



Defamation as a ground of limitation on the freedom of press

Dr. Virender Sindhu

Assistant Professor, UILMS, Gurugram, Haryana, India

Introduction

Defamation is an injury to a man's reputation, which is considered as his property, while insult is an injury to one's self-respect, defamation is an injury to the esteem or regard in which one is held by others, ^[1] in the words of Winfield :

"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 them." ^[2]

Defamation concerns the opinion about the person held by others. The law of defamation tries to protect his honour and reputation from depreciation of his respect and esteem entertained by his fellow men towards him. Since defamation is a ground for restricting the freedom of speech and of press under Article 19(2), hence the press would be liable for defamation, as any other citizen, if the matter printed or published defamatory of a person.

The word defamation covers both crime and tort. In Article 19(1)(a), it means the entire law of defamation civil as well as criminal, and although the former is unwritten, yet the protection of Clause (2) of Article 19 is not continued to a statutory law as enacted in Section 499 and 500 of I.P.C. ^[3]

The law of civil liability is still uncodified in India and is largely based on the common law. The law of torts being uncodified, the world defamation is not defined under the civil law Salmond states that the wrong of defamation consists in the publication of a false and defamatory statement, respecting another person without lawful justification. [4] However, the law of criminal liability is codified and is contained in Section 499 of the I.P.C. The offence is defined in terms which definitely requires mens rea, and the Section provides defences which exhaust almost all the traditional defences to proceedings for defamation.

Therefore, the defamation is wrong done by a person to another's reputation by words, by signs or by visible representation. A formal and comprehensive definition of defamation is given under Section 499 of the I.P.C. 1960, as follows:

"Whoever, by words either spoken or tended to be read, or by signs or by visible representation makes a publishes an 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 excepted in that Section, to defame that person."

In order to constitute the offence of defamation, it is not necessary that an injury to reputation of the complainant must have been actually caused. ^[5] An imputation concerning a

person shall be defamatory if it has been made with the intention of harming the reputation of such other person, or which knowledge or reason to believe that it will harm the reputation of such person.

In other words, the imputation would harm the reputation of that person if living, and intended to be harmful to the feelings of his family or near relatives amounts to defamation. But there is no such intention to harm where a newspaper publishes an advertisement, disputing the paternity of a person, at the instance of the alleged father of that person, in circumstances which justified such dispute. ^[6] Intention is, in general, irrelevant for civil liability but it is essential for liability under section 499, IPC. Hence, though good faith is a defence in criminal law, it is not so except in case of 'qualified privilege' under the civil law of defamation.

Thus, in (Smt.) Lalliani v. R. L. Rina ^[7] where the accused published the biography of a poet depicting a beautiful girl, one "Liani" who was source of inspiration to poet and with whom the poet had love affairs, and the complainant, one Mrs. "Lalliani" alleged that she was the girl described as 'Liani', the accused was not guilty when there was no direct reference of the complainant in the love story and there was no material to connect the complainant with the girl 'Liani' and the accused has not intended to harm the complainant's reputation. If the publication is proved and the innuendo is unmistakable, defamation can arise even by innuendo. ^[8]

In a civil action for defamation, however, intention of the defendant is, in general, immaterial. A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both. ^[9]

The defention in Section 499 refers to the reputation of a 'person' being injured by defamation. Explanation 2 provides that it may amount of defamation to make an imputation concerning a company or an association or collection of persons as such. An imputation in the form of an alternative or expressed ironically may amount of defamation. Hence, there can be defamation of a collection of persons, e.g., the Rashtriya Sevak Sangh, ^[10] "the prosecuting staff" at a specified place. ^[11]

But in Narasimham v. Chokkappa ^[12] it was held that an association or collection of persons can maintain a complaint for defamation only if it is an identifiable body, so that it is possible to say that a group of particular persons, as distinguished from the rest of community, was defamed. A writing against mankind in general is no libel. But if a well-defined class is defamed, every particular member of

that class can file a complaint even if the defamatory imputation in question does not mention him by name. A conference which passed a resolution would not be such a determinate body, in the absence of records as to its composition and like particulars. ^[13] Imputation, however, means accusation against a person and implies an allegation of fact and not merely a term of abuse ^[14] or insult which is dealt within Section 504, IPC.

In order to constitute defamation it is necessary that the imputation must directly or indirectly lower the moral or intellectual character of that person in respect of his caste or of his calling, or lower the credit of that person, or caused to be believed that the body of that person in a loathsome state or state generally considered as disgraceful. The following according to this Section are not cases of defamation:

Exception 1: Imputation of truth which public good requires to be made or published. In civil action truth of the defamatory statement is a complete defence but in criminal action the accused in addition has to prove that the publication for the public good. Both ingredients are questions of fact, and the accused must prove both ingredients strictly, as if the complainant was being prosecuted for the offences imputed to him. Hence, proof of truth of a part of the libel would not suffice. ^[15] In India, the publication is an essential requirement for the criminal offence under Section 499 IPC, as for an action for damages. The two remedies are not alternative but cumulative. The aggrieved persons can bring a civil suit before the Civil Court or complain to a Criminal Court or pursue both remedies at the same time. Hence the pendency of a criminal proceeding for defamation is no bar to a civil suit and vice versa. ^[16] However the object of a civil suit is to compensate the person defamed for his loss of reputation by damages, while the object of a criminal prosecution is to punish the person who made the defamatory statement for the offence, by way of imprisonment or fine ^[17] or both.

The plea that the offending allegation was true known as the plea of justification, where the accused takes this plea, he would be required to tender such evidence in support of it as would be necessary to convict the complainant of the offence alleged, e.g., forgery, bigamy or etc.

One who declares himself to be editor, printer of a newspaper and whose name is printed as such in the newspaper is liable for every portion of that newspaper, not to speak of defamatory article or news item in that issue of the newspaper. Such person can of course defend himself on ground that said defamatory publication was for public good. ^[18] If an article is published in two parts, and in the second part there is something disreputable about Syrian Christians but the same was removed by the other part, and the conclusions, containing complements and eulogiums, are in terms praiseworthy of the sect, then the disreputable part done cannot be taken out in the process of picking and choosing in order to venture a prosecution for defamation. ^[19]

Exception 2: Public conduct of public servants, and

Exception 3: Conduct of any person touching any public question.

These two Exceptions relate to the defence of 'fair comment' to a charge of defamation; while Exception 2 applies in case of comment respecting the conduct of public servant in the discharge of his public functions, Exception 3 applies where the comment is made respecting any person (including a public servant) touching any public question.

The expression 'good faith' ^[20] is defined in Section 52 of the IPC as follows:

"Nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention."

Section 3(22) of the General Clauses Act 1897 defines the expression 'good faith' as:

"A thing shall be deemed to be done in 'good faith' where it is in fact done honestly, whether it is done negligently or not."

Hence, in considering whether the accused acted in good faith in publishing his impugned statement, what is to be considered is whether he acted with "due care and attention."

^[21] The element of 'honestly' is not introduced in the definition prescribed by the IPC. The element of due care and attention, therefore, plays an important role. If it appears that before making the statement the accused did not show due care and attention. In making inquiries before publication, that would defeat his plea of good faith. Thus, the mere plea that the accused believed that what was stated was true by itself, will not sustain his case of good faith under Exception 9. At the same time, the proper point to be decided is not whether the allegations put forward by the accused in support of the defamation are in substance true, but whether he was informed and had good reason after due care and attention to believe that such allegations were true. It follows that in deciding whether an accused acted in good faith under Exception 9, it is not possible to lay down any rigid rule or test. It would be a question to be considered on the facts and circumstances of each case. ^[22]

However, Exception 2 or 3 can be invoked only if the matter complained of is an expression of an opinion, as distinguished from an assertion or a statement of fact. The expression must have been made in good faith. If the opinion purports to be based on facts, then the person claiming the benefit of these Exceptions must prove those facts. A comment cannot be fair which is built upon facts which are not truly stated. ^[23]

The publishers of newspapers are entitled to make fair comments. The doctrine of fair comment is based on the hypothesis that the publication in question is one which, broadly speaking, is true in fact and is not made to satisfy a personal vendetta and that the facts stated therein would go to serve public interest. Mere ex-aggeration or even gross ex-aggeration would not be itself prove malice, when the report made is substantially true and the comment made basing on the facts, is supported by good faith. ^[24] The question of good faith has to be considered on facts and circumstances it had come to be made, what is the status of the person who makes the imputation, was there any malice in his mind and was there any enquiry made by him before he made it. ^[25]

The editor, printer and publisher of a newspaper must exercise due care and caution in publishing matter likely to defame others. Where the newspaper openly attacked the morality and reputation of the complainant and her daughter describing

them as prostitutes engaging brokers and that they were in the habit of supplying their bodies of politicians.

Therefore, editors and publishers of newspapers must be most watchful not to publish defamatory attacks upon individuals unless they first take reasonable pains to ascertain that there are strong and cogent grounds for believing the information, which is sent to them to be true, that proof is readily available and that in the particular circumstances their duty to the public requires them to make the facts known. It is the duty of an editor of a newspaper to check up the news and views supplied to him before publishing the same in his paper, particularly when they might be of a defamatory nature.

Exception 4: Publication of reports or proceedings of courts. The Exception immunizes a report of proceedings before a Court of Justice (including a justice of Peace or other officer holding enquiry in open Court preliminary to a trial in a Court of Justice), provided such report is a substantially true report of the proceedings.

It is to be noted that the protection relates to the proceedings before a Court of Justice and not judicial proceedings, which is a wider expression. Court of Justice is defined in Section 20 of the I.P.C. In order to claim the immunity : (a) it must be nothing more than a report, and no comments should be mixed up. (b) Good faith is not an ingredient, but it must be a substantially true report. ^[26] However, where confidential matter is directed to be produced by order of Court at instance of party alleging defamation, the person concerned cannot be held responsible for publishing same since it was by virtue of order of Court that communication had come to be filed and consequently came to be known to others. ^[27]

Exception 5: Merits of case decided in Court or conduct of witnesses and others concerned, provided the expression of opinion is in good faith.

Exception 6: Merits of public performance, under this Exception, a newspaper or any other person would not be liable for expressing any opinion regarding the merits of some public performance, provided that the expression of such opinion is in good faith ; it relates either to the merits of such performance or the character of the author insofar as such character appears in such performance ; and that the performance in question has been submitted to the judgement of the public either expressly or impliedly.

Exception 7: Censure passed in good faith to authorized person. This Exception is not relevant to this work, and may be skipped over.

Exception 8: accusation preferred in good faith to authorized person. If the accused proves that he had good reason, after due care and attention, to believe that the allegations were true and in that belief he made the accusation, he need not further prove that the accusation was in fact true.

Again, in order to establish good faith, the accused must show that, he made inquiry with due care and attention before making the imputation, also he must show that he was satisfied about the truth of that imputation. ^[28] The accused also must prove that the person to whom the accusation was

made has lawful authority over the person against whom the accusation (in good faith) was made, and had authority to deal with the subject-matter. ^[29]

Exception 9: Imputation made in good faith by person for protection of his or other's interests. Under this Exception, it is no defamation if the imputation on the character of another is made: (a) in good faith; (b) for the protection of the interest of the person making it, or of any other person, or the public good. ^[30] However, both the conditions (a) and (b) must be satisfied for sustaining the defence under this Exception. ^[31] The interest of the person has to be real and legitimate when the communication is made in protection of the interest making it. It has further been held that not only the person making the imputation but also the person to whom it is made must have an interest in making the imputation. ^[32]

Exception 10: Caution intended for good of person to whom conveyed or for public good. A possible application of this Exception may be where something is published which explicitly or impliedly warns an employer to employ a person because of his dishonesty, provided the publisher has acted in good faith.

Obviously, the Exceptions to liability under the criminal law are codified under Section 499 of the I.P.C. and these ten Exceptions cannot be enlarged even though the civil law may admit of any additional exception, under the English common law of torts, with modifications in India (if any, according to the principles of justice, enquiry and good conscience). ^[33]

Thus, under the civil law of torts, there are two kinds of privilege absolute and qualified, the criminal law, as embodied in Section 499, I.P.C., there is provision only for qualified privilege and none for absolute privilege, as codified in the 9 Exceptions to that section. These Exceptions cannot be enlarged by invoking common law or anything outside the Indian Penal Code. ^[34]

In short, defamation is an injury to a man's reputation. The right to reputation is an absolute right in rem, and anybody who touches the reputation of another is said to do so at his peril.

The wrong of defamation consists in the publication of a false and defamatory statement respecting another person without lawful justification or excuse. A statement is said to be "defamatory when it has a tendency to injure the reputation of the person to whom it refers. Such a statement is one which exposes him to hatred, ridicule, to injure him in his office, profession or calling. ^[35] A defamatory statement differs from mere insult or abuse or any other form of injurious falsehood.

Painting or engraving matter known to be defamatory, as per definition under Section 499 I.P.C., or sale of printed or engraved substance or containing matter of defamatory, as per above definition, are offences more aggravated as made punishable respectively under Section 501 and Section 502, whereas defamation simple is punishable under Section 500 of the I.P.C.

However, sometimes the action of an individual may be such that it causes harm to the community. In such a case he needs to be exposed to protect the society. As the possibilities to cause such harms by an individual have increased tremendously in the modern complex living. It becomes one of the tasks of the mass media to bring to the public gaze the

deeds of such a person. Like most of our legal propositions, the law of defamation reflects reconciliation of two conflicting values – protection of the individual and the protection of the society.

Therefore, the law of defamation is basically meant to protect the reputation of a person from degradation of his respect and esteem in the minds of the members of society. In other words, it can also be described as “tale of two interests” i.e. the interest of the individual in his reputation and the interest of the society that the information should pass freely. In such cases it requires a fine balancing between the interest of the community and the interest of the individual. According to one law, in the interest of freedom of speech, action for defamation should have no place in law but such extreme view has never been accepted by the fore-fathers of Indians’ Constitution. Therefore, the Constitution of India allows the imposition, by law of reasonable restrictions on freedom of speech and expression and of press in relation to defamation. Since the right under Article 19(1)(a) is not absolute, no special privilege would go in favour of the publication of a news item in a newspaper and the civil or criminal law of defamation, as the case may be, shall prevail because the extent of freedom of press is neither lesser nor even higher than the freedom of an ordinary citizen.

References

1. Basu DD. Law of The Press in India 1st Edn. 1980, p. 110.
2. Winfield and Jolowich on Tort. 1979, 274.
3. Purushottam Lal Sayal v. Prem Shankar, AIR 1966, 377.
4. Salmond on Torts, 1961, Edn, 381.
5. Ram Narain v. K. E., AIR. 1924, 566.
6. Palaniaswamy v. Rasu, (1974) Cr. LJ 1209.
7. 1987 Cr. LJ 1295.
8. subair V, Dr. V, Sudhakaran PK, 1987, 736.
9. Hulton v. Jones. 1910, 20(23).
10. Tek Chand v. Karanjia, 1969 r. LJ 536 (All).
11. Sahib Singh v. State of U.P., AIR 1965 SC 1451 (Para 9).
12. (1972) 2 SCC 680 (Para 15).
13. Ibid.
14. Prem v. Mohan Cr. LJ 1208 (Para) H.P, 1981.
15. Veeramani v. Supdt. Of Police, Cr. LJ (NOC) 110 (Mad), 1977.
16. Supra note 216 at P. 111.
17. See also Section 357(1) of the Cr. P.C. 1973.
18. Ashok Kumar Jain v. State of Maharashtra, 1986-1987.
19. Narayana Pillai MP, VMPV Chacko, 1986- 2002.
20. ‘Good faith’ is a common requirement of the Exceptions, 2, 3, and also Exceptions, 5, 6, 7, 8, 00000000000000000009 and 10, infra.
21. Harbhajan v. State of Punjab, AIR 1961 Punj. 215 (Paras 48-49).
22. Ibid.
23. Sankar v. State, AIR 1959 Ker. 100
24. Nazeem Bavakunju v. State of Kerala, 1988 Cr. LJ 487.
25. H. Singh v. State of Punjab, AIR 1966 SC 97.
26. Annada v. Monotosan, (1953) Cr. LJ 1168.
27. A. G. Pol. v. State of Maharashtra, 1987 Mah. LR 525.
28. Sukra v. Basudeo, AIR 1971-1567.
29. Chaman Lal V. State of Punjab, AIR 1970 SC 1372 (Para 10).
30. Sewakram v. Karanjia, AIR 1981; 1514, 10-11.
31. Harbhajan v. State of Punjab, AIR 1966 SC 97.
32. Kanwal v. State of Punjab AIR 1963 SC 1317 (Para 4).
33. Ashok v. Radha Kishan, (1983) Cr. LJ 48 (Del.)
34. Ibid.
35. Neville v. Fine Arts Ins., (1897) AC 68 (72).