1960 *Present :* **Sansoni, J., and H. N. G. Fernando, J.**

THE ASSOCIATED NEWSPAPERS OF CEYLON LTD., Appellant, *and* DR. GUY DE SILVA, Respondent

S. C. 223 and 232—D. C. Colombo, 42945/M

Defamation—Publication of contents of pleadings filed in pending civil proceedings—Defence of privilege—Scope.

Privilege attaches to the publication of documents placed before the Judge in open Court in judicial proceedings, though the contents of the documents are not read out. Accordingly, the publication, before the trial, of the contents of the plaint and answer filed in an action is privileged.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *G. T. Samarawickreme* and *D. R. P. Goonetilleke*, for Defendant-Appellant in S. C. 223 and for Defendant-Respondent in S. C. 232.

H. W. Jayewardene, Q.C., with *P. N. Wikramanayake*, for Plaintiff-Respondent in S. C. 223 and for Plaintiff-Appellant in S. C. 232.

Cur. adv. vult.

November 22, 1960. SANSONI, J.—

The plaintiff sued to recover a sum of Rs. 50,000 from the defendant as damages arising from the publication of four articles in the *Sunday Observer* of 10th November, 1957, and the *Thinakaran* of 11th November, 1957. All four articles refer to the plaintiff being the co-respondent in a divorce action filed in the District Court of Panadura. That action was filed on 12th June, 1957 ; answer was not filed by the wife although she was served with summons, but an answer was filed by the present plaintiff on 15th October, 1957, and on that day the trial was fixed for 31st January, 1958. The present plaintiff in that answer denied the charge of adultery made against him, and asked for the dismissal of the action. The four articles in question correctly set out the contents of the plaint and the answer filed in the divorce action, and mentioned that the case had been fixed for trial on 31st January, 1958. Each article had a headline which read " Doctor cited in Divorce Suit ".

The defendant in its answer admitted the publication of the articles in question and pleaded that such publication was privileged because (1) they were fair and accurate reports of judicial proceedings, and (2) they were in respect of matters which the defendant had a duty or interest to communicate to the readers of its newspapers, and its readers had an interest in knowing.

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When the case came up for trial, the plaintiff's counsel suggested the following issues :

(1) Are (*a*) the headlines,
(*b*) the articles,
defamatory of the plaintiff ?

(2) To what damages will the plaintiff be entitled ?

The defendant's counsel suggested issues based on the defence of privilege raised in the answer. It will be noted that no issue raising the question of malice was suggested by the plaintiff's counsel.

The only evidence called was that of the plaintiff's proctor who produced the articles in question, and through him were also produced the plaint, answer, and journal entries in the divorce action.

The learned District Judge held that the publication of the articles in question was not privileged because the publication of the contents of the pleadings before the trial commenced was not covered by privilege. He awarded the plaintiff Rs. 1,000 as damages and the defendant has appealed.

" The rule of law is that, where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open court, then the publication without malice of a fair and accurate report of what takes place before that tribunal is privileged ", said Lord Esher, M.R., in *Kimber v. The Press Association* [1]. Although it was suggested before us that the articles in question were not a fair and accurate report because of the headlines, I see no substance in this contention. The plaintiff was a doctor and the headlines, " Doctor cited in Divorce Suit ", are perfectly accurate.

I shall deal with some other incidental questions raised by Mr. Jayewardene before I consider what seems to me to be the main question arising on this appeal. It was urged that as the article first appeared on the front page of the *Sunday Observer*, the defendant was giving it undue publicity. I see nothing in this complaint : in later editions the same articles occupied less prominent positions, as one would expect. Nor do I read anything sinister into the delay between the filing of the answer and the publication of the articles. Another submission was that the evidence of the reporter or the Editor of the defendant's newspaper should have been led to show how a copy of the pleadings in question was obtained : it was suggested that some malicious person had these pleadings published in order to appeal to the idle curiosity or the desire for gossip on the part of the readers of the newspapers. In the absence of an issue suggesting that the publication was malicious, the defendant need only show that the articles were a fair and accurate report of judicial proceedings which took place in open court. The circumstances

[1] *(1892) 1 Q. B. 65.*

then create the privilege, and it was not necessary for the defendant to lead evidence to rebut a suggestion of malice which was never raised in the issues. Where a report is privileged, it does not matter whether the newspaper reporter was himself present in Court or not : so long as his facts are accurate, and correctly set out what actually happened in Court, the source of his information is irrelevant.

The question for decision thus boils down to this : Are the articles a publication of judicial proceedings which took place in open court ? In deciding this question one must be careful to distinguish what takes place in open court and before the Judge, from what takes place, say, before an officer of the Court in his office. It is also necessary to bear in mind that, under our procedure, every action of regular procedure must be instituted by presenting a plaint, which will be filed of record only if the Court entertains it. When it has been so entertained by the Court and filed, the Court orders a summons to issue to the defendant. When the defendant appears in answer to the summons either in person or by proctor, he does so in open Court. If he does not admit the plaintiff's claim, he or his proctor must deliver to the Court a written answer, which the Court may reject or return for amendment if it is defective ; if it is accepted by the Court, the case is fixed for trial, and such an order is again a judicial order.

In considering whether the publication of pleadings before the trial is privileged or not, it would be wrong to be guided blindly by decided cases from other countries, where a procedure which is quite different from ours may obtain. I do not know what the English procedure is. We were told that in England an action is commenced by the issue of a writ of summons which is endorsed with a statement of the nature of the claim made ; and that after such a writ has been served on the defendant he delivers his defence ; and that these steps in the procedure do not take place either before the Judge or in open court. In *Rex v. Astor*[1], Scrutton, J. said that newspapers ought not to publish in full the private proceedings before the case came on for trial, and he instanced a statement of claim, an affidavit, and a writ. In no sense can it be said that the entertaining of a plaint, the ordering of a summons to issue, the filing of an answer, and the fixing of a case for trial under our procedure, are private proceedings : they are all steps in a judicial proceeding : and certainly the filing of the answer and the fixing of the case for trial are proceedings which take place in open Court.

Mr. Jayewardene also referred us to the Scottish case of *Richardson v. Wilson* [2], which was a case filed in consequence of defamatory statements made in a summons in another action. It was held by the Court of Session that a summons which has been called in Court, but upon which no other step of procedure has followed, is not a public document, and any person who publishes defamatory statements contained in it is liable to an action of damages. But the judgments show that " calling a

[1] *(1913) 30 T. L. R. 10.*

[2] *(1879) 7 R. 237.*

summons " merely means that the summons is placed in the hands of an officer of the Court, called the Clerk of the process, who had a duty not to part with it or to give access to it except to the parties or their agents. The Lord Ordinary pointed out in his judgment that nothing occurs in Court at this stage, and what was published was not a report of judicial procedure but the contents of a writ which were at the time even unknown to the Court. When the case went up in appeal, the Lord President said that whatever takes place in open Court, either before or after the proper hearing of a case, falls under the rule that the publication by newspapers of what takes place in Court at the hearing of a cause is undoubtedly lawful. The principle on which the rule is founded was that " as Courts of Justice are open to the public, anything that takes place before a Judge or Judges is thereby necessarily and legitimately made public, and being once made legitimately public property, may be re-published without inferring any responsibility ". He then went on to say that the defender was seeking to apply the rule to what did not fall either within the rule itself or the principle on which the rule was founded. No discussion or proceedings had taken place before a Judge, and since no newspaper reporter or any member of the public could have obtained access legitimately to the summons, it must have been obtained in an illegitimate manner. In these circumstances the publication in question was obviously not the publication of proceedings which were either judicial or which had taken place in open Court.

In *Abt. v. Registrar of Supreme Court* [1], the question considered was whether a stranger to a suit was entitled as of right to inspect the pleadings in the Registrar's office before judgment has been pronounced. The application was refused on the ground that the case may never come into Court and, therefore, did not concern the public. The case is similar to the Scottish case, in that it turned on the point that the case had not reached the stage of being dealt with in open Court. A similar case is that of *Transvaal Chronicle v. Roberts* [2] in which damages were claimed from a newspaper which published defamatory statements which a husband made about his wife in his affidavit answering to an application for alimony. The affidavit was filed in the Court Registrar's office, and the case was never called in open Court because the application was withdrawn. De Villiers, J.P. held that the publication was not privileged. He cited with approval a dictum of Mason, J. in *Kingswell v. Robinson* [3] : " I have no doubt that the publication of documents filed in pending civil proceedings, and not brought up in open Court, is not privileged, apart from some privileged occasion, such as some special public interest in the information which they contain ". Having said that the privilege attaches only to matters which have transpired in open Court, the learned Judge, in considering what falls within the rule, said that " documents which have not been actually read, but to which counsel

[1] *(1899) 16 S. C. 476.*

[2] *(1915) T. P. D. 188.*

[3] *(1913) W. L. D. 129.*

have referred or which have been used in the course of the proceedings, and which are necessary for a proper understanding of the case " are within the spirit of the rule. Bristowe, J. who agreed with De Villiers, J.P. said that while the public had a right to read fair and proper reports of the proceedings of Courts of Justice, it is a very different thing to say that a newspaper reporter has a right of access to any of the records of the Court where the matter has not come before the Court at all. Where a matter has never been brought into Court, it seemed to him undesirable and not in the public interest to publish affidavits which have never been used. But he also said that so far as matters that occur in Court are concerned, a reporter ought to know what occurred there, and he was at liberty to report all particulars appearing on the record which may be necessary to explain what actually occurred in the Court.

Kingswell v. Robinson [1] was an action for damages based on the publication of a defamatory letter which was referred to in certain affidavits filed in a prosecution for criminal libel. The letter itself, although it was referred to in the affidavits, was never produced before the Magistrate, nor was it read or referred to in any proceedings which took place before the Magistrate. A newspaper reporter obtained a copy of the letter from the solicitors and published its contents along with a report of the other proceedings. In the course of his judgment holding that the publication of the letter was not privileged, Mason, J. said that the principle that everyone is entitled to publish a fair account of judicial proceedings in open Court embraced the right " to give all such information as may be necessary to enable the public to comprehend the course and result of those proceedings. In Courts of law judges and counsel frequently refer to documents which they have perused, but which are not read aloud. So far as these documents are used in the course of proceedings or constitute a ground for discussion or decision, a newspaper is, in my opinion, entitled in ordinary circumstances to publish their contents as fully as if they had been read aloud and reported verbatim. " But he held that this rule did not apply to records which are filed in legal proceedings, but which have not yet been discussed or referred to in public. The reason is that in the one case the proceedings and the relevant documents come before the public in open Court, while in the other case there is no proceeding in open Court and the documents are in no sense made public because the stage of publicity has not been reached, and even though it be a judicial proceeding it is not a proceeding in open Court to which the rule applied. All the cases I have discussed so far relate to the publication of documents referred to or filed in legal proceedings, but not dealt with in open Court. They are, therefore, not applicable to the facts of the present case.

The rule that allows publication applies, however, to documents which, even though they are not read aloud in open Court, can be taken as read. The present appeal, in my view, relates to such documents. The District

[1] *(1913) W. L. D. 129.*

Judge sitting in open Court had the case called in order that the answer might be filed and the case fixed for trial. It is true that the plaint and the answer would not have been read aloud in Court, but any reporter who was present would certainly have known that the trial was to take place upon the pleadings filed before the Judge. He was, in my opinion, entitled to report the contents of those pleadings, because they formed the subject of a judicial order made in open Court fixing the case for trial upon those pleadings, and they were necessary to a proper understanding of the case.

An analogous case arose with regard to a charge sheet handed in open Court to a Magistrate, which contained particulars of the charge, but to the contents of which no verbal reference was made. I refer to the case of *Kavanagh v. Argus Printing and Publishing Company* [1]. It was held that where a charge sheet was handed to the Magistrate, sitting in open Court, for his information, that was tantamount to reading it. It was taken as read and, therefore, anyone reporting the actual proceedings in Court was entitled to incorporate in his report the contents of the charge sheet including the particulars of the charge. Distinguishing the case of *Kingswell v. Robinson* [2], Millin, J. said that while the defamatory letter in that case was never placed before the Magistrate, or in any way taken as read or seen by him, in the case he was deciding it was necessary that the Magistrate should be informed of the charge, and he actually did see the charge because it was handed to him. He said : " It was handed to him for that purpose at any rate . . . . if the contents of the document are not deemed to be part of the proceedings in Court when handed to the Magistrate for his information then it is a secret document, a secret communication between the prosecutor and the Magistrate, a view which need only be stated to be rejected. "

This decision, to which Mr. H. V. Perera drew our attention, seems to me to cover the facts of the case we have to decide, and it shows quite clearly that privilege attaches to the publication of judicial proceedings in open Court where documents are placed before the Judge, though their contents are not read out. I hold that the articles in question were privileged as being fair and accurate reports of judicial proceedings held in open Court, and the plaintiff's action should have been dismissed on this ground.

The appeal of the defendant is allowed with costs in both Courts. The cross-appeal of the plaintiff on the question of damages is dismissed.

H. N. G. FERNANDO, J.—I agree.

Appeal allowed.
Cross-appeal dismissed.

[1] *(1939) W. L. D. 284.*

[2] *(1913) W. L. D. 129.*