

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 567 OF 2018,

COUNTER CLAIM NO. 123 OF 2018 IN SUIT NO. 567 OF 2018.

Decided on: 11-03-2018

CC/OT/1000/BB/2018

IN THE MATTER OF:

Heisenberg

..... Plaintiff

Rose Villa Garden, Shivashankar Nagar,

Mumbai- 400 037

Versus

M/s. Travel Solutions Private Limited

.....Defendant

D.D. Satya Marg, Shanti Heights, Ambedkar

Road, Mumbai- 400 004

Counsels:

Mr. XYZ for the Plaintiff

Mr. ABC Senior Advocate a/w Mr. G i/b M&M Associates for the Defendant

HON'BLE JUDGES/CORAM:

R.S. RUDRA, & AJAY SANGHI, JJ.

ORAL JUDGMENT (PER R.S. RUDRA J.)

1. The above suit was filed under Section 26 Order IV Rule 1 of Code of Civil Procedure, 1908, Plaintiff seeks compensation of Rs. 1 crore for the negligent act of the Defendant Company. The Defendant has filed a counter-claim to the suit for defamation. This case portrays the story of frustration and sadness of a working man who desired to take a family vacation to Australia despite the hectic work schedule. It also reveals, how it has become important for a person availing services to remain vigilant, calm and composed at all times. It also depicts, how a frustrated person should not lose his peace of mind in any adverse condition.
2. There are no admitted facts in the present case.
3. Though this case comes within the ambit of a consumer dispute which becomes very obvious while going through sections 2(d) and 2(o) of the Consumer Protection Act, 1986, which define a consumer and a service respectively, this court is taking up this matter as according to section 3 of the same Act, approaching the consumer court for seeking redressal of grievances is an additional remedy and it is upon the victim to choose which forum to approach and therefore, we have decided to take up this case.
4. In order to appreciate the grievances of the plaintiff, it is important to highlight the facts of the case. The necessary relevant facts as disclosed by the evidence are that the original plaintiff (Mr. Heisenberg) approached the defendant company (Travel Solution Private Limited) in order to book flight tickets to Sydney. On the defendant's advice the plaintiff booked tickets from Chennai as it was cheaper and the defendant handed him a list of documents, which are to be submitted. After 4 days the plaintiff submitted the documents

and subsequently, 10 days later he got a call from the defendant company asking for an additional document. On 06/09/2017, the image of visas were sent to the plaintiff via WhatsApp and the defendant company advised that they will send the passports directly to Chennai as it was too risky to send it to Mumbai. On 08/09/2017, the plaintiff along with his family missed the flight as the passports reached late due to some unforeseen event and added to this misery, he came to know that those tickets were non-refundable. Plaintiff then posted that the defendant company is the worst company ever and called the defendants a bunch of liars, cheats and thieves, further he posted the logo of the company with a hash tag 'TSPLsucks'.

5. ISSUES AND FINDINGS:-

The arguments raised by both the parties deal primarily with negligence and defamation.

	ISSUES	Onus of Proof	RESULT
1	Whether there is negligence on part of the Travel Solutions Private Limited?	Plaintiff	Partially as this is a case of contributory negligence.
2	Whether the social media misinformation posted by the plaintiff constitutes defamation?	Defendant	Yes. There is defamation because it went beyond the reasonable degree of fair comment

6. We have thoroughly perused the case filed and revisited the arguments.

7. It is a firmly established principle that the jurisprudential concept of Negligence defies any precise definition. Eminent jurists and leading judgments have assigned various

meanings to negligence. Negligence as defined in **Jacob Mathew v. State of Punjab 2005 (6) SCC 1:**

“Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do.”

It is necessary to mention that there is no liability for negligence unless here is in the particular case a legal duty to take care.

8. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property...The definition involves three constituents of negligence as was laid down in **Jeet Kumari Poddar v. Chittagong Engg. And Electrical Supply Co. Ltd AIR 1947 Cal 195:** (1) A legal duty to exercise due care on the part of the party complained of towards the party complaining the former's conduct within the scope of the duty; (2) Breach of the said duty; and (3) Consequential damage. Cause of action for negligence arises only when damage occurs; for, damage is a necessary ingredient of this tort."
9. In our considered view of the facts of the case at hand, it can be seen that although there was a duty on part of the defendant to take care, it could not be said that it was entirely due to their fault that the plaintiff missed the flight to Sydney. The Counsel for the plaintiff points out that all these situations arose mainly due to the negligence of the defendant company but the court after due analysis and estimation finds that the plaintiff suffered not solely because of the negligent conduct of the defendant company but also because of his own negligent and careless acts. Hence, the court concludes that *it is a case of contributory negligence.*

10. The finding of contributory negligence points to the fact that there existed negligence on both sides. The rule of contributory negligence is invariably raised as a defence in actions brought by the injured parties against wrongdoers and in many cases, the plaintiffs are able to get over this defence by proving that despite their negligence, the defendants had the last opportunity of avoiding the accident and this was well established in the case of **Davies v. Mann 152 Eng. Rep. 588 (1842)**. *This is where the doctrine of 'last opportunity' has come into play.* In the instant case, it is discernible that initially there was negligence on both the sides but later when the plaintiff managed to send the additional document well within time, it was then the defendant company who had the opportunity to avoid the damage to the plaintiff. The defendant tried his best to make use of this opportunity available to him and this was reflected in its actions when it refused to send the passports to Mumbai stating that owing to the paucity of time it would be too risky to send the passports to Mumbai and instead they would send it directly to the Chennai Airport which would be much safer an option.
11. On perusal of the records submitted, the court finds that the passports could not reach the Chennai Airport on time owing to some unforeseeable and unfortunate event. The doctrine of foreseeability was discussed in the case of **Bournhill v. Young (1943) AC 92**, where it was held that the defendant owes a duty to the plaintiff only when the injury is reasonably foreseeable.
12. However, on close scrutiny it can be said that this entire series of events could have been avoided had both the parties acted in a more careful and reasonable manner. In **Air Arabia and Ors. v. Pagdaloo Prashant Naidu and Ors. IA/6977/2016** it is laid down that the travel agencies are bound to give or disclose critical travel details to their clients. However, in the present case, the defendant company failed in this duty and therefore, it can be said that they were negligent in their act. The plaintiff too did not check his travel

details before leaving for Chennai and hence reasonableness was found to be lacking on his part as well.

13. In view of the above, this court on the basis of pleadings, the observations made, appreciating the evidence on record and applying the correct law in the matter, has come to a conclusion that the plaintiff and the defendant have contributed to the negligence in the ratio of 25:75 respectively taking cue from the case of **Kumari Kiran v. Sajjan Singh 2014 ACJ 2550**.
14. We now come to the counter-claim petition filed by the defendant company. It has an actual nexus with the original suit filed by the plaintiff as in **Laxmidas v. Nanabhai AIR 1964 SC 11** and thus, cannot be regarded as a frivolous claim. The defendant company contends that it has suffered a tremendous loss of goodwill due to the social media misinformation posted by the plaintiff as it is false and defamatory in nature.
15. Defamation is nothing but spreading evil and causing damage to reputation of another. A man's reputation is the enjoyment of good opinion in the minds of other right thinking members of society generally. Jurist Blackstone and Mr. Odger in his book on defamation have stated that every man is entitled to have his reputation inviolate and intact. Furthermore, every man has a right to have his good name maintained unimpaired. This right is a jus in rem, a right absolute and good against the entire world."
16. Reference can also be made to the case of **T.V. Ramasubba Iyer and Anr. v. A.M. Ahamed Mohideen AIR 1972 Mad 398** where the Court stated the principle as follows:
"...The law of defamation as part of the law of torts as applied and enforced under the common law of England is applied to this country only on the basis of justice, equity and good conscience. There is no statutory law compelling the courts of this country to apply the English decisions on these matters...."

(Umar Abid Khan and Ors. vs. Vincy Gonsalves Alias Vincent Gonsalves 2010 (1) ALLMR 74).

17. The correct test to be applied in the cases of tort of defamation was formulated by Lord Atkin in the case of **Sim v. Stretch (1936) 2 All ER 1237** as:

“Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?”

Thereby the defamatory matter must have some bearing upon the question of damage.

18. The Law of Defamation aims at balancing the interests of the parties concerned. These are the rights that a person has to his reputation vis-a-vis the right to freedom of speech. The Law of defamation provides defences to the wrong such as truth and privilege, protecting right of freedom of speech. In **Kokan Unnati Mitramandal and others v. Bennett Coleman & Company Limited 2011 (113) BomLR 4016**, the Bombay High Court while dismissing suit for defamation filed by plaintiff has held that "defendants have shown and proved the fair comment made by them in public interest. The defamation of plaintiffs alleged by them is therefore amply justified,"

19. In light of the above principles, there have been emerged certain established rules to determine whether statement is defamatory or not:

- (a) Firstly, the whole of the statement complained of must be read and not-only a part or parts of it.
- (b) Then words are to be taken in the sense of their natural and ordinary meaning as would convey to the ordinary man.
- (c) The test of defamatory nature of a statement is its tendency of excite against the plaintiff, adverse opinion of other persons.

20. This Court is of the inference that the question which falls for determination is whether reasonable men would endorse that particular opinion, if their attention were directed to the matter. There appears to be an overwhelming consensus of judicial opinion that to determine whether a statement defames or disparages, the viewpoint to be considered is that of the general public as laid down in **Tolly v. Fry 1931 AC 333**. Furthermore, in **Gillick v. Brook Advisory Centres [2001] EWCA Civ 1263**, the approach that was adopted is: "the court should give the article the natural and ordinary meaning which it would have conveyed to the ordinary reasonable reader reading the article once."
21. It is evident from the facts of the case that the degree to exercise the right of fair comment has been exceeded by the Plaintiff Mr. Heisenberg. The words are manifestly defamatory on reading the whole of it and not merely particular parts of it. The defamation must be found in the words themselves and not on facts extrinsic to them. The averments are crystal clear and thus, the Plaintiff cannot apply to strike them as vague. The post on the social media platforms in which the Plaintiff had put the entire blame on the Company, has become viral. Admittedly, the Plaintiff's use of such deprecating words has crossed all the limits of fairly criticising the defendant company. There are elements of gross exaggeration present in the detailed post put up by the Plaintiff. We are of the opinion that the Plaintiff has not exercised his right to freedom of Speech and Expression in a fair manner and hence, should be reasonably restricted from expressing his opinion. It is held in **Narshi Thakershi v. Pradyuman Singhji Arjun Singhji 1971 (3) SCC 844** that 'it cannot be denied that justice is a virtue which transcends all barriers and the rules of procedure or technicalities of law cannot stand in the way of administration of justice. Law has to bend before justice'.
22. In *Subhashitratbandagaram*, it has been described:

Sa jeeviti yasho yashya kirtiyashya sa jeeviti,

Ayashokirtisanyukto jeevannipe mritoopamma

Translated into English it is as follows:

One who possesses fame alone does live. One who has good praise does alone live. Who has no fame and negative praise is equal to one who is dead while alive.

This Sanskrit slogan narrated by us is merely an incidental observation, ‘*obiter dicta*’, ‘not part of *ratio decidendi*’ and ‘not authoritative’.

23. We have dwelled upon the views and opinions of the Counsels as regards value of reputation and importance attached to it. We shall be obliged, as we are, to advert to the assessment of the value of reputation and scrutinise the conceptual meaning of the term "reputation", as we are required to weigh in the scale of freedom of speech and expression, especially under our Constitution and the nature of the democratic polity the country has.
24. The parameters of recovering in a defamatory action is that the successful plaintiff is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; and take account of the distress which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people... **Hindustan Unilever Limited v. Reckitt Benckiser India Limited 207 (2014) DLT 713.**
25. The expression "at large " should be used in general to cover all cases where awards of damages may include elements for loss of reputation, injured feelings, bad or good conduct by either party, or punishment, and where in consequence no precise limit can be

set in extent. The award is thus not limited to the pecuniary loss that can be specifically proved." (**Rookes v. Barnard [1964] A.C. 1129, 1221**).

26. Be it noted that a three-Judge Bench, in **Aneeta Hada v. Godfather Travels and Tours (P) Ltd. (2012) 5 SCC 661** has ruled that a company has its own reputation. Of course, a company stands in a slightly different position, for it has no feelings to hurt, and it follows that considerations of aggravation which might be relevant if the claimant is an individual do not apply. However, the entitlement of a company to recover general damages has recently been affirmed by the House of Lords in **Jameel v. Wall Street Journal [2007] 1 AC 359**. A company's good name is a thing of value. Goodwill is about the nature of the business and the integrity and ethics with which one conduct its business. It gives the possessor a differential competitive advantage over others.

27. It seems to me plain beyond argument that reputation is of importance to corporations. Proof of actual damage caused by the publication of defamatory material would, in most cases, need to await the next month's financial figures, but the figures would likely be inconclusive. There is no doubt that, as the case law now stands, a libel is actionable per se at the suit of a corporation as it is at the suit of an individual, without the need to prove that any actual damage has been caused as in **South Hetton Coal Co. Ltd. v. North Eastern News Association Ltd. [1894] 1 QB 133**.

28. COSTS AND RELIEFS:-

Having regard to all these circumstances, the court is of opinion that the award of **Rs. 50 lakhs** as compensation to the plaintiff in the original suit which includes pecuniary and non-pecuniary damages is justified keeping in mind the conclusion that there existed negligence on both the sides. The order in favour of the Plaintiff is followed by a reasonable amount of compensation for the defendant company as they have suffered a loss of image, reputation, and goodwill due to the severity in degree of the right to

exercise fair comment. The reasonable amount that the court thinks fit is **Rs.20 lakhs** in view of the extent of publication. The plaintiff is ordered to pay the same. Besides, the post should be taken down from the social media platforms at the earliest in order to prevent further damage to the reputation of the company.