CHAPTER VI

THE DOCTRINE OF UNJUST ENRICHMENT AND DEFAMATION
Law of defamation is a restriction imposed on the freedom of speech. It is aimed at protecting the honour and dignity of mankind. Honour and dignity relate to the personality of a man. Therefore, law of defamation is recognized as a universal rule applicable to all civilised countries. But the rule varies from country to country on account of variation of social, political and economic conditions. The framing of rules, therefore, depends on the philosophy of the particular community or society.

Winfield's definition on defamation is exhaustive. "Defamation is the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right thinking members of society generally or tends to make them shun or avoid him."

The analysis of the aforesaid definition yields three essentials in order to constitute defamation. They are (I) the words must be defamatory; (II) They must refer to the plaintiff and (III) they must be maliciously published.

Defamation is divided into two categories viz. libel and slander.

A libel consists of a defamatory statement or misrepresentation in permanent form. For example a picture,

statue, waxwork, effigy or any writing, print, mark or sign exposed to view.

If a defamatory meaning is conveyed by spoken words or gestures it is slander.

Libel is addressed to the eye and slander is addressed to the ear.

Libel is actionable per se but according to English law, slander is actionable per se in the following cases:

I. Imputation of criminal offence punishable with imprisonment;

II. Imputation of a disease or infection of disease likely to prevent other persons from associating with the plaintiff;

III. Imputation of unchastity or adultery to any woman or girl (Slander of Woman Act, 1981).

IV. Imputation of unfitness, dishonesty or incompetence in any office, profession, selling, trade or business held or carried on by the plaintiff at the time when the slander was published.

But in early period defamation was not actionable at Common law. As compared to English Common law, the ancient Hindu Law recognised law of defamation. The source of law of defamation in ancient India is the Commentaries on Hindu law and Manu's Eighteen Tables. Abuse is defined by Narada as an offensive statement, couched in offensive and violent language, regarding the native country, a caste, family and so forth (of a man). It is divided into three species viz. Harsh, Vulgar, and Virulent. According to Modhatithi abusing takes the following forms: (a) addressing offensively foul words; (b) causing ill-repute without reasons; (c) defamation attributing serious and non-serious offences. According to Katyayana defamation consists in one maliciously exposing the disqualifications of another or attributing to his qualities that are not present or applying to him an objectionable name. Subsequently, the social necessity in the United Kingdom necessitated the Common law courts to allow an action on the case for defamatory words written or spoken. But as it was an action on the case, damage had to be proved. The old Hindu law on defamation which at a point of time was better and even a precursor to other countries, could not develop further in subsequent ages. The efficacy of the Hindu conception on the law of defamation was drowned during roughly seven hundred years of Muslim rule in India.

Law is an experience. Progression of law is possible through experience and social dialectics. In
defamation the conflict lies between the interest of one person who believes in what people think of him and the interest of another who tells people what he thinks about the former. Through the clash of interests of thesis and antithesis, law of defamation is screened out as synthesis which produces social good. Law of defamation, as it is evolved and developed upto this time, is a complicated law. It demands to be the oldest. There are three special features in the law of defamation viz. (a) liability is extinguished by the death of either party; (b) trial by jury is available at the instance of either party; and (c) legal aid is not available to either party.

In the seventeenth century, on the occasion of defamatory statement, damages began to be presumed. In King v. Lake, the Common law Courts created a new tort of libel. The Court appears to have been influenced by two facts viz. absurd technicalities which had invaded the action on the case for slander and extinction of the Star Chamber which had dealt with defamatory words as crime. What King v. Lake decided was not that all written words were actionable per se but merely that case (printing of a petition and sending it to members of the House of Commons) was so presumably damaging that it should be included in the category of

defamation actionable per se. The decision paved the way for further development through interpretation by the courts. The distinction between libel and slander seems to be based on the underlying idea of eighteenth century thought and the interpretation of King v. Lake. It was firmly established in the law in 1812. The law of defamation in the United Kingdom is always stricter than that of any other free country. A considerable portion of English people are dissatisfied with the existing law of defamation. According to them it gives leverage to too much protection to reputation and to impose too great a restriction on the freedom of speech. However, the Porter Committee was appointed to consider the then existing law of defamation in the United Kingdom. Its recommendations were implemented in the Defamation Act, 1952. The Act carries the following special features:

I. The Act helped plaintiffs by increasing the number of slander cases where they need not prove any damage;

II. The Act helped defendants by tempering the defences of "justification" and "fair comment" introducing the procedure of "offer of amends" for innocent publishers.

III. The Act extended the range of matters of which newspapers and broadcasters could safely give a fair and accurate report.
In France, the criminal law is much used against the persons abusing or vilifying others. In the United States the Supreme Court has held that it is unconstitutional (a) to make a person liable for saying what he believes about a public figure, even if he should have known that what he said was groundless, (b) to make a person liable for what he says about a private person unless he is at fault in some way and (c) to make a person pay more than compensatory damages unless he is guilty of deliberate or reckless misrepresentation. Long after the Defamation Act of 1952 was passed, Faulks Committee was appointed to reconsider the whole area of defamation. The report of the Faulks Committee was produced in 1975 (Cmnd. 5909). The report suggests many recommendations but only a few of them deserved to be radical in nature. The radical recommendations are as follows:

1. The age-old distinction between libel and slander has been proposed to be abolished. It presumes that no natural person is required to prove any damage whereas an artificial person is required to prove that the words actually caused them to suffer loss and injury or there is a likelihood to suffer so.

II. Death will cease to have any extinctive effect on liability. If the critic or the wrongdoer dies, his estate will be liable. If the plaintiff i.e. the person wronged dies, his action will continue. If the victim died before the filing of the suit, his representatives can claim compensation for the loss caused to the estate. If the victim died before suit (but less than five years before it) his relatives could sue for declaration.

III. Litigants will be entitled to legal aid and be entitled to sue in the county court.

IV. Litigants will not be entitled to claim jury.

V. No punitive damage will be allowed. The award given by the trial Court will be subject to alteration in the Court of Appeal.

VI. The procedure of "offer of amends" would be tied up but will remain available only in the case of a wholly innocent publication.

VII. The range of matters on which a fair and accurate report can safely be made will be increased again and the privilege extended to all publishers, not just to newspapers and broadcasters. Printers will share with booksellers, news agents and lending libraries the defence of innocent dissemination."
Mere use of vulgar or abusive language does not fall within the category of slander.

**ABUSE:**

While the old Hindu society through its law forbade using offensive and violent language, in modern society mere use of vulgar language (spoken) is neither defamation nor any other tort. Spoken words which, on the very face of them, slanderous are not actionable if it is clear that they were used merely as general vituperation and were so understood by those who heard them. To determine as to whether the words so spoken were mere vituperation or slander Mansfield GJ. in *Benfold v. West Cote* held, "the manner in which the words were pronounced and various other circumstances might explain the meaning of the word." The speaker of the words must take the risk of his hearers construing the words as defamatory and not simply abusive. But in any case the burden of proof lies upon the speaker to show that a reasonable and prudent man would not have understood the


words as defamatory. I agree with the observation of Chief Justice Mansfield Winfield emphasised that if the words be written, not spoken, they cannot be protected as mere abuse. The reason behind it is that the writer had time for reflection before the same was put into writing. The law of defamation is not confined by itself to the defamatory words in their natural and ordinary meaning only. It extends to innuendos through developmental process.

INNUENDO:

The word innuendo means a parenthetic explanation especially in slander or libel action of an injurious word or expression introduced in the case. It comes from the Latin word "innuere" which means to nod at; to hint at.

The words complained of may be either (a) defamatory in their natural ordinary meaning (those which are prima-facie defamatory) or (b) defamatory only or additionally additional to in the light of facts and circumstances known to the persons to whom the words were published (those which are not prima facie defamatory) and which are defamatory because of a secondary meaning attached to them. As to (a) words can, 7. Winfield and Folowicz. Law of Torts, 11th Ed. 284.
of course, convey meanings to different people. In the same judgment Lord Denning M.R. held, "the legal process requires that since "right" meaning be given to the words for the purposes of action, a jury or a judge alone cannot award damages upon the basis that the words may convey different meanings to different reasonable people." Practically there is great difficulty in answering the question, "were the words defamatory"? This question involves discovering or ascertainment of the meaning of the word. Even in dictionaries words have more than one meaning. In the various contents of life words can mean almost everything. This is one of the reasons for distinction between libel and slander. Written words at least have a fixed partial connotation. When can the words be said to be very likely to cause other people, reasonable people, to think so much worse of the plaintiff that their behaviour towards him would be affected? In law, at any rate in bilateral situations, words mean what their addressees would reasonably suppose the speaker to have intended to convey. But in practice, people relate what they read and hear to what they already know and believe and what they may know more than the speaker or writer. It is then quite possible for words to be defamatory of a person although the publisher had no idea that such a person even existed, let alone that

the words defamed him. In Capital and Counties Bank Ltd. v. Henty, Lord Black Burn observed, "There are no words so plain that they may not be published with references to such persons knowing these circumstances as to convey a meaning very different from that which would be understood from the same words used under different circumstances." To call a man "Cony Catcher" would convey little to most people today but at one time it was a well known word for swindler. On the other hand, the word 'mafia' bears a particular meaning to the people. If it is said that a Company is run by the mafia, it is defamatory to its natural and ordinary meaning. Philip S. James in his book "General Principles of the Law of Torts" has explained innuendo with some examples: Two such examples are as follows:

I. B says to x, "A is a Viper": this, one would think, must not only, at first sight, but in all circumstances and in the abstract, be defamatory. But reflection will show that even this statement is not inevitably so; for instance it might well be that B was referring to the fact that A is a member of a cricket team who call themselves the Vipers.

II. B says of A, "I saw him enter a brothel." Is this necessarily defamatory? It may seem so, but after all, A might have entered the house not knowing what it was, or he might have been forced to go there on business. Hence, as Lord Devlin points out, it would not be ridiculous to add in the plaintiff's pleading in such a case an innuendo to the effect that the words were understood to mean and did mean that A entered the brothel for an immoral purpose. The leading cases on innuendo are Wakley v. Cooke; Allsop v. Church of England News Paper Ltd.; Tolley v. J.S.Fry & Sons Ltd. The principles laid down in the aforesaid cases are well founded.

It is stated in Winfield's Law of Tort

"Where however, the words are not defamatory in their natural and ordinary meaning, or where the plaintiff wishes to rely

11. Lewis case 278,169-170 respectively cited by Philip S. James.


15. Winfield and Folowicz; Law of Torts, 11th Ed.

Pages 287-288.
upon an additional defamatory meaning in which they were understood by person having knowledge of particular facts, then an innuendo is required. This is a statement by the plaintiff of the meaning which he attributes to the words and he must prove the existence of facts to support that meaning. If such facts do not exist, the innuendo fails and may be struck out of the statement of claim, though the plaintiff may still fall back on the natural and ordinary meanings of the words. Where a statement is not prima facie defamatory imputation in its natural meaning, there may be various reasons for it. It may be because the words are true or innocent, or have plurality of meaning, some of which are innocent, or have no well-known or fixed connotation of, as in the case of slang words, or mere provincialism, and local and technical terms not in common use. Under such circumstances an innuendo is necessary. This is a statement by the plaintiff of the meaning which he attaches to the word complained of. The plaintiff should not only set forth in this statement the special or secondary meaning of a defamatory character which the words complained of conveyed to the persons to whom they were published, but should also prove the facts and circumstances which made the words convey that meaning of those persons as reasonable men. The Cassidy's case on innuendo is


discussed below:

Facts of the case: A man named Cassidy who for some reason also called himself Garrigan and described himself as a General in the Mexican Army, was married to a lady who was called Cassidy or Mrs. Carrigan. Her husband occasionally came and stayed with her at her flat and her acquaintances met him. Cassidy achieved some notoriety in racing circles and in indiscriminate relations with women, and at a race meeting he posed, in company with a lady, to a racing photographer to whom he said he was engaged to marry the lady and the photographer might take a snap of it. The defendants accordingly published the photograph with the following words underneath:

"Mr. M. Carrigan, the race horse owner and Miss 'X', whose engagement has been announced."

The innuendo placed upon these words by the plaintiff was that she was an immoral woman who had cohabited with Garrigan without being married to him and some female acquaintances of the plaintiff gave evidence that they had formed a bad opinion of her on that ground as a result of the publication.

The jury found that the words did reasonably bear a defamatory meaning and awarded the plaintiff £500 damages. The Court of Appeal held that the verdict could not be disturbed. Where words are capable of being understood in a defamatory sense by persons to whom special facts are known
it is unnecessary to prove more than that as there are people who know those special facts and so might reasonably understand the words in a defamatory sense.

The aforesaid case laws correctly establish that innuendo derives its name from the leading word by which it was always introduced when the pleadings were in Latin. It is used in actions of libel and slander, and is then said to be a subordinate averment connecting particular parts of the publication with what has gone before, in order to elucidate the defendant's meaning, more fully. Let us now examine how far American law is in conformity with this principle. The American law may be explained with reference to a case law viz.

Cosgrove Studio and Camera Shop, INC v. Pane

Facts of the case: The plaintiff Corporation and the defendant are competitors in the business of commercial photography in the city of Hazleton Lezern County a comparatively small city. The plaintiff Corporation caused an advertisement, addressed to the public to be inserted and published in two of the community newspapers of general circulation, offering a roll brought into its business establishment by a customer for development and printing. The following

day, the defendant caused to be inserted and published in one
of the same newspapers an advertisement which said inter alia:

"USE COMMON SENSE
You get NOTHING for
NOTHING : WE
WILL NOT :

1. Inflate the prices of your developing to
give you a new roll free :

2. Print the blurred negatives to inflate the
price of our snapshots

3. Hurry up the developing of your valuable snap­
shots and ruin them :

4. USE inferior chemicals and paper on your
valuable snapshots; "

In the complaint, the plaintiff alleged that
the advertisement of the defendant "was" by innuendo, imputation
and implication an answer to plaintiff's advertisements offer­
ing to give the public photographic film free, and, by implica­
tion, charged the plaintiff with being dishonest in its business
practices, of inflating prices, of unnecessary haste and
unskilled workmanship in the development of customer's film
resulting in ruin and by use of inferior materials mulcting
the public.

The Court below ruled that, while the meaning ascribed by the plaintiff to the language used in the advertisement involved may well be true and so found by a jury, the words themselves were not libellous per se, since an innuendo was necessarily pleaded and further that since no special damages were sufficiently averred (plaintiff was given the opportunity to amend but failed to do so, and admitted that special damages would not be pleaded or proven) the plaintiff did not set forth a recoverable cause of action.

The Court held, "a libel is a maliciously written or printed publication which tends to blacken a person's reputation or expose him to public hatred, contempt, or ridicule or injure him in his business or profession." It is the function of the Court, in the first instance, to determine whether or not the communication complained of, in the case of the advertisement, is capable of a defamatory meaning.

In the instant case, the advertisement clearly imputes to the person to whom it refers characteristics and conduct which are incompatible with the proper and lawful exercise of a business. Certainly to charge one engaged in such a business with running snapshots, using inferior materials and printing blurred negatives in order to inflate, the cost incurred by the public, would lower him in the estimation of the community and defer third person from associating or dealing with him. Clearly, the characteristics and
dishonest conduct imputed in the advertisement need no extrinsic proof of explanation. In short, the words in themselves are defamatory and import the serious sense attributed to them. In such a case, general damages for loss of personal or business reputation are recoverable and no averments or proof of special damages are necessary. The next recognized characteristic of defamation is Juxtaposition.

**Juxtaposition:**

The word 'juxtapose' means to place near or near to: place side by side often for comparing or contrasting. The word juxtaposition means the act of juxtaposing.

Mere juxtaposition to noxious matter may make an otherwise innocent representation defamatory. The leading case on juxtaposition is Manson v. Tussands Ltd. In this case it was alleged that the defendants who kept a Waxworks exhibition, had exhibited a Wax model of plaintiff, with a gun in a room adjoining the Chamber of Horrors: The plaintiff had been tried for murder in Scotland and released on verdict of the charge not being proved. It was further alleged that a representation of the sense of the alleged murder was displayed in the Chamber of Horrors.

19. (1894) 1 Q.B. 671.
The Court of Appeal considered that though in all circumstances the case was not clear enough for the issue of an interlocutory injunction, the exhibition was capable of being found by a jury to be defamatory. If reliance is placed upon juxtaposition, it must be shown that a reasonable man seeing the two objects together would draw their relative positions an inference as defamatory to the plaintiff. Now let us discuss about injurious falsehood, hatred, ridicule and contempt to ascertain as to whether they fall within the law of defamation.

**INJURIOUS FALSEHOOD:**

There is a difference between injurious falsehood and defamation. They are governed by different rules. Both contains falsehood and on certain condition are actionable. An injurious statement is a falsehood told about another which in no way affects his reputation, but in some other way it causes loss and injury to him. For example, it is not defamatory to state that a certain tradesman has ceased to carry business, yet if this statement is deliberately and wilfully false, an action will lie for it. Similarly, to say falsely of a shopkeeper that his goods are of a quality inferior to those of another trader is not the wrong of defamation but that of injurious falsehood. But if it is said that a particular tradesman fraudulently sells inferior goods as of superior quality is an attack upon his business as well as upon his
reputation and is therefore defamatory.

**HATRED, RIDICULE AND CONTEMPT:**

Every sentence tends to bear some meaning. What is the tendency of the defamatory nature of a statement? How is it to be ascertained? Some recognized tests if applied, the tendency will be found out. These tests are (i) to ascertain as to whether the words spoken or written creates excitement against the plaintiff; the adverse opinion of feelings of other persons; (ii) to ascertain as to whether words spoken or written implies an attack upon the moral character of the plaintiff, attributing to him any form of disgraceful conduct, such as crime, dishonesty, untruthfulness, ingratitude, or cruelty; (iii) to ascertain as to whether it tends to bring plaintiff into ridicule, hatred and contempt without any suggestion of any form of misconduct. In *Cook v. Ward*, it was held that action would lie if the statement tends to bring the plaintiff into hatred, ridicule or contempt. Therefore, publication of humorous story exhibiting the plaintiff in a ridiculous manner is defamatory.


A statement is defamatory if it amounts to a reflection upon the fitness or capacity of the plaintiff in his profession or trade or in any other undertaking assumed by him. But a statement is not defamatory merely because it excites hatred, contempt, ridicule or other adverse feelings in some particular class of the community whose standard of opinion is such that the law cannot approve of it.

Words are only defamatory if they impute conduct to the plaintiff which would tend to lower him in the eyes of a considerable and respectable class of the community though not in the eyes of the community as a whole. In Byrne v. P.f.i.a.n. the plaintiff complained of a type-written piece of doggerel on the notice board of a Golf Club which suggested that he had been guilty of disloyalty to his fellow members by reporting to the police that there were some "diddler" (gambling) machines kept on the premises. The Court held that although it is clear that any such change would lower the plaintiff in the estimation of most of his fellow members, it cannot be defamatory to say of a man that he has put in motion the proper machinery for suppressing crime, whether in his own country or another.

MODE OF PUBLICATION:

Publication of a libel is the actionable wrong but the composition thereof is not.

23. 1937 1 K.B. 818-
The modes of publication of a libel are as follows:

(i) Publication produces some amount of effect upon its readers;

(ii) Publication means the act of making the defamatory statement known to any person or persons other than the plaintiff himself;

(iii) A private and confidential communication to a single person is enough;

(iv) A statement by the defendant to the wife or husband of the plaintiff is a ground of action. It may even be reasonable to foresee that the spouse of the plaintiff will open a letter addressed to the plaintiff.

(v) The contents of a written document is said to have been published either by allowing someone to read the documents for himself or by reading it out to him. The second mode is an act of slander.

(vi) Every publication is a new libel.

(vii) Newspaper distributors, librarians, booksellers, hawkers who take only a subordinate part in its dissemination are generally exempted, provided that they have no reason to suspect that the works they propagate contain defamatory matter.

Many people are not happy with the present law of defamation in the United Kingdom. It is their grievance that the law of defamation in the United Kingdom gives too much protection to the plaintiff and at the same time it imposes too much restriction on the speech. Reputation, the cousin of respectability, does not get its importance as it received before. People now do not bother what other people think. Freedom of speech is gaining more and more strength and importance. Law of defamation in the United Kingdom is stricter than law of defamation in other countries. In France, the criminal law is much used against those who abuse & vilify others. The basic principle of law of defamation ought to be to restore the lost honour. Through the punishment of the wrongdoer as well as publication thereof in the newspaper automatically restore the honour and dignity of the victim. In this view of the matter, the French Law has jurisprudential approach. In the United States the Supreme Court has held that it is unconstitutional (a) to make a person liable for saying
what he believes about a public figure, even if he should have known that what he said was groundless, (b) to make a person liable for what he says about a person unless he is at fault in some way, and (c) to make a person pay more than compensatory damages unless he is guilty of deliberate or reckless misrepresentation.

DEFENCES IN DEFAMATION SUIT:

The defendant in a suit for defamation under the English Law is entitled to take all or any of the six defences viz. (I) justification; (II) Absolute privilege; (III) Qualified privilege; (IV) Fair comment; (V) Consent and (VI) Apology.

I. JUSTIFICATION:

Justification connotes that the statement made by the speaker is true. Salmond says that "he who attacks the reputation of another does so at his peril; and mistake however inevitable, is no excuse". But no action will lie for the publication of a defamatory statement if the defendant pleads and proves that it is true. Onus heavily lies


on the defendant to justify the defamatory statements. In Mcnheroson v. Daniels Little Date J. held, "For the law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess." Section 6 of the Libel Act of 1843 of the United Kingdom provides that the publication of truth, however defamatory, is no longer a criminal offence if the jury is of the opinion that the publication of it was for the public benefit. So far as the plea of justification is concerned, the defendant is required to prove that the essence of the imputation is true. The erroneous details do not aggravate the defamatory character of the statement. The Defamation Act of 1952 of the United Kingdom provides that in an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only if the words not proved to be true, do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges. This provision is at per with the decision in Alexander v. N.E.Ry. Rumour is no justification. The rule of justification is a well recognized defence throughout the whole world particularly, in the Common Law world. The next important defence is privilege.

30. Z"1865_7 S 3 & S 340.
II. PRIVILEGE:

According to Salmond "a privileged statement may be defined as one which is made in such circumstances as to be exempt from the rule that a man attacks the reputation of another at his own risk." It is the occasion and not the statement which is privileged. There are two kinds of privileges viz. absolute privilege and qualified privilege.

Absolute privilege: A statement is said to be absolutely privileged when it is of such a nature that no action will lie for it, however, false and defamatory it may be, and even though it is made maliciously i.e. from some improper motive. The freedom of speech prevails over another's reputation under the absolute privilege.

The absolute privileges are seven in number:

1) Any statement made in the course of and with reference to judicial proceedings by any judge, juryman, party, witness or advocate;

ii) Fair, accurate and contemporaneous report of public, judicial proceedings published in a newspaper.

iii) Any statement made in parliament by a member of either House.

iv) Parliamentary papers published by the direction of either House and any re-publication thereof by any person in full.

v) Any statement made by one officer of State to another in the course of his official duty.

vi) Communication between husband and wife.

vii) Certain publications made by the Parliamentary Commissioner are protected and also certain reports and other communications between a local Commissioner and a local Government authority.

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33. Sec. 3 Law of Libel Amendment Act 1888 (U.K)
34. Section 1, Bill of Rights 1688 (U.K).
35. Section 1, Parliamentary Papers Act, 1840 (U.K)
36. Chatterson v. Secretary of State for India, 2 Q.B. 189.
The theory of absolute privilege is based on public policy.

Qualified privilege is an intermediate case between total absence of privilege and the presence of absolute privilege. The principle is that the statement is protected if it is fairly made by a person in the discharge of some public or private duty, whether legal, moral or in the conduct of his own affairs, in matters where his interest is concerned.

The following are the instances of qualified privileges.

1. Statements made in pursuance of a legal, social or moral duty to a person who has a corresponding duty or interest to receive them;

2. Statements made for the protection or furtherance of an interest to a person who has a common or corresponding duty or interest to receive them;

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3. Statements made in the protection of a common interest to a person sharing the same interest;

4. Fair and accurate reports of judicial proceedings, whether or not published contemporaneously with the proceedings;

5. Fair and accurate reports of parliamentary proceedings and parliamentary sketches;

6. Extracts from parliamentary papers and public register;

7. Certain reports published in newspaper or by broad-casting which are protected by virtue of the provisions of the Defamation Act, 1952.

The qualified privilege may be defeated if the plaintiff can prove that the defendant was actuated by malice in publishing the defamatory statements. Indian decisions also support the aforesaid classification of qualified privilege.

English Law recognizes four categories of qualified privileges:

i) Statements made in the performance of a duty;

ii) Statements made in the protection of an interest;

iii) Reports of Parliamentary, Judicial and certain other public proceedings;

iv) Professional communication between solicitor and client.

FAIR COMMENT:

Nothing is defamatory which is a fair comment on a matter of public interest. The defence is of peculiar use to journalists. Expressions of opinions contained in editorials, critical articles, letters to the editor and news items of an analytical nature are covered chiefly by the defence of the right of fair comment as applied to a defamatory publication. An honest and fair expression of opinion on a matter of public interest is not actionable even though the opinion be untrue. It is not necessary that the

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Court must agree with the comment.

The defendant in a defamation suit raising defence of fair comment must satisfy the court that --

(a) the matter complained of is one of public interest. Government and political matters are of public interest, so is anything which the general public is invited to purchase, to listen to or to attend;

(b) the comment must be based on facts, and

(c) the comment must be made on bonafide belief that it is true assessment and not made maliciously.

Thus in the case of fair comment, the onus lies upon the defendant to prove that the matter commented upon is one of public interest; the statement is based on the facts and the comment is fair. After successful proof of fair comment by the defendant, the onus shifts to the plaintiff to prove that the defendant was actuated by express

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43. Broadway Approvals Ltd. v. Odhams Press Ltd. (No 2) 1965 1 W.L.R. 805, 817.
malice. If the allegation of express malice is proved, the defence of fair comment is defeated.

The main principles relating to the defence of fair comment have been stated by Duncan & Neil as follows:

(a) The comment must be on a matter of public interest;

(b) The comment must be based on facts;

(c) The comment though it can include inferences of fact, must be recognizable as comment;

(d) The comment must satisfy the following objective test; could any man honestly express that opinion on the proved facts?

(e) Even though the comment satisfies the objective test, the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice.

In London Artists v. Littler, Lord Denning said, "Whenever a matter is such as to affect people at large, so that they may be legitimately interested in or concerned at what is going on, or what may happen to them or to others; then it is a matter of public interest on which every one is entitled to make a fair comment." The decision of Lord Denning is perfectly correct.

In view of the worldwide corruption the rule of fair comment in defence of a defamation suit should be liberalised further so that on the matter of public interest, the journalists or social workers may take bold steps to inform the people what is happening in the country.

ASSENT TO PUBLICATION:

Volenti non fit injuria is the principle upon which if the plaintiff expressly or impliedly assents to the publication of matter which is true on the face of it, the defendant is not liable. In Cookson v. Hare Wood, Scrutton L.J. said, "It has seemed to me all through this case that these questions about innuendos are quite beside the mark. If you get a true statement and an authority to publish the

46. Supra foot note. 43.

47. [1932] 2 K.B. at Page 482.
true statement, it does not matter in the least what people will understand it to mean. The plaintiff had submitted to the jurisdiction of the Pony Turf Club. The Stewards have authority to publish the decision in the Racing Calendar, and if it is defamatory, it does not matter in the slightest, what exact shade of meaning you are to put upon the obviously defamatory statement."

**APOLOGY:**

Sec. 4 of the Defamation Act, 1952(U.K) provides a procedure whereby, in the case of words published innocently as defined by the Section, a defendant may avoid liability to pay damages if he is willing to publish a reasonable correction and apology and pay the plaintiff's costs and expenses reasonably incurred as a consequence of the publication in question.

**INDIA:**

India is a common law country. By application of the doctrine of 'reception' India has adopted the common law principles on the law of defamation. No separate Defamation Act has been enacted. On the common law principles, the Indian judiciary has built up the principles of the

law of defamation by judicial prescription. This area is covered with sufficient case laws. But only in Indian Penal Code, there are two sections namely, sections 499 and 500 dealing with offences relating to defamatory statements.

Section 499 of the Indian Penal Code 1860 defines defamation as follows:

"Whoever by words either spoken or intended to be read, or by sign or by visible representation 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 excepted, 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 harmful 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 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.

The Section provides ten exceptions to the application of the provisions laid down in Section 499.

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 the public good is a question of fact.

Second Exception: Public conduct of public servant: 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.

Fourth Exception: Publication of reports of proceedings of Courts: It is not defamation to publish a substantially true report of the proceedings of the Court of Justice, or of the result of any such proceedings.

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 question whatever respecting the merits of any case, civil or criminal, which has been decided by 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.

Sixth Exception: Merits of public performance: It is not defamation to express in good faith any opinion respecting the character of the author so far as his character appears in such performance and no further.
Seventh Exception: Censure passed in good faith by 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.

Eighth Exception: Accusation preferred in good faith to authorised persons: 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.

Nineth Exception: Imputation made in good faith by person for protection of his or others 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.

Tenth Exception: Caution intended for good of person to whom conveyed or for the 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."
In India an aggrieved party is entitled to both the remedies; civil action and criminal action may go on simultaneously. If the criminal action is withdrawn on tender of apology, the civil action may still continue. Similarly if civil action is withdrawn, the criminal case may still continue.

Two parts of the first explanation to Sec. 499 are to be read together. The imputation aimed at not only will harm the reputation of the deceased person if living, but also it will be intended to be harmful to the feelings of the members of his family or other relatives. The meaning of explanation (for harming a person's reputation) has been given by Lahiri J. in Debajyoti Burman v. The State. " In my opinion this explanation does away with much of the fine distinctions under the English Law and seems to imply that what constitutes defamation has to be determined not upon an interpretation that may be found for a word by a laborious research in a court of law but upon the meaning that might be conveyed by the word to a reasonable and fair minded man. I am prepared to concede that a meaning that might be conveyed to a morbid

52. ILR (1957) 2(Gal.) 181.
or suspicious mind cannot be taken into account for this purpose. The word "others" in the explanation refers in my opinion to a reasonable and fair minded man and not to a man with a morbid or suspicious mind." The concept of good faith has been widely discussed by the Privy Council. It was alleged that the accused, the editor of a newspaper, published an article alleging that the District Magistrate in discharging a military officer for the offence of rape, had committed a breach of trust and was unworthy of the position he held. In fact, the Lieutenant Governor of the province had exonerated the District Magistrate, and the editor did not produce any fresh information on the basis of which he had made the allegation. Therefore, the plea that the publication was made in good faith did not succeed. In Sahib Singh v. State of U.P., there was a reckless allegation/comment in a newspaper article that the prosecuting staff at Aligarh was corrupt. No instance of bribery had been cited and the plea of good faith was, therefore, held to be absent.

The first exception to Section 499 deals with what is known as "justification," in a civil case for defamation. There is a distinction between civil and criminal

54. AIR 1965 (S.C) 1451 at 1467, Para 11.
liability. In civil action as soon as it is proved that the statements complained of are true, the civil suit will fail.

In *Emperor v. Murat Singh* the Allahabad High Court gave a wide connotation to the first exception to Section 499 IPC. An application was made before a Magistrate that a particular person was of "bad character" and "a previous convict." The person concerned was a candidate for a Mukhia. He complained of defamation. The defence of truth was taken. No previous conviction was proved against him. But it was proved that he had committed adultery with his sister-in-law, by whom he had also an illegitimate child. It was held that the offence of adultery under Section 497 of the Indian Penal Code was a serious criminal offence, and therefore, even if there was a statement about conviction which was not literally established, the evidence showed that he ought to have been convicted under Section 497, thus indicating that the statement was substantially true. Therefore, the exception was held to be applicable.

Where truth is set up as a defence, it must extend to the entire libel. Truth of the allegation need not be literally proved. It is enough if it is substantially proved. If there is a doubt whether the matter in question is true or not,

55. AIR 1934(All.) 904, 905,
57. Gour Penal Code para, 24 [1973]

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there is no protection. In *Mohammed Nazir v. Emperor*, the Allahabad High Court held that the plea of justification is a dangerous plea. "The defendant in a proceedings for defamation whether in a suit or under Section 500 I.P.C. is usually in a delicate and difficult position... The first step to consider is what is the exact nature of the defence that can be set up.... The facts may be so strong that occasionally it may happen that the counsel can advise the client to justify ... That most dangerous plea should never be put forward unless there is a practical certainty of success."

Practically the second, third, sixth and ninth exceptions to Section 499 I.P.C. embody the principle what is known as defence of "fair comment in Civil suit for defamation." In *Purushottam Vijoy v. AIR* the Madhya Pradesh High Court while observing that a newspaper writer should be more cautious than a private individual, formulated the requirements of the defence available under the second and third exceptions to Section 499 I.P.C.:

I. The facts (on which comment is offered) should be substantially true.

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59. AIR 1928(All.) 321 at Page 325.
60. AIR 1961(M.P) 205,208,210,211,212.
II. The comments should be fair, in the sense that they are inspired by a genuine desire on the part of the writer to serve the public interest and not by the intention of wrecking private spite.

III. The criticism, even if called for by the facts, should be in public interest, and should not be malicious. It is for the accused to show that these requirements are satisfied.

The Madhya Pradesh High Court further held that, "it is in the public interest that anything shaky or unjust or improper in a minister's conduct should be brought to the notice of the country at large."

61 In N.B. Khere v. W.R. Massani, Vivian Bose J. observed that the comments must be based on facts truly stated, must not contain imputations of corrupt and dishonest motives to the person whose conduct or work is being criticised and must be an honest expression of the writer's real opinion.

So far as the second exception involving newspapers is concerned the Indian Courts have formulated the following principles:

I. The press has no special privileges as such.

61. AIR 1942 (Nag) 117, 118.
II. Newspapers must be more cautious than ordinary persons in publishing defamatory matter.

III. The defence of fair comment does not extend to defamatory allegations of fact.

IV. A Newspaper editor cannot publish matter which is known to be a half true.

This is most respectfully submitted that the decisions do not reflect the duties of the press in the subjective and objective conditions of the country. The press must have some sort of freedom to inform the nation as to what is going on in the country and this must be done without fear or favour. Only malicious publications should be condemned and referable to action.

The third exception has both positive and negative aspect. Positive aspect suggests the situation where the exception applies. The negative aspect suggests limitations to which the exception is subject. The illustration provided with the exception elucidates its scope and limitation.

63. Rama Rao v. Emperor, AIR 1945 (Oudh) 1,8,9,10.
64. Imperatrix v. B. Kakde, ILR. 4(Bom) 298 /1830/
In Muralidhar Jeramdas v. Narayandas, the High Court of Sindh held, "Where in a newspaper report the main assertion is true, mere exaggeration does not take away the privilege under the third exception." In Subroya Aiyar v. Kadar Rowthan Abdul Kadar, it was held, "an article in a newspaper which is a fair comment on public affairs and merely an expression of opinion is immune unless it is proved to be the outcome of a dishonest or corrupt motive." The negative aspect i.e. limitation has been dealt with in Abbasi v. Emperor. The Court held, "a writer is not justified in repeating highly defamatory statements based upon misstatements of facts." The death of a person become a public question. The editor of Kannada Paper Ashavadi published an article, expressing an opinion in respect of the conduct of the complainant touching that question. The Mysore High Court held that the third exception would apply. In the absence of a dishonest or corrupt motive, an article in a newspaper which is a fair comment on public affairs is protected. In order to apply the third exception the comment must be based on facts. In Anna v. Maricar

65. AIR 1914 (Sindh) 35, 86, 87.
66. AIR 1914 (Mad) 552, 553.
67. AIR 1941 (Sind.) 92, 93, 95, 96.
69. AIR 1918 (Lower Burma) 36, 40.
the Court held, "to assert that a certain person makes gifts to certain funds, not out of motives of charity but from motives of self-advantage, would be defamatory." It would seem to make no difference that writing is published in a newspaper. The conduct of a public man cannot be labelled as dishonest simply because the writer fancies that such conduct is open to suspicion.

The element of "due care and attention" required to prove good faith has been discussed in number of cases. In Superintendent and Remembrances of Legal Affairs v. P.C. Ghosh, the Calcutta High Court held that if the accused, without making inquiries, published defamatory allegations against a doctor, (charging a doctor with drugging a patient), he could not claim the protection of the ninth exception of Sec. 499, merely on the ground that the public good was involved.

I agree with the decision on the third exception.

Fourth Exception: In Annada Prasad v. Manatosh Roy, the Calcutta High Court held, "it is not necessary under this exception that the proceedings of the Court should be

70. AIR 1924 (Cal.) 611, 614.
71. AIR 1953 (Cal.) 503, 504.
published contemporaneously. The publication need not be true word by word, but should give a substantially true account of the proceedings. Good faith is not an ingredient of the exception. Now under this exception, the old trials leading to conviction of a person in the distant past may be written and published in a newspaper. But this right infringes Law of Privacy in other countries including U.S.A.

So far as the Indian law is concerned where Law of Privacy has not been recognised, decision is correct but it is most respectfully submitted that the modern jurisprudence does not allow a person or newspaper publish the past condemned or shameful life of a man who is settled in the main-stream of the nation. Such publication offends the privacy of the person concerned.

Fifth Exception: The authors of the Indian Penal Code have tried to explain at length the rationale of the exception. But there is hardly any case law on the fifth exception.

Sixth Exception: The crux of the immunity lies in the requirement of submission of the work to the judgment of the public. The explanation to the exception provides that a performance may be submitted to the judgment of the public expressly, or by acts on the part of author which
imply such submission to the judgment of the public. Thus, as elucidated by illustration a, b and c to the exception, a person who publishes a book, makes a speech in public or appears as an actor or singer of a public stage, submits his work to the judgment of the public. In Emperor v. Abdul Wadood Ahmed, the Court observed, "the responsibility of the critic of a public performance, where he seeks to rely on the defence of fair comment underlying this exception, is to be gauged by the effect which his comment calculated to produce, and not by his intention. It was also observed, "the object of the sixth exception is that the public should in its evaluation of a performance submitted to public judgment be aided by a comment on that performance." The defence of comment under this exception is available as much to newspapers as to others. At the same time, newspapers do not enjoy higher protection than ordinary citizens. In Channing Arnold v. King Emperor, the Privy Council per Lord Shaw held, "there appeared on the one side in this case the time worn fallacy that some kind of privilege attaches to the profession of the press as distinguished from the members of the public. The freedom of the subject, and to whatever length the subject in general may go, so also may the journalist, but apart from a statute law, his privilege is no other and no

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72. Indian Law Institute: Law of Defamation, Some Aspects. 87
73. ILR, 31(Bom.) 293 (1907)
74. AIR, 1914 (P.C.) 116 at Page 124.
higher."

It is most respectfully submitted that the press and the individual citizens do not belong to same class. The social duties imposed upon them are different. The reasonable classification between the press and the public is well-founded. Thus the press and the individual ought not to have been treated alike.

Seventh Exception: The illustration to the exception gives six instances of censure protected by the exception, if good faith is established, as under --

(i) a judge causing the conduct of a witness or of an officer of the court;

(ii) a head of a department causing those who are under him;

(iii) a parent censuring his child in the presence of other children;

(iv) a school master, whose authority is derived from a parent censuring a pupil in the presence of other pupils;

(v) a master censuring a servant for remissness in service;

(vi) a banker censuring the cashier of his bank for his conducts.
Eighth Exception: This exception renders immunity to person who, in good faith, prefers an accusation against any person to any of those who have lawful authority over that person, with respect to the subject matter of the accusation.

In Mrs. Binta v. Emperor, a woman made a false complaint to the police that her modesty had been outraged by the servants of A at the instigation of A. The report was held defamatory, as covering the complainant in the estimation of right thinking persons. In Jai Debi v. Emperor, a woman made certain defamatory and false statements against a government official and on enquiry, she repeated the same before the enquiry officer which amounted to be a publication of the original petition. The Court held that the case was not covered either by the second exception or by the eighth exception. The woman was held guilty of three separate publications of libel. The eighth exception does not formulate privilege. A statement made to a higher authority by way of complaint and casting an imputation on the character of a co-villager is privileged only if the imputation is made in good faith. The status of the privilege enjoyed in criminal law by witnesses giving evidence in judicial proceedings

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75. AIR 1936 (Nag.) 240, 242.
76. AIR 1915 (All.) 162, 163.
is that of qualified privilege. Sometimes there may be inter-relationship of defamation with other wrongs and offences. Libellous reflection upon the conduct of a judge in respect of his judicial duties may certainly come under Section 499 and it may be open to the judge to take steps against the libeller in the ordinary way for vindication of his character and personal dignity as judge, but such libel may or may not amount to contempt of court, which is something more than mere defamation and is of a different character. If defamation of a subordinate court amounts to contempt of court, proceedings can certainly be taken under the Contempt of Court Act, quite apart from the fact that another remedy may be open to the aggrieved officer under section 497.

I agree with the decisions. The decisions are well founded and they are based on sound reasons.

Ninth Exception: There are two essential ingredients for application of ninth exception:

I. The statement must be made for protecting the interest of the maker or recipient of the communication or for the public good.

79. Lala Lachman Prosad v. Majju AIR 1923(All) 167.
II. The communication must be made in good faith. The interest sought to be protected can be a private one, or it may be the public good. But the mere belief of a person that he is seeking to protect such an interest or the public good is not enough. The existence of a legitimate interest of the maker or recipient or of the public good must be established objectively.

Honesty of purpose is an ingredient of good faith. The care and attention required for good faith must have relation to the occasion and the circumstances. If the allegations made are such that, having regard to certain facts and circumstances within his knowledge, the accused might, as an ordinarily reasonable and prudent man, have drawn the conclusion which he expressed in defamatory language for the protection of his own interest, he can be said to have acted in good faith. A libel containing a charge of bribery against a Magistrate is not protected if published in a newspaper. It was held that the public good could have been protected by making a

81. Bhola Nath v. Emperor, AIR 1929 (All.) 1, 8
85. Abdul Hamin v. Tejchandra Mukherjee, ILR 3 (All.) 815, 818 (1881).
representation to the government. Publication in a newspaper was held to be excessive in the circumstances and destroyed the privilege. Publication of a notice in the newspaper having wide circulation was held to be outside the ninth exception. In *Bibhuti Bhusan v. Sudhir Kumar*, the Calcutta High Court held, "editor of a local journal must submit to a more rigorous test of good faith, when he claims the protection under ninth exception." In *Mohammed Nazir v. Emperor*, the Allahabad High Court emphasised, "the editor of a newspaper should be most watchful not to publish defamatory attacks upon individuals, unless he first takes responsible pains to ascertain that there are strong and cogent grounds for believing the information which is sent to him, to be true." In *Bala Subrahmania v. Raja Gopalachari*, it was alleged by Chakraborty Raja Gopalachari, that after he had resigned as the Chief Minister of the Madras Province under the Congress Government, the Justice Party in its weekly newspaper *Sunday Observer* published a news item containing certain allegations, the gist of which was that Gandhiji and Raja Gopalachari

87. Mammunhi v. Abdul Rahiman 50 Cr. L.J 710(1940);
    Thiagaraya v. Krishnasami ILR 15 (Mad.) 214 [1892];
88. AIR 1966 Cal. 47.
89. AIR 1923 All. 321 at 324.
90. Bala Subrahmania v. Raja Gopalachari AIR 1944(Mad.) 484 492, 494.
in league with each other, were encouraging violence. While laying down the propositions that (I) the editor of a newspaper is in no better position than an ordinary citizen, and (II) where protection is claimed under an exception (ninth exception) which requires good faith, recklessness may negate good faith, the High Court held, "the ninth exception may protect even baseless or incorrect statements if there is good faith." In *Thakur Dovar Singh v. Krishna Kant*, the Madhya Pradesh High Court held, "there can be no 'public good' in telling the world that a person was killed, when in fact, he died a natural death. Similarly, there cannot be 'public good' in letting the public know that a death was caused by a particular person, when that person was not, in any way, concerned with it."

**Tenth Exception:** A limited and specialised area of protection is the subject matter of the tenth exception to the section. It gives immunity to caution conveyed 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.

Section 500 of the Indian Penal Code deals with punishment. The section provides simple imprisonment up to two years or with fine or with both. The Law Commission 91. AIR 1958 (M.P) 216, 217, 218.
of India in its report (42nd Report 331, Para 21.5 (1971)) recommended that the punishment should be imprisonment of either description up to two years and further recommended that where the defamatory statement has been published in a newspaper and thus made known to a large number of persons, the fact of offender's conviction should be similarly published. The cost of publication should be recoverable from the convicted person as a fine. Accordingly the Law Commission recommended that section 500 should be revised as under:

1. Whoever defames another shall be punished with imprisonment of either description for a term which may extend to two years or with fine, or with both.

2. Where the offence has been committed by publishing an imputation in a newspaper, the court convicting the offender may further order that its judgment shall be published, in whole or in part, in such newspaper as it may specify.

3. The cost of such publication shall be recoverable from the convicted person as a fine.


with this recommendation of the Law Commission.

The aforesaid recommendation of the Law Commission has not yet been considered by Parliament. Since dignity of a person relates to his personality, it should be protected by any means. The recommendation of the Law Commission is a pragmatic approach to protection of the personality of an innocent person against unjust and malicious publication. The Indian parliament should enact law in terms of the said recommendation without further delay.

**CIVIL DEFAMATION IN INDIA.**

There is no Statute Law of Defamation in India. The Indian courts, on the principles of Common Law of Defamation, have made judge-made laws of defamation. In this particular area there is a plethora of litigations and the case laws cover much of the area. Some of the most important case laws of recent past are discussed below:

**On Privilege.**

In the undenoted cases it was held, "the complaint made to police is protected by qualified

93. Gangappa Gouda v. Bassayya AIR 1943(Bom.) 167;
    Moroti Sadashiv v. Godubai Narayan Rao AIR 1959. (Bom.)
    433; Mayr. v. Qivaz ILR[1943] 1(Cal.) 250.
privilege." In *V. Narayana v. E. Subbama*, it was alleged that the defendant respondent made a complaint to the police imputing an offence of robbery against the plaintiff-Appellant. The complaint was enquired into by police and was found to be false. Thereafter, the police prosecuted the defendant for filing a false complaint and he was convicted but the conviction was set aside in appeal. Under the circumstances, the plaintiff filed the suit against the defendant claiming Rs 1000/- as damages for defamation alleging that the defamation statements contained in the complaint had brought him disrepute and infamy in society. The trial court dismissed the suit holding that the complaint to the police was not false, frivolous and vexatious to the knowledge of the defendant and that plaintiff failed to show that he was defamed by the complaint. The lower appellate court held that the complaint was defamatory *per se*, and the defendant failed to substantiate the plea of justification. It however, concluded that the statement in the complaint was protected by the absolute privilege. The Karnataka High Court relying on the decisions in *Majju v. Legman Prosad*; *Benalal & Co. v. Krishna Swami Iyre*; *Sanjiv Reddy v. Kenna Reddy*; *Vatappa Koney v. Methu Karuppan*; *Madhav Chandra v. Niran Chandra*; *Rachman v.*

94. AIR 1975 (Kant.) 162.
95. AIR 1924 (ALL.) 535 (F.B.)
96. AIR 1942 (Mad.) 26.
97. AIR 1926 (Mad.) 521 (F.B)
98. AIR 1941 (Mad.) 1538
99. AIR 1939 (Cal.) 477.
Pyareband held, "the statements made in the complaint to the police are protected by absolute privilege."

In Gopalan Kutty v. M. Sankunni the Plaintiff alleged that the defendant submitted a petition to the (executive) first class Magistrate with a view to initiating proceedings under Section 107 of the Criminal Procedure Code. (The Section empowers certain Magistrate to take a bond from a person likely to commit a breach of the peace etc). He not only called the plaintiff and his brother notorious bad characters, but also accused them of owing their success in life to blackmail and criminal breach of trust. The Full Bench of the Kerala High Court, including the dissenting Judge held that the per se defamatory statements contained in the petition to the court enjoyed absolute privilege. Such proceedings (popularly called) "Chapter proceedings" under Chapter eight to thirteen of the Criminal Procedure Code, are first judicial proceedings and second, they enjoy absolute privilege. Another question was whether the same absolute immunity was available to a copy of the petition presented on the same day to the sub-inspector of police. The majority answered the question in the affirmative and stated that the privilege

100. AIR 1959 (Raj.) 163.

101. AIR 1971 (Ker.) 280 (F.B).
was not merely to proceedings at the trial, but also to proceedings which were essentially steps in judicial proceedings such as statements in pleadings and communications on the subject passing between the solicitor and his client. The Court also discussed on the theory of "potential witness". According to this theory the protection of absolute privilege extends to "potential witness" who may not mature into an actual witness.

In K. Daniel v. T. Hymavathy Amma, the Kerala High Court discussed the immunity of absolute privilege in making slanderous statements in course of judicial proceeding. The Court held that an examination of the common law of England would show that statement made by judges, juries, counsels, parties and witnesses in the course of judicial proceedings were not actionable in Civil Law for slander as the occasion was absolutely privileged. The common law rule of absolute privilege in a civil action for slander in regard to statements made in the course of judicial proceedings has been followed by courts in India.

102. AIR 1985 (Ker.) 233.

It is imperative that judges, counsels, parties, and witnesses participating in a judicial proceeding must be able to make their comment without any apprehension of being called to answer a claim for damages for defamation. They must be able to act uninfluenced by any such fear. Freedom of speech on such occasions has to be totally exempted.

Hence, it is necessary to protect the maker of statements on such occasions. The privilege arises on account of privilege attached to the occasion and not to the individual. It is possible that sometimes counsels or parties or witnesses may take advantage of the occasion and indulge in false or malicious statement which has the effect of bringing down the reputation of some other person. In such cases the court has ample power to strike out the vexatious and malicious statements from the petition or pleading. Malicious and false or purjured evidence may be dealt with under Section 340 of the Criminal Procedure Code, 1973. Basis of privileges is not the absence of malice or the truth of statement of the intention of the maker but public policy. Any restriction on privilege during the occasion would create constraints in the

\[1868\] L.R. 3 Ex. 220; Dawkins v. Lord Rokely \[1875\] LR 7 H.L. 744; Seaman v. Nether Cliff \[1876\] 2 QPD 53; Munster v. Lamb \[1883\] 11 QBD 588; Royal Acquarian and Summer and Winter Garden Society v. Parkhison \[1892\] 1 QB 431; Anderson v. Goreia \[1898\] 1 QB 5
process of administration of justice. In the public interest it is not desirable to enquire whether the words or actions of these persons are malicious or not. It is not that there is any privilege against malice, but it is a privilege in favour of public interest. Individual interest is always inferior to public interest. The privilege is to be exempted from all enquiries as to malice. The rule of absolute privilege is different from the rule of qualified privilege as contained in Indian Criminal Law. To qualify the rule of absolute privilege by insisting that only those statements which are absolutely or necessarily relevant is to impair the vigour and efficacy of the rule. It must always be borne in mind that in deciding whether a statement has reference to the matter of enquiry, the widest and most comprehensive interpretation must be given.

In a suit for recovery of certain sums of money advanced by the plaintiff to a lady defendant, she made statements alleging that the sums were advanced with ulterior motive.

The Court also relied upon a number of Indian decisions. All the decisions arrived at the same conclusion. Decision of Baboo Gunnesh Dutt Singh was accepted by the Privy Council in principle. In Kamalini's case Tulzapukar (as he then was) after reviewing the entire Indian case laws on this point, held that the English Common Law Rule pertaining to absolute privilege enjoyed by judges, advocates, attorneys, witnesses and parties in regard to words spoken or uttered during the course of judicial proceeding was applicable in relation to a civil suit filed for damages for defamation. In Adivarnamma's case the Madras High Court held, "while statements in order to be protected need not be absolutely relevant statements which have no earthly connection with the case, may not be protected." In Hindustan Gilt Jewel Works Case the Madras High Court observed, "the statements must have some reference to the enquiry and not entirely irrelevant though the expression 'reference to enquiry' must be given a very wide and comprehensive application."

In Y.A. Dikshit v. Radha Krishna the Oudh High Court held, "a communication made from a sense of duty, legal, moral and social, must, if the circumstances of the case so justify, be treated as privileged." Where an attack is made upon the character of a person, he has the right to answer it and to communicate his answer to all concerned, particularly those who head the attack. No action for libel can be founded on a publication made by a person in the ordinary course of business in the discharge of his duty.

In Branna v. Nanjappa the Court held, "it is no doubt defamatory for a person to characterise another, in a petition sent by him to the police for preventive action, as a rowdy and as a person who waylaid the petitioner in order to beat him and to cause apprehension of damages to his life. But if such statement is made bonafide, that is, with an honest belief in its truth in spite of its being defamatory, must be held to be privileged whether it be true or false."

In the undernoted cases it was held that a man had no right to sue in respect of defamatory words

106. 1948 (Oudh) 226.
106. 27 (Mys.) L.J. 1.
referring to another person even if the latter was a near relation. But in *Sukhan v. Bipad*, it was held by the Calcutta High Court, "an action will lie in respect of words imputing misconduct to the plaintiff's wife which degraded him in his caste."

In *Tarapada Majumder v. K.B. Ghosh & Co.*, it was held by the Calcutta High Court, "a lawyer is not like a loose canon to inflict any discriminatory damages. Whatever he announces he is acting within his professional capacity. Therefore, justice, equity and good conscience and the standard to be followed demand that between the public policy and freedom of citizens, a balance has to be struck if a lawyer acts in his professional capacity on the instructions of his client, then his statements are immune from being the basis of action of defamation, unless express matter is pleaded and established." It is submitted that the decision of the Calcutta High Court is not correct. The principles of absolute privilege to save the occasion on public interest have not been reflected in the judgment. The judicial precedents or ratios have not been followed.

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Brahmans v. Rama Krishnamma 18 (Mad.) 250; Daya v. Parum Sukh 11 (All.) 104.

108. 34(Cal.) 48.

109. AIR 1979 (Cal.) 68, 74, 75.
In Shedatt v. Ram Swarup, it was held that the words of an advocate were absolutely privileged and that he could not be proceeded against civilly and criminally for words uttered by him in his capacity as an advocate. Full Bench of the Bombay High Court in Bhai Sankar v. L.M. Wadia held, "an advocate has fullest liberty of speech in the course of trial before a judicial tribunal so long as his language is justified by the instructions or by the evidence or by other material on the record." The mere fact that the words are defamatory or that they are calculated to hurt the feelings of another or that they ultimately go want out to be altogether unfounded will not make him liable civilly or criminally.

In P.C. Gupta v. State the Calcutta High Court laid down the principle, "a lawyer cannot carry on his profession if his freedom is unduly fettered. The imputation complained of is after all not his own but has been made on behalf of his client; he need not vouch-safe for his truth."

110. ILR 1945 (All.) 702; Bhai Shankar v. L.M. Wadia. 3 (Bom.) LR 3 (F.3); Sullivan v. Norton 1885 10 (Madras) 28 (F.B.); Maharaj Kumar Jogotmohan Nath Sah Deo v. Kalipada Ghosh 1 (Pat.) 371; Shivakumari Debi v. Bacharam 25 (CWN) 835; 1922 (Cal) 525.

111. 3 (Bom.) L.R. (F.B).

112. 75 (CWN) 402 (410).
In the backdrop of the case-laws, the principle underlying such a concept of privilege, qualified or absolute, appears to be expedient. If any one needs to be free of all fear in the performance of his arduous duty, an advocate is such a person and until and unless there is a proof of express malice on the part of the lawyer, he does not come within the bounds of the offence of defamation. The lawyers are the high priests in the pursuit of truth at the temple of justice and there should be no spoke in the wheels of justice by fettering unreasonably the freedom of such lawyers. *Fiat Justitia Ruat Coelum* (let justice be done though heaven may fall). The lawyer in this country is the only qualified privileged and he will not come within the bounds of the offence of defamation without express malice or malice in fact. Such express malice ought not to be presumed. The lawyers are the ministers of the government of law and for proper functioning of justice the lawyers, like judges and witnesses, should enjoy absolute privilege.

The recognised principle in India is that public policy requires that judges, counsels and witnesses should be able to make their statements in judicial proceedings without fear of being exposed to legal consequences.

In *Raman Nayar v. Subramanya Ayyan* the Madras High Court held, "the provision of law is not for

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114. I.L.R. 17(Mad.) 87 (1894).
the protection of benefit of a malicious or corrupt judge, but for the benefit of the public whose interest mandates the judges. In [Jagannath Prosad v. Rafat Ali Khan](AIR 1934 (All.) 827) the Allahabad High Court held, "even a magistrate who had used the words 'dishonest liar, foolish and pest of Aligang' is protected by absolute privilege."

Whether the doctrine of absolute privilege extends to tribunals in India, depends on the status, composition and function of the Tribunals. In [O'Connor v. Waldron](1935/1 AC 76 (Appeal from Canada)) the Privy Council held, "the doctrine of absolute privilege extends to 'Tribunals exercising functions equivalent to those of an established Court of Justice?'" In view of this principle the doctrine of absolute privilege does not apply to the following cases:

a. Inquiries which are merely administrative.

b. Administrative inquiries with a duty to act judicially.

c. Preliminary enquiry to report to the Collector about the conduct of a Police Patrol.

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115. AIR 1934 (All.) 827.
118. Supra 115 (121) Gangappa Gouda v. Bassayya AIR 1943 (Bom.) 167.
But the tribunal constituted under the Statute enjoys absolute privilege, for example, Tribunal under the Bar Council Act.

The principle of absolute privilege on official statement is recognised in India. A resolution of the government on an official matter is absolutely privileged. If prima facie an official communication is privileged, no allegation of malice would be allowed to be raised and no proof of malice will affect the privilege. But in Narasimha Rao v. Balwant Bombay High Court held, "the official communication is one of qualified privileges." It is submitted that the decision in Narasimha Rao v. Balwant is not based on sound reasoning or on any subordinate norm. Official communication cannot be said to be actuated by malice. It is privileged on public policy and public interest and as such it is deducible that official communication is absolutely privileged.

So far as the qualified privilege is concerned, the existence of a duty is more important than the existence of a matter of public interest. A privileged occasion is, in reference to qualified privilege, an occasion where

\[ \text{(References and Footnotes: AIR 1944(Bom.) 246, ILR 27(Bom.) 585, 588, 589, R.K.Karanjia v. K.Wd. Thakersey AIR 1970(Bom.) 424. Paras. 8,20,21.)} \]
the person who makes a communication has an interest or duty, legal, social or moral, to make it to the person to whom it is made and the person to whom it is so made, has a corresponding interest or duty to receive it. This reciprocity is essential.

The motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. In Janardan Karandikar v. Ram Chandra Tilak, the dispute and litigations arose out of certain statements and counter statements relating to the affairs of a trust created by the late Lokmanya Tilak and to the policies pursued by two newspapers (the Maratha in English and the Kesari in Marathi) which were stated by him and later handed over to the trust.

The plaintiffs were the two sons of Lokmanya Tilak who had attacked the defendant and his co-trustees in a document called "Public Declaration," whose publication was followed by the plaintiff's undertaking a fast unto death. It was in reply to the 'public declaration' issued by the plaintiff and in avoidance of responsibility for the plaintiff's fast unto death, that the articles of the defendant were published in the Kesari. It was the article which was the basis of the plaintiff's claim for damages for libel. Blagden J. who tried the suit on the original side held the statement of the plaintiff defamatory, but on appeal, the Division Bench of the Bombay

High Court held that the article was written on a privileged occasion and was protected, there being no proof of malice. It was held that where in an action for libel, it was found that the alleged article was published on a privileged occasion, two questions arose for consideration, (1) whether any portion of the offending article was outside the privileged occasion and was, therefore, not protected and, (2) if the privileged occasion covered the whole article, was there evidence of express malice?

To sum up the defence on qualified privileges, an article, "Defamation--Qualified privilege" may be referred to. The article deals with a decision in Reginald Austin v. Mirror News Papers Ltd.

In this case the plaintiff, a trainer of a professional Rugby Club, claimed damages for defamation for an article published in the Daily Mirror who complained that it contained defamatory imputations (1) that the plaintiff directed physical conditions and preparation of the Manly Rugby League in such a wrong and incompetent manner that he was unfit to hold the position of trainer and (2) that the plaintiff was an incompetent conditioner. The defendant raised the plea, amongst others, of qualified privilege. The Privy Council had to deal with the qualified privilege with reference to Sec. 22 of the

125. 90 CWN, Part 16 dated 10.3.86.
126. 1986/2 W.L.R. 57.
Defamation Act, 1974 of the New South Wales. Sub-section (I) of Section 22 provides: "Where, in respect of matter published to any person — (a) the recipient has an interest or apparent interest in having information on some subject; (b) the matter is published to the recipient in the course of giving to him information on that subject; and (c) the conduct of the publisher in publishing that matter is reasonable in the circumstances, there is a defence of a qualified privilege for that publication". The judgment inter alia runs as follows:

It is submitted on behalf of the plaintiff that the defendant failed to establish the necessary ingredients of the defence under each of sub-paragraphs (a), (b), (c).

As to sub-paragraph (a) it was submitted on behalf of the plaintiff, that the readers of the newspaper did not have "an interest" in having information on the subject matter of the article, which it was agreed between the parties, could be taken to be the performance of teams in the Rugby League competition and the alleged training methods of conditioners. It is possible as a matter of construction to place a narrow or a broad construction on the words "an interest." The narrow construction would equate "an interest" with that type of interest which is usually looked for as an ingredient of the defence of qualified privilege at common law, that is to say, an interest material to the affairs of the recipient of the information such as would for instance assist in the making of an important decision or the determining of a
particular course of action. It is for this narrow construction that the plaintiff contends. But it is clear that the courts in New South Wales have placed a broader construction upon the words "an interest" and have taken them to include any matter of genuine interest to the readership of the newspaper. In *Wright v. Australian Broadcasting Commission* Reynolds JA with whom Glass J.A agreed, said at Page 711, when considering section 22(1) (a) in respect of a Television Broadcast:

"It cannot be denied that the recipient, in this case is the general public, who had an interest in having information on the subject of public affairs."

In *Morosi v. Mirror Newspapers Ltd.*, the Court of Appeal drew a contrast between the interest required to find qualified privilege at common law with the wider interest referred to section 22. They said in the judgment of the Court, "The limited application of the common law principles of qualified privilege to publications in newspapers has already been discussed. Section 22 was designed to enlarge the protection afforded by these principles to defamatory publications generally, and it has a particular relevance to publications in newspapers; but it gives no carte blanche to

129. *2 N.S.WL* 797 Per Moffitt P.Hope and Reynolds JJA.
newspapers to publish defamatory matter because the public has an interest in receiving information on the relevant subject. What the section does is to substitute reasonableness in the circumstances for the duty or interest which the common law principles of privilege require to be established."

In Barbaro v. Amalgamated Television Services Pty. Ltd., the court held,

"The word 'interest' is not used in any technical sense, it is used in the broadest popular sense, to connote that the interest in knowing a particular fact is not simply a matter of curiosity, but a matter of substance apart from its mere quality as news; ....."

In Field v. John Fairfax & Sons Ltd. (Unreported) 23 May, 1974, Supreme Court of New South Wales Court of Appeal, it was held that the public had an interest in the grey-hound racing industry.

Bearing in mind that this Act was clearly intended to widen the scope of the common law defence of qualified privilege, their Lordships see no reason to differ from the wider construction adopted by the Courts in News South Wales and, applying this construction, accept the view of both the trial judge and the Court of Appeal that the readership of this daily newspaper had an interest in the

130. \[1985\] N.S.W. LR 30 per Hunt J at P. 40.
performance and training of the Manly Rugby League Team within the meaning of Section 22(1) (a).

The next submission on behalf of the plaintiff was that the Article was not conveying "information" within the meaning of Section 22(1)(a) and (b). It was said that information should be restricted to facts contained in news or reportage as distinct from comment or opinion. It is difficult to see any reason why the word "information" should be given such an artificially restricted meaning. The word itself in its ordinary meaning is apt to cover both fact and opinion and there are as many matters of opinion that will be of general interest to the readership of a newspaper as there are facts upon which such opinions are based. It is implicit in the decision of the Court of Appeal in Wright v. Australian Broadcasting Commission (1977) 1 N.S.W.L.R. 697 and Morosi v. Mirror Newspaper Ltd. (1977) 2 N.S.W.L.R. 749 that the Court of Appeal in New South Wales considered that information would, where appropriate, cover comment and opinion. Their Lordships agree with this view and accept that so much of the article as comprised comment was information within the meaning of Sec. 22(1)(a) and (b) and was published in the course of giving information on the subject in which readership had an interest, namely, the performance and training of professional Rugby League Teams.
It now remains to be considered whether the Court of Appeal was right to conclude that the conduct of the newspaper in publishing the article was reasonable in the circumstances within the meaning of Section 22(1)(c). In considering whether the conduct of the publisher is reasonable, the court must consider all the circumstances leading upto and surrounding the publication. These circumstances will vary infinitely from case to case and it would be impossible and most unwise to attempt any comprehensive definition of what they may be. But where a jury has rejected a defence of fair comment upon the ground that the facts upon which the comment is based are not substantially true, the starting point of the enquiry must be the ascertainment of those facts which the jury have found to be untrue. A newspaper with a wide circulation that publishes defamatory comment on the untrue facts will, in the ordinary course of events, have no light task to satisfy a judge that it was reasonable to do so. Those in public life must have broad backs and be prepared to accept harsh criticisms but they are at least entitled to expect that care should be taken to check that the facts upon which such criticism is based are true.
JUSTIFICATION

In India, truth is a complete defence to a civil action for libel. The burden of proof of the defence of justification lies on the defendant. All defamatory statements are presumed to be false, but the defendant can rebut the presumption.

In Nellikka Achuthan v. The Deshabhimani Printing or Publishing House Ltd. Kozl Kode & Anr., the plaintiff filed a suit for recovery of damages against printer and publisher of newspaper for having printed and published a defamatory news item under the caption "theft of elephant tusks" in its newspaper dated 1.12.1974. This was followed by a further news item four days later with the caption "the elephant tusks taken into custody have been produced in Court." The defence was one of justification by truth. It is an undisputed fact that on 23.11.74 an elephant was shot dead by the plaintiff in the forest allotted to him by the Government in recognition of his service as Captain in Indian National Army. According to plaintiff, he had taken to his house tusks of dead elephant to prevent their pilferage by others and later

132. Mitha Rustomji v. Nusserwanji Nawroji AIR 1941 (Bom.) 278.
133. AIR 1986 (Ker.) 41.
had produced before the Court and there was therefore, no evil intent to commit theft of tusks. The defendants have taken the stand that the statements contained in the two articles are correct and true.

The Kerala High Court held that the defence plea of justification by truth has been established.

The elephant is a wild animal as defined in Section 2(36) of the Wild Life (Protection) Act. As the plaintiff had not obtained licence under Section 9(3) of the Act, the elephant killed by him and the tusks would be the property of the State Government under Section 39. They did not belong to him. The evidence of the plaintiff showed that he had known about the movement of elephants about two days prior to the shooting incident, that he had proceeded from his house well protected and well prepared to shoot and that while proceeding in his estate when he saw the elephant at a distance of 20 yards he shot it. This blasts the case of shooting the elephant in self defence. This is not consistent with what he has stated in his letter dated 29.11.74. to the Deputy Superintendent of Police. It is not as though all of a sudden he was confronted with an attacking rogue elephant. His omission to inform forest authorities or Police authorities earlier about the danger posed by wandering wild elephants can be taken as a relevant factor to decide upon the intention in the removal of tusks. In proof of his making report to the authorities about the incident and of his preparedness to hand over
the tusks to the authorities, he relied on his letter dated 20.11.74 to the Deputy Superintendent of Police. But the said letter does not contain the office seal of a Deputy Superintendent of Police. Either the Dy. Sp. or the Collector was not examined to corroborate the plaintiff. The attitude indicated in that letter is totally inconsistent with the one evidenced by the petition before the Magistrate wherein he has stated that he is entitled to the tusks and claimed their return. In these circumstances no reliance can be placed on the letter. There cannot, therefore, be any doubt that a dishonest intention motivated his action and that his intention was to appropriate to himself the tusks. Newspaper reports in question, reporting about looting and plunder of forest wealth and wild life are matters of public interest. The anxiety of a citizen who approach the Court for protection of his reportation has to be balanced with the equally (or perhaps more) important consideration like the freedom of the press. A balancing of the consideration has to be attempted by the court.

The defence of fair comment in common law has been recognised and much utilised in litigation in India. Fair comment has two wings viz. true fact and public interest. What is public interest? It was held in Union Benefit

134. Vishan Sarup v. Nardeo Shastri AIR 1965 (All.) 439
Irwin v. D.J. Reid AIR 1921 (Cal.) 282.
Guarantee Co. v. Thakorlal that, "matter or subject which invites public attention or is open to public discussion or criticism is a matter of public interest. There is a difference between public interest and general interest. On this footing a newspaper does not stand in any special position. Comment must be based on facts. It is well established in law that the comment must be based on a fact which either the person commenting states or which is indicated by him with sufficient clarity to enable the reader or listener to ascertain the matter on which the comment is being made. It was held in Subhas Chandra Bose v. R. Knight & Sons, "If the conclusion recommended his readers that the plaintiff is guilty of this charge, he is in position of a person who has publicly charged another with a crime, not apart from a defence of privilege, he must either justify or pay. It is no defence whatsoever, to say that he honestly believed in his accusation, or that he had a certain amount of reason for making it, or that Lord Lytton had said it before; or that he was concerned to support a policy of Government."

Fair comment, though it can include inference of fact, must be recognisable as comment. Some statement of facts must consist in common. Such statement of fact can be held to be a comment if the fact so stated appears to be a deduction or conclusion arrived at by the speaker from the facts. In India it is

135. AIR 1936 (Bom.) 114.
137. AIR 1929 (Cal.) 69.
recognised that the defence of fair comment protects only statements of opinion and not defamatory allegations of facts. Comment may be "fair" even though it is wrong or is expressed with violence and haste. In O'Shaughnessy v. Mirror News Papers Ltd. the High Court of Australia observed, "It is not that the writer merely failed to preface what she had to say about the production with some formula such as "it seemed to me"; it is rather that the jury could have found that an imputation of dishonesty was levelled against the plaintiff as the writer's explanation of what she asserted to be waste of talent. If what was written had been no more than comment it only had to be fair, but if it were a fact, it had to be correct to defeat the plaintiff's claim. It was, we think, for the jury to decide whether there were any statements of defamatory facts and because the issue was withdrawn from them we consider that the trial miscarried."

"To protect ourselves from too broad a generalization we should add that it is not our view that an imputation of dishonesty is always an assertion of facts. It is part of the freedom allowed by the common law to those who comment on matters of public interest that facts truly stated can be used as the basis of an imputation of corruption or dishonesty on

139. Raghu Nath Singh v. Mukand Lal AIR 1936(All.) 720
the part of the person involved."

The interpretation of the phrase "fair comment" is wider than the English Common Law and Indian Law.

**LIBEL**

The law of defamation relating to libel is somewhat settled in India. In absence of statutory provisions, the Indian Courts have laid down the following principles as guidelines:

1. The defamation is a false and damaging statement.

   Asking a witness that he has amassed the wealth "by sucking the blood" is not defamatory.

   To say about a person in respect of his profession or calling that he is unfit or incompetent for the profession is defamatory.


143. AIR 1941 (Bom) 278. Mithu Rustamji v. Nuserwanji.
A statement made against a lawyer that certain persons had engaged him and reposed their confidence in him but he after accepting the brief betrayed their confidence and let his client down is highly libellous.

A company or corporation may sue for any defamatory words which reflect upon it in the way of its property or trade or business.

A Corporation is also liable to an action for libel published by its servants or agents.

The mere use of abusive and insulting language is not sufficient to justify or claim for damages.

Limitation for filing suit for defamation is one year.

The Indian Limitation Act 1963 has unjustly made a distinction between libel and slander. Art. 76 contemplates special damage as an essential requisite for the

144. Raghunath Singh v. Mukundilal AIR 1936(All) 780, 784.
145. Union Benefit Guarantee Co. v. Thackorlal AIR 1936(Bom.) 114, 117.
actionability of slander whereas Art. 75 does not require special damage for libel to be actionable. These two specific provisions indicate that the distinction between libel and slander as prevailed in U.K. is followed in India. I submit that provisions of Art 76 are highly discriminatory. The classification is not reasonable. It offends Art 14 of the Constitution.

SLANDER

In the case of Dewan Singh v. Mahit Singh, Mahmood J. held that abusive language was held actionable without special damage unless excused or protected by other rule of law and a civil injury apart from defamation, in India. It was also observed that the English Law of slander drawing an arbitrary distinction was not applicable in India.

The true test of spoken actionable words is their tendency to excite feelings of hatred, contempt, ridicule, fear, dislike or disesteem, due regard being had to the circumstances in which the language was used.

(All.) 461.

148. ILR 10 (All.) 425, 456 1886
There are divergent judicial decisions in India. In some cases the Court held that action for slander did not lie without proof of special damage, but in other cases the Courts held that action for slander lay without proof of special damage. These divergent decisions upon the principle of the doctrine of precedent, often cause injustice to the litigants. Therefore law in this field still remains unsettled. It is most respectfully submitted that the first bunch of cases does not show the reason as to why special damage should be pleaded and proved in the case of an action for slander. Judgments not based on sound principle, reasonings can have no universal application, hence they are not authorities. Arbitrary and capricious decisions are not value judgments. The decisions in the second bunch of cases are in conformity with the sound principles of law relating to libel.


151 Sagar Ram v. Baburam (1904) 1 (All L.J) 102; Suraj Narain v. Sitaram AIR 1939 (All) 461; W.C. D'Silva v. T.H Potenger ILR 1 (Cal) 157, 167, 168 (1946); Gaya Din Singh v. Mahabir Singh AIR 1926 (Oudh) 363; Parvati v. Manman ILR 8 (Mad) 175 (1884); Vallabha v. Madhu Sudan ILR 12 (Mad) 495 (1887).
In Leslie Rogers v. Hajee Fakir Muhammad 152 Salt p Wallis G. J. observed, "taking it to be defamatory to say that a person is suspected of having committed an offence, I think the person against whom the offence is alleged to have been committed must have a qualified privilege to discuss the case mentioning his suspicion."

In Subbanaidu v. Sreenivasa Charyulu, the plaintiff and the defendant were rival candidates at an election. The plaintiff called the defendant "rowdy suspect" at an election meeting. Defendant retorted that the plaintiff was a drunkard and repeated this after the meeting.

The Court held, (I) allegation at the meeting enjoyed qualified privilege, but

II. repetition afterwards was actionable.

EVALUATION OF THE LAW OF DEFAMATION.

The law of defamation protects human dignity and honour. Dignity and honour are inalienable absolute right of mankind. In early society slaves had no personal ities, hence law of defamation was not applicable to them.

152. 35 (M.L.J.) 673 (1918).
Society requires strong discipline within it. That discipline symbolizes social norms which include law and morality. Norms again are part of the values (social, moral, ethical and legal) for upholding of which several institutions are set up. The social norms suggest that the dignity and honour of the members of the given society should be protected. Moral and ethical norms lay down the reasons for such protection and the legal norm of a given society protects such inalienable personal rights. Law protects the dignity and honour of a member of the society in two ways viz. through criminal action and civil action. Law of defamation presumes that the infringement of personality by way of defaming a person is a recognised offence against the State and as such the offence of this type is punishable. The punishment serves two purposes namely, (1) it restores the defamed dignity and honour and through punishment of the tortfeasor it warns the people at large to be vigilant about this particular type of social and legal norm. The theory of compensation or damages in civil cases for defamation is contrary to the basic human right. Basic human right is always inalienable. Barring a few exceptional circumstances, defamation does not cause any pecuniary loss to the defamed person. The theory of compensation invariably relates to financial loss. Where there is no financial loss, there cannot be any compensation. There are some cases, for instance, in the case of a girl who is victim of rape has not suffered any pecuniary loss, the question of her rehabilitation arises and that rehabilitation cannot be possible without money. But in
the case of defamation, the only question of the defamed person is to restore the lost honour through republication of the factum of restoration of honour and nothing else. Suppose 'A' publishes an article in the newspaper 'X' about the corrupt practice of 'B' who is really an honest and socially reputed person. Two questions may arise here. How far has the publication damaged his honour and reputation in the society? If the society is disciplined and norm abiding, the publication may damage the honour and reputation of 'B' to a great extent and his association may be avoided by his fellow brethren. But if the society is corrupt and indisciplined, where the values are at the low ebb, the publication does not affect any social interest of 'B'. In that case 'B' does not suffer any injury. We can set up another example to clarify this point.

In the socialist society if 'B' is characterised as an agent of C.I.A.; the socialist society from the interest of the national point of view should shun the company of 'B' and the activities of 'B' will be evaluated by the socialist society with great suspicion. In India even a member of parliament with a placard containing "I am a C.I.A. agent" hanging on his back may enter into one of the Houses of Parliament and publicly announce that he is a C.I.A. agent. As the social interest in India is not unified with national interest and national feeling, such public announcement does not create any adverse social feeling. There are even instances of socially labelled ill-reputed persons being elected to parliament, State Legislatures and local bodies. The second question is how
to restore the lost or damaged honour of 'B'? If the offence committed by 'A' is punishable under the Penal Code of any given society, 'A' may be tried and punished. The punishment of 'A' and publication of judgment in the daily newspaper for two or three days may serve three purposes: (I) it at once restores the honour of 'B' to his original position to the knowledge of the society at large, (II) the punishment and detention of 'A' behind bar creates extra-ordinary pleasure and enjoyment in the mind of 'B' and his associates. This extraordinary pleasure and enjoyment is the compensation of the pangs and agony 'B' suffered because of defamation. Material object has money value but spiritual object has no money value. Material object cannot properly be equivalent to spiritual object. Only the spiritual object can be equivalent to another spiritual object. We can set an example of social action and reaction to clarify this point. A and B are two neighbours. There is a constant enmity between 'A' and 'B' over some social interest. This enmity is a social action which creates constant pain and unhappiness in each of them. On an evening 'A' gets an information that there has been a police search and raid in 'B's house and the police having recovered huge unaccounted money and jewellery from B's house has arrested 'B' and his sons. The immediate reaction of this incident creates inexplicable pleasure and happiness in the mind of 'A'. Therefore, only punishment of 'B' can create pleasure in the mind of 'A' which he lost at the illegal action of 'B'. This is how restoration of honour and
dignity together with associated pleasure and happiness are possible, (III) the punishment of 'A' and its publication in newspaper warns the people to impose self-restraint upon their exercise of freedom of speech so as to protect the personal interest of others. The same relief may be obtained through civil litigation. In the civil litigation the prayers of the plaintiff ought to be, (I) declaration that the words are defamatory and slanderous; (II) publication of the judgment in two daily newspapers for two or three days at the cost of the defendant and failing compliance the costs of such publication along with civil imprisonment for contempt of Court and (III) costs of the suit taking the real expenses incurred by the plaintiff. But the Anglo-Saxon Jurisprudence deals with defamation in Civil suits with compensation. Mere compensation is nothing but the consideration of the lost honour. In case of payment of compensation, the honour and dignity is sold and the same is not restored to its original position. The analysis of the theory of compensation in defamation suit yields the following results:

1. Honour and dignity of a person being a spiritual object, there is no legal criteria to measure it. The award of compensation or damages for defamation without a legal criteria or subordinate norm leads to arbitrary decision. Again through payment of compensation honour and dignity are sold. But inalienable right cannot be alienated in any way. Suppose 'B' trespassed into A's house and forcibly took away A's
A files a suit against 'B' for trespass and detinue and prays for damages for trespass, recovery of picture and alternatively for Rs 500/- being value of the stolen picture. The Court passes a decree for Rs 500/- being value of the article. After payment of the decretal dues,'B' will be the owner of the article. Therefore, after payment of the decretal dues in the nature of damages or compensation, publication concerning 'A's fame, reputation, dignity and honour, B will be entitled freely to deal with the same in future without any restriction being imposed upon him by the society.

II. The payment of compensation does not ipso facto restore the defamed name, reputation, dignity and honour of the defamed person.

III. The doctrine of unjust enrichment is a bar to award compensation. The compensation money is not hard earned money. It may affect the money market. Social norm does not allow a person to get rich by selling his reputation and dignity.

IV. It affects the old social norm, "forgiveness is the best virtue." If at an early stage of the suit, the tortfeasor tenders unqualified apology to the Court and the party and the judgment thereon is published in the newspapers at the cost of the defendant, the
relationship between the parties may be revived yielding good social result. But the judgment of the suit on merits may create enduring enmity between the parties even through generations.

V. Law of defamation, so far as it relates to award of damage or compensation is concerned, has no universal application. The application of the rule is bound to differ in different subjective and objective conditions of the society.

VI. It does not consider the theory of "social purpose". Without payment of compensation the social purpose of France and U.S.S.R. are well-served in dealing with defamation cases but Anglo-Saxon jurisprudence does not explain as to whether the theory of compensation better serves the social purpose than that of France and the U.S.S.R.

VII. The theory of compensation is based on the feudal concept of social status. The feudal society being transformed into capitalist society or socialist society, the attitude and concept of law must change.

VIII. The theory of compensation gives rise to the application of the Latin maxim, "actio personalis moritur cum persona". This maxim is a long established common law principle. The rule means that the death of either party extinguishes any existing cause of
action in tort by one against the other. This rule has been in vogue since the fifteenth century A.D. According to social exegencies the rule had to be amended excepting the area of defamation. Law Reforms (Miscellaneous Provisions) Act, 1934 was passed to provide generally for the survival of causes of action in tort. Under section 1(1) of the Act, all causes of action subsisting against or vested in any person on his death, except causes of action for defamation, now survive against or as the case may be, for the benefit of his estate. The matter was considered further by a committee under the chairmanship of Faulks J. The Faulks Committee in U.K. recommended the following measures to be enacted by the British Parliament:

(A) that a cause of action for defamation should survive against the estate of the deceased in the normal way;

(B) that when the person defamed has started an action but has died before judgment, his representatives should be entitled to carry on the action in the normal way; and

(C) that where the person defamed died before starting an action, the representatives should be entitled to commence one, but only for an injunction and damages for pecuniary loss.
Section 306 of the Indian Succession Act, 1925, lays down the following rules:

"All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault as defined in the Indian Penal Code or other personal injuries not causing the death of the party, and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory." But the Law Reforms (Miscellaneous Provisions) Act of 1934 does not contain any such provision.

Defamatory statements are not confined to the living persons only. It may be made about a person who died about a century ago. In the latter case the effect of defamation on a dead man has both direct and indirect result upon the heirs of the deceased. The present law of defamation as it is based on the theory of compensation does injustice to the heirs of the deceased in as much as they are not entitled to bring civil action. In *Mele Purath V.* The Kittil*, the question arose whether a suit for defamation or an appeal in such a suit abated on the death of the

plaintiff. The appellant Mele Purath filed a suit for defamation against the respondent which was decreed. During the pendency of an appeal against the decree in the Supreme Court the appellant died. An application for the substitution of the legal representatives of the appellant was made and the question arose whether the right to sue had survived to the legal representatives of the appellant. It was held by the Supreme Court that the appeal had abated. The reason shown by the Supreme Court is that the law of defamation being based on the pecuniary compensation for personal injuries to honour, reputation etc. the maxim "actio personalis moritur cum persona" applies. It is most respectfully submitted that the decision of the Supreme Court is not correct. After decree of a suit, the decree becomes the property of the decree-holder or his legal representatives. When this appeal pending in the Supreme Court abates, it suggests that decree passed in the Court below and affirmed in the High Court is still executable against the heirs of the deceased appellant. If it be so, then his heirs are as legal representatives of the deceased entitled to challenge the decree in the Supreme Court. Had the law of defamation been based on declaration, publication of judgment, decision on defamatory statements, perpetual injunction, mandatory injunction, the maxim would not have applied and the law would have been more human and just. Salmond has stated, "Defamation may cause much more harm to the next of kin than assault". Winfield has stated, "the exclusion of
defamation from the provision of the Act, 1934 is hard to justify. Not only does the victim of a libellous attack lose his right to damage if his defamer dies but also he looses the opportunity of vindicating his character in a Court of Law. The Indian Succession Act, (Sec. 306) in view of this legal position is a defective piece of legislation and the same requires to be amended.

IX. The common law doctrine that every publication is a new libel is unreasonable, illogical and illusory principle. Publication means the act of making the defamatory statement known to any person or persons other than the plaintiff himself. It is the effect that it produces upon its readers. The defamation is the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right thinking members of society generally or tends to make them shun or avoid him. This is the crux of the law of defamation according to Anglo-Saxon jurisprudence or common law doctrine. Suppose, A publishes defamatory statements in a newspaper about B depicting him as a smuggler. Now B has filed a civil suit for defamation against A alleging that the defamatory statement made by 'A' against him has not only reflected A's reputation in the society but it has tended to lower him to the estimation of right thinking members of society and his associates have already shunned his association.
Then what is the effect of the publication? He has been disgraced; his reputation has been lowered in the estimation of right thinking men of the society and his associates have shunned his company or association.

Thereafter 'C' publishes same story against 'B'. After a few days 'D' publishes against 'B' alleging the same story.

According to Anglo-Saxon jurisprudence or common law doctrine action will lie against A, C and D. Let us now examine the reasons of the said legal proposition.

After the first publication of the defamatory statement in the newspaper, the plaintiff B's character-assassination in the nature of defamation, social avoidance was complete. It is not the case made out that by such defamatory publication his 50% honour and reputation were disgraced. The balance 50% honour was disgraced by successive two publications at the ratio of 30% and 20% respectively. If after the first publication, the effect of publication on society is complete, then the successive publications have no fresh effect upon the society. If the second and third publications do not produce any new effect upon the society, it will not amount to publication of defamatory statements and consequently no action
lies against 'G' and 'D'. The correct principle will be that between the first and the second publication, if the honour and dignity were restored by the decree of the court, then the second publication would create liability, otherwise not. Moreover, it will be impossible for a court to determine the percentage of honour and dignity of the plaintiff which was lost after each publication and the value thereof. The total social periphery of the plaintiff has got to be ascertained to evaluate his social position in the society with reference to evidence on that point. In any case, if the theory of percentage is applied on the basis of pleading, the result will be bound to be inaccurate without the whole periphery of loss of honour and dignity being brought home. But it will be a very difficult task for the court to investigate in that line.

X. The existing legal proposition that the newspapers do not enjoy more protection than a private individual is also not a correct interpretation of law. Although formal justice demands that the law should treat all alike but under the present concept of constitutional jurisprudence "reasonable classification" is permissible. Media which includes radio broadcasting, television, newspapers and journals itself constitutes a class which rationally differs from private individuals. In America this differentiation is recognised by the First Amendment of the U.S. Constitution. The
relationship between the law of libel and the First Amendment received a new interpretation in *Newyork Times Co. v. Sullivan*. The action for libel was brought by the detective Police Commissioner of Montgomery, Alabama. It was alleged that the plaintiff had been libelled by an advertisement in the defendant's newspaper which described violations of black rights by the Montgomery Police. The advertisement contained inaccuracies and the State Courts had ruled it libellous per se. The Supreme Court reversed the decision of the Courts below and held that the action for libel was barred by the First Amendment which shielded criticisms of official conduct. The amendment requires a rule that provides a public official from recovering damages for a defamatory falsehood relating to his official conduct unless 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 or not. A public official may not sue for defamation growing out of statements concerning the performance of the public duties unless actual malice is shown . The principle is not limited


in application to elected officials. According to Schwartz, the need for freedom to criticise the working of Government exists with regard to any official whether he obtained his position through election or appointment. New York Times rule applies to limit of defamation suits by "Public figures" who do not hold any Governmental Office or employment. This rule is not extended to defamation of the private individuals.

The basic principle behind this rule and the First Amendment is that the press exercises its duties as the fourth organ of the Government.

The position is more critical and serious where the country is plunged into deep-laid corruption and where all values have been eroded by human vices. Human vices develop institutional vices and the law enforcing agencies are turned into mere spectators of the competition of corruption.

Let us take the example of India. It is no doubt that India is the largest democratic country in the World. The national spirit and values which were infused in the people during freedom movement have been allowed to be completely eroded gradually and spontaneously during the last four decades. The subjective condition of the country is alarming. A parallel black money economy is running side by side with Government money market. No property is salable without payment of black money between 60% and 40%. Purchasers are bound to pay perquisites to the registry offices. Licences are obtainable on payment of perquisites. So far as bribery or perquisites are concerned there is severe competition.
amongst all Government departments. Politicians take politics as a profession. They make their fortune through politics. Criminals, gangsters, antisocials take their shelter under the umbrella of political parties. Safety and security of lives and properties are endangered. Act of violation of existing law is rampant, pure and unadulterated article is not available in the market even for research work. Cheating and defrauding the customers by less weighty measure is a continuous process of cheating. No Ombudsman is there to investigate into corruption of high Government or public offices and public figures. In this horrified state of affairs what should be the goal of the Press? It can effectively play the role of an ombudsman. It can also play the role of the watchdog of democracy. In fact it is said to be the fourth organ of the modern state. It can bring to the knowledge of the public about information of corruption in the government offices, high public offices, business houses which indirectly control the Government through their lobbies. This public interest is associated with the public duty entrusted upon the modern press by the modern society. We can set up two examples to clarify the point. There are two gardens side by side. One garden is full of flower plants with negligible wild plants here and there. Another garden is full of wild plants with negligible flower plants. Paying due attention to and care for cleansing the two gardens by the same gardener fundamentally differs on account of different situation and subjective condition prevailing in two gardens. In the first
garden the gardener sees with open eyes the flower plants. That is why while rooting out the negligible wild plants due and proper attention is required so that the flower plants may not be uprooted negligently. So far as the second garden is concerned, the gardener sees the wild plants with open eyes and a few flower plants rooted here and there are so microscopic that even if due and proper care and attention is paid while cleansing the garden, some flower plants may be uprooted unconsciously. So far as the second garden is concerned, the gardener shall not be liable for uprooting the flower plant unless there is clean and unequivocal intention to do the same. In the second case unless some sort of privilege is given to the gardener, the gardener will be unable to discharge the duty reposed upon him. Where the country is corrupted, the press shall enjoy qualified privilege to unearth corruption and other social evils. People are interested to know about it from the press. Therefore, the duty of the press and the duty of the individual are not identical. Private individuals constitute one class whereas press constitutes different class. The treatment of law towards each of the classes must be bound to be different. Therefore, the legal proposition that newspapers do not enjoy more protection than a private individual is without any logic.

XI. Law of defamation deals with the effect of publication and not with the publication itself. If the effect of libellous statements and slanderous statements is
same, then can there be any logic or reason to support that libel is actionable per se but slander is actionable on proof of special damage? Each and every legal proposition must have some logical conclusion. There must be either induction or deduction. Unless the effect produced by libel fundamentally differs from the effect produced by slander, there cannot be two separate legal propositions for the same and similar effect. Thus the proposition that slander is actionable on proof of special damage is contrary to both formal and substantive justice, hence, unjust and void ab initio. The legal proposition is to apply universally, but it must not be the arbitrary deliberation of a judge. The deliberation must be on legal materials with careful application and verification thereof so that there may be a bridge between the subjectivity and objectivity which is the end of law and the function of the Government of law. Considering all the aforesaid negative aspects of the law of Civil defamation it is suggested that the law of civil defamation for compensation should be abrogated.

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