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Rajindra Kishore Sahi Vs Durga Sahi

Court: Allahabad High Court

Date of Decision: May 13, 1966

Acts Referred: Criminal Procedure Code, 1898 (CrPC) â€" Section 107
Evidence Act, 1872 â€" Section 132
Penal Code, 1860 (IPC) â€" Section 499

Citation: AIR 1967 All 476 : (1967) 37 AWR 163

Hon'ble Judges: S.S. Dhavan, J

Bench: Single Bench

Advocate: R.B. Misra, S.R. Misra and U.S.M. Tripathi, for the Appellant; V.B.S. Srivastava, for the Respondent

Final Decision: Dismissed

Judgement

S.S. Dhavan, J.
This is a plaintiffs second appeal from the decree of the Additional Civil Judge, Deoria reversing that of the First

Additional Munsif, Deoria and dismissing his suit for recovery of Rs. 500 from the defendant--respondent as damages for slander. The plaintiff

appellant Rajindra Kishore Sahi is a practicing lawyer of Deoria and that the defendant respondent Durga Sahi is his pattidar. The relations

between them have been bad, and a number of proceedings, civil and criminal, have been fought between them. In 1959 the dispute led to

proceedings u/s 107 Cr.P.C. and there were two cross-cases. In one of them the plaintiff-appellant and his brother were the accused, (State v.

Ravindra Kishore Sahi and others) and in the other the defendant respondent Durga Sahi and his party were the accused. The case against the

plaintiff-appellant was heard on 6-2-1959 and Durga Sahi gave evidence as a prosecution witness.

The plaintiff appellant, who appeared as counsel for himself and his brother, cross-examined Durga Sahi. During the cross-examination the

appellant asked him whether he had ever been convicted of theft u/s 379 I.P.C., and Durga Sahi replied that he was not a thief and then

volunteered the statement that the appellant himself was a thief A little later he explained that he did not mean that the appellant was a thief but that

he harboured thieves, and patronised all the badmashes in the village. He also made a statement that the appellant''s, grandfather Manandeo

Prasad Sahi had been convicted u/s 110. The exact words used by the respondent Durga Sahi were these:

Mannan Deo Prasad Sahi Ki 110 Men Sal Bhar ki saja huwi thi .... Chor aap khud hain ... Rajindra Kishore Sahi ko chor kahta hun. Yah kahta

hun ki way chor hain. Dehat ke tamam badmash aap rakhte hain.

After the proceedings, the plaintiff appellant filed the present suit. He contended that the statement that he was a thief or harboured thieves and

badmashes was false and defamatory, and had been made by the respondent Durga Sahi maliciously and with intent to defame the appellant. The

respondent resisted the suit and denied all liability. He contended that the words imputed to him were never uttered by him; alternatively that they

were absolutely privileged as he had made them while giving evidence in judicial proceedings before a court of law.

2. The trial court believed the plaintiff-appellant and disbelieved the respondent, and held that the respondent did make the statements imputed to

him. It also held that the abatements were false and defamatory of the appellant. It further held that the statements were not privileged as they were

volunteered and, not made in reply to the question put to the respondent in cross-examination. It held that the appellant was entitled to recover

damages from the respondent and awarded a decree of Rs. 500. On appeal the learned Additional Civil Judge agreed with the trial court teat the

respondent did make the statements alleged against him and that they were defamatory, but held that no action for defamation lay against the

respondent as the statements were made by him as a witness, in judicial proceedings and were absolutely privileged. He allowed the appeal and

dismissed the suit. The plaintiff has come here in second appeal.

3. Learned counsel for the appellant argued that the view of the lower appellate court that the statements are absolutely privileged is erroneous. He

contended that a witness who, when asked a question in cross-examination while answering it makes a slanderous and defamatory statement

against the counsel loses his privilege as a witness and becomes liable to pay damages for defamation. On the other hand counsel for the

respondent contended that the statement of a witness in judicial proceedings is absolutely privileged, however malicious, irrelevant or defamatory it

might be.

4. This case involves the question of defining the limits to the doctrine of absolute privilege as regards statements made by a witness on oath in

judicial proceedings for which he is subsequently sued for defamation. Under the English Law the following statements are absolutely privileged, so

that no action will lie in respect of them, however false, defamatory and malicious they may be:--

1. Any statement made in the course of and with reference to judicial proceedings made by am Judge. Jury man, party, witness, or advocate. (It is

not necessary for me to consider the other classes of privileged statements).

But it is important to note that the statement to be privileged must be made in the course of and with reference to judicial proceedings. If the

offending statement has no connection with the proceedings, and is made wantonly and without reference to these proceedings, the person making

them cannot claim privilege. This qualification is explained by Salmond as follows:

The statement, in order to be privileged, need not be relevant, in the sense of having a material bearing upon the matter in issue in the case. Thus,

the statement of a witness is privileged, even though inadmissible as evidence, and even though so immaterial that no prosecution for perjury would

be possible in respect of it. Nevertheless the statement, though it need not be relevant in this sense, must, it would seem, be made in the course of

and with reference to the case in hand. A judge who from the bench makes a defamatory observation in respect of some entirely extraneous matter

would no longer be speaking in his capacity as a judge, and would have no privilege-- Salmond on Torts, 11th Edition page 461.

Winfield explains the limits of absolute privilege as regards statements made in judicial proceedings thus:

The statement is not privileged if it has no reference to the inquiry which is proceeding. This is generously interpreted and the privilege of a witness

is not limited to statements for which, if untrue, he might be indicted for perjury. But it would not extend to an entirely irrelevant answer

unprovoked by any question put to him: e.g. June?"" he replies, ""Yes, and X picked my pocket there"". Winfleld on Torts, 6th Edition P. 335.

5. The question whether the doctrine of absolute privilege should be applied to statements made in judicial proceedings in India was answered in a

Full Bench of five judges of this court in Chunni Lal Vs. Narsingh Das, . In this case it was observed that as there is no statute in India dealing with

civil liability for defamation the rule to apply is that of justice, equity, and good conscience. The Bench adopted the Privy Council"s interpretation

of the words ""Justice, equity and good conscience"" to mean the rules of English Law if found applicable to Indian society and circumstances. It

further held that there was nothing in the circumstances and society of this country that would make it improper or inadvisable to apply to India the

English rule of privilege, which is well established in England. The case before the Bench did not arise out of a statement made by a witness but out

of a petition presented to a criminal court by a party.

In that case the defendant Chunni Lal had filed the complaint against his lawyer Narsingh Das alleging that he had misappropriated a sum of Rs.

100 entrusted to him for the purpose of standing surety and executing a bail bond. The complaint was dismissed after a preliminary inquiry and

without issuing process to the lawyer. He then filed a criminal complaint against hit, client Chunni Lal u/s 499 I.P.C. which was dismissed on the

ground that Chunni Lal was protected by the ninth Exception to Section 499 I.P.C. The lawyer then filed a civil suit claiming damages for libel The

defence was that the statements made in the complaint were absolutely privileged. The matter was referred to a Bench of five Judges in view of the

previous conflict of opinion in this court and between the different High Courts in India The Courts held that as there was no statute in India dealing

with civil defamation, the rules of equity, justice, and good conscience must be applied and these rules meant those of the English Law if found

applicable to Indian society and circumstances.

The Bench rejected the argument advanced on behalf of the plaintiff by Sir Sunder Lal that the rules of English Law should not be applied to India

because the social conditions are different--a fact which had been recognised when the doctrine of absolute privilege was rejected in favour of a

qualified privilege to Section 499 I.P.C. The reason given by the Bench in rejecting this argument was that a criminal enactment cannot be

interpreted as amending the civil law by implication. I would like to observe, with great respect for the five learned Judges, that it was not the

argument of Sir Sunder Lal that a criminal enactment can or should be interpreted as amending the civil law by implication. As far as I can

understand it from the report, his argument was that the fact that the Indian Penal Code departed from the English doctrine of absolute privilege

indicated that our legislature recognised that Indian social conditions are different from the English and had therefore admitted that the principles of

equity, justice and good conscience are not necessarily identical in both countries.

6. However, the doctrine of absolute privilege as a defence in a civil suit for defamation was firmly established by this decision, and has been

accepted and approved in every subsequent case.

7. But two aspects of this decision must, however, be noted. First, it related to a defamatory statement made by a party in judicial proceedings;

Secondly, it did not consider the limits of the doctrine of absolute privilege. Even under the English law the privilege is subject to the condition that

the offending statement must have some connection with the proceedings in which it is made. The Full Bench in Chunni Lal Vs. Narsingh Das, had

no occasion to discuss this condition because the statement which gave rise to the defamation was so obviously connected with and relevant to the

proceedings in which It was made that it required no discussion.

8. But in subsequent cases, this Court has had the occasion to consider whether there are any limits to the doctrine of absolute privilege, and if so

what. In Rahim Bakhsh Vs. Bachcha Lall, the Court had to consider whether a defamatory remark made by an advocate during a suit was

protected under the doctrine. In that case one Bachcha Lal, a partner in a firm called Moolchand Ram Prasad, was prosecuted u/s 420 I.P.C. The

complainant''s witness was, being cross-examined and was asked whether the firm (of which Bacha Lal was a partner) was the biggest in the town

The witness answered ""yes"", and at this stage the pleader of the complainant remarked, and it is also the most dishonest in the town"" Bacha Lal

filed a suit for damages for slander. The defence was that the statement was absolutely privileged as it had been made by a counsel appearing in

judicial proceedings This plea was rejected by the Division Bench on the ground that the defamatory statement had no reference to the matter

before the Court and was irrelevant and therefore the pleader could not plead privilege in defence.

The English Law is virtually the same. In Rahim Bakhsh Vs. Bachcha Lall, that ""words spoken by an advocate in the course of the defence of his

client, however, defamatory they may be of the prosecutor, are not actionable, ""provided they be relevant to the matter in hand and spoken in

good faith"" though there must be considerable latitude in the matter of the freedom of his speech before a Court concerning the action in which he

is employed"". The words underlined (here in "" "") by me indicate that even under the English Law an advocate cannot claim privilege for any

defamatory remarks which have no reference before the court.

A similar limit has been fixed under the English Law to the privilege claimed by a witness. In (1883) 11 QBD 588 the privilege of a witness was

described thus: ""with regard to witnesses, the chief cases are, Revis v. Smith (1856) 18 C.B. 126 and Henderson v. Broomhead (1859) 4 H & N.

569 and with regard to witnesses, the general conclusion is that all witnesses speaking with reference to the matter which is before the Court--

whether what they say is relevant or irrelevant, whether what they say is malicious or not--are exempt from liability to any action in respect of what

they state, whether the statement has been made in words that is, on viva voce examination, or whether it has been made upon affidavit. ""Thus the

absolute privilege of a witness was confined to statements which are made by him with reference to the matter before the court. By necessary

implication, it was held that a statement by a witness which has no connection with the matter before the Court is not protected under the doctrine

of absolute privilege.

9. In Seaman v. Netherclift (1876) 2 C.P.D. 53 it was held that a witness in a court of justice is absolutely privileged as to anything he may say as

a witness having reference to the inquiry on which he is called as a witness. In this case a witness who was an expert in handwriting, was asked a

question suggesting that in a previous case his opinion that a particular will was a forgery had been severely criticised by the Presiding Judge. In

reply he admitted this fact and then volunteered the remark. ""I believe that will to be a rank forgery, and shall believe so to the day of my death.

Subsequently, one of the attesting witnesses to the will brought an action of slander for these words against him The action was dismissed and it

was held that the words were spoken by the defendant as a witness and had reference to the inquiry before the Magistrate, as they tended to

justify the defendant, whose credit as a witness had been impugned; and that the defendant was, therefore, absolutely privileged.

Cockburn, C.J. made it clear that the doctrine of absolute privilege conferred upon a witness is not without limits. He observed, ""But I agree that if

in this case, beyond being spoken maliciously, the words had not been spoken in the character of a witness or not while he was giving evidence in

the case, the result might have been different. For I am very far from desiring to be considered as laying down as law that what witness states

altogether out of the character and sphere of a witness, or what he may say de hors the matter in hand, is necessarily protected. I quite agree that

what he says before he enters or after he has left the witness-box is not privileged, which was the question in the case before Lord Ellenborough--

(in Trotman v. Dunn (1815) 4 Camp. 211). Or if a man when in the witness-box were to take advantage of his position to utter something having

no reference to the cause or matter of inquiry in order to assail the character of another, as if he were asked: Were you at York on a certain day?

and he were to answer: Yes, and A. B. picked my pocket there; it certainly might well be said in such a case that the statement was altogether de

hors the character of witness, and apt with in the privilege." Our Court has recognised that there are limits to the absolute privilege conferred on

counsel or witnesses appearing in judicial proceedings.

In B. Sumat Prasad Jain, Advocate Vs. Sheo Dutt Sharma and Another, a Division Bench of this Court held that a counsel acting professionally in

a cause, is absolutely protected from a suit for defamation for words spoken or written in his professional capacity in the course of the

administration of the law in respect of that cause even though the words are uttered or written without justification and maliciously and are

irrelevant to any issue then before the Court, unless it can be shown that the words said or written in the course of the administration of the cause

or suit are not said or written in reference to that cause or suit and are in that broad sense irrelevant (my emphasis).

In that case an advocate was sued for libel for having stated in the written statement drafted by him on behalf of his client that the suit against his

client had been brought in collusion with the plaintiff''s son who was an ""awara"". The Court held that the statement was absolutely privileged,

though entirely unjustified and defamatory. But, while dismissing the suit, the Bench observed, ""....the only question that remains is to fix the

boundary of relevancy at which the privilege of an advocate ends. As the learned Lord Chief Justice pointed out in (1876) 2 C.P.D. 53 in

reference to a witness, it is obvious that even in the presence of the Court a point can be reached at which departure from relevancy takes a

witness'' or even an advocate''s words and actions altogether outside the realm of his office, and it is possible that to that extent motive might to

some extent be material But unless that boundary has been prima facie shown to have been crossed, my view is, that no enquiry can properly be

made as to the extent if at all, that an advocate has exceeded or departed from his instructions or has even acted from improper motive Upon the

point of fixing the boundary at which irrelevancy in an advocate amounts to an abandonment of his office"" a learned Judge of the Madras High

Court, Venkatasubba Rao J. in Duraiswami Thevan Vs. K.N.K.L. Lakshmanan Chettiar, observed that relevancy in relation to the absolute

privilege is not to be construed, narrowly but rather in the sense of ''having, reference or being ''made with reference'' to the inquiry in the course of

which the question arises. It is obvious that, even in a Court, a party, a witness or an advocate may say something which has no reference

whatever to the proceedings going on, as, for instance, if a man were to come in at the door of the Court and the party, the witness or the

advocate were to say him ""that man picked my pocket"" obviously no question of privilege would arise, where such a statement were made not ""in

office"" at all.

While accepting the authority of Full Bench in Chunni Lal Vs. Narsingh Das, the Bench observed. ""But I should not wish to imply that there is no

limit to the immunity of an advocate from the consequences of his words and acts in the causes he conducts There comes a point at which

''irrelevance'' in the sense in which it has been explained above, takes him out side his ''office'' altogether. When that point is reached, he ceases to

be an advocate even in a Court. At what point that stage is, reached in any particular case, must necessarily vary with the facts. But, until it has

been shown that what an advocate says or writes in the course of the administration of a ""suit is not said or written in reference to that suit, and is in

the broad sense ''irrelevant'' I should hold that in his client''s interest rather than in his own, he enjoys an absolute privilege. And, in my view at

least, a prima facie case of irrelevance in the wide sense must be shown in the suit against him before his conduct can even be inquired into in a

Court of law. When, however, irrelevance in the proper sense is established, then the absolute privilege of the advocate ceases.

10. The Bench also made it clear that the broad interpretation of absolute privilege given by it was limited to the case of an advocate and did not

necessarily extend to a wit ness. The learned Judge observed."" ""I should desire to add that what I have said refers to the privilege of advocates and

of the other recognised legal representatives of parties. Whether it applies to witnesses and to the parties themselves to the same extent is not a

question with which it is necessary for me to deal in this appeal and I particularly desire to express no concluded view.

11. The Lahore High Court has also held that the doctrine of absolute privilege conferred upon a witness has its limits. In Jiwan Mal v. Lachhman

Dass AIR 1926 Lah 486 it was held that a remark made by a witness wholly irrelevant to the matter of inquiry, uncalled for by any question of

Court and introduced by the witness is not privileged. In that case the trial court while hearing a petty suit between the parties suggested a

compromise, and to this suggestion one of the parties, Lachhman Dass replied. ""A compromise cannot be effected as Jiwan Mal (who had got

nothing to do with the suit) stands in the way. He had looted the whole of Dinanagar and gets false case set up."" This Jiwan Mal was a Municipal

Commissioner of Dinanagar and when fee came to hear what had been said he filed a suit for damages for slander. The defence was that the

statement made in the Court by Lachhman Dass was absolutely privileged.

Rejecting this plea the High Court held that the remark made by Lachhman Dass was wholly irrelevant to the matter of inquiry and was uncalled for

by the question of the Munsif. A review of the authorities leads me to the following conclusions: In India the principles governing the privilege of a

witness are not the same in criminal and civil defamation. u/s 499 I. P. C. the absolute privilege enjoyed by a witness under the English Law has

been reduced to a qualified privilege But in civil defamation, there being no statute or code governing the law of torts, the principles of the English

Law, which are based on equity justice and good conscience are applied unless they are shown to be inapplicable due to social conditions

prevailing in this country. Therefore, a witness making a statement in judicial proceedings, who is subsequently sued for slander for having made

that statement, can claim absolute privilege unless it can be shown that the statement was made without any reference to the proceedings before the

Court and had no connection with them.

12. Applying these principles to the case before me, the question is whether the offending statement made by the defendant respondent was

absolutely privileged That it was false and defamatory has been conceded before me. But learned counsel for the respondent claimed absolute

privilege on the ground that it was made in answer to a question by counsel in cross-examination. The plaintiff-appellant, who was the cross-

examining counsel, asked the respondent whether he had ever been convicted of the offence of theft u/s 379 I.P.C. Instead of giving a straight

answer, the respondent replied, ""Chor main nahin hun Chor aap khud hain. Rajindra Ki shore Sahi (the plaintiff-appellant) ko chor nahin kahta hun.

Yeh kahta hun ke way chor rakhte hain. Dehat ke tamam badmash aap rakhte hain.

Ordinarily, I would have no hesitation in holding that this kind of answer had no reference to the proceedings before the Court and is a gross abuse

of the privilege of a witness A counsel cross-examining a witness is perfectly entitled to ask him if he was ever been convicted of the offence of

theft, and if instead of giving a straight answer, yes or no, the witness starts abusing the counsel or flinging mud at him and making defamatory

statements regarding counsel''s character, he must be deemed to have if I may borrow the words of Brown J. crossed the boundary at which

irrelevance takes him outside his office as a witness.

13. But in this case the position is complicated by the fact that the proceedings in which the question was asked and answer given were two cross

cases u/s 107 Cr.P.C. and the cross-examining counsel was himself an accused in one of the cases. In his plaint, the plaintiff appellant has admitted

that the relations between the plaintiff and the defendant had been strained for some time before these proceedings and that the police had sent up

two cases u/s 107 Cr.P.C. in which the plaintiff appellant was the accused in one case and the defendant-respondent, the witness for the

prosecution. He further admitted that when the respondent appeared M a witness against him, he cross-examined him ""for himself and his brother"".

14. Now ordinarily a cross-examining counsel has no personal interest in the result of the case--except of course, the normal professional interest

of every counsel to win his case - and every question put by him to shake the credit of a witness is presumed to be disinterested. Therefore, if a

witness instead of replying to his question gives the reply attacking the character of the counsel himself he cannot claim any privilege when

subsequently sued for slander. But where the cross-examining counsel is himself a party to the criminal proceedings u/s 107 Cr.P.C. and puts a

question to a witness who is also a party in the other cross case, and in answer to his question the witness gives an answer defamatory of counsel''s

character, it cannot be said that the answer is irrelevant to the inquiry or has no reference to the proceedings. In such a situation it is difficult for a

witness to draw any fine distinction between the position of his questioner as counsel and as party. I am there fore inclined to the view that the

answer given by the respondent did not cross the limit of relevance in view of the peculiar position of the plaintiff appellant who was appearing both

as a party and as counsel in his own cause.

15. I dismiss this appeal but in the circumstances direct the parties to bear their own costs throughout.

16. Before leaving this case I would like to draw the attention of the Law Commission to the unsatisfactory state of law with regard to the doctrine

of absolute privilege as applied to witnesses making defamatory statements in judicial proceedings. As the law of torts had not been codified yet, it

is still governed by the English Law on the ground of equity, justice and good conscience. But the reasons on which the absolute privilege of a

witness is founded under the English Law are not always valid in India. The reason is that witnesses in judicial proceedings must give evidence

fearlessly and without fear of being liable for damages for any statement made by them.

But in India it is notorious that this privilege is grossly abused. It is not uncommon, for example, for a person charged with the offence of criminal

trespass to come forward with the defence that he went there on the invitation of a lady of the house who was on intimate terms with him. I can do

as better than draw the attention of the Commission to the following observation of Sir Charles Arnold White, C. J. in In re. P. Venkata Reddy

ILR(1913) Mad. 216 ""It seems monstrous that an accused person, just because he happens to occupy the position of an accused, should be

entitled to utter any malicious untruths that may come into his head and so wantonly defame the complainant''s character. The common instance

may be given, so far as my experience extends in this Presidency of an accused person alleging without good faith that his prosecution is due to his

having enjoyed immoral intimacy with one of complainant''s female relations. A black-guardly attempt to bemirch the honour of a family in

retaliation for an honest prosecution ought to be punish able at law and according to the Indian Penal Code it is.

17. The question for the Commission to consider is whether the absolute privilege enjoyed by such a witness in defence to a civil action for slander

should be curtailed in the public interest, and if so, to what extent. A copy of this judgment be sent to the Law Commission.