Madras High Court
Tiruvengada Mudali vs Tripurasundari Ammal on 15 February, 1926
Equivalent citations: (1926) 51 MLJ 112
JUDGMENT

1. In this case the petitioner filed a complaint against three persons charging them with offences of simple hurt and house-trespass under Sections 323 and 448 of the Indian Penal Code. In that complaint he described two of them as being paramours. Thereupon he was charged with defamation and was convicted. The Sessions Judge referred the case to the High Court on the view that the decision in In re Muthuswami Naidu (1912) I.L.R. 37 M. 110 following In re Venkata Reddy (1912) I.L.R. 36 M. 206 : 23 M.L.J. 39 established the position that statements such as that on which the conviction was founded were absolutely privileged. The correctness of the ruling in In re Venkata Reddy (1912) I.L.R. 36 M. 206 : 23 M.L.J. 39 has un-doubtedly been questioned in the Full Bench case, Gopal Naidu v. King-Emperor (1922) I.L.R. 46 M. 605 : 44 M.L.J. 655 (F.B.). The learned referring Judges therefore very rightly took the view that the matter should be settled and that a Full Bench should reconsider the question and decide whether In re Venkata Reddy (1912) I.L.R. 36 M. 206 : 23 M.L.J. 39 was rightly decided.

2. We do not think that any useful purpose would be served by an exhaustive examination of the authorities such as was made by Mookerjee, Offg. Chief Justice, in Satish Chandra Chakravarti v. Ram Doyal De (1920) I.L.R. 48 C. 388. It is not contested that the general trend of the Madras and Bombay authorities is to regard such statements as absolutely privileged and that the Calcutta and Allahabad Courts have taken the opposite view that the privilege is qualified only and should be taken as confined to the exceptions appended to Section 499 of the Indian Penal Code. The Rangoon Court also has recently in MacDonnell v. King-Emperor (1925) I.L.R. 3 Rang. 524 adopted the Calcutta view. Our task is to consider the words of the statute and to say whether it leaves it open to the accused to contend that it is not exhaustive of all the cases of privilege which can be put forward. The suggestion is that the statute only concerned itself with cases of qualified privilege and legislated for them, leaving intact the absolute privilege conferred by the English Common Law on Judges, advocates, parties and witnesses.

3. Two propositions appear to us to be indisputable on the facts of the case as stated. The first is that the petitioner cannot bring himself within any of the exceptions to Section 499 for the simple reason that there is a finding against him that the statement that he made was not made in good faith. The only exception to the Indian section under which he could bring himself is the 8th and that expressly lays down that the privilege conferred by it on persons who prefer accusations against others extends only to those who make them in good faith. The second proposition (and the Crown does not contest it) is that, if the Common Law of England is to be held to apply to this case, the action of the petitioner would be absolutely privileged.

4. The words of the section itself as distinct from the explanations and exceptions are quite clear in their definition of what is prima facie to be regarded as defamatory.

Whoever... 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.

5. We have next to consider the decision in In re Venkata Reddy (1912) I.L.R. 36 M. 206 : 23 M.L.J. 39 which was a considered pronouncement of the then Chief Justice, Sir Arnold White, and two other Judges and it lies upon us closely to scrutinize the grounds on which that decision was based before we venture to dissent from it. As we follow that reasoning, it is based mainly on two considerations. The first is that it was not to be inferred that the framers of the Indian Penal Code intended to depart from the English law which is substantially reproduced in the statute unless they did so expressly or by necessary implication; the second, that, as the Code confined itself to dealing with cases of qualified privilege, it might be supposed that its authors intended to leave the provisions of the English Common Law regarding absolute privilege intact. The first line of reasoning is summarised in the observations of the learned Chief Justice at page 222 of the report: "It is not to be supposed that the framers of the Penal Code had not before their minds the doctrine of the English law with regard to the question of absolute privilege; and it seems to me that, in dealing with a matter of such importance, if they had intended to exclude its application, they would have made their intention clear and would not have left it to be a matter of negative inference."

6. The second line of reasoning is of course closely allied to the first but, as it seems to us, it is based on a misapprehension. Although Section 499 is silent as to absolute privilege, the Code as a whole is not; for it confers absolute privilege by Section 77 on a Judge "in the exercise of any power which is, or which in good faith he believes to be, given to him by law." That perhaps is a wider privilege than is given to an English Judge, because there are expressions in the English cases which lend colour to the view that the existence in fact of jurisdiction and not merely the honest belief in the possession of jurisdiction is a condition precedent to the privilege

7. But the first line of reasoning is not obnoxious to this objection and raises a question of gravity and importance. It is undoubtedly remarkable that the draftsman of the statute who must have been familiar with the English Common Law made no reference to the position of witnesses or advocates nomina-tim but confined himself to the perfectly general language of the 8th and 9th exceptions. The inference drawn in In re Venkata Reddy (1912) I.L.R. 36 M. 206 : 23 M.L.J. 39 was that it was inconceivable that the statute should have been silent on such obvious topics unless it meant to leave the English Common Law relating to them intact. That is a line of reasoning which seems to us to be wholly inapplicable to a codifying statute and the Indian Penal

8. Code is obviously meant to be a codifying statute, an expression (which may sufficiently for our present purposes be defined as a-statute intended to be complete in itself with regard to the subject-matter with which it deals. Indeed the very title Indian Penal Code ' involves the conception of a codifying statute. As we understand the principles of construction applicable to such matters, a codifying statute does not exclude reference to earlier case-law on the subject covered by the statute for the purpose of throwing light on the true interpretation of the words of the statute where they are, or can be contended to be, open to rival constructions. We are unaware of any instance other than the present where it has been argued that matter outside of the statute can be invoked not by

way of construing its provisions but of adding something to it which is admittedly not to be found within it. We agree with Sir Arnold White, Chief Justice, that these matters must have been present to the mind of the draftsman. We differ from him in the inference to be drawn from the silence of the statute regarding them. It seems to us inconceivable that that silence can be interpreted otherwise than as a deliberate refusal to incorporate that part of the Common Law of England into the law of India.

9. In re Ramaswami Aiyar (1921) I.L.R. 44 M. 913, a decision to which one member of this Court was a party, was cited as authority for the proposition that the Common Law of England could be imported into the Indian Penal Code and render acts that would prima facie be offences under the Code into acts not criminal or punishable. That was a case of a conviction under Section 341 of the Indian Penal Code for wrongful restraint and the restraint was held not to be wrongful within the meaning of the section because the restraint exercised in that case would not be civilly wrongful by the Common Law of England. The Court therefore thought itself entitled to treat the word ' wrongfully ' as meaning ' tortiously ' and it is not disputed that the law of this country with regard to torts must in the main be guided by principles derived from English law and English cases. The English authorities relied upon in that case were relied upon merely for the proposition that a restraint in such circumstances as there appeared would not be tortious in English law. It may very well be that a consideration of English Law was excluded by the definition of 'wrongful restraint' contained in Section 339 of the Indian Penal Code, which was not brought to the notice of the Court and that a therefore the case was decided on a wrong footing. Be that as it may, the case is not an authority for the proposition that the English Common Law can be imported into an Indian statute unless words are used which necessarily refer the

10. Court for their interpretation to the English cases defining what is to be considered as a civil wrong.

11. We are therefore of opinion that the privilege defined by the exceptions to Section 499 of the Indian Penal Code must be regarded as exhaustive as to the cases which they purport to cover and that recourse cannot be had to the English Common Law to add new grounds of exception to those contained in the statute. At the same time we desire to guard ourselves against laying down any principle wider than that necessitated by this reference. The reference relates to the position of a complainant and the 8th exception and the illustration to it show clearly that the exception was meant to apply to complainants. The question of privilege that may attach to an advocate or a witness is not before us and we express no opinion as to whether it might or might not be possible to distinguish their positions. In the next place the question referred relates solely to criminal proceedings against a complainant and we say nothing as to how far he may be protected from civil proceedings. It no doubt seems anomalous that it should be a possible view that a man should be protected against civil proceedings but still exposed to a criminal prosecution; but we do not exclude the possibility, should the question arise hereafter, of that being the necessary conclusion from the fact that the criminal law of India is codified and the law of civil wrongs is not. We refer this case back to the Divisional Bench with the expression of opinion that no absolute privilege attaches to the statement made in this case. It will be open to that Bench, before whom the matter comes on revision, to consider whether the Sub-divisional Magistrate was right on the footing of qualified

privilege alone attaching to the statement made in this complaint.

12. Finally we desire to say this, that the divergence of judicial opinion on the subject referred to us and the allied subjects discussed in the argument is so great that we venture to suggest that further legislation defining for this country the limits of privilege, whether absolute or qualified, is eminently desirable.