

1939

Present : Soertsz A.C.J.

VAITILINGAM v. VOLKART BROS.

7—C. R. Colombo, 44,357.

Defamation—Master and servant—Servant a member of Mercantile Union—Intercession by President of Union on behalf of servant—Letter from master—Privilege.

The plaintiff, whose services were discontinued by his employers, the defendants, was a member of the Mercantile Union and he prevailed upon the President of the Union to intercede on his behalf with the defendants. The Mercantile Union was a member of the Trade Union Congress between whom and the Employers' Federation there was a pact by virtue of which it was possible for disputes and differences arising between them to be investigated and settled.

The President of the Union, who was also President of the Trade Union Congress, addressed certain requests to the defendants to which they replied in a communication addressed to the Secretary of the Trade Union Congress.

Held, that the communications of the defendant were made on a privileged occasion.

Negligence in making defamatory statements on a privileged occasion is not actionable.

A PPEAL from a judgment of the Commissioner of Requests, Colombo. The facts are given in the head-note.

H. W. Thambiah, for plaintiff, appellant.—Defendants' letter is not privileged. When plaintiff was discontinued he appealed to the President of the Union to intercede and get him reinstated. The President addressed a letter to the manager of the defendant Company, personally. The fact he used a letter paper which contains the names of the officials of the All-Ceylon Trade Union Congress does not alter the capacity in which he wrote the letter. He signed his name and in his evidence he says he expected the replies to be sent to him personally. The Secretary of the All-Ceylon Trade Union Congress never wrote to the defendants. Hence communication of the libellous contents of the letter to the Secretary is not privileged. The Secretary opened the letter. The publication to be privileged must be addressed to the person who has a corresponding right to receive it and not to a third party. Vide *Hebditch v. Macilwanie et al*¹; *Pullman v. Hill*². The President only asked that an inquiry should be held. This statement is a volunteered and gratuitous statement and therefore not privileged.

Even if the occasion is a privileged one malice has been proved. Malice in law does not mean ill will or hatred. It means an improper motive. A wrongful act done intentionally, without just cause or excuse is malicious. Even where the defendant says that he honestly believed the statement to be true yet such statement will be malicious if the belief is an unreasoning belief. (Vide *Tissera v. Holloway*³.)

The state of mind of a person cannot be known and can only be gathered from his conduct and other circumstances—one of the modes of proving malice is to show that the statements were so reckless that the plaintiff could have had no *bona fide* belief in their truth. Vide *Gulick v. Green*⁴; *Sand v. Bell*⁵; and *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*⁶. The manager did not know anything about the plaintiff. He formed his belief on a petition alleged to have been sent by a woman. The woman is not called and at the inquiries held nothing was proved. Hence the statements were made recklessly and were not *bona fide* and hence malicious.

E. F. N. Gratiaen (with him O. L. de Kretser, Jnr.), for defendant, respondent.—Plaintiff is a member of the Mercantile Union and as such appealed to Mr. Goonesinha, who is the President. The Mercantile Union is a member of the All-Ceylon Trade Union Congress. The defendant is a member of the Employers' Federation. There is a pact between the Employers' Federation and the All-Ceylon Trade Union Congress to refer all matters affecting employees to arbitration. Mr. Goonesinha wrote as President of the All-Ceylon Trade Union Congress and the reply was correctly addressed to the Secretary. Communications made to clerks in the ordinary course of business are privileged. Hence it is a privileged occasion, and plaintiff can only succeed on proof of express malice. The question whether there is malice or not is a question of fact and the Commissioner holds that there is no malice. Such a finding

¹ (1893) 2 Q. B. 54.

² (1891) 1 Q. B. 524.

³ 1 S. C. C. 29 at 30.

⁴ 20 N. L. R. 176.

⁵ 16 N. L. R. 318.

⁶ (1892) 1 Q. B. 431.

cannot be canvassed in the Appeal Court without leave obtained on the facts. There is no proof of express malice and plaintiff's action must fail.

H. W. Thambiah, in reply.—If the statements have been made recklessly, the question whether they amount to malice is a question of law and can be canvassed in this Court.

Privileged can only be claimed within narrow limits.

Cur. adv. vult.

May 9, 1939. SOERTSZ A.C.J.—

The principal question in this case is whether the defamatory statement complained of was made on a privileged occasion. I see no room for doubt on that point. The defendants had been the employers of the plaintiff, but had discontinued his services on certain reports made to them by their Superintendent. The plaintiff's position was that he was the victim of the defendants' Superintendent who was ill-disposed towards him, and being a member of the Mercantile Union, the plaintiff went to Mr. Goonesinha, the President of that Union, and prevailed upon him to take his case up with his late employers. The Mercantile Union was a member of the All-Ceylon Trade Union Congress between whom and the Employers' Federation of Ceylon of which the defendants were members, there was a pact by virtue of which it was possible for disputes and differences arising between them to be investigated and decided upon. When, therefore, Mr. Goonesinha, at the instance of the plaintiff addressed certain requests to the defendants, the defendants' reply to them must be considered as a reply on a privileged occasion, for it is a reply made to a person who had such an interest in the matter as to entitle him to make the request or to put the question, and it was a reply made in pursuance of a duty imposed on the defendants by their pact with the Trade Union Congress. Mr. Thambiah contended that the privilege, if it did exist, was lost in view of the fact that the defendants addressed this reply in which the defamatory statement occurs to the Secretary of the Trade Union Congress and not to Mr. Goonesinha himself. In my opinion, there is no substance in this contention. The evidence is clear that Mr. Goonesinha is the President of the Trade Union Congress. It was on paper belonging to that body that Mr. Goonesinha had written the letter to which the defendants were replying, and the names of the other officer-bearers, among them that of the Secretary of the Congress appeared, and the defendants were acting in accordance with ordinary business methods when they addressed their reply to the Secretary. When the plaintiff invoked the assistance of the Mercantile Union and of the Trade Union Congress he must be taken to have consented to the matter being handled by them and the Employers' Federation, or by the members of that Federation in the usual way. *Volenti non fit injuria*. I, therefore, agree with the finding of the Commissioner that the occasion was privileged unless the plaintiff was able to show that the defendants were acting with malice as understood in law.

On this point, Mr. Thambiah's case was that the defendants were acting maliciously when they without sufficient investigation repeated in their

letter of reply a defamatory statement said to have been made by one of their labourers in a petition presented to them complaining against the plaintiff.

Now in regard to this contention, I think the law is clear. I do not think I can do better than put it in the words in which Salmond summarises the case law on the point:—"It is neither necessary nor sufficient to constitute liability that the statement was made without reasonable and probable cause. Not necessary—for if the statement is made maliciously, and is in fact false, the defendant is liable for it although he had good grounds for believing it to be true; malice destroys the privilege, and leaves the defendant subject to the ordinary law by which a mistake, however reasonable, is no defence. Neither is the absence of reasonable and probable cause sufficient in itself to constitute liability. The law requires that a privilege shall be used honestly, but not that it shall be used carefully. Negligence in making defamatory statements on a privileged occasion is not actionable. The unreasonableness of the defendant's belief may, however, amount to evidence of malice". The Roman-Dutch law takes the same view of the matter.

In this case it cannot be said that the defendants' view of the plaintiff's conduct was so unreasonable as to show malice. The plaintiff acquits the defendants of malice in the sense of hatred or ill-will towards him, and that, in my view, has an important bearing on the question whether the defendants acted from an improper motive when they wrote as they did.

I dismiss the appeal with costs.

Appeal dismissed.

