

Appeal No. 25 of 1917.

Appeal No. 56 of 1916.

Suit No. 337 of 1916.

Surajmal B. Mehta... .. Applt & Plff

vs

B. G. Horniman and others. ... Respts & Defts.

*Coram Martin J
delivered on 5-11-17*

J u d g m e n t .

In this libel action the Plaintiff Surajmal is a solicitor and the three Defts are or were the Editor Printer and Proprietor respectively of a newspaper called " The Bombay Chronicle ". The alleged libel relates to Surajmal's professional conduct in two actions, viz, Suit 907 of 1912 Ashidbai v T. S. Holkar which was a suit for damages for breach of contract of sale of real estate and Suit 837 of 1915 Bhagwandas v Dada which was a suit on a Promissory Note for Rs 3000.

The circumstances giving rise to the alleged libel, are as follows. In 1912 Surajmal had two rich clients, viz, Tatyasaheb Holkar, whom I will call " Holkar ", and Haji Ahmed Haji Hassam Dada, whom I will call " Dada ". In that year Holkar sold some land in Napean Sea Road twice over, viz, first to a purchaser called Khambatta, and secondly, in February 1912 to Ashidbai as Dada's nominee. As re-

gards this second sale which was for Rs 66000 Surajmal acted for both the vendor and the purchaser. The first purchaser Khambatta then brought an action for specific performance against Holkar and obtained a decree therein. In that action Surajmal acted for Holkar.

In August 1912 Dada by his mother and nominee Ashidbai brought against Holkar the above suit 907 of 1912 for damages for breach of the contract of February 1912. This suit was settled in January 1914 by Holkar paying Dada Rs 9000 as damages. In this suit Surajmal acted for Holkar and a Mr. D'Cunha acted for Dada.

Meanwhile on the 26th. April 1913 Dada had executed a Promissory Note for Rs 3000 in favour of a clerk of Surajmal's named Shambhuprasad. This clerk died on the 12th. June 1914 leaving a brother named Bhagwandas who claimed the Promissory Note as a joint family asset to which he was entitled by survivorship.

Subsequently in July 1915 Bhagwandas brought against Dada the above suit 837 of 1915 to enforce the Promissory Note. In this suit Surajmal acted for Bhagwandas until September 1915 when there was a change of solicitors until-September-1915 ^{Messrs} Mr. Hiralal Mehta & Co. thenceforth acting for Bhagwandas. Dada also changed his solicitors, being represented at first by Vacha & Co. and afterwards, viz, in February 1916 by Ardeshir Hormasji Dinsha & Co.

The Written Statement in that suit was declared on the 17th. August 1915 and raised a startling defence which in effect was as follows:- Dada alleged that Surajmal had instigated him to bring the 1912 suit: that Surajmal promised he would influence his client Holkar to pay Rs 20000 to Rs 25000 as damages: that Surajmal was to be paid by Dada Rs 3000 if such damages were in fact obtained: that the Promissory Note was in respect of such Rs 3000 and was passed in the name of Surajmal's clerk Shambhuprasad as nominee for Surajmal, who, it was submitted, was a necessary party to the suit: that as only Rs 9000 had been obtained as damages Dada was not liable on the Promissory Note and had received no consideration ^{thereof} thereof and he accordingly counterclaimed for its cancellation and delivery up. ^{up.}

This then was the position when the 1915 suit came on for trial before Davar J on Saturday 26th. February 1916, and it will be seen that the suit involved issues of a very grave character for Surajmal, although he was not a party to the proceedings and was no longer on the record as Solicitor for the Plff. ~~in that suit~~. At the trial the Plff in that suit proceeded to call his evidence although the onus would appear to have been on his opponent. His first two witnesses claimed to have been present at

the execution of the Promissory Note and the payment of the Rs 3000 but appear to have been ^{seriously} somewhat shaken in cross-examination. Then Surajmal was called and after denying in examination-in-chief the allegations made against him was partly cross-examined by Mr. Davar when he soon showed a somewhat surprising ignorance as to what advice he had given Dada when told of Khambatta's prior contract of sale; and as to whether he had drafted a notice for Dada to send to Holkar; and as to whether he had advised Dada to go to another solicitor. Stopping here for a moment I ^{must} most respectfully dissent from Mr. Justice Macleod's criticism of this cross-examination. In my opinion Mr. Davar was quite entitled to ask the questions he did, and I may further observe that ^{before us} the Advocate General ~~before us~~ expressly declined to put forward any contention to the contrary. In fact the cross-examination was never finished, as on the Monday morning (28th. February 1916) the suit was abruptly withdrawn, and according to the newspaper report, Ex. S, the Judge observed that it was an extremely wise step to take and ordered that the suit should be dismissed with costs. Surajmal appears to have acquiesced in this notwithstanding that the Saturday's proceedings had been reported in the public press. At any rate he made no sign. Even the first alleged libel which was published on the 7th. March elicited no response

from him and it was not till after the publication on the 15th. March of the second alleged libel that an apology was asked for and the present suit instituted. It is also noteworthy that in cross-examination in the present suit after stating that he was not surprized at Counsel's statement to the Court that the 1915 ^{suit} was going to be dismissed, Surajmal added " I was quite indifferent as I was not concerned".

As regards the alleged libellous articles, they have been read and re-read several times over and I do not think it necessary to repeat them here. It will be seen that they demand an enquiry by the proper authorities into Surajmal's conduct in relation to the 1912 and 1915 suits and in particular as to (1) the charge that the Promissory Note ^{for Rs 3000} was in effect a secret commission or bribe taken by Surajmal as the price for giving his client Holkar certain advice and that the 1915 suit was a false suit engineered by Surajmal and (2) the charge that Surajmal settled the 1912 suit over the head of Dada's solicitor and then by his letter of the 19th. Janaury 1914 endeavoured to create the false impression that the parties themselves had settled the suit.

Of these two charges, the first is by far the most serious. The second is little more than an alleged breach of professional etiquette apart from the interpretation to be put on the letter of 19th. January 1914.

The defence is substantially one of fair comment. In particular the Defendants do not contend that Charge No. 1 is true. As regards Charge No. 2 they justify some of the details obtained ~~ali-unde~~ ^{aliunde} and for this purpose rely on para 6 of the Written Statement.

The legal principles governing a defence of fair comment are set out by Lord Ludlow in South Helton Coal Co. v N. E. News Association, 1894, 1 Q. B. 133 at p. 143ⁿ⁻⁴, by Lord Cozens Hardy in Hunt v The Star Newspaper Co. Ltd., 1908, 2 K. B. 309 at page ³¹⁷ ~~309~~; and by Lord Atkinson in ^{Dakhy} ~~Dakhy~~ v Labouchere, 1908, 2 K. B. 325 (Note) and have been cited again in the Court of Appeal in Peter Walker & Son Ltd v Hodgson, 1909, 1 K. B. 239. I need not repeat them. It is sufficient to say that in the present suit the Advocate General accepted Lord Cozens Hardy's view in Hunt v The Star Newspaper Co. Ltd. that the statement of facts must be substantially true and did not rely on the literal interpretation of Lord Collins's Judgment in Digby v Financial News Ltd, 1907, 1 K. B. 502 at ^{pages 507-8,} ~~page 507,~~ which is to the effect that there must be no misstatement of fact whatever.

Turning then to the first charge, there is one clear misstatement of fact, for it was not Surajmal but Shambhuprasad who was alleged to have said it would not look good for the Promissory Note to be in Surajmal's name. The

misstatement is not nowever pleaded nor was it raised at either the trial or the first appeal and before us the point was only taken as the result of a remark from the Bench towards the close of the Advocate General's opening speech. Under all the circumstances I think that the misstatement even if now admissible must on the Plaintiff's own showing be regarded as too minute or trivial for him to rely on as defeating the plea of fair comment.

largely relied on the fact that the article omitted to mention omission in the article of Surajmal's denial of
The Advocate General did strongly rely on the ~~article omitting to mention that Surajmal denied the charge in examination-in-chief. The article shows however that he was being cross-examined and I think one would infer that~~ under cross-examination and I think the inference would be that he had previously denied the charge. Otherwise ^{why} was he called and what need would there be to ~~cross-examine~~ him.

I have carefully considered all the other points raised on Surajmal's behalf, e. g., as to the words "creature", "very little doubt", "content to have the case withdrawn and the allegations left unrefuted". But as Sir Basil Scott pointed out in his judgment we must consider what the writer of the article knew at the time, and must disregard matters subsequently proved or alleged in the present suit. At that time the writer had not before him Surajmal's evidence in the present suit. But he did have before him Surajmal's conduct

on the withdrawal of the 1915 suit. I quite recognize that a lawyer may remember the saying "No case, abuse the Plaintiff's attorney" and may properly be slow to take offence. But a line must be drawn somewhere and I think it may be drawn at a charge of fraud. Speaking for myself, I regard it as almost inexplicable for any respectable solicitor to behave like Surajmal did in making no protest or appeal whatever either to the Judge or to the Law Society so that his character might be cleared of the charges of fraud made against him. Surajmal's own explanation, viz, that he was quite indifferent as he was not concerned, demands in itself an explanation, but this of course was said in the present suit and was not before the writer of the article and I therefore merely use it as showing that even now no real explanation has been given of Surajmal's silence. In my judgment therefore the writer was justified in drawing very adverse inferences from Surajmal's behaviour and from the Judge's comment that it was extremely wise to withdraw the suit.

There is too another important consideration. The story as to the cash consideration for the Promissory Note having broken down at the

trial, how came it that Dada signed this Promissory Note in favour of Surajmal's clerk at a time when he was engaged in litigation with a client of Surajmal's, viz, Holkar. Dada's story is in effect that it was a bribe. There is no other explanation even now of this Promissory Note which admittedly is a genuine document. I recognise that Surajmal if innocent would not know the real origin of the Pro Note, e.g., if it was part of a fraudulent scheme concocted by the deceased clerk alone. But this possibility has to be taken into consideration with the other circumstances of the case, and the unexplained origin of the Pro Note is in my opinion a matter from which an adverse opinion could fairly be drawn. In saying this I have not overlooked the fact that Dada on his own showing was in effect an accomplice in the attempted fraud on Holkar, and that Nanabhai from whom the Defts obtained some information was a discharged clerk of Surajmal and on hostile terms with him. A fair critic would therefore regard anything these men said with caution, and in fact Dada has never gone into the witness box and Nanabhai at the present trial was shown to be an unreliable witness. The case does not however depend on whether the statements of these two men were all true.

Looking then at the articles as a whole, and after giving my best consideration to the judgments at the trial and on the first appeal, I think the articles did not exceed the bounds of fair comment as regards the first and graver charge I have mentioned.

n.p. As regards the second charge, it is —————

true that the Defendant Horniman amplified the allegations made in para 4 of the Written Statement in the 1915 suit and relied on matters contained in " Observations for Counsel" which in fact were not before Counsel at the trial. But if in consequence of this it becomes necessary to justify, I think Surajmal did in effect settle the 1915¹⁹¹² action over Mr. D'Cunha's head. Even on his own showing his clerk Nanabhai brought about the settlement in company with Holkar's agent, Vinayakrao. Surajmal further admits, having drafted the letter, Ex.2, which Mr. D'Cunha's client was to send to Mr. D'Cunna informing him of the settlement of the suit. I also think that Surajmal's letter of the 19th. January 1914, Ex F, was in such terms as to give Mr. D'Cunha the erroneous impression that the parties themselves had settled the suit. Under these circumstances I am not disposed to regard as vital any inaccuracy in the passage " as a matter of fact there was no intervention on the part of any agent at all". It is clear that no agent was acting for Jada in the settlement. It is also clear that Surajmal by himself or his clerk Nanabhai took part in that settlement, and that Surajmal either knew of the settlement himself or was informed of it by Nanabhai. That being so, why write to Mr. D'Cunha " We are informed by our client's agent ", meaning thereby Vinayakrao, unless it was to create a wrong impression. Under these circumstances,

I think that even if the passage alleges in effect that Vinayekrao gave no information or assistance, it is not of a substantially sufficiently substantial character to defeat either the plea of fair comment or that of justification. So too as regards the statement that Surajmal gave his own cheque this is not true but is either a fair inference from Dada's Written Statement or if not, is unimportant in the view I take of the case.

There are other points in connection with this second charge which have been raised in argument and duly considered by me including what I have already said about the unavailability of Narabhai, but looking again at the articles as a whole, I think on a full consideration of the circumstances I think the Defendants succeed on this second charge as well as on the first.

In the result therefore I think that the Plaintiffs appeal should be dismissed and the Defendants' cross-appeal as to costs allowed, the result being that the action will be dismissed and that the Plaintiff will pay the costs of the action and of both appeals. ^{and} ^{refused} ^{already} ^{paid to} ^{him should be refunded.}

A. B. Martin
5 Nov. 1917.

ap. 25-17

ap 56-16

Suit No 337-16

O.O.C.T

Filed in. 14 of 1917
Suit No. 337 of 1916

Principal B. Mehta

B. S. Horniman & Co.

Chungking Bank & Co.

Judgment of Master J.

delivered on 5-11-17

coram. Martin J.

with Batchelor J. & Besman J.

Filed in. 14 of 1917
Suit No. 337 of 1916
Principal B. Mehta
B. S. Horniman & Co.
Chungking Bank & Co.
The day of November 1917

that there is a
system of law in
the meaning of
of the Civil Procedure Code
therefore the rule is absolute for
a certificate
appeal

1917