

**1st Surana & Surana and Ramaiah Collage of Law National Judgement
Writing Competition on Tort Law 2018**

IN THE HIGH COURT OF JUDICATURE AT MUMBAI

ORDINARY ORIGINAL CIVIL JURISDICTION

CIVIL SUIT NO__ OF 2018

HEISNENBERG] ...Plaintiff.

vs

TRAVEL SOLUTIONS PRIVATE LIMITED] ...Defendant.

Mr. Lawyer P for the Plaintiff

Mr. Lawyer D for the Defendant

CORAM : _____ , _____

DATE : 11th MARCH, 2017

ORAL JUDGEMENT (_____):

- 1 Called out from final hearing. Heard learned counsel for the parties finally.
- 2 The factual matrix involved in the above suit can be in brief stated thus. The plaintiff approached the defendant for availing services of flight booking, processing request for visa and hotel reservation for the family vacation to Sydney (Australia) along with his wife and two children. The sales team of the defendant, when met with the defendant assured that the visa is generally issued within 10-15 days and not more than that. The plaintiff was advised to book the flight from Chennai as opposed to a flight from Mumbai stating that the same would be cheaper.
3. A list of documents required for visa application were provided to the plaintiff on 07.08.2017. He was instructed to submit the same personally to Mr. Tommen (employee of defendant) so that the same may be scrutinised and sent to Delhi office for filing with

embassy. The documents were submitted on 11.08.2017 evening at the reception desk since the said employee was not in office. Mr. Tommen, instructed the receptionist to dispatch the same immediately. On 21.08.2017, plaintiff was informed of the requirement of an additional document which was found to be missing upon verification. The plaintiff was informed that the documents were not submitted to the embassy on account of various public holidays from 12.08.2017 to 15.08.2017, and that the documents dispatched on 16.08.2017 were received only on 18.08.2017. The next two days being Saturday and Sunday, the embassy was closed.

4. The defendant apologised and requested the plaintiff to send the additional document. The same was arranged and sent to Delhi by express courier on 22.08.2017, which reached on 23.08.2017. The application for visa was filed on 23.08.2017. The plaintiff who was sceptic about the delay, was assured by the defendant that the visa would be issued within time. The visa was issued on 06.09.2017. The plaintiff requested for dispatch of the visa immediately, however he was advised that owing to paucity of time it would be too risky to send it to Mumbai and instead the passports and visa would be sent to Chennai airport directly.

5. The plaintiff left Mumbai on 08.09.2017 and reached Chennai airport at 14:00 hours. The visa and other documents arrived only at 21:00 hours by which time the plaintiff had already missed his flight. The plaintiff was stranded in the airport with his family. He was informed that the flight from Chennai was non-refundable where the flight from Mumbai was refundable. Out of frustration of the money lost on flight bookings, hotel bookings etc. as well as the fact that his family had to undergo the entire ordeal he tweeted “Travel Solutions Private Limited – a bunch of liars, cheats and thieves with no ethics. The worst company ever” In addition he also made a detailed post placing the entire blame on the company along with the logo of the defendant. The social media outrage of plaintiff was shared several hundred times and resulting in wild spread condemnation on the internet.

6. The plaintiff filed the current suit against the defendant claiming a sum of Rs. 1 Crore towards cancelled air tickets, hotel reservations, mental trauma, agony etc. suffered by him and his family owing to the negligence on the part of the defendant.

7. The defendant filed a counter-claim against the plaintiff contending that the social media misinformation is false and defamatory in nature and owing to the malicious propaganda, the defendant has suffered a tremendous loss of image, reputation and good-will.

8. We have heard Mr. Lawyer P, learned counsel on behalf of the plaintiff and Mr. Lawyer D, appearing for the defendant.

9. The basic contention raised by the learned counsel appearing for the plaintiff is that the actions of the defendant amounted to negligence and that the actions of the plaintiff does not amount to defamation liable to damages. Learned counsel appearing for the defendant, submits that his action does not qualify as negligence and further contends that the posts made by the petitioner is libel and liable for damages.

10. The Lawyer P, learned council submitted that the actions of the defendant qualifies as actionable negligence as all the three constituents of negligence as laid down by the Apex Court in the case of Jacob Mathew v. State of Punjab and Anr. AIR 2005 SC 3180 exist in the current issue. According to him, a legal duty to exercise due care existed on the part of the defendant and the said duty was breached. The breach of duty resulted in consequential damages for the plaintiff. He submits that legal duty exists, since the defendant could foresee the harm that would be caused to the plaintiff, if a breach occurred, and also because of the existence of proximity in relationship between the plaintiff and defendant. He has placed reliance upon the decisions of House of Lords in the case of Donoghue v. Stevenson (1932) AC 562 (HL) p. 580 as well as in the case of Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Company Limited and others [1984] UKHL 5. According to him, the defendant breached the duty of care at multiple occasions resulting in the final event of plaintiff missing his flight and incurring economic loss as well as pain and suffering. The negligence of the defendant in the current case are failure to inform the fact that the tickets from Chennai were non-refundable; Lack of care in ensuring the documents submitted were couriered on time; Unnecessary delay in checking the documents, incompetence in ensuring the visa arrived on time when the defendant was aware of the urgency of matter; Also giving assurances which were not met merely for ensuring the plaintiff avail the services of the respondent.

11. On the other hand, Mr. Lawyer D, learned council, submitted that the actions of the defendant does not amount to actionable negligence since the defendant had acted by use of ordinary care and skill towards the plaintiff. The defendant does not deny the existence of duty of care. However, the plaintiff also owed care to himself, the same was held in Bates v. Parker (1953) 1 All ER 768. According to him, there exists no breach of duty and in effect no cause of action arises against the defendant. The standard of foresight is that of a reasonable man. The defendant had not contemplated a possibility that the documents submitted by the plaintiff would be incomplete and also the fact that the courier dispatched on 06.09.2017 would not reach the Chennai airport in time, could not have been foreseen by a reasonable

man. Reliance is placed on the decision of the House of Lords in the case of *Muir v. Glasgow Corporation* [1943] AC 448. He also submitted that the defendant advised the plaintiff to have the documents couriered to the Chennai airport directly to reduce the risk involved. This advice *ipso facto* is proof that the defendant took sufficient care to avoid the risks within his contemplation. According to him the advice in respect of the flight from Chennai to Sydney as opposed to a flight from Mumbai to Sydney was an advise which was made purely for the benefit of the plaintiff; Also the time by which the plaintiff had submitted the documents were too late in the day to courier the said documents on the same day. The plaintiff ought to have been aware of the upcoming public holidays and the fact that the office of the defendant does not operate on those days. Reliance is placed on the maxim *volenti non fit injuria*. He also raised the plea of alternative remedy available under Consumer Protection Act for consumer disputes, for which he has relied upon legal principles of statutory interpretation of *generalia specialibus non derogant* and *generalibus specialia derogant* which requires that a specific statute like Consumer Protection Act should be given priority over a general statute like the Civil Procedure Code. According to him, the social media posts made by the plaintiff amounts to tort of defamation. The existing law in relation to defamation is a reasonable restriction on the fundamental right of freedom of speech and expression. The posts qualify as a libel as they are false, in writing, defamatory, and published. The words ‘liars’, ‘cheats’, ‘thieves’ are indeed defamatory and unwarranted in the circumstances.

12. In reply, Mr. Lawyer P submitted that as per section 3 of the Consumer Protection Act, other remedies available under any other law for the time being in force can be availed. He also submits that the actions of the plaintiff does not qualify as a libel on account of the posts being justified by truth and also on account of the same being a fair and bona fide comment.

13. We have given our anxious consideration to the various pleas raised by the learned counsel for the parties.

14. Coming to objection raised by the learned counsel for the defendant regarding availability alternative remedy and dismissing the petitions on this ground alone is concerned, we find that the maxims *generalia specialibus non derogant* and *generalibus specialia derogant* had been mechanically applied. The above rules of statutory interpretation does not apply in the present case since the Act in itself provides that it would not be in derogation of any other law.

12. In the case of *State of Karnataka v. Vishwabharathi House Building Co-operative Society and other* (2003) 2 SCC 412, the apex court has held that –

“ . . . 45. By reason for the provisions of Section 3 of the Act, it is evident that remedies provided there under are not in derogation of those provided under other laws. The said Act supplements and not supplants the jurisdiction of the civil courts or other statutory authority.

46. The said Act provides for a further safeguard to the effect that in the event a complaint involves complicated issues requiring recording of evidence of experts, the complainant would be at liberty to approach the civil court for appropriate relief. The right of the consumer to approach the civil court for necessary relief has, therefore, been provided under the act itself.

. . . 52. The provisions relating to power to approach appellate court by a party aggrieved by a decision of the forums/State Commissions as also the power of High Court and this Court under Article 226/227 of the Constitution of India and Article 32 of this Court apart from Section 23 of the Act provide for adequate safeguards. Furthermore, primarily the jurisdiction of the forum/ commissions is to grant damages. In the event, a complainant feels that he will have a better and effective remedy in a civil court as he may have to seek for an order of injunction, he indisputably may file a suit in an appropriate civil court or may take recourse to some other remedies as provided for in other statutes.”

13. Applying the principles laid down in the aforesaid case to the facts of the case in hand, we are not inclined to dismiss the plaint on the ground of alternative remedy.

14. Coming to the merits of the case, we observe that actionable negligence and its constituents has been held in the case of *Jacob Mathew v. State of Punjab* (supra) as follows:

“ . . . 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: (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. . . . ”

15. It is seen from the above that the existence and breach of duty of care is a pre-requisite to negligence. Duty in the current situation refers to an obligation to exercise reasonable care. The extent of duty is determined on the basis of (1) foreseeability of harm, (2) proximity of relationship and (3) the duty being just and reasonable. What is foreseeable in a given situation is that of a reasonable man. The said principle was well stated by LORD MACMILLIAN in *Muir v. Glasgow Corporation* (supra). We observe that the defendant has taken reliance on *Indian Airlines v. Madhuri Chowdhuri* in support of a wrong decision in a dangerous situation where multiple courses are open to him. We find that the situation faced by the defendant cannot be equated with the situation as set out in the case and therefore not applicable.

16. In our view the defendant owed duty of care to plaintiff, similarly the plaintiff also owed duty of care to himself. The flight tickets were booked well before time the visa applications were submitted. It ought to be in the contemplation of the plaintiff that all processes would not go as planned and there might be a delay in issuance of visa. However, the same cannot be held as a defence to deny that there existed a breach of legal duty on the part of the defendant. The defendant being a travel agent is expected to be knowledgeable about the processes and timings involved in the visa issuance. The plaintiff had acted only after receiving assurance that the visa issuance generally does not take more than 15 days. The documents submitted by the plaintiff even though not with the concerned person was available for his or any other employee for inspection. There was a delay of 10 days in verifying the file submitted. While the defendant was aware of the fact that the flight tickets were already booked for 08.09.2017, the delay in sending and verifying the same was negligence.

17. The jurisprudential concept in relation to legal liability on account of omissions is well stated in the *Salmond on Jurisprudence*, 12th Edition, it is stated (p. 352)

“But while omissions incur legal liability there is a duty to act, such a duty will be in most legal systems will be an exception rather than a rule for it would be unduly oppressive and restrictive to subject man to perform positive acts”

18. We are clearly of the view that there was a duty by the defendant in ensuring the visa reach the plaintiff on time. However the said duty cannot be said to be breached as the defendant has done what any prudent man might have done in the said circumstances. The

fact that there could have been a delay in delivery could be contemplated but would not be just and reasonable.

19. The apex court on the matter of right to freedom of expression under Article 19(1)(a), 19(2) vis-à-vis right to reputation under Article 21, after detailed scrutiny and reference to plethora of cases on each subject matter, resorted to the rule of harmonious interpretation and adopts the doctrine of balancing of rights. Existing law relating to defamation is a reasonable restriction on the right of freedom of expression.

20. We are clearly of the view that the statements made by the plaintiff in twitter is in substance false while the detailed post is in substance true. The terms used such as ‘liars’, ‘cheats’, and ‘thieves’ are inconsistent with the facts of the case and therefore the plaintiff’s defence on account of justification by truth is of no avail for the former post. The learned counsel for the defendant had alleged of an existence of malicious propaganda by the plaintiff. In evaluation existence of malice one may have to consider the mode of publication and the relative prominence given to different parts. The statements made were on social media, which is the media of this era for raising opinions. We find no evidence of malice as the words used and the circumstances that prevailed at that time indicates that the action arose out of anger and frustration of the plaintiff as he was stranded in the airport along with his family.

21. It may be clarified that the court finds that the posts does not qualify as statements but as comment made by the plaintiff. However, for a comment to be not liable to action it ought to be fair and *bona fide* comment. In *Merivale v. Carson* (1887) 20 QBD 275, it was held that legitimate criticism is no tort: should loss ensue, it would be *damnum sine injuria*. The Court finds that the principle laid down applies to the current case. Court is also of the view that mere exaggeration or even gross exaggeration would not make the comment unfair.

22. The Court observes that restricting a person from expressing an opinion on the negligent service that was rendered to him would be a misuse of the restriction provided under Article 19(2). The intention of preserving reputation should not in effect lead to being a restriction on any opinion being raised such that reputation does not suffer damage. The ratio in the case *M Pherson v. Daniels* (1829) 10 BC 263 (272) is of relevance. The law does not permit a man to recover damages in respect of an injury to character which he does not or ought not to possess.

23. The Court observes that the plaintiff has claimed for actual loss of 15,00,000, aggravated damages 35,00,000 as well as exemplary damages of 50,00,001. In the present case we find that the actual loss as well as aggravated damages claimed are warranted. However, the claim of exemplary damages is of no substance and does not hold good. The defendant even though negligent has not been in complete violation of his duties. He has acted upon his assumption of risk and practical considerations. The negligence in the case at hand is not grievous of awarding exemplary damages, if the same was done, would result in an unfair precedence. The court finds that the actual loss and aggravated damages are sufficient in the present case.

ORDER

- 1) The court declares that the defendant was negligent towards the plaintiff
- 2) The defendant to pay the plaintiff 50,00,000 INR as damages; Interest at the rate of 8% to be paid from the date of institution of this suit till the date of the decree, and further an interest at the rate of 10% from the date of decree till the date of payment
- 3) Cost of suit to be paid to the plaintiff by the defendant

[Judge A]

[Judge B]