



Media and Civil Wrongs

PRANAV VERMA

Assistant Professor

NALSAR University of Law, Hyderabad

DEFAMATION

- Criminal defamation and civil defamation
- One of the reasonable restrictions on Article 19(1)(a)
- Criminal offence under section 499, IPC

“Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person.

Explanation 1.—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2.—It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3.—An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4.—No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

Illustrations

- a) A says—"Z is an honest man; he never stole B's watch"; intending to cause it to be believed that Z did steal B's watch. This is defamation, unless it fall within one of the exceptions.
- b) A is asked who stole B's watch. A points to Z, intending to cause it to be believed that Z stole B's watch. This is defamation unless it fall within one of the exceptions.
- c) A draws a picture of Z running away with B's watch, intending it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the exceptions.

First Exception.—Imputation of truth which public good requires to be made or published.—It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Second Exception.—Public conduct of public servants.—It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

Third Exception.—Conduct of any person touching any public question.—It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Illustration It is not defamation in A to express in good faith any opinion whatever respecting Z's conduct in petitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending a such meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharges of the duties of which the public is interested.

Fourth Exception.—Publication of reports of proceedings of Courts.—It is not defamation to publish substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings. Explanation.—A Justice of the Peace or other officer holding an inquiry in open Court preliminary to a trial in a Court of Justice, is a Court within the meaning of the above section.

Fifth Exception.—Merits of case decided in Court or conduct of witnesses and others concerned.—It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.

Section 52 IPC defines “good faith”: ‘Nothing is said to be done or believed in good faith which is done or believed without due care and attention’.

Illustration:

A says—“I think Z’s evidence on that trial is so contradictory that he must be stupid or dishonest”. A is within this exception if he says this in good faith, in as much as the opinion which he expresses respects Z’s character as it appears in Z’s conduct as a witness, and no further.

But if A says—“I do not believe what Z asserted at that trial because I know him to be a man without veracity”; A is not within this exception, in as much as the opinion which he expresses of Z’s character, is an opinion not founded on Z’s conduct as a witness.

Sixth Exception.—Merits of public performance.—It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.

Explanation.—A performance may be substituted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.

Illustrations

- (a) A person who publishes a book, submits that book to the judgment of the public.
- (b) A person who makes a speech in public, submits that speech to the judgment of the public.
- (c) An actor or singer who appears on a public stage, submits his acting or singing in the judgment of the public.

(d) A says of a book published by Z—“Z’s book is foolish; Z must be a weak man. Z’s book is indecent; Z must be a man of impure mind”. A is within the exception, if he says this in good faith, in as much as the opinion which he expresses of Z respects Z’s character **only** so far as it appears in Z’s book, and no further.

(e) But if A says—“I am not surprised that Z’s book is foolish and indecent, for he is a weak man and a libertine”. A is not within this exception, in as much as the opinion which he expresses of Z’s character is an opinion not founded on Z’s book.

Seventh Exception.—Censure passed in good faith by person having lawful authority over another.—It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

Illustration:

A Judge censuring in good faith the conduct of a witness, or of an officer of the Court; a head of a department censuring in good faith those who are under his orders; a parent censuring in good faith a child in the presence of other children; a school-master, whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils; a master censuring a servant in good faith for remissness in service; a banker censuring in good faith the cashier of his bank for the conduct of such cashier as such cashier—are within this exception.

Eighth Exception.—Accusation preferred in good faith to authorised person.—It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.

Illustration If A in good faith accuse Z before a Magistrate; if A in good faith complains of the conduct of Z, a servant, to Z's master; if A in good faith complains of the conduct of Z, and child, to Z's father—A is within this exception.

Ninth Exception.—Imputation made in good faith by person for protection of his or other's interests.—It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good. Illustrations

(a) A, a shopkeeper, says to B, who manages his business—"Sell nothing to Z unless he pays you ready money, for I have no opinion of his honesty". A is within the exception, if he has made this imputation on Z in good faith for the protection of his own interests.

(b) A, a Magistrate, in making a report of his own superior officer, casts an imputation on the character of Z. Here, if the imputation is made in good faith, and for the public good, A is within the exception.

Tenth Exception.—Caution intended for good of person to whom conveyed or for public good.—It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

500. Punishment for defamation.—Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

DEFAMATION AS A CIVIL WRONG

English law – distinction between libel (crime and tort both) and slander (only tort or civil wrong)

No such distinction in Indian law – as you have seen, 499 IPC makes no such distinction. Therefore, libel and slander are both crimes. Also, no distinction under civil law – both are civil wrongs.

It is the choice of the plaintiff – file a criminal case to seek prosecution and penalties under section 500 IPC, or a civil case for compensation.



*Tata Sons Limited v
Greenpeace International
and another, 2011 SCC
OnLine Del 466*

GREENPEACE

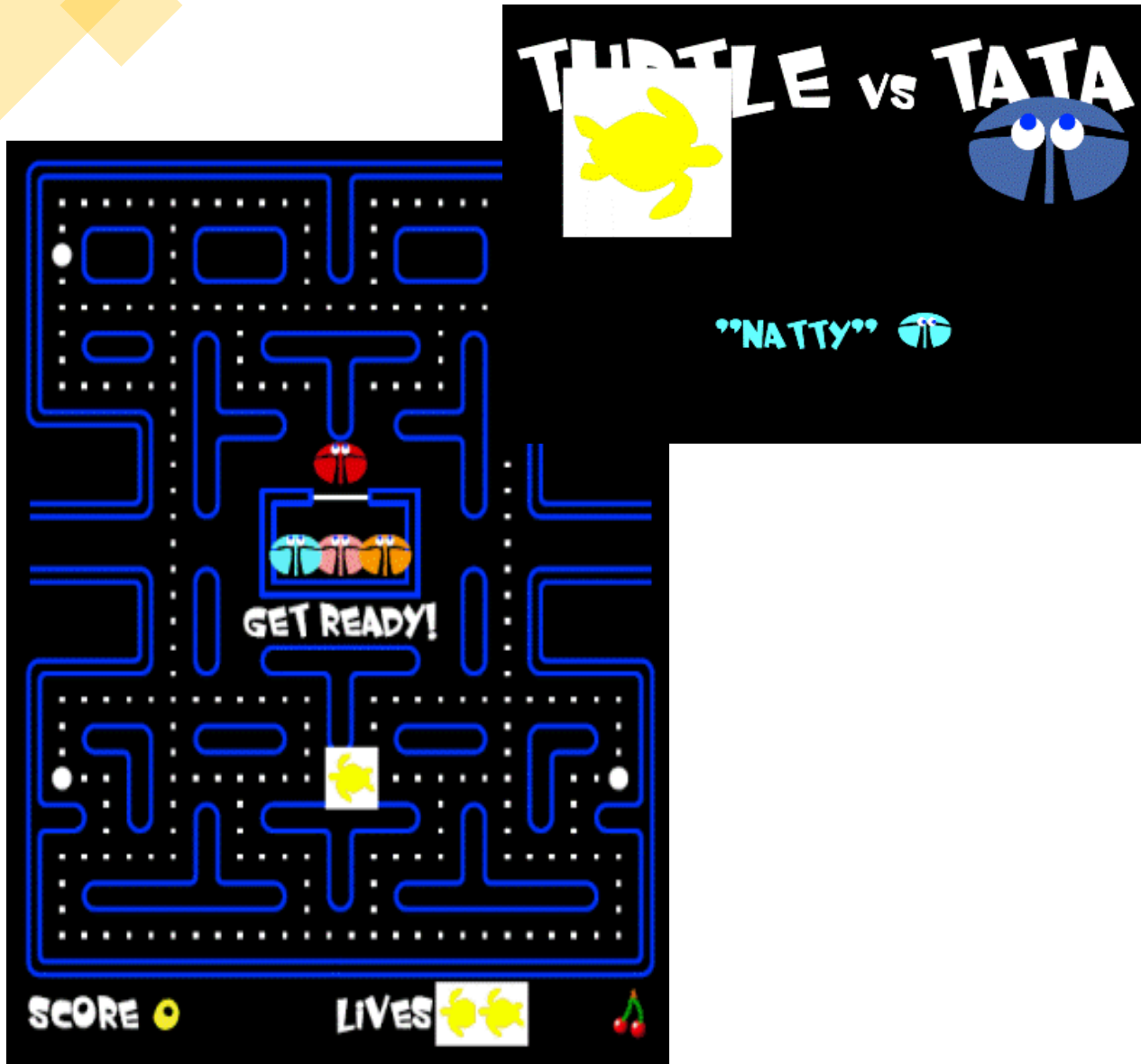


- *Tata Sons Limited v Greenpeace International and another*, 2011 SCC OnLine Del 466

Documents pertaining to the 'well-known' status, reputation and the goodwill enjoyed by the plaintiff company were filed with the court. It was averred that

- the plaintiff is India's oldest and largest private sector employer, consisting of over 100 major operating companies;
- For the fiscal year 2008-09, Plaintiff's annual revenues exceed US \$70 billion of the nearly 65% was generated outside India and the balance 35% within India. The revenue generated within India was equivalent to 2.1% of India's Gross Domestic Products at Current market price, and the exports per USD 6.3 billion, equivalent to 3.4% of India's exports
- The plaintiff has over 3.5 million shareholders and its assets are valued at US\$ 51.7 billion.

- TATA companies have laid the foundation in the industrial core sectors, pioneering the iron & steel, textiles, power, chemicals, hotels and automobile industries in India, and that the TATA brand encompasses diverse businesses and services such as computers and computer software, electronics, telecommunications, financial services, mutual funds, tea and publishing.
- TATA group was ranked 13th in the list of World's 50 Most Innovative Companies by Business Week, for the year 2009. Further, the TATA brand has also been ranked 65th among top 100 brands worldwide, listed by Brand Finance, (an independent company focused on the management and valuation of brands) Global 500 Report March 2010.
- 2009 – ranked as 11th most reputed company according to the report by the US based Reputation Institute
- Dhamra Port Company Limited (DPCL) was a 50-50 JV of Larsen and Turbo Ltd and TATA Steel Ltd. (of which plaintiff was a promoter). DPCL was awarded a concession by the Government of Odisha to build and operate a port north of the mouth of river Dhamra in Bhadrak district for a total period of 34 years.
- The defendant, Greenpeace International is a non-profit organisation with presence in 40 countries across Europe, US, Asia, and the Pacific. The Greenpeace India Society (the second Defendant) is an independent global campaigning organization that acts to change attitudes and behavior, to protect and conserve the environment and to promote peace; it was established on 28th of June, 2004, and has consistently espoused environmental issues and the impact of development at the cost of the environment.



TATA Sons (plaintiff) submitted that despite all regulatory clearances having been obtained for developing Dharma as an eco-friendly port, the defendants have been raising concerns about the alleged probable dangers to the nesting and breeding of Olive Ridley Turtles by the proposed port. The plaintiff claimed that these were based on false, frivolous, and misleading facts.

- The plaintiff submitted that the defendants have gone a step ahead and made an online game by the title "Turtle v TATA"

- The principal objective of the game, as argued by Greenpeace India, is to bring to the public's notice the alleged destruction of the Olive Ridley Turtles' nesting habitat by the construction of the Dharma Port. This game has been fashioned in such a way, that the TATA logos essentially play the role of an antagonist. The turtle has to, in the game, strategically destroy the TATA logos.
- It was stated that a mere look at the defendant's game's screenshot reveals how they have unauthorizedly used the plaintiff's trade mark, “TATA” as well as the “T” within a circle device without the permission of the plaintiff thereby infringing its trade mark rights. The plaintiff further submits that the defendant has not only infringed the plaintiff's trade mark rights, but is also maligning its reputation.
- An article was even published in the Wall Street Journal titled, ‘*Campaign 2.0: Turtle v Tata, the Game*’ on June 29, 2010. The article stated as follows:
 - *“The aim of the colourful and noisy video game is to help the yellow turtles eat as many little white dots as possible without running into Ratty (presumably after Ratan Tata, chairman of the Tata Group), matty, Natty or Tinku”*
 - *“... while dodging the TATA demons if you eat a power pill, you will be gifted with super-turtle powers to vanquish the demons of development that are threatening your home”*

“The plaintiff submits the impugned game and the defendant's use of the TATA mark and T device within a circle, amounts to defamation, with the ulterior motive of damaging its reputation. This is also motivated at prejudicing the plaintiff's immense goodwill, as well as the reputation of Mr. Ratan Tata, the Chairman of Tata Steel. The plaintiff also alleges that this is aimed (by the defendants) to create a false impression with members of the general public, about its activities. It is also urged, besides that the defendants have demonstrated their dishonesty by putting forth wrong facts and information to the public at large with the ulterior motive of maligning and defaming the TATA group.”

The plaintiff thus sought a decree for permanent injunction (under CPC), and a decree for damages to the extent of Rs. 10 crores (civil wrong of defamation).

The plaintiff also argued that “Tata Sons is only 50% shareholder/stake holder in the joint venture for setting up of the port and which is for the benefit of the State of Orissa. Therefore, to target the Tata's by drawing the attention of the public to its trademark and the logo is not only malicious but untrue as the impression sought to be conveyed is that the entire project has been conceived, established and is owned by the Tata's”

- “The plaintiff further argued that the mode of publishing the defamation in this case is also objectionable as anything posted on the internet has propensity to cause greater and lasting damage.”
- “Greenpeace India alleges that the present suit is a Strategic Lawsuit Against Public Participation (popularly known as SLAPP suits), intended to silence, censor, and intimidate the answering defendant and other third parties, who are concerned with the negative impact of the Dhamra port project, has on one of the largest nesting grounds for the Olive Ridley Sea Turtle and two adjoining protected Areas.”
- “It is submitted that the present suit has been instituted with the only motive of stifling honest and bona fide criticism by threatening to burden the defendants with have financial consequences. The plaintiff by virtue of the present suit proceeding is seeking damages of Rs. 10 crores, which according to its own averments has no justification or basis.”

- Greenpeace submitted that:
 - “The construction of the port is less than 15 kilometres from Gahimatha, one of the world's largest Olive Ridley Sea Turtle nesting beaches, and just five kilometers from the Bhitarkanika National Park, India, second largest mangrove forest and home to the saltwater crocodile. The project is to become operational by August 2010. The defendants say that the port's ongoing expansion work is believed to have serious long-term environmental and social implications. It endangers the surrounding mangrove forests and the wildlife, particularly the endangered Olive Ridley Sea Turtles, a protected species under Schedule I of the Indian Wildlife (Protection) Act, 1972, and vulnerable, according to the International Union for Conservation of Nature Red Data Book. They are also protected under the Migratory Species Convention and Convention on International Trade on Endangered Species of Wild Flora and Fauna (CITES). ”
 - Accordingly, it had been highlighting these concerns through peaceful and non-violent means and also that it has been working towards protecting one of the world’s largest sea turtle mass nesting sites for the last five years.

- It further expressed shock at the fact that the only assessment of the project was done over 10 years prior to this suit, without having conducted any Environmental Impact Assessment Study in compliance with the Forest (Conservation) Act, 1980.
- Greenpeace India claimed that in order to raise awareness about various environmental issues and to garner public interest and participation in its such causes, it usually undertakes participatory campaigning. As a part of such campaigning, in relation to the project, the Defendant launched a Pac-Man inspired video Game TURTLES v. TATA. It further submitted:
- “the acts of Greenpeace India amount to a peaceful, creative and non violent/non confrontationist mechanism of registering protest and concerned against the project, which is perceived as a an environmental disaster in the making. The use of the TATA marks by the second defendant is in a descriptive context so as to be in a position to criticize and protest against the role of the plaintiff and its group companies in the project.”

- also submitted that the reference to the word “Demons” was only to emphasise and drive home the point that development through the concerned project amounts to a “demon” which threatens the existence and survival of the Olive Ridley. The juxtaposition of the word “demons” with TATA and with reference to the project was thus mere hyperbole.
- ‘The word “demons” have been used as an overtly emphatic expression primarily with the purpose of making a strong impact impression without intending it to be taken literally. When the word and indeed the entire game is viewed in this light, it can hardly be said to be defamatory.’
- Thus, Greenpeace claimed that the juxtaposition of the word “Demons” with TATA and indeed with reference to the projects itself was a mere hyperbole and must be seen and viewed in the context of fair criticism and comment which is guaranteed as freedom of speech and express under the Constitution of India.

- Greenpeace relied on the Supreme Court's decision in *S. Rangarajan v P. Jagajivan Ram*, 1989 (2) SCC 574 to submit that terms and expressions in a defamation case are not to be seen in isolation of their context, and the Court must allow a certain latitude to the author or maker who is exercising his right to free speech or fair criticisms in regard to matters of public concern.
- Further relied on the centuries old rule laid down in England in *Bonnard v Perryman*, [1891] 2 Ch 269, where it was held that exceptional caution has to be exercised by the Court while exercising jurisdiction to interfere by way of injunction. It was stated in the decision that “ ... *The right of free speech is one which it is for the public interest that individuals should possess, and, ... Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions...*”
- Also urged the court that the present suit was “an instance of a SLAPP SUIT, the sole objective of which is the plaintiff's desire to muffle or stifle criticisms about the ecological damage threatened by the Dhamra Port Project. It was argued that though the Port is a joint venture, the real beneficiary after it comes up, is the Tata group, as it (the port) affords a proximate sailing point from which their products, such as steel, etc. can be shipped.”

- The Delhi High Court noted that the law on awarding interim injunctions in cases of defamation was set out by the case of *Bonnard*, which decided that an interim injunction should not be awarded unless a defence of justification by the defendant was certain to fail at trial level. This was subsequently followed in many cases.
- The HC analysed the precedents and noted that “it follows that the Court will invariably not grant an interim injunction to restrain the publication of defamatory material as it would be unreasonable to fetter the freedom of speech before the full trial takes places, where each of the parties can argue in detail with the help of additional evidence...”

- The Court did not disagree with the plaintiffs on its power to issue temporary injunctions but disagreed on whether it was merited in the instant case.

‘The fact that it is not Greenpeace India alone which is voicing concerns about the alleged or potential destruction about the Olive Ridley turtles' habitat and nesting grounds, is clear because environmental experts appear to have written about it, and sought to intervene in Supreme Court proceedings. It is quite possible that the concerns are genuinely held beliefs, even backed by materials. That the project received clearances and approvals, only discloses the truth of that fact, i.e. that it was granted legal sanction and permission. Yet, it is open to all - especially more in a plural democracy such as in India, to hold views, based on whatever materials the person concerned is relying upon - that the project indeed is ecologically disastrous - potentially, notwithstanding the clearances issued or granted by the statutory and government agencies. Such beliefs and their articulation cannot be characterized as *mala fide*.’

‘As far as portraying the plaintiff as a demon is concerned, the Court is unpersuaded that it amounts to a mala fide expression. The defendant's position that the use of the term and depiction of the TATA logo and device is hyperbolic, and exaggerative, appears to be more reasonable. It is not as if the plaintiff is being painted as demons, in all their activities; what is attacked through the game, and awareness sought to be spread is the *potential or likely destruction*, which the defendant believes would occur...’

Therefore, hyperbole and exaggerated forms of speech do not necessarily entitle to a plaintiff to injunction against defamation.

‘It must not be forgotten that the Court is, at this stage, merely weighing the arguments of parties without the benefit of rival evidence, made available after trial. While the plaintiff has been able to show that the relevant statutory clearances for the port project were available, at the same time, the defendant has placed on record the circumstance that the projects likely ecological adverse impact on Olive Ridley turtles has been spoken about by environmental experts, and is also subject matter of an intervention proceeding. The matter was also referred to the Central Empowered Committee. These justify the defendant's position that there is another opinion, counter to that of the statutory authorities. If that is the case, the game is an instance where the defendant creatively (or reprehensively, depending from what is the perspective of the viewer) seeks to highlight the plight of the Olive Ridley turtles. The use of the TATA mark and logo, as *demonic*, is, in that context, *prima facie* exaggerative or hyperbolic, in respect of matters of public concern.’

TM infringement claim – not profit purpose, only for drawing attention to their own activity – due case.

The Court finally quoted Walter Lippman – “*The theory of the free press is not that the truth will be presented completely or perfectly in any one instance, but that the truth will emerge from free discussion*”

Subramanian Swami v Union of India and others, (2016) 7 SCC 221

The Court repelled the constitutional challenge to criminal defamation, i.e. sections 499 and 500 IPC; also examined in depth defamation as a civil wrong + criminal offence.

‘The submission that the word “defamation” may not call for a civil action in the absence of a codified law has no substance. The Common Law of England was the prevalent law before the Constitution came into force and it is declared as a law in force under Article 372 of the Constitution of India ... an important branch of law which has remained uncoded in India is the law relating to civil wrongs. Some of the most important rights of a person which the law protects from injury are rights to the security of his person, his domestic relations and his property and reputation. A civil action for which there is no codified law in India, a Common Law right, can be taken recourse to under Section 9 of the Code of Civil Procedure, 1908, unless there is specific statutory bar in that regard.’

[NB: Section 9 CPC states that, *‘The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is wither expressly or impliedly barred.’*

- ‘Defamation as an offence is admittedly a pre-constitutional law which was in existence when the Constitution came into force. To interpret the word “defamation” occurring in Article 19(2) of the Constitution such that it would not include “criminal defamation” or that the words/act concerned should have a tendency to cause public disorder or amount to incitement of an offence to be actionable as a crime, would not be in consonance with the principle of interpretation pertaining to the Constitution’
- FOS crucial, but defamation a reasonable restriction + pre-constitutional existence, narrow meaning not envisaged by the Constitution or would have specifically said so
- ‘Upon a detailed conspectus thereof Section 499 IPC along with its Explanations and Exceptions cannot be called unreasonable, for they are neither vague nor excessive nor arbitrary ...’

- ‘A law of defamation protects reputation of a person. Reputation is an integral and important part of the dignity of the individual and when reputation is damaged, society as well as the individual is the loser. Protection of reputation is conducive to the public good. Therefore, freedom of expression is not an absolute right.’
- ‘While the freedom of speech and expression is, no doubt, extremely relevant and requires protection as a fundamental right, at the same time, it is necessary that the reputation of individuals requires to be protected from being unnecessarily tarnished. Reputation is an element of personal security and is protected as a fundamental right under Article 21 of the Constitution and requires equal protection. The right to freedom of expression under Article 19 is subject to the right to reputation. It is to be noted that civil action for defamation would not be a satisfactory remedy in many cases as the author of the defamation may not be able to compensate the person defamed.’

- INVASION OF PRIVACY

- *R. Rajagopal and others v State of Tamil Nadu and others*, (1994) 6 SCC 632
- ‘The right to privacy as an independent and distinctive concept originated in the field of Tort law, under which a new cause of action for damages resulting from unlawful invasion of privacy was recognised. The right has two aspects which are but two faces of the same coin: (1) the general law of privacy which affords a tort action for damages resulting from an unlawful invasion of privacy and (2) the constitutional recognition given to the right to privacy which protects personal privacy against unlawful governmental invasion’
- ‘The first aspect of this right must be said to have been violated where, for example, a person’s name or likeness is used, without his consent, for advertising – or non-advertising – purposes or for that matter, his life story is written – whether laudatory or otherwise – and published without his consent ...’ (recent Amitabh Bachchan order of the Delhi HC!)
- NB – now, a Fundamental Right after the 9-J Bench ruling in *K.S. Puttaswamy v Union of India*, (2017) 10 SCC 1 [also see DY Chandrachud, J’s judgment affirming *Rajagopal* on the above point]

New York Times v Sullivan [1954] 376 U.S. 254: 11 :.Ed. 2d. 868

In the year 1960, the New York Times carried a full-page paid advertisement sponsored by the 'Committee to Defend Martin Luther King and The Struggle for Freedom in the South', which asserted or implied that law enforcement officials in Montgomery, Alabama, had improperly arrested and harassed Dr. King and other civil rights demonstrators on various occasions. Respondent, who was the elected Police Commissioner of Montgomery, brought an action for libel against the Times and several of the individual signatories to the advertisement. It was found that some of the assertions contained in the advertisement were inaccurate. The Alabama courts found the defendants guilty and awarded damages in a sum of \$500,000 which was affirmed by the Alabama Supreme Court. According to the relevant Alabama law, a publication was "libelous per se" if the words "tend to injure a person...in his reputation" or to "bring (him) into public contempt". The question raised before the United States Supreme Court was whether the said enactment abridged the freedom of speech and of the press guaranteed by the First and Fourteenth Amendments.

In the leading opinion delivered by Brennan, J., the learned Judge referred in the first instance to the earlier decisions of that court emphasising the importance of freedom of speech and of the press and observed:

‘Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth - whether administered by judges, juries, or administrative officials - and especially one that puts the burden of proving the truth on the speaker....A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions-and to do so on pain of liberty judgments virtually unlimited in amount-leads to... "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars.... Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." ...The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the, First and Fourteenth Amendments.

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" - that is, with knowledge that it was false or with reckless disregard of whether it was false....’

Time Inc., v. Hill [1967] 385 U.S. 374 : 17 L.Ed. 2d. 456

On a particular day in the year 1952, three escaped convicted intruded into the house of James Hill and held him and members of his family hostage for nineteen hours, whereafter they released them unharmed. The police immediately went after the culprits, two of whom were shot dead. The incident became prime news in the local newspapers and the members of the press started swarming the Hill home for an account of what happened during the hold-up. The case of the family was that they were not ill-treated by the intruders but the members of the press were not impressed. Unable to stop the siege of the press correspondents, the family shifted to a far-away place. "Life" magazine sent its men to the former home of Hill family where they re-enacted the entire incident, and photographed it, showing inter alia that the members of the family were ill-treated by the intruders. When "Life" published the story, Hill brought a suit against Time Inc., publishers of "Life" magazine, for invasion of his privacy.

- The New York Supreme Court found the whole story to be “a piece of commercial fiction” and not a true depiction of the event, and accordingly confirmed the award of damages. But the United States Supreme Court (following its ruling in Sullivan) overruled the decision holding that the jury was not properly instructed in law and directed a re-trial. Brennan, J. held:

- ‘We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with the knowledge of its falsity or in reckless disregard of the truth.’

- ‘We create grave risk of serious impairment of the indispensable services of a free press with the impossible burden of verifying to a certainty the facts associated in a news article with a person's name, picture or portrait, particularly as related to non-defamatory matter....

- ...Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society.... That books, newspapers and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded.’

- The Supreme Court of India in *Rajagopal* noted that the principle in Sullivan 'has been held applicable to "public figures" as well. This is for the reason that public figures like public officials often play an influential role in ordering society. It has been held that as a class the public figures have, as the public officials have, access to mass media communication both to influence the policy and to counter criticism of their views and activities. On this basis, it has been held that the citizen has a legitimate and substantial interest in the conduct of such persons and that the freedom of press extends to engaging in uninhibited debate about the involvement of public figures in public issues and events.'

- The principle of Sullivan was also carried forward in *Derbyshire County Council v Times Newspapers Ltd.*, [1993] 2 WLR 449 by the House of Lords.

- 'The plaintiff, a local authority brought an action for damages for libel against the defendants in respect of two articles published in Sunday Times questioning the propriety of investments made for its superannuation fund. The articles were headed "Revealed: Socialist tycoon deals with Labour Chief" and "Bizarre deals of a council leader and the media tycoon".'

- Citing its previous decision in *Attorney General v Guardian Newspapers Ltd.* 2 (1990) 1 A.C. 109, the HL opined that 'there are rights available to private citizens which institutions of...government are not in a position to exercise unless they can show that it is in the public interest to do so.'
- Also held that 'not only was there no public interest in allowing governmental institutions to sue for libel, it was "contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech" and further that action for defamation or threat of such action "inevitably have an inhibiting effect on freedom of speech".'
- The principle in *Sullivan* from the US was explicitly affirmed and held relevant for UK –
- "while these decisions were related most directly to the provisions of the American Constitution concerned with securing freedom of speech, the public interest considerations which under laid them are no less valid in this country. What has been described as "the chilling effect" induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available".

How relevant are these to the Indian context? *Rajagopal* notes:

‘Our system of government demands - as do the systems of government of the United States of America and United Kingdom - constant vigilance over exercise of governmental power by the press and the media among others. It is essential for a good government. At the same time, we must remember that our society may not share the degree of public awareness obtaining in United Kingdom or United States. The sweep of the First Amendment to the United States Constitution and the freedom of speech and expression under our Constitution is not identical though similar in their major premises. All this may call for some modification of the principles emerging from the English and United States decisions in their application to our legal system. ...

(1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. None can publish anything concerning the above matters without his consent - whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy

(2) The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interest of decency [Article 19(2)] an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media.

[NB – Section 228A IPC – Disclosure of identity of the victim of certain offences etc.]

(3) There is yet another exception to the Rule in (1) above - indeed, this is not an exception but an independent rule. In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages. It is equally obvious that in matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen, as explained in (1) and (2) above. It needs no reiteration that judiciary, which is protected by the power to punish for contempt of court and the Parliament and Legislatures protected as their privileges are by Articles 105 and 104 respectively of the Constitution of India, represent exceptions to this rule.

(4) So far as the government, local authority and other organs and institutions exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them.

(5) Rules 3 and 4 do not, however, mean that Official Secrets Act, 1923, or any similar enactment or provision having the force of law does not bind the press or media.

(6) There is no law empowering the State or its officials to prohibit, or to impose a prior restraint upon the press/media.

[NB – non-exhaustive, broad principles]

Shankar @ Gauri Shankar @ Auto Shankar was charged and tried for as many as six murders. He was convicted and sentenced to death by the learned Sessions Judge, Chenglepat on May 31, 1991 which was confirmed by the Madras High Court on July 17, 1992. His appeal to this Court was dismissed on April 5, 1994. It is stated that his mercy petition to the President of India was pending consideration at the time of this case.

Appellant's case: Auto Shankar wrote his autobiography running into 300 pages while confined in Chenglepat sub-jail during the year, 1991. The autobiography was handed over by him to his wife, Smt. Jagdishwari, with the knowledge and approval of the jail authorities, for being delivered to his advocate, Sri Chandrasekharan. The prisoner requested his advocate to ensure that his autobiography is published in the petitioners' magazine, 'Nakkheeran'. The petitioners agreed to the same. Auto Shankar affirmed this desire in several letters written to his advocate and the first petitioner. The autobiography sets out the close nexus between the prisoner and several IAS, and other officers, some of whom were indeed his partners in several crimes. The presence of several such officers at the house-warming ceremony of Auto Shankar's house is proved by the video cassette and several photographs taken on the occasion. Before commencing the serial publication of the autobiography in their magazine, the petitioner announced in the Issue dated May 21, 1994 that very soon the magazine would be coming out with the sensational life history of Auto Shankar.

- 'The first petitioner is the editor, printer and publisher of a Tamil weekly magazine 'Nakkheeran', published from Madras. The second petitioner is the associate editor of the magazine. They are seeking issuance of an appropriate writ, order or direction under Article 32 of the Constitution, restraining the respondents, viz., (1) State of Tamil Nadu represented by the Secretary, Home Department, (2) Inspector General of Prisons, Madras and (3) Superintendent of Prisons (Central Prison), Salem, Tamil Nadu from taking any action as contemplated in the second respondent's communication dated June 15, 1994 and further restraining them from interfering with the publication of the autobiography of the condemned prisoner, Auto Shankar, in their magazine.'

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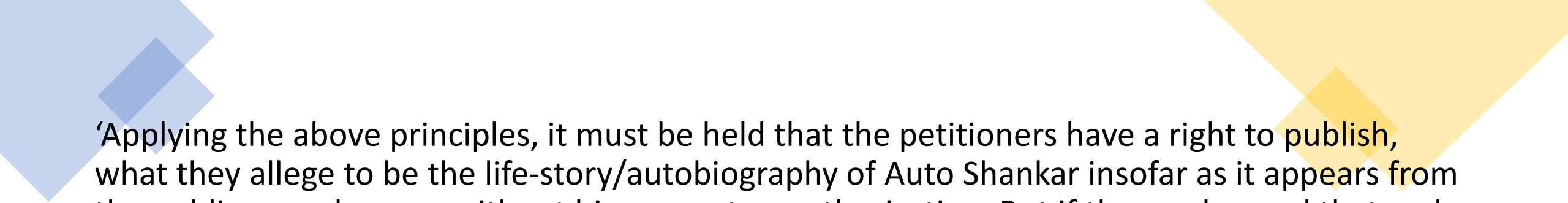
The petitioners' case:

This announcement sent shock waves among several police and prison officials who were afraid that their links with the condemned prisoner would be exposed. They forced the said prisoner, by applying third degree methods, to write letters addressed to the second respondent (Inspector General of Prisons) and the first petitioner requesting that his life-story should not be published in the magazine. Certain correspondence ensued between the petitioners and the prison authorities in this connection.

Ultimately, the Inspector General of Prisons (R-2) wrote the impugned letter dated June 15, 1994 to the first petitioner. The letter states that the petitioner's assertion that Auto Shankar had written his autobiography while confined in jail in the year 1991 is false. It is equally false that the said autobiography was handed over by the said prisoner to his wife with the knowledge and approval of the prison authorities. The prisoner has himself denied the writing of any such book. It is equally false that any power of attorney was executed by the said prisoner in favour of his advocate, Sri Chandrasekharan in connection with the publication of the alleged book. If a prisoner has to execute a power of attorney in favour of another, it has to be done in the presence of the prison officials as required by the prison Rules; the prison records do not bear out execution of any such power of attorney.

The letter concludes, "from the above facts, it is clearly established that the serial in your magazine under the caption "Shadowed Truth" or "Auto Shankar's dying declaration" is not really written by Gauri Shankar but it is written by someone else in his name. Writing an article in a magazine in the name of a condemned prisoner is against prison rules and your claim that the power of attorney is given by the prisoner is unlawful. In view of all those it is alleged that your serial supposed to have written by Auto Shankar is (false) since with an ulterior motive for this above act there will arise a situation that we may take legal action against you for black mailing. Hence, I request you to stop publishing the said serial forthwith."

How would you decide?



‘Applying the above principles, it must be held that the petitioners have a right to publish, what they allege to be the life-story/autobiography of Auto Shankar insofar as it appears from the public records, even without his consent or authorisation. But if they go beyond that and publish his life-story, they may be invading his right to privacy and will be liable for the consequences in accordance with law. Similarly, the State or its officials cannot prevent or restrain the said publication. The remedy of the affected public officials/public figures, if any, is after the publication, as explained hereinabove.’

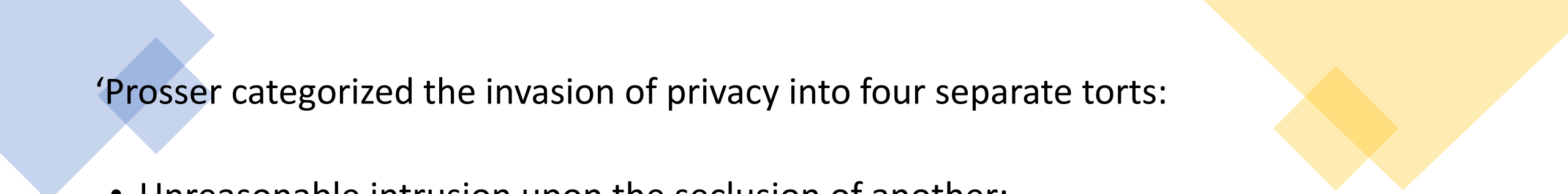


Justice Sanjay Kishan Kaul notes in his opinion in *Puttaswamy*:

‘An individual has a right to protect his reputation from being unfairly harmed and such protection of reputation needs to exist not only against falsehood but also certain truths. It cannot be said that a more accurate judgment about people can be facilitated by knowing private details about their lives – people judge us badly, they judge us in haste, they judge out of context, they judge without hearing the whole story and they judge with hypocrisy. Privacy lets people protect themselves from these troublesome judgments.’

‘There is no justification for making all truthful information available to the public. The public does not have an interest in knowing all information that is true. Which celebrity has had sexual relationships with whom might be of interest to the public but has no element of public interest and may therefore be a breach of privacy. Thus, truthful information that breaches privacy may also require protection.’

‘Every individual should have a right to be able to exercise control over his/her own life and image as portrayed to the world and to control commercial use of his/her identity. This also means that an individual may be permitted to prevent others from using his image, name and other aspects of his/her personal life and identity for commercial purposes without his/her consent’



‘Prosser categorized the invasion of privacy into four separate torts:

- Unreasonable intrusion upon the seclusion of another;
- Appropriation of another’s name or likeness
- Unreasonable publicity given to the other’s private life; and
- Publicity that unreasonably places the other in a false light before the public.’

Hindustan Times v High Court of Allahabad, (2011) 13 SCC 155

‘The unbridled power of the media can become dangerous if checks and balances are not inherent in it. The role of the media is to provide to the readers and the public in general with information and views tested and founded as true and correct. This power must be carefully regulated and must reconcile with a person’s fundamental right to privacy...’



Dhyandev Kachruji Wankhede v Nawab Malik, Interim Application (L) No. 25975 of 2021 in Suit (L) No. 25974 of 2021, Decided On: 21.11.2021



‘It is the case of the Plaintiff that the interviews/press conferences given by the Defendant to various news channels and the posts uploaded by him on his social media accounts, including the said Twitter Account, are highly defamatory, slanderous as well as libellous, as it contains incorrect facts and conclusions, communicates misinformation and incomplete information, and is a deliberate, calculated move on the Defendant's part to knowingly and maliciously defame, inter alia, the Plaintiff and/or his family members, causing him and his other family members, as mentioned above, not only an incalculable loss, harm and damage to their reputation at large but ex-facie impairs their right to live with human dignity.’

Tweets:

- (i) Fletcher Patel seen in this picture, with someone who he calls 'My Lady Don'. Who is this 'Lady Don'?
- (ii) Ugahi ka dhandha Maldive me!
- (iii) Here are the proofs!
- (iv) Sameer Wankhede has accepted the fact that he had visited Maldives but he denies the visit to Dubai. Here is the proof of his visit to Dubai with his sister. Sameer Wankhede was at Grand Hyatt Hotel in Dubai on 10th December 2020. His lie stands exposed.
- (v) Pehchan kaon?
- (vi) Sameer Dawood Wankhede ka yaha se shuru hua farjiwada.
- (vii) Who is this Wankhede Dawood?
- (viii) Photo of a Sweet Couple Sameer Dawood Wankhede and Dr. Shabana Qureshi.
- (ix) This is the 'Nikah Nama' of the first marriage of 'Sameer Dawood Wankhede' with Dr. Shabana Quraishi.
- (x) Who is this person? What is his relation with Dawood Wankhede and Sameer Dawood Wankhede? Please let us know

(xi) ...He farzi certificate chya aadharavar yanna nokari milali nasati tar hotkaru ek gareeb dalit porga kinva porgi ti ya padavar basali asti... ...Sameer Wankhede ne toh dharma parivartan nahi liya hum maan te hai kyun ki janam se who musalman hai.Unke pitashree ne dharma partivartan kiya tha. Dono bachche bachpan se musalman hai...

(xii) Screenshot of the whatsapp chat between Yasmeen Dawood Wankhede (sister of NCB official Sameer Dawood Wankhede) and a drug peddler. Question arises, is this morally ethically and legally right?

(xiii) ...Aur aaj main phir kayam hoon apni baat pe. Jis tarah se farziwada karke certificate Sameer Dawood Wankhede ne banaya, us ski quasi-judicial authority Maharashtra ke Zilla Adhikari yaha se Mumbai Shahar se certificate jaari hua... Humein pura vishwas hai ki joh farziwada hua hai, uss farziwada pe jaanch ke baad mohar lagegi..

The defendant claimed that the point of the tweets for to make aware public about the following important two aspects:

1. Mr. Sameer Wankhede is Muslim by birth and that he has secured the Government job by falsely claiming to be from scheduled caste;
2. There is material to show that Sameer Wankhede sought illegal gratification in cases filed by NCB

The plaintiff also alleged that his son had lodged a case against the defendant's son-in-law which was the motivation behind the defendant's 'hounding'.

The plaintiff submitted that 'WhatsApp chat of the Plaintiff or his family members published on the twitter account of the Defendant are manipulated. He submitted that the family vacation of his son at Maldives was given colour of business vacation and false allegations of extortion are made. He submitted that photograph of Plaintiff's son alleged to be taken at Grand Hyatt Hotel in Dubai as alleged by the Defendant was in fact taken at the lounge of Mumbai airport.'

Held:

- Reputation being an inherent component of Article 21, it should not be allowed to be sullied solely because another individual can have its freedom. Therefore, the balance between the two rights needs to be struck. "Reputation" of one cannot be allowed to be crucified at the altar of the other's right of free speech.
- Right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters.
- None can publish anything concerning these matters whether truthful or otherwise without citizen's consent.
- However, publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including Court records. This is so as once a matter becomes the matter of public record, the right to privacy no longer subsists and it becomes legitimate subject for comment by press, media and others.
- In case of public officials right to privacy or for that matter remedy of action for damages is not available with respect to their acts and conduct relevant to discharge of official duties. It is to be established that such publication is totally false and that the same has been done without reasonable verification of the facts.
- Where the publication is proved to be false and actuated by malice or personal animosity, the Defendant would have no defence and would be liable for damages.
- In matters not relevant to discharge of his duties, the public official enjoys the same protection as any other citizen.
- Right to privacy as an independent and distinctive concept originated in the field of Tort law, under which a new cause of action for damages resulting from unlawful invasion of privacy was recognised.

The court looked at the documents produced by the defendant, the only document available in public record had interpolations or had been fabricated. The alleged nikahnama did not appear in any public record.

Thus, no reasonable verification of facts by the defendant.

Further, several documents filed by the plaintiff to establish that his name is Dnyandeo and he belongs to “Mahar” caste recognised as SC. These included copies aadhar card, of school leaving certificates, migration certificates, driving license, marksheets, BA pass certificate etc... Documents produced for his son also.

However, AFTER the order was reserved for pronouncement, the defendant was able to provide some credible documents in his favour as a result of which the court concluded that some of the defendant’s allegations were not totally false. hence, no interim injunction was granted restraining the defendant. But this was notwithstanding the fact that at the time of making the tweets it was found that the defendant did not reasonably verify all the allegations made by them, hence were directed to conduct reasonable verification of facts in future before making such publications

LIVE TWEETING/REPORTING OF COURT PROCEEDINGS

- PRO – democratisation of court rooms
- CONS – confused for final orders/views of the court; taken out of context (including video clips in case of live-streams)