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IN THE SUPREME COURT OF FIJI

AT SUVA

Civil Jurisdiction

Action No: 36 of 1982

BETWEEN: SHREE RAMLU f/n Ramlu

PLAINTIFF

A N D: FIJI TIMES AND HERALD LIMITED

A N D: VIJENDRA KUMAR

DEFENDANTS

Mr. V. J. Parmanandam — Counsel for the Plaintiff

Mr. B. Sweetman — Counsel for the Defendant

J U D G M E N T

The first defendant is the proprietor, printer and publisher of the "Fiji Times", a daily newspaper which circulates throughout this country, and the second defendant is its editor.

In the 14th January, 1982, issue of that newspaper there appeared, under the heading "MP TOLD TO PAY BACK $3500" a news item which I now set out in full:

> " A Labasa MP has been ordered by the Supreme Court in Suva to repay more than $3500 he spent with a Diners Club card on overseas visits.
>
> Alliance Party MP Shree Ramlu had used the card for airline tickets and on visits to the Philippines, Australia, Hong Kong and India.
>
> Diners Club (NZ) Ltd. has been trying to recover the money for three years.
>
> Delivering his judgment, Mr. Justice Kermode said Ramlu had refused to answer certain questions under court order and the answers he had given had been "evasive" and "far from satisfactory".

When first asked for payment, Ramlu did nothing about it and a writ was filed by Mr. Terry Fong, of Mitchell Keil and Associates.

Ramlu offered no defence to the claim and Mr. Fong obtained a judgment from the Supreme Court in default.

Parmanandan Ali and Co then acted on behalf of Mr. Ramlu and had the court set aside the judgment on certain conditions.

A defence file was found to be unsatisfactory and Mr. Fong applied for a Supreme Court order that Ramlu answer a detailed set of questions.

But Ramlu refused to answer all the questions and appealed to the Fiji Court of Appeal for an order that the Supreme Court order was wrong.

The appeal was dismissed.

Mr. Justice Kermode said the history of the action disclosed failures by Ramlu to comply not only with the rules of the Supreme Court but also orders made by the court.

Mr. Justice Kermode also dismissed a writ of summons issued by Parmanandan Ali and Co seeking an order striking out the action.

Mr. Justice Kermode said Ramlu's application was an abuse of the court process "clearly made on the advice of his solicitors, Messrs Parmanandan Ali and Co. which should have appreciated it was "entirely without merit."

He ordered that Mr. Ramlu pay interest and the cost of the action.

Mr. Justice Kermode said the action indicated that the court may have been too lenient in the past in setting aside judgments where solicitors had negligently failed to comply with the rules.

'Some practitioners appear to have forgotten that they can be held liable to their clients for the negligent manner in which they handle their clients affairs.' he said."

There is no doubt at all that the person referred to as Shree Ramlu in that news item was the plaintiff. As the defendants admit, he was at all material times a member of the parliament of this country. He was also, I find on his undisputed evidence, at all material times a landlord.

He pleads that the following five statements in that news items are defamatory:

(a) The heading "MP told to pay back $3,500"

(b) The following words in the first paragraph: "A Labasa MP has been ordered by the Supreme court in Suva to repay more than $3,500"

(c) The whole of the second paragraph: "Alliance Party MP Shree Ramlu had used the card for airline tickets and on visits to the Philippines, Australia, Hong Kong and India."

(d) The whole of the third paragraph: "Diners Club (NZ) Ltd has been trying to recover the money for three years."

(e) The whole of the fifth paragraph: "When first asked for payment, Ramlu did nothing about it and a writ was filed by Mr. Terry Fong, of Mitchell, Keil and Associates."

In deciding whether or not a statement is defamatory I must first decide upon the meaning in which a reasonable man of ordinary intelligence, with an ordinary man's general knowledge and experience of worldly affairs, would be likely to have understood that statement when reading it in the context of the news item as a whole, i.e. its "natural and ordinary" meaning: see paras 43 and 45, Volume 28, Hal. 4th ed.

I have borne in mind that an inuendo however well concealed that is capable of being detected in the language used (i.e. a "popular" inuendo, as distinct from a "legal" inuendo which depends on extrinsic facts) is deemed to be part of the natural and ordinary meaning :

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per Lord Devlin in Lewis v. Daily Telegraph Ltd. (1963) 2 All E.R. 151, 170, line F.

The plaintiff pleads that the natural and ordinary meanings of those five statements are, respectively:

(a) That the plaintiff, as a member of parliament, was told to pay back $3,500.00.

(b) That he (the plaintiff) was ordered to repay more than $3,500.00 and that the plaintiff had borrowed same and was ordered to repay same.

(c) That he (the plaintiff) as an Alliance Party member of parliament used the (credit) card for airline tickets to (the) Philippines, Australia, Hong Kong and India and that he, as an Alliance Party member of parliament, took flights of levity and gaity and mirth which no sensible and duty minded government member of parliament should do.

(d) That the plaintiff as he was insolvent was unable to pay the sum (of $3,500.00) for 3 years.

(e) That when the plaintiff was first asked for payment he did nothing about it and a writ was filed against him and that the plaintiff was proud and imprudent.

My views and findings as to the natural and ordinary meanings of those statements are, respectively, as follows:-

(a) I cannot agree that the natural and ordinary meaning of statement (a) is that it was as a member of parliament that the plaintiff was told to pay back $3,500.00.

I find, rather, that the natural and ordinary meaning is simply that the plaintiff was told to pay back $3,500.00. To that extent only, I uphold the plaintiff's plea as to the natural and ordinary meaning of statement (a).

(b) I find that the natural and ordinary meaning of statement (b) is that which the plaintiff has, in effect, pleaded, i.e. that the plaintiff was ordered to repay more than $3,500.00 which he had borrowed.

(c) I cannot agree that the natural and ordinary meaning of statement (c) is that the plaintiff acted as an Alliance Party member of parliament. Nor can I agree that the natural and ordinary meaning is that the plaintiff "took flights of levity and gaity and mirth which no sensible and duty minded government member of parliament would do."

The natural and ordinary meaning of statement (c), I find, is simply that he used the credit card for airline tickets to the Philippines, Hong Kong and India. To that extend I uphold the plaintiff's plea, but I reject each and every other meaning pleaded by the plaintiff.

(d) I cannot agree that the natural and ordinary meaning of statement (d) is that the plaintiff was unable by reason of insolvency to repay the sum in question.

The court must not put a strained or unlikely construction upon a statement: per Lord Shaw of Dunfirmline in Stubbs Ltd. v. Russell (1913) A.C. 386 at 398. Nor, if a statement is capable of bearing a number of good meanings is it reasonable to seize upon the only bad one to give it a defamatory meaning: per Brett L.J. in Capital and Counties Bank v. Henty and Sons (1880) 5 C.P.D., 514 at 541 (cited with approval by Lord Shaw of Dunfirmline in Stubbs Ltd. v. Russell (supra) at page 399).

The news item read as a whole intimates that the plaintiff was in a position to employ solicitors to resist the claim. Read, as I think it should be read, in the light of that intimation, the statement cannot, in my view, reasonably be said to mean that the plaintiff was unable to repay the sum in question because of insolvency.

I entirely reject the plaintiff's plea as to the natural and ordinary meaning of statement (d).

(e) The plaintiff has in effect pleaded that the natural and ordinary meaning of statement (e) is that when the plaintiff was first asked by his creditor to pay a debt he proudly

> and imprudently did nothing about the matter and that a writ was issued against him. I accept that this statement imputes that he acted imprudently but not that he acted proudly. Subject to that, I accept that the natural and ordinary meaning of statement (e) is that which the plaintiff has, in effect, pleaded.

The plaintiff has chosen to confine his pleading to the natural and ordinary meanings of the statements. As I have already remarked, if a "popular" innuendo that the plaintiff had dishonourably refused to repay a debt were capable of being detected in the language of a statement, it would be within the natural and ordinary meaning of the statement. But the plaintiff has not pleaded that any statement bears that natural and ordinary meaning. Nor has he pleaded any "legal" innuendo at all.

I take the view that it is not open to me to consider meanings different from those pleaded by the plaintiff. I draw authority for that view from the following dicta of Salmon L.J. in Slim v. Daily Telegraph Ltd. (1968) 2 Q.B. 157 at page 185:

> "Supposing, however, that it is not necessary for the indirect meanings or inferences to be alleged in the statement of claim but that nevertheless the plaintiff (as here) has chosen to allege them, is he confined to those meanings or may be rely upon some entirely different meaning at the trial. Without commiting myself to any concluded view, I am inclined to think that the plaintiff is bound by his pleading - otherwise it may prove to be nothing but a snare for the defendant. I do not mean, of course, that the plaintiff is strictly confined to the very shade or nuance of meaning which he has pleaded - but what he sets up at the trial must come broadly within the meaning he has pleaded. Nor do I think that, without any amendment of his statement of claim, it would be permissible for him to set up any entirely different meaning, even if they were less injurious to the plaintiff than the meaning pleaded."

A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of society generally

or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling trade or business. Hal. para 10.

To be defamatory, a statement need have no actual effect on a person's reputation, for the law looks only at its tendency, which must be to lower the plaintiff in the estimation of right thinking society generally as opposed to damaging him in the eyes of a section of the community : Gatley on Libel and Slander, 8th Ed., paras 31 and 41.

As to statements (a) and (b) I do not consider a statement, the natural and ordinary meaning of which is merely that a person has been ordered to pay back or repay a sum of money he has borrowed, to be defamatory of him.

As to statement (c) I do not consider a statement, the natural and ordinary meaning of which is merely that a person has used a credit card for airline tickets to the Philippines, Hong Kong and India, to be defamatory of him.

As to statement (d), I have entirely rejected the plaintiff's plea as to its natural and ordinary meaning and it follows, in my view, that the question whether or not the statement is defamatory is not to be considered.

As to statement (e) I consider to be defamatory a statement the natural and ordinary meaning of which, as pleaded and accepted by me, is that the plaintiff when first asked by his creditor to repay a debt, imprudently did nothing about the matter.

In paragraph 5 of their statement of defence the defendants have pleaded fair comment, in the form of the "rolled up plea", as follows:

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> "In so far as the said words referred to in paragraph 4 of the Statement of Claim consist of statements of fact the said words in their natural and ordinary meaning are true in substance and in fact and in so far as the said words consist of expressions of opinion, they are fair comment on the said facts which are a matter of public interest."

That the "rolled up plea" is a plea of fair comment only and not a plea of justification seems to me to be well enought established - the averment that the facts are true merely lays the necessary basis for the defence of fair comment: per Lord Finlay in Sutherlandv. Stopes (1925) A.C. 47 at pp. 62-3.

It is also, I think, clearly enough established that the defence of fair comment applies only to comment being a mere expression of opinion and that matter which does not indicate, with reasonable clarity, that it purports to be comment and not statement of fact, cannot be protected by a plea of fair comment: Hal., para 134. In this regard the following dicta of Fletcher Moulton L.J. in Hunt v. Star Newspaper Co. Ltd. (1908) 2 K.B. 309 at page 320 is relevant:

> "I must express my disagreement with the view apparently taken by the Court of Queen's Bench in Ireland in the case of Lefroy v. Burnside, where the imputation was that the plaintiffs dishonestly and corruptly supplied to a newspaper certain information. The Court treated the qualifications "dishonestly" or "corruptly" as clearly comment. In my opinion they are not comment, but constitute allegations of fact. It would have startled a pleader of the old school if he had been told that, in alleging that the defendant "fraudulently represented," he was indulging in comment. By the use of the word"fraudulently" he was probably making the most important allegation of fact in the whole case."

of which, I hold that statement (e), the natural and ordinary meaning/ in brief, is that the plaintiff acted imprudently, is a statement of fact and that the defence of fair comment therefore fails in relation to it.

The defendants have also pleaded that all of the statements to which the plaintiff takes exception "consist of a fair and accurate report of proceedings before this Honourable Court in Civil Action No. 605 of 1979

and as such are absolutely privileged."

Section 13 of our Defamation Act reads as follows:

> "A fair and accurate report in any newspaper or broadcoast of proceedings publicly heard before any court or other judicial proceeding shall, if published contempraneously with such proceedings, be absolutely privileged:
>
> Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter."

That section was, I suppose, inspired by section 3 of the Law of Libel Amendment Act, 1888, of the United Kingdom which reads as follows:

> "A fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority shall, if published contempraneously with such proceedings, be privileged: Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter,"

It will be noted that, unlike its United Kingdom parent, the Fijian section expressly confers <u>absolute</u> privilege. Consequently, there is no doubt in this country, as there may be in the United Kingdom, that the statutory privilege is absolute.

The privilege conferred by our Section 13 should not be confused with the common law privilege relating to proceedings before judicial tribunals which is subject to the condition that the public is entitled to be present: see Hall., para 119. According to my understanding, the common law immunity would not extend to proceedings in chambers (as were the proceedings now under consideration) unless the public were admitted with the leave of the judge: see Hal., para 122 and footnote 5 thereto. That is obviously true of the United Kingdom statutory immunity.

I take the view that our Section 13, unlike Section 3 of the United Kingdom statute, applies to judicial proceedings whether or not they are conducted in public.

That is because of the inclusion of the words "or other judicial proceeding" in the description which Section 13 contains of proceedings to which the privilege relates: "proceedings publicly heard before any court or other judicial proceeding".

(It is not, I venture to think, beyond the realms of possibility that "tribunal" was originally intended to appear where "proceeding" now appears in the section. But that is not something I would be justified in assuming).

In Section 2, the term "judicial proceedings" is interpreted thus:

> "'judicial proceedings' include any proceeding had and taken before any court, tribunal, commission of inquiry, or person in Fiji, in which evidence may be given on oath."

As a matter of fact, the term "judicial proceedings" does not thereafter appear anywhere in the act. However, the term "judicial proceeding" does appear, once. That is in Section 13. Why, then, was the term "judicial proceedings" interpreted in Section 2? The most likely answer to that question, I think, is that "judicial proceeding" in Section 13 is a mis-print. It should have been, I think, "judicial proceedings", thus giving a reason for the interpretation of that term in Section 2. That same erroneous printing of "proceeding" instead of "proceedings" occurs, I think, where "proceeding" appears in Section 2 - see above.

That leads me to the conclusion that Section 13 describes two classes of judicial proceedings to which the privilege relates and that they are:

(i) all proceedings publicly heard before any court and

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(ii) all other judicial proceedings (whether or not publicly heard before a court).

In chambers proceedings, evidence is given by affidavit. In Reg. v. Pentonville Prison Governor ex-parte Fernandez (1971) 1 W.L.R. 459, it was held in the Queens Bench Division that an affidavit was "a document which purports to set out evidence given on oath" (vide Section 11 (1) of the Fugitive Offenders Act, 1971) albeit that it had not been received in evidence.

On that authority I hold that chambers proceedings are proceedings in which evidence may be given on oath.

It follows, I think, that chambers proceedings are "judicial proceedings" within the interpretation of that term in Section 2 since they are proceedings had and taken before a court (or a person, if a judge in chambers is not a court) in which evidence may be given on oath.

So, in my view, even if the chambers proceedings with which I am concerned in the present case are not covered by the words "proceedings publicly heard before any court" in Section 13 (either because they were not publicly heard or because a judge in chambers is not a court) they are nevertheless covered by the words " or other judicial proceedings" in that section.

I thus reach the conclusion that the chambers proceedings with which I am concerned were covered by Section 13. In other words, if statement (e) is a fair and accurate report of any part of the decision of Kermode J., published contemporaneously with that decision, it is absolutely privileged.

As to the meaning of "contemporaneously", Mr. Carter-Ruck says in his work "Libel and Slander" at page 135:

> "There is no authority on the meaning to be given to 'contemporaneous'; it is submitted that in the context it should be construed to mean as soon as possible having regard to the frequency with which the particular newspaper is published"

At pages 196 and 197, the learned author says:

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> "There has been no judicial decision as to what amounts to a contemporaneous report. It is reasonably clear that the legislature must have contemplated that an interval of some sort must, of necessity, elapse between the proceedings and the publication of the report. A report in an evening paper of a case heard the same day must be a contemporaneous report, as also must a report appearing the following morning in a daily newspaper ..... It is submitted that the test is whether the report was published in the first possible issue of the particular newspaper following the hearing or hearings of the proceedings which are the subject matter of the report ..... Thus, a report of a case appearing in a fortnightly periodical thirteen days after its conclusion could be a contemporaneous report within the meaning of the Act; but a report of the same case appearing in a daily newspaper thirteen days after the hearing would not be contemporaneous."

I think that that is sound reasoning. The "Fiji Times" is a daily newspaper. Kermode J. delivered his decision on 12th January, 1982, and the news-item containing statement (e) was published in the issue of 14th January, 1982. I find that the news-item was probably published in the first possible issue. I therefore hold that it was published contempraneously with the delivery of the decision.

The question remains: Is statement (e) a fair and accurate report of any part of the decision? That statement, I remind myself, reads as follows:

> "When first asked for payment, Ramlu did nothing about it and a writ was issued by Mr. Terry Fong, of Mitchell, Keil and Associates"

The burden of proving that the statement is a fair and accurate report is on the defendants: Hal., para 125.

I have read and re-read that decision of Kermode J. and I find nothing in it to the effect of any part of statement (e). There is nothing to the effect that when he was first asked for payment (or at any other stage) the plaintiff did nothing about it and there is nothing to the effect that a writ was issued.

So it cannot, in my view, be said that statement (e) is afforded any protection by Section 13. It is a defamatory statement and the defendants must pay damages to the plaintiff for having published it. In that regard their liability is joint and several.

The defamatory meaning ascribed to statement (e) by the plaintiff in his pleading is in effect that when he was first asked by his creditor to pay a debt he imprudently did nothing about the matter. I confine myself to that meaning in assessing damages.

I have also borne in mind that a defamatory statement is presumed to be false - I trust I need cite no authority for that - and that a defendant who has not pleaded justification may not mitigate damages by showing that his defamatory statement is true - see Hobbs v. Tinling (1929) 2 K.B., 1. Even if that were not so, the plaintiff's evidence that he responded to his creditor's first demand for payment by paying $720.00 was not contradicted.

I assess damages at $1,000.00.

The defendant's are to pay the plaintiff's costs of this action to be taxed if not agreed.

R. A. Kearsley

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(R. A. Kearsley)
JUDGE

LAUTOKA,
5th July, 1985