Holkar. But Holkar was unable to carry out his agreement as he had already agreed to sell the house to one Khambatta, who obtained against him a decree for specific performance. Dada then instituted a suit agst Holkar claiming damages for breach of the contract of sale, and this suit was ultimately settled in January 1914 by the payment of ₹3,000 by Holkar to Dada. At this time there was in the service of the pltf a clerk named Shambhuprasad, who died in June 1914, leaving a brother named Bhagvandas. In July 1915 Bhagvandas through his solicr, the pltf, filed a suit on a promissy note for ₹ 3000, executed by Dada in favour of Shambhuprasad. The suit was ~~filed~~ instituted as a short cause, but, a written statement being

being filed by Dada in August the
pltff was discharged as solicr on the
record on 9th Sept 1915. Stated shortly,
Dada's defence to this suit was that the
prom. note had been passed without
consideratn, that Shambhuprasad
was the mere nominee or prête-
nom of the pltff, and that the note
was passed on an understanding
with the pltff that he was to be
paid Rs 3000 if, as he promised,
he succeeded in obtaining for
Dada a sum exceeding Rs 20,000
as damages in Dada's suit agst
Holkar. Dada went on to plead
that, as he had received nf Rs 9,000
in his suit agst Holkar, he had
refused to honour the prom. note,
and hence the suit brought agst
him by the pltff in the name of Bhagvandas.
Bhagvandas's suit came on for
hearing before the late Dasar J. on
Saturday the 26th. Febry 1916. Issues
were raised, among them being the
issue whether, as Dada contended,
the pltff was a necessary party.

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On the Saturday two witnesses were called by Bhagvandas as to the promissory note, but admittedly these witnesses' evidence was not such as any Court could accept. Then the Deft went into the witness box, being an indispensable witness for Bhagvandas, and denied generally the truth of the allegations made agst him in Dada's written statemt. At this hearing a beginning was made of the cross-examn of the Deft, but this cross-examn was far from being finished when the Court rose for the day, and the case stood over till the following Monday, the 28th Febry. On the case being called on on the Monday, Bhagvandas thro' his counsel immediately submitted to a decree dismissing the suit with costs, the learned Judge observing that in taking this course Bhagvandas had acted very wisely. The present Deft made no intervention either by way of protest or by way of

applicatn

application to the learned Judge for an inquiry into the charges made in the written statement: he acquiesced in the dismissal of the suit with costs, and these matters rested for the time. A week later, that is, on 7th March, appeared the first of the two articles now complained of, but again the Deft made no sign. On the 15th March the newspaper published the second of the two articles, and on the 18th March the Deft files the present suit.

The question is whether these articles libel the Deft, in other words whether the Deft in these articles has transgressed the limits of fair comment allowed to a journalist. I agree with the C.J. in thinking that this question must be answered in the Deft's favour. I find that all material facts are truly stated in the articles, though it may be that there are one or two small deviations from absolute accuracy

on

on minor points which are of no influence on the conclusions, and I find that the conclusions are such as ought to be drawn from the premises by a critic bringing to his work the amount of care, reason and judgment which is required of a journalist.

In the first place it is not alleged that there was any pre-existing malice or ill-will between the parties, and it is not denied that the subject matter of the articles, the conduct of a solicitor of this Court as disclosed in proceedings in this Court, is a topic of public interest and importance. Then I must give it as my own opinion, after a careful reading of the articles, that the real object of them is, not to condemn the Petitioner out of hand, but to pray for further investigation into serious allegations which had been

in solemn affirmation

been made as to his integrity, ~~in solemn affirmation~~, and which were still left in the region of controversy.

I now read the material passages from the articles complained of, as those passages are set out in paras 5 and 6 of the plaint :-

[Here copy the passages cited in paras 5, 6 of the plaint †].

(Ch 2.31 Printed Book)

As

As the case has been argued before us by the learned Adv. Genl. for the Deft, the imputations complained of as libellous fall into two classes and may conveniently be summarised as follows :-

(a) the imputation that in bringing an unsustainable suit agst Dada, Bhagwandas was acting merely as the creature of the Deft, who acquiesced in the dismissal of the suit, though Dada's charges agst him were thus left unrefuted and unanswered;

(b) the imputation that the Deft was guilty of grossly unprofessional conduct in the manner in which he settled Dada's suit agst Holkar and in writing an untrue letter with the object of disguising that misconduct.

In regard to point (a), the defft pleaded fair comment; in regard to (b), the defence was justification quoad the facts stated, and, for the rest, fair ~~defence~~ comment.

So far as concerns the law, the principal authorities bearing upon the question of libel by a journalist are cited and considered in the judgments of the C.J. and Heaton J. In the view I take of the case no useful purpose would be served by any further discussion of those authorities. So far as the question of law concerns this appeal, I do not think we need travel far beyond the decision of the Court of Appeal in Hunt v Star Newspaper Co [(1908) 2 K.B. 309], where Cozens Hardy, M.R., said:- "The defence "of fair comment only arises in the "event of the plea of justification failing, but the plea

"plea of justifn may fail by reason of
"the facts stated not being substantially
"true." Here of course, on the first charge,
the plea of fair comment is the only point
for considn, for there is no plea of justifn;
but I quote the passage to show that
the M. R. required only that the statement
of facts should be, not absolutely, but
substantially true. It is true that the
adverb is not repeated in the judgts
of the other Lords Justices, but the learned
Advo. Genl. admits that he cannot demand
more than that the facts stated shd
be substantially true. In the same
case Fletcher Moulton L. J., as he then
was, lays down the law in the words
used by Lord Atkinson in Dakhyl v
Labouchere [(1908) 2 K.B. 325], pointing
out that, where the Judge has ruled
that a personal attack can reasonably
be inferred from the truly stated
facts, "it is for the Jury to determine
"whether in that particular case
"the inference ought to be drawn." In

other

other words, the learned Lord Justice continues,
"a libellous imputation is not warranted
"by the facts unless the jury hold that it
"is a conclusion which ought to be
"drawn from those facts."

The only other cases to which I think it may be of advantage to refer are South Shelton Coal Co. v N.E. News Assn [1894] 1 Q.B. 143] and Risk Allah Bey v Whitehurst (18 L.J. 615). I need not discuss these cases. I refer to them only as establishing propositions which, in my judgment, are not now open to controversy. These propositions are that while the defendant is bound to comment on public questions with care, reason & judgment, he is not necessarily deprived of his privilege merely because there are slight, unimportant deviations from absolute accuracy of statement, where those deviations do not

affect

affect the general fairness of the comment. The articles must be considered rather in their entirety than by separate insistence on isolated passages, and the jury — where there is a jury: in our case the judges — must decide what impression wd be produced on the mind of an unprejudiced reader who, knowing nothing of the matter beforehand, read the articles straight through.

These, in my judgment, are the material propositns of law, and on the understanding that those propositns are correct, I am of opinion that the defence shd prevail.

On the first imputation, which I have marked (a) above, the defts case appears to me particularly strong, and it is to be noticed that this is the real gravamen of the articles, the imputation marked (b)

being

being far less serious. To professional misconduct in settling a case over the head of the solicitor on the record is venial indeed compared with instigating one's clerk's brother to institute a false suit. It is now admitted that, as to the first imputation, the deft is entitled to be judged by the facts properly available to him at the time when the articles were written, without regard to facts which the deft subsequently has established or sought to establish. The critical question, therefore, is: what were the facts then known to the deft?

First, he knew that the antecedent probabilities were in favour of Dada's version, for it was obviously unlikely that Dada, a rich man, would have borrowed Rs 3000/ from a solicitor's clerk of very limited means. Secondly, he knew that Shambhu?, to whom the note purported to be passed, was at the time

time the pet's clerk. Thirdly, he knew that, practically from the first, Dada had put forward one & the same answer to the claim, an answer which, in the circumstances, bore on the face of it, to anyone familiar with Indian methods, a fair appearance of being true. Fourthly, and above all, he knew the fate of Bhagvandas' suit, a circumstance which spoke eloquently in favour of Dada and was difficult of reconcilement with the pet's denials. Indeed if I had been on a jury appointed to try this issue, I sh? have said without any doubt that the conclusion here drawn by the deft ~~was~~ ought to have been drawn, and was, in fact, the only reasonable conclusion open to a disinterested mind. For, how stood the suit when the Court rose on the Saty evening? The two witnesses called to prove the making of the note had contradicted each other beyond

beyond hope of reconcilement. And the deft himself, so far forth as his cross-examn had gone, had, in my judgmt, cut a pitiable figure. On this point I will content myself with quoting the passage where his cross-examn had to be broken off for the day. These are his words:-

"Dada sent a notice of claim to "Holkar. I don't remember if Dada consulted me before sending the notice. I did not write the notice on behalf of deft. I think D'Cunha did. Deft asked me what to do when he heard of Tatya Saheb's agreemt with Khanderao. I don't remember what I told him. I don't remember if I drafted a notice on behalf of the deft. I will not swear that I did not. I did not send deft to D'Cunha. I don't remember if I gave a draft of a notice to be taken to D'Cunha to be written by him and addressed to me. I can't say whether I

did

did it or did not. I do not remember if I told to Jeff to go to some other solicr saying that I wd. act for Holkar."

In plain English, when directly questioned whether he did not do certain thoroughly unprofessional & dishonourable things, Jeff's only answer is that he cannot remember. Has his conscience been easy, there could have been no tax on his memory. As to the excuse that he was "frightened by counsel", I do not believe it: that would be a good argument in the case of an illiterate villager, but is very unlikely to be true of a Bombay solicr.

With this cloud resting upon him on the Saturday evening, one wd expect to find Jeff anxious to dispel it on the Monday morng. What we find, however, is that Jeff is spared from any further cross exn as Bhagvandas consents to the suit being dismissed with costs, the learned Judge observing that in so doing Bhagvandas was acting very wisely. What that meant, must have been manifest to all in Court. But the

Jeff

Pelt stands by, acquiesces in the dismissal, and makes no sign or protest or application that the charges agst him should be withdrawn or investigated. As a juryman, I sh^d. not hesitate to draw the inference that his main anxiety was to escape further cross-examn, hoping that it would be nobody's business to investigate the charges now that Dada was satisfied. There were but two cases before the Court, that of Bhagvandas & that of Dada: Bhagvandas submitted to defeat, lest worse should happen, and it was a fair inference that Dada's account was probably true. In all this the Pelt quietly acquiesced, and his present reasons for that acquiescence may be stated. It is enough to state them, for they carry their own comment. "On the "28^th., the following Monday, I was "prepared," he says, "to continue my "evidence, when M^r. Bahadurji, pelt's "counsel, informed the Court that the "suit was going to be dismissed. I was "not surprised. I was quite indifferent, as "I was not concerned." And he remained

unconcerned

unconcerned, and continued unconcerned even after the appearance of the first alleged libel on the 7th March. When the second article appeared on the 15th March, and it was clear that the attitude of unconcern was not likely to evade the charges, then the suit was brought on the 18th March.

It is true that, as the learned Adv. Genl. has urged, the Deft had on solemn affirmation formally denied that Bhagwandas was his nominee, and I agree that this fact ought not to have been withheld, but ought to have been stated for whatever it is worth. But the omission cannot, I think, serve as a set-off against all the evidence on the other side. I do not think it can be said that deft designedly suppressed all reference to Defts denial. I think rather he took it for granted that his readers would assume that the solicr charged with fraud would deny the fraud, for, except upon that implication, no further inquiry wd be needed, and the gist of the articles is to demand inquiry.

On two small points of verbal

criticism

criticism I think it will be enough to state my opinion summarily. As to the phrase "little doubt", the deft is entitled to say that it means what it says, and does not mean "no doubt." As to "unrefuted", I think that "refuted" means disproved, satisfactorily met, put out of controversy; and the word "unanswered" in its context seems to me to bear the same meaning as "unrefuted". On both points, therefore, I accept the interpretation offered for the deft.

Upon this first imputation there is one misstatement of fact. According to the article it was deft who explained that it would not look well if the note were taken in the solicr's name, whereas in fact Dada's case was that it was Shambhu Prasad who offered this explanation. This inaccuracy appears to me of no consequence for three reasons: first, the deft, who should know where he is libelled, has never complained of it, nor was the point ever taken till in this second appeal it was suggested by my Brother Marten; secondly, it is obvious, in Dada's case, that even

though

though the actual speaker may have been Shambhu[D], he was the mere mouthpiece of his master, the deft; and, thirdly, in the fourth para of Dada's writt. statt. it was expressly asserted that the demand for the Rs 3000 was made by the deft in person.

With regard to the argument that deft was not justified in using the "Observations" brought to him, at his request, by Engineer, the discharged clerk and avowed enemy of the deft, I entirely agree that in seeking help from Engineer the deft acted very indiscreetly, and ran very grave risks. But this circumstance will not affect the result if I am right in holding that all substantial matters of fact are truly stated, and all comments on the facts are fair within the meaning of the law as already explained. In justice to the deft it must also be remarked that all that he acted upon was, not any verbal assurances or statements of Engineer, but three official papers which, though produced by Engineer, would naturally be assumed by the deft

to be above reproach. Indeed the present objection is confined to one of the papers, viz the observations for counsel, and it is the fact that these observations had never been submitted to counsel. But the deft did not know that, and I do not think that he is obnoxious to very grave censure if he supposed that these formal observations for counsel had a foundation in truth. All this, however, is not in my view very material, because my exoneration of the deft is based on the opinion that his facts are true and his comments fair.

I have now discussed all the arguments which were addressed to us on interpretation (a), and for the reasons given I find that the defence of fair comment must succeed.

The

The second imputation, that which I have marked (b) above, is, as I have said, of a far less serious character, and may, I think, be dealt with more summarily. The gist of it is that the Deft settled Dada's suit agst Holkar in a manner contrary to professional rules or etiquette, and then — this is "the sting of it", says the learned Adv. General — wrote an untrue letter in order to conceal the professional misconduct. The letter in question, admitt written by Deft to the other solicrs, is in these terms:

> "We are informed by our client's agent that the above suit has been settled by the parties out of Court. ..... We are informed that our client has written to you accordingly."

The question really turns on the meaning to be put upon this letter. But before that is considered, it will be convenient to notice the argument of the Ad. Gen. that the Deft must fail here because he is guilty of two misstatements of fact. These misstatements are, it is said, first that, according to the article, Deft gave his own cheque to Dada, whereas the fact is that Deft gave Holkar's cheque; and secondly, that,

according

according to the article, there was no intervention of any agent at all, whereas the fact is that, on behalf of Holkar, his agent, Venkatrao, took part in the settlement.

As to the first of these statements, it is admitted that it is a misstatement - that in fact the cheque was Holkar's, and not Pelli's. But the inaccuracy appears to me to be immaterial - to fall within the slight margin of error allowed by law, because it signifies nothing, and never did signify anything whether the cheque was the Pelli's or Holkar's: nobody has ever suggested that the money was Pelli's, and it was common ground that it came from the pocket of Holkar. Moreover, I feel sure that the inaccuracy was a bonâ fide slip due to a not unnatural reading of a passage in Dada's writ. stmt. The passage runs

> "The said suit agst Tatya Saheb
> "Holkar was settled by Mr Suraimal
> with this deft for Rs 9000/ for
> damages. When Mr Suraimal ~~the deft~~ gave
> this deft a cheque in payment
> of Rs 9000/, etc".

In

In my opinion this passage would suggest to many readers that Surajmal gave his own cheque.

As to the second alleged misstatement of fact, that brings me to a consideration of the meaning of the letter, for the question whether there is, or is not, a misstatement turns upon the meaning of the passage which I have cited from the letter. The deft's assertion is

> "As a matter of fact, there was no
> "intervention on the part of any
> "'agent' at all. The matter was
> "settled between Mr Dada and
> "Mr Surajmal direct, and the latter
> "wrote this letter, it is alleged,
> "to prevent it being known that
> "he had communicated with or
> "seen Dada in the absence of
> "his solicitor."

The passage which I last quoted from Dada's writ. stmt. is, I think, sufficient answer to the contention that for these allegations the deft had no better authority than the "Observations." And as I read the present excerpt from the alleged

libel

libel, what it imputes is that Jeff settled with Holkar (or his agent) and Dada over the head of Dada's solicitor, D'Cunha, and that there was no intermediary between Jeff and Dada. I do not think the imputation is that Holkar was not represented at the settlement, nor would there have been any point in making such an assertion. The point is, as I understand it, that here again (according to Dada's version) the whole business was really Jeff's though Dada was put up to file the suit, and consequently when the suit came to be settled, we find Jeff settling on behalf of Dada without reference to Dada's then solicitor, D'Cunha. I must say candidly that that is what the passage means to me after all the argument we have heard, so that I feel safe in saying that, at least, that is what the words may have conveyed to a fair, unprejudiced reader. But upon that meaning I find

find that the defence is established. For there was no reference to D'Cunha, and the letter commented on was in fact written by Pelf. In the present suit, no doubt, the Pelf asserts that the settlement was made by Engineer & Vinayak without consulting him. Engineer, on the contrary, says that Pelf took part in the settlement, and that is intrinsecally so much the more probable story that I believe it, though Engineer is a poor witness, and, on their merits, I see little to choose between him & the Pelf. In the suit of Bhagwandas all that the Pelf said upon this point was "The arrangement "was brought about ~~between~~ by Nanabhai "Cavasji Engineer who was lately my "managing clerk." Further corrobn of this view is, I think, supplied by the admitted fact that Pelf himself drafted the letter Exh 2, a letter from Dada (in the name of his mother Ashidibai) to D'Cunha apprising the latter that the suit had been settled. I cannot doubt that Pelf was himself instrumental in

making

making this settlement with Holkar, and admittedly this was done "over the head of", i.e. without reference to, Dada's solicr. When, therefore, we find the Deft writing to the other solicr that the Deft is merely "informed" of the settlement by Vinayak, I think it is perfectly fair comment to say that this is <u>suggestio falsi</u>, intended to conceal the fact that the settlement was made by the Deft himself.

On these grounds I am of opn that on the second imputation also the defence must be allowed; in other words the appeal fails, and this Court's order should be that the Defts' suit be dismissed & Deft shd pay all costs throughout.

SLB

Appeal No 25 of 1917
Appeal No. 56 of 1916
Suit No. 337 of 1916

Surajmal B. Mehta — } appellant

v/s

B. G. Horniman & ors } Respt defts

Coram Batchelor

with Beaman J. & Martin J.