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BEFORE

THE HON'BLE HIGH COURT OF BOMBAY

PLAINT FILED UNDER SECTION 6 OF THE CIVIL PROCEDURE CODE OF INDIA, 1908

Mr. HEISENBERG (PLAINTIFF)

v.

TRAVEL SOLUTIONS PRIVATE LIMITED (DEFENDANT)

WRITTEN SUBMISSION FOR DEFENDANT

INDEX

LIST OF ABBREVIATIONS

ABBREVIATIONS	MEANING
• §	Section
• ¶	Paragraph
• &	And
• A.I.R	All India Reporter
• Anr.	Another
• Art.	Article
• TSPL	Travel Solutions Private Limited
• H.C.	High Court
• Id.	Ibid
• Ltd.	Limited
• No.	Number
• Ors	Others
• pg.	Page
• r/w	Read with
• Pvt	Private
• S.\Sec.	Section
• S.C.	Supreme Court
• U.O.I.	Union of India
• V.\ Vs.	Versus
• Vol.	Volume
• QB	Queen's Bench
• SCC	Supreme Court Cases
• KB	King's Bench
• UKHL	United Kingdom House of Lords
• AC	Appeal Cases
• All er	All Indian Reporter
• Lloyd's rep	Lloyd's Representative
• H&N	Hurlstone and Norman Ex-checker Reports

INDEX OF AUTHORITIES

LIST OF CASES

15.	Hayward v. Thompson,	(1981) 3 All ER 45 (458)(CA).
16.	in Blyth v. Birmingham Waterworks Co	(1856) 11 Exch 781
17.	John Vs. MGN Ltd.	(1996)2 ALL ER 35 [1997] Q.B. 586 (CA)
18.	Jones v Livox Quarries Ltd	[1952] 2 QB 608
19.	Lewis v. Daily Telegraph Ltd.	(1964) A.C. 234.
20.	Leyman v. Latimer,	(1877) 3 ExD 15, on appeal, (1878) ib 352.
21.	London Artists Ltd. v. Littler	(1968) 1 All ER 1075 on appeal (1969) 1 WR 607.
22.	Lt. Col. Gidney v. The A.I. & D.E. Federation	(1930) 8 ILR Ran 250
23.	Lucas Box v. News Group Newspapers Ltd.	(1986) 1 All ER 177
24.	Metropolitan Saloon Omnibus Co. Ltd. v. Hawkins	(1859) 4 H and N 87.
25.	Morrel v. International Publishing Ltd.	1989) 3 All ER 733 (CA)
26.	Muirhead v Industrial Tank Specialities	[1986] QB 507
27.	Naganatha v. Subramania	, (1917) 21 MLT 324
28.	Narayanan v. Narayana	AIR 1961 Mad 254
29.	of State of Bihar v. Lal Krishna Advani	AIR 2003 SC 3357

30.	Ogilvie v. The Punjab Akhbarat & Press Co.	1929) 11 ILR Lah 45
31.	Prager v. Time Newspapers Ltd. (1988) 1 All ER 300	1988) 1 All ER 300
32.	Radheshyam Tiwari vs Eknath Dinaji Bhiwapurkar,	AIR 1985 Bom 285.
33.	Rajkot Municipal Corpn. v. Manjulben Jayantilal Nakum	(1997) 9 SCC 552,
34.	Ratan v. Bhaga	(1896) PJ 376.
35.	Roe v. Minister of Health	[1954] 2 All ER 131
36.	Sadashiba v. Bansidha	AIR 1962 Ori 115
37.	Sim v. Stretch	(1936) 2 All ER 1237,(1936) 52 TLR 669
38.	Smith v Austin Lifts Ltd.	[1958] 2 Lloyd's Rep. 583
39.	South Helton Coal Co. v. North Eastern News Association Ltd.,	(1894) 1 Q. B. 133.
40.	Subramanian Swamy Vs. Union of India	(2016) 7 SCC 221
41.	Sutradhar v. Natural Environment Research Council	[2006] UKHL 33
42.	Thomas v. Bradbury Agnew & Co. Ltd	(1906) 2 KB 627 : 75 LT 23: 22 TLR 656

43.	Union Benefit Guarantee Company Limited v Thakorlal P. Thakor and Others	AIR 1936 BOM 114
44.	Union Benefit Guarantee Company v. Thakorlal Thakor	(1935) 37 Bom LR 1033
45.	Yahoo Inc! v. Akash Arora	1999 PTC 201

LIST OF BOOKS

Sr.No	Name of the Book	Author
1.	The Law of Obligations	John Fleming
2.	Modern Tort Law	Vivienne Harpwood
3.	Law of Torts with Consumer Protection Act	R.K.Bangia
4.	The Law of Tort	Ratanlal and Dhirajlal
5.	Tort in Commercial Tort	James Edelman and James Goudkamp
6.	Tort Law Principles	Bernadette Richards and Melissa de Zwart
7.	Understanding Tort Law	Carol Harlow
8.	Essentials on Tort Law	William P Statsky
9.	Implementation of Basic Human Rights	Manoj Kumar Sinha
10.	Black's Law Dictionary	Henry Campbell Black

LIST OF INTERNET SOURCES

Sr.No	Name of the Site
1.	www.Manupatra.com
2.	www.Westlawindia.com
3.	www.Lexisnexusindia.com
4.	www.Heinonline.com
5.	www.Scconline.com

STATEMENT OF JURISDICTION

The case is filed before the Hon'ble High Court of Bombay, which has inherent jurisdiction to try, entertain and dispose of the present case by virtue of The Bombay High Court (Original Side) Rules, 1980 along with the Section 6 of the Civil Code of Procedure, 1908.

STATEMENT OF FATCS

1. In July 2017, Mr. Heisenberg plans a family vacation to Australia, for which he contacted company providing travel services i.e. Travel Solutions Private Limited **(TSPL)**, as he was assured by TSPL that the visa process would not take more than 10-15 days.

2. On the advice of **TSPL**, Mr. Heisenberg booked the tickets for his family from Chennai to Sydney dated 08.09.2017 instead of Mumbai to Sydney via Singapore.

3. Mr. Heisenberg submitted these documents to TSPL on the evening of 11.08.2017 as prescribed by Mr. Tommen at the reception desk by which time Mr. Tommen had already left the office, nonetheless he instructed the receptionist to dispatch the documents immediately.

4. On 21.08.2017, Mr. Heisenberg got a call to submit an additional document. Mr. Heisenberg was furious as his documents were not submitted yet, he was informed that on 12.08.2017 and 13.08.2017 the office was closed because of Second Saturday and Sunday. 14.08.2017 and 15.08.2017 were national holidays. The documents were dispatched on 16.08.2017 and received only on 18.08.2017. Saturday and Sunday the embassy was closed. On 21.08.2017 upon verification, they realized that a document was missing.

5. The documents were sent via express couriers on 22.08.2017 and was delivered on 23.08.2017. The Visa Form was filed on the same day and Embassy issued the visas on 06.09.2017. On Mr. Heisenberg request to dispatch the passports, TSPL advised that due to paucity of time, passports would be sent directly to the Chennai airport instead of Mumbai.

6. On 08.09.2017, Mr. Heisenberg along with his family reached Chennai Airport by 14:00 hours. Unfortunately, the passports reached the airport only by 21:00 and they missed his flight. Mr. Heisenberg was very furious as he got to know that the flight was non-refundable and he had lost a lot of money and his family had to undergo the entire ordeal.

7. Out of frustration, he tweeted with a hashtag "#TSPL sucks" and a logo of the company which got trending next day. The incident drew widespread condemnation on the internet.

8. Mr. Heisenberg sued TSPL before the High Court of Mumbai for negligence claiming a sum of Rs. 1 Crore for the negligence on the part of TSPL and the same was defended by TSPL on the ground that issuance of visa is not in their hands and further claimed that Mr. Heisenberg was responsible for not submitting the documents in order.

9. Further, TSPL filed a counterclaim against Mr. Heisenberg claiming the malicious propaganda amounting to tremendous loss of image suffered by TSPL.

10. The trial has completed and the case is posted for Final hearing.

STATEMENT OF ISSUES

1. **WHETHER TRAVEL SOLUTIONS PRIVATE LIMITED IS LIABLE FOR THE TORT OF NEGLIGENCE.**

2. **WHETHER MR. HEINSBERG IS LIABLE FOR DEFAMING THE TRAVEL SOLUTIONS PRIVATE LIMITED.**

3. **WHETHER TRAVEL SOLUTIONS PRIVATE LIMITED IS ENTITLED TO PAY THE COMPESATION OF RUPEES 1 CRORE TO MR. HEINSBERG.**

SUMMARY OF ARGUMENTS

I. WHETHER TRAVEL SOLUTIONS PRIVATE LIMITED IS LIABLE FOR THE TORT OF NEGLIGENCE.

The arguments under this contention seek to establish that the parameters laid down to meet the judicial requirements for proving negligence are not fulfilled i.e. (i) Reasonable care; (ii) Breach of Duty and (iii) immediate damage and thus, the Respondent is not liable to compensate the Plaintiff. Furthermore, it was very evident from the actions of the Plaintiff that due care was not taken at the initial stage for the processing of visa while he was requested to submit the documents, thus this would amount to contributory negligence.

II. WHETHER MR. HEINSBERG IS LIABLE FOR DEFAMING THE TRAVEL SOLUTIONS PRIVATE LIMITED.

The Defendant states that the statements of Plaintiff are defamatory. All the essentials of defamation have been met. Material is not protected by the Right to Freedom of Speech and Expression under Article 19 of the Indian Constitution. Statements published are malicious and are not covered by the Defence of Truth. Also, they do not fall under the Defence of Fair Comment as it was not in interest of the public at large.

III. WHETHER TRAVEL SOLUTIONS PRIVATE LIMITED IS ENTITLED TO PAY THE COMPESATION OF RUPEES 1 CRORE TO MR. HEINSBERG.

In the light of the above issue it is submitted by the Defendant that as the essentials of negligence are not satisfied, the claim of Plaintiff fails. This is clearly a case of Contributory Negligence wherein the Plaintiff was also equally negligent. Plaintiff has committed the tort of Defamation. All the essentials are met and the Defence of Freedom of Speech and Expression, Truth and Fair Comment fails.

ARGUMENTS ADVANCED

I. WHETHER TRAVEL SOLUTIONS PRIVATE LIMITED IS LIABLE FOR THE TORT OF NEGLIGENCE?

1. The Black's Law Dictionary defines *Negligence* as the omission to do something which a reasonable man, guided by those ordinary considerations which ordinary regulate the human affairs, would do or the doing of something which a reasonable and prudent man would not do.[1] The term negligence was aptly summed up by Alderson, B. in *Blyth* v. *Birmingham Waterworks Co*[2]as:

> "Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

2. Thus Defendant argues that the Defendant is not liable for damage suffered by Plaintiff . If it shall be noted that: "acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief"[3]. The actions based on Negligence have historically to be based on been analysed in the four requirements: duty, breach, causation, and damages.

The Defendant did not owe the 'duty of care' to the Claimant.

3. The first element is the duty of care. It was deduced in the case of *Caparo Industries pic v. Dickman* that a duty of care may now be imposed if three requirements are satisfied: (i) foreseeability; (ii) proximity; (iii) justice and reasonableness.[4].

Foreseeability

4. In order to prove the existence of "foreseeability", it should be required that Defendant has foreseen Plaintiff as both an individual or a member of a class and injury of the kind

[1]Black's Law Dictionary, 6th Edition
[2](1856) 11 Exch 781
[3]UKHL 100

[4]1990] UKHL 2

that actually occurred as seen in the case of ex. Haley v. London Electricity5; Roe v. Minister of Health.[6]

5. In this case the Defendant could not possible foresee this happening in the future as he was under the impression that the Plaintiff would submit the documents sooner and without any discrepancies which would mean that the visa would be processed early and the passports would be with them and they can board in the flight from Chennai which was economically beneficial for them, as advised by the Defendant.

Proximity

6. Defendant owed Plaintiff a duty of care if there was proximity between both parties. Proximity is another way of expressing foreseeability test. Proximity does not mean that the Defendant and Plaintiff have to know each other, but Defendant could not reasonably be expected to foresee that his or her actions could have caused the said damage to the Plaintiff .[7] In addition, proximity was elaborated in the case of *Sutradhar v. Natural Environment Research Council*[8] which means "a measure of control over and responsibility for the potentially dangerous situation."

7. In the present case, the requirement of foreseeability and proximity were not satisfied. The same can be seen as the documents that were to be submitted for the process of visa was to be submitted by the Plaintiff to the Defendant's office at the earliest. The list of documents that was to be submitted by the Plaintiff was received by him on 07.08.2017 and the documents were submitted by the Plaintiff after four days on the evening of 11th August i.e. a Friday. It was Plaintiff 's responsibility to understand the essence of time and should submit the documents at the earliest and shouldn't have taken such long. Furthermore, the office of TSPL was closed from 12 August - 15 August because of the public holidays, as a result of which the entire Visa Process was delayed. After taking a time as long as four days it was expected out of Mr. Heisenberg to submit the documents as per the list and not miss up on any document. In order to save time of the Plaintiff, Mr.

[5][1965] AC 778
[6][1954] 2 All ER 131
[7]Muirhead v Industrial Tank Specialities[1986] QB 507
[8][2006] UKHL 33

Tommen couriered the documents at the earliest without scrutinising them to save time and reduce the risk factor.

8. Furthermore in addition to it the travelling agency was acting in an advisory nature, wherein the Plaintiff was advised by the Defendants to book the flight tickets from Chennai to Sydney and not from Mumbai to Sydney as that would have helped Mr. Heisenberg saving a lot of money. In the light of the present case the Defendant was only acting in the advising nature and no clear proximity could be found between the both, nonetheless proper care was taken by the Defendants that no losses are suffered by the Plaintiff and all the advises were given to the Plaintiff in the best of its interest.

9. Therefore, the relationship between Plaintiff and Defendant was insufficiently proximity was there between the parties yet the duty of care was efficiently taken care of by the Defendant.

Justice and reasonableness

10. If cases meet the requirements of foreseeability and proximity, justice and reasonableness is considered. In this case, the requirements of foreseeability and proximity are not satisfied. Thus, the Court need not consider this requirement.

Defendant did not breach the duty of care owed to Plaintiff**.**

11. The second element required to prove negligence is that a duty of care has been breached. In the present case, it is very apparent from the actions of the Defendant that the proper care was taken by them and there was no breach of duty from the TSPL's end.

12. When the advice was given by the Defendant to Mr. Heisenberg to book the tickets from Chennai instead of Mumbai it was very evident that the TSPL is reasonably concerned and careful about the expenses of the Plaintiff. Along with that, Defendant try doing every possible thing to help the Plaintiff save on the expenses and time and make sure the visa are issued within time, which did happen. But when Mr. Heisenberg furthermore, when the Plaintiff was advised by the TSPL to directly deliver the Passports at the Chennai airport, that too was done out of genuine care from the TSPL's end as the chances of passports getting delivered at the Chennai Airport were much more than that of Mumbai.

It was an inherent risk which was very much clear in the eyes of the Plaintiff as well, but still the Defendants tried their best to ensure that the passports reach Chennai in time. Therefore, it can be deduced that the Defendants did not breach any duty of care that he owed to the Plaintiff.

Defendant did not cause the damages suffered by Plaintiff:

13. The third element is the existence of causation and remoteness. The actions of Defendant did not cause the damages suffered by the Plaintiff as it was because of the delay that was caused by the Plaintiff at the very beginning at the time of submission of the visa documents which took them as long as four days adding to which one document was still missing. If the process of visa could have started earlier and not on the 21st August and sometime before that, the issuing of visa would have been completed before 6th September no such problem of delivery of Passports would have occurred. Hence it can be said that the loss cause to the Plaintiff is not because of any fault of the Defendants, but because of the delay caused by the Plaintiff himself.

Defence of Contributory Negligence:

14. The contributory negligence of the Plaintiff is a defence in a tort action based upon negligence is a well-established doctrine. The leading case and the one generally spoken of as the case establishing the doctrine is the landmark judgment of Butterfield v Forrester[9] that the Plaintiff rode his horse violently and collided with a pole which the Defendant had negligently left in the road. It was held that if the Plaintiff had used ordinary care the accident would not have happened. The Plaintiff was therefore guilty of contributory negligence and could recover nothing.

15. Numerous theories as to the grounds and policy of the defense of contributory negligence have been suggested. Professor Bohlen classifies the common theories of contributory negligence as follows:(i) indemnity or contribution between joint tortfeasors; or (ii) voluntary assumption of risk as expressed in the maxim volenti non fit injuria.[10]

[9](1809) 11 East 60

[10]See Bohlen, Contributory Negligence (1908) 21 HARVARD L. REV. 233, for two little known cases decided ten and six years earlier, which announce the similar doctrine of assumption of risk, but the facts of earliest case would seem to be more fitted to the doctrine of contributory negligence

Indemnity or contribution between joint tortfeasors**:**

16. In this case it can be seen that if it is said that negligence was to take place then there was reasonable amount of negligence on part of the Plaintiff as well. It can be seen that the Plaintiff took four days for submitting the documents for the processing of the visa application which was reasonably a longer time. After taking a time of four days, the documents were not submitted in totality and one document was still missing. Plaintiff being a service class person is expected to be aware of the public holidays coming further. Documents were submitted by the Plaintiff on the August 11 which was followed by four holidays, hence there was a delay in processing of the documents. Therefore, it can be seen that the Plaintiff was also negligent in the same.

17. It was deduced in the case of *Jones* **v** *Livox Quarries Ltd*[11]that the contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless. In the present case, the Plaintiff had played the role of contributory negligence as there was no possible duty of care but there was foreseeability and it was on part of both the parties as it has been explained above.

Volenti Non fit Injuria

18. Volenti non fir injuria is a common law doctrine which states that if someone willingly places themselves in a position where harm might result, knowing that some degree of harm might result, they are not able to bring a claim against the other party in tort. *Volenti* applies only to the risk which a reasonable person would consider them as having assumed by their actions. A man cannot be said to be truly willing unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely[12]

[11][1952] 2 QB 608

[12]Bowater vs Rowley Regis Corp [1944] KB 476

19. In the present case as well, the Plaintiff was free to make his own choices as to his trip to Australia. The Defendants i.e. the TSPL was just an advisory body who was involved in giving suggestions and the best advices to the Plaintiff in order to enjoy a feasible trip without incurring any extra damages. All the steps that were taken up by the TSPL were taken with the permission of the Plaintiff and when the advice of sending the passports directly to the Chennai Airport was given to the Plaintiff, the Plaintiff consented to the Defendants for the same knowing the amount of risk that was involved in the same.

Assumption of Risk

20. When a Plaintiff assumes the risk involved in an obviously dangerous activity but proceeds to engage in the activity anyway, he or she may not be able recover damages for injuries. In order for this doctrine to apply, the Plaintiff must have actual, subjective knowledge of the risk involved in the activity. The Plaintiff must also voluntarily accept the risk involved in the activity. An example might involve an amusement park ride that flips passengers completely upside-down. A passenger who saw the ride and knew what would happen on the ride assumed the risks associated with the ride. On the other hand, a Plaintiff does not assume the risk of something unexpected related to the ride, such as where a loose bolt causes the ride to throw the Plaintiff in a violent manner.

Extent of risk

21. In order for volentinon fit injuria, the claimant must have knowledge of the existence of the risk and its nature and extent. The test for knowledge is subjective. If the claimant should have been aware of the risk but was not, the defence will fail.[13] In this case the Plaintiff was well aware of the nature and extent of risk as it can been seen that he was already unsure as to whether the visa would be granted on such short notice or not. It is not as such that the Plaintiff was not aware about the risk but despite that when the visa was granted in due time decisions relating to the next procedures were of advisory nature and that to act on this or not was on his discretion and hence, the defence of Volenti non fit injuria is valid.

22. Hence in the light of the above mentioned arguments, it can be accomplished that the

[13]Smith v Austin Lifts Ltd.

Defendant is not liable for the tort of Negligence.

II. WHETHER MR. HEINSBERG IS LIABLE FOR DEFAMING THE TRAVEL SOLUTIONS PRIVATE LIMITED?

Essentials of Defamation:

23. As per Black's Law Dictionary, *Defamation* means the offence of injuring a person's character, fame, or reputation by false and malicious statements. The term seems to be comprehensive of both libel and slander.

24. The test is whether the words would "tend to lower the Plaintiff in the estimation of right-thinking members of society generally".[14]The meaning of words in a libel action "is a matter of impression as an ordinary man gets on the first reading, not on a later analysis".[15] On the user of the words "spurious manufacturer" it was held by the court that the word "spurious" itself is defamatory. If the general dictionary meaning is looked at, such words convey a meaning that the manufacturer is not genuine, false and that such manufacturer is manufacturing a product which is adulterated. These words defame the Plaintiff s in the way of their business.The Defendant here has therefore to establish if he wants to succeed in getting damages (1) that the words or the acts must have been published maliciously, (2) that they are defamatory, (3) that they have reference to the Plaintiff , and (4) that they have been published.[16]

25. As held in Metropolitan Saloon Omnibus Co. Ltd. v. Hawkins17, South Helton Coal Co. v. North Eastern News Association Ltd.,18 D. L. Caterers Ltd. v. D'Ajou,19 Lewis v. Daily Telegraph Ltd.20, Selby Bridge Proprietors v. Sunday Telegraph a trading corporation has

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[14] Sim v. Stretch,(1936) 2 All ER 1237,(1936) 52 TLR 669 : 80 SJ 703(HL)(LORD ATKIN).
[15] Hayward v. Thompson, (1981) 3 All ER 45 (458)(CA).
[16] Radheshyam Tiwari vs Eknath Dinaji Bhiwapurkar, AIR 1985 Bom 285.
[17] (1859) 4 H and N 87.
[18] (1894) 1 Q. B. 133.
[19] (1945) K. B. 364.
[20] (1964) A.C. 234.

a business reputation and can sue for defamation in respect of a publication calculated to injure its reputation in the way of its business.

26. The Burden of Proof that the words are false does not lie upon the Plaintiff (here, Defendant). Defamation of a person is taken to be false until it is proved to be true. Further if a man has stated that which is false and defamatory, malice is also assumed.[21] 'Malicious' here means that the publication was without just cause or excuse. The motive of the Defendant is not material in determining liability.

27. The Defendant here is a highly reputed company, which provides travel services such as booking of air tickets, processing the request for visa, hotel reservations etc. For these purposes the Plaintiff contacted Defendant. The Defendant informed Plaintiff that the process of issuance of a visa generally takes 10-15 days. Usually whenever a time period is given (as here, 10-15 days), it is assumed to exclude holidays. The word 'generally' according to dictionary means 'in most cases, except under exceptional circumstances'. Here, the delay in issuance of passport took extra time due to the continuous holidays and non-submission of certain document by the Plaintiff . However, what is to be noted here is that the passport was still issued within 15 days.

28. It is the case of the Defendant that Plaintiff has maliciously defamed the Defendant company without any just cause or reason. Malice in its legal sense means a wrongful act done intentionally without just cause or excuse.[22]

29. The essentials as discussed earlier above are (1) that the words or the acts must have been published maliciously, (2) that they are defamatory, (3) that they have reference to the Plaintiff , and (4) that they have been published.[23] In the present case, condition 3rd and 4th are already justified as the defamatory material has been published on social media and it clearly refers to the Defendant as the logo of the Defendant Company is uploaded with the unfair comments. Plaintiff also satisfies the condition of malice which will be seen below where it has been proved that there was no truth or fairness in making such derogatory

[21] Ogilvie v. The Punjab Akhbarat & Press Co., (1929) 11 ILR Lah 45; Lt. Col. Gidney v. The A.I. & D.E. Federation, (1930) 8 ILR Ran 250; Narayanan v. Narayana, AIR 1961 Mad 254; Clarke v. Malyneux, (1877) 3 QBD 237, 247, followed in Ratan v. Bhaga, (1896) PJ 376.

[22] Radheshyam Tiwari v Eknath Dinaji Bhiwapurkar and Others AIR 1985 BOM 285

[23] Radheshyam Tiwari vs Eknath Dinaji Bhiwapurkar and Others AIR 1985 Bom 285

comments towards the Defendant. Plaintiff did not use appropriate words to convey his dissatisfaction and absolutely exaggerated the term. It takes years to build reputation and seconds to destroy it. The Plaintiff has completely besmirched the name of the Defendant Company which took them years to build. The 2nd condition that the material is defamatory has also been proved below where the Plaintiff does not qualify to take the cover of the Freedom of Speech and Expression, Defence of Truth and the Defence of Fair Comment.

The Defendant asserts that the Plaintiff 's publication is not protected by defences claimed*:*

It is the case of the Defendant that the Plaintiff 's case doesn't fall under the protection of the Defence of Article 19(1)(a), Truth or Fair Comment.

Plaintiff 's statement does not fall under the protection of Article 19(1)(a)

30. Freedom of Speech and Expression Article 19(1)(a) of the Constitution of India states as follows: Article 19: Protection of certain rights regarding freedom of speech, etc.- (1) All citizens shall have the right- (a) to freedom of speech and expression;" Article 19(2) states: "Article 19: Protection of certain rights regarding freedom of speech, etc.- (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence."

31. The Right to Reputation of an individual was recognized by the Supreme Court in the matter of *State of Bihar v. Lal Krishna Advani*[24] wherein it was observed that reputation is an integral and important aspect of dignity of every individual. Supreme Court held in the case of *Subramanian Swamy Vs. Union of India*[25] that while in a democracy, an individual has a right to criticize and dissent but his right under Article 19(1)(a) is not absolute and he cannot defame another person. The limit has to be proportionate and not unlimited. The test

[24] AIR 2003 SC 3357
[25] (2016) 7 SCC 221

of reasonableness cannot be determined by laying down any abstract standard or general pattern-it would depend upon the nature of the right which has been infringed or sought to be infringed and the ultimate impact i.e. the effect on the right has to be determined

32. The Defendant here is a renowned trade name and enjoys high reputation for its honest and principled conduct, quality and reliability of its services. The Plaintiff by exceeding his Freedom to Speech and Expression has transgressed the limit thereby committing the tort of Defamation.

Plaintiff 's statement doesn't fall under the Defence of Truth

33. The Defendant asserts that the words used by the Plaintiff in his tweet were not in any way true. They were false and defamatory and the Defendants never cheated or lied to the Plaintiff about anything. If there is gross exaggeration, the plea of justification will fail, *e.g.,* to say that a person has been suspended for extortion three times when he has been suspended only once,[26] or to call an editor of a paper 'a felon editor' when he was once convicted.[27]

34. The Defendant (here, Plaintiff) must make clear in the particulars of justification the case which he is seeking to set up and must state clearly the meaning or meanings which he seeks to justify.[28] The scope of the defence of justification in a defamation action does not depend on the way in which the Plaintiff pleads his case, but on the meanings, which the words published are capable of bearing.[29] If the statement is false, it is no justification that the Defendant honestly and on reasonable grounds believed it to be true.

35. In the present case, the Plaintiff has used very harsh and inappropriate words which destroyed the reputation of the company in the minds of right minded people. The Plaintiff here by using the words "a bunch of liars", "cheats", "thieves with no ethics" and "the worst company ever" has clearly grossly exaggerated everything and besmirched the reputation of the company to the level that it is irreparable.

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[26] Clarkson v. Lawson, (1829) 6 Bing 266.

[27] Leyman v. Latimer, (1877) 3 ExD 15, on appeal, (1878) ib 352.

[28] Lucas Box v. News Group Newspapers Ltd., (1986) 1 All ER 177 : (1986) 1 WLR 147(CA) ; Morrel v. International Publishing Ltd., (1989) 3 All ER 733 (CA) .

[29] Prager v. Time Newspapers Ltd., (1988) 1 All ER 300 : (1987) 132 SJ 55(CA) .

36. These statements made by the Plaintiff have the effect of the conduct on the part of the Plaintiff s to degrade them and also prejudiced in their business, and more than any else, these statements are false and defamatory tend to lower the reputation of the Plaintiff 's company having right thinking in the society.

Plaintiff 's statement doesn't fall under the Defence of Fair Comment:

37. To take the defence of fair comment, the important requirement is that the comment must be fair, that is to say, it must be relevant to the subject-matter commented upon and honest in the expression of the writer's real opinion, though mere honesty of purpose would be of no avail if the words exceeded the proper limits.

38. The fact that a comment is honest does not necessarily make it fair. But an exaggerated or strong or prejudiced comment is not necessarily unfair, though the fairness of the comment often depends upon the language used. Malice destroys the defence, though it is for the Plaintiff s to prove it. It is neither a fair nor a bona fide comment to say of a company that it is started by a set of adventurers.[30] It is thus clear from the above that the language of defamatory material matters and it should not exceed the proper limit.

39. For the purposes of the defence of fair comment on a matter of public interest such matters must be (a) in which the public in general have a legitimate interest, directly or indirectly, nationally or locally, *e.g.,* matters connected with national and local government, public services and institutions, and (b) matters which are at public theatres and performances of theatrical artists offered for public entertainment but not including the private lives of public performers. [31]

40. The word "fair" refers to the language employed, and not to the mind of the writer. Hence, it is possible that a fair comment should yet be published maliciously.[32] The motives of the

[30] Union Benefit Guarantee Company Limited v Thakorlal P. Thakor and Others AIR 1936 BOM 114

[31] London Artists Ltd. v. Littler, (1968) 1 All ER 1075 : (1969) 1 WR 607. An appeal against this case was dismissed on the ground that the plea of fair comment had failed: (1969) 2 All ER 193 : (1969) 2 QB 375. See also, British Chiropractic Association v. Singh, [2011] 1 WLR 133(CA) .

[32] Thomas v. Bradbury Agnew & Co. Ltd., (1906) 2 KB 627 : 75 LT 23: 22 TLR 656. Whether a libel was justified or exceeded the bounds of fair comment is a question of fact: Naganatha v. Subramania, (1917) 21 MLT 324 .

publisher are also required to be considered. They should be warranted by the facts. In the present case, the comment made by Plaintiff is not at all justified. He used words "sucks", "a bunch of liars", "cheats", "thieves with no ethics" and "the worst company ever". All these words used by the Plaintiff are not acceptable. The fairness of the comment often depends upon the language used and therefore it can be clearly seen here that the words used do not in any way fall under the protection of Fair Comment. Defendant never lied or cheated Plaintiff in any way.

41. On account of these defamatory statements made by the Plaintiff , Defendants have suffered irreparable mental agony, injury and loss of reputation in the eyes of public for no fault of theirs and the very allegations made by the Defendant and published are totally false.

Damage caused due to Publication on Social Media:

42. It is well settled that in the case of a company or a trading corporation, words calculated to reflect upon it in the way of its property or trade or business, and to injure it therein, are actionable without proof of special damage; but if they refer only to the personal character or reputation of its officers, then proof of special damage is necessary.[33]

43. If the defamatory statement consists of an article with a headline and photograph the whole of the article including the headline and photograph has to be taken together and considered whether in its natural and ordinary meaning which may be ascribed to it by ordinary men it is defamatory of the Plaintiff .[34] Therefore here, the uploaded photo and the #hashtags are to be read together**.**

44. In a case of libel, it is not necessary to prove the actual loss of reputation; it is sufficient to establish that the defamatory statements made could damage one's reputation.[35] **T**he Defendant is suffering and stands to suffer irreparable and unquantifiable loss since the Defendant's entire business depends upon its good name and reputation in the market. The

[33] Union Benefit Guarantee Company v. Thakorlal Thakor, (1935) 37 Bom LR 1033; D. & L. Caterers Ltd. v. D'Ajou, (1945) KB 364 .
[34] Charleston v. News Group Newspapers Ltd., (1955) 2 All ER 313: (1995) 2 AC 65(HL).
[35] Sadashiba v. Bansidhar, AIR 1962 Ori 115.

goodwill that the Plaintiff enjoys has been built up by over years of hard work, and the same would be irreparably damaged by usage of such horrendous untrue words.

45. The dogma of defamation has it that the Defendant's statement should expose the Plaintiff to hatred, contempt or ridicule and the Law holds it to be a valuable asset that a man should be held in esteem by others. The first type of loss, therefore, depends on nothing which happens to the Plaintiff himself but on how others react to the tort. A paradigm case is *Cook v. Ward*, wherein "P was represented by D in a local newspaper as a hangman. At a parish meeting which he attended in his capacity as the Assistant Overseer of the parish, P was made the object of a joke which played on his being represented as a hang man, Evidence of P being subjected to the humiliation 'of a general roar of laughter' was admitted as being relevant to the issue of damages."

46. It is well settled that publication is a comprehensive term, embracing all forms and mediums - including the Internet. That an internet publication has wider viewership, or a degree of permanence, and greater accessibility, than other fixed (as opposed to intangible) mediums of expression does not alter the essential part, i.e. that it is a forum or medium. The mode of publishing the defamation in this case is extremely objectionable as anything posted on the internet has propensity to cause greater and lasting damage. In the context of *Yahoo Inc! v. Akash Arora*,[36] the Ontario Court of Appeal"s judgment in *Barrick Gold Corp. v. Lopehandia*,[37] as well as the decision reported *as Dowjones and Company Inc v. Jameel* [38], it is submitted that unlike publication in the print media which can cause the same intensity of the damage to the individual, the reach of the internet and its widespread accessibility means that any defamatory or libelous material posted on it, causes greater damage and harm to the injury of the subject. Therefore the Courts have to view this aspect from a wider perspective while considering the balance of convenience and the likelihood of irreparable prejudice to the Plaintiff who is the subject of defamation.

47. The Defendant therefore submits that the Plaintiff has defamed the Defendant by making such derogatory statements on social media because of which they have suffered a tremendous loss of image, reputation and good-will.

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[36] 1999 PTC 201
[37] 2004 CanLII 12938 (ON C.A.)
[38] [2005] Q.B. 946.

III. WHETHER TRAVEL SOLUTIONS PRIVATE LIMITED IS ENTITLED TO PAY THE COMPESATION OF RUPEES 1 CRORE TO MR. HEINSBERG.

Negligence:

48. The actions based on Negligence have historically to be based on been analysed in the four requirements: duty, breach, causation, and damages. A duty of care is imposed if three requirements are satisfied.: foreseeability, proximity, justice and reasonableness.

49. In order to prove the existence of "foreseeability", it is required that Defendant has foreseen Plaintiff as both an individual or a member of a class (1) and injury of the kind that actually occurred (2). However, in this case, Defendant could not possibly foresee as he was under the impression that the Plaintiff would submit the documents sooner which would mean that the visa would be processed early and the passports would be with them and they can board in the flight from Chennai.

50. In the present case, the requirement of foreseeability and proximity were not satisfied. The same can be seen as the Plaintiff failed to submit the documents on time. The Defendant was only acting in the advising nature and no clear proximity could be found between the both, nonetheless proper care was taken by the Defendants that no losses are suffered by the Plaintiff and all the advises were given to the Plaintiff in the best of his interest. If cases meet the requirements of foreseeability and proximity, justice and reasonableness is considered. In this case, the requirements of foreseeability and proximity are not satisfied. Thus, the Court need not consider this requirement.

51. The second element required to prove negligence is that a duty of care has been breached. In the present case, it is very apparent from the actions of the Defendant that the proper care was taken by them and there was no breach of duty from the TSPL's end.

52. The third element is the existence of causation and remoteness. The actions of Defendant did not cause the damages suffered by the Plaintiff as it was because of the delay that was caused by the Plaintiff s at the very beginning at the time of submission of the visa documents which took them as long as four days adding to which one document was still missing. If the process of visa could have started earlier and not on the 21st August and

sometime before that, the issuing of visa would have been completed before 6th September no such problem of delivery of Passports would have occurred.

53. The contributory negligence of the Plaintiff is a defence in a tort action based upon negligence. Common theories of contributory negligence are as follows:(i) indemnity or contribution between joint tort feasors or (ii) voluntary assumption of risk as expressed in the maxim *volenti non fit injuria.*[39]

a. If it is said that if at all negligence was to take place then there was reasonable amount of negligence on part of the Plaintiff as well. It can be seen that the Plaintiff took four days for submitting the documents for the processing of the visa application which was reasonably a longer time.
b. The Defendants is just an advisory body who was involved in giving suggestions and the best advices to the Plaintiff in order to enjoy a feasible trip without incurring any extra damages. All the steps that were taken with the permission of the Plaintiff knowing the amount of risk that was involved in the same. In this case the Plaintiff was well aware of the nature and extent of risk as it can been seen that he was already unsure as to whether the visa would be granted on such short notice or not. Thus, the defence of Volenti non fit injuria is valid.

Defamation:

54. In order to establish defamation these essentials are to be fulfilled:- (1) that the words or the acts must have been published maliciously, (2) that they are defamatory, (3) that they have reference to the Plaintiff , and (4) that they have been published.[40] The test is whether the words would "tend to lower the Plaintiff in the estimation of right-thinking members of society generally".[41]

55. It has been already proved that a trading corporation has a business reputation and can sue for defamation in respect of a publication calculated to injure its reputation in the way of its business. In this case, all the essentials of Defamation have been satisfied and therefore

[39]See Bohlen, Contributory Negligence (1908) 21 HARVARD L. REV. 233, for two little known cases decided ten and six years earlier, which announce the similar doctrine of assumption of risk, but the facts of earliest case would seem to be more fitted to the doctrine of contributory negligence
[40] Radheshyam Tiwari vs Eknath Dinaji Bhiwapurkar, AIR 1985 Bom 285.
[41] Sim v. Stretch,(1936) 2 All ER 1237,(1936) 52 TLR 669 : 80 SJ 703(HL)(LORD ATKIN).

the Plaintiff is liable for Defamation. Plaintiff 's statement is not protected by the Freedom of Speech and Expression and Defence of Truth and Fair Comment Article 19 clearly imposes a restriction in Right to Speech and Expression and recognizes the right to reputation. The Defendant here is a renowned trade name and enjoys high reputation for its honest and principled conduct, quality and reliability of its services. The Plaintiff by exceeding his Freedom to Speech and Expression has transgressed the limit thereby committing the tort of Defamation.

56. Plaintiff has maliciously defamed the Defendant Company without any just cause or reason. Malice in its legal sense means a wrongful act done intentionally without just cause or excuse.[42] If a man has stated that which is false and defamatory, malice is also assumed.[43] Thus, malice is proved when there is no truth in comment.

57. The Defendant asserts that the words used by the Plaintiff in his tweet were not in any way true. They were false and defamatory and the Defendants never cheated or lied to the Plaintiff about anything. When there is gross exaggeration, the plea of justification fails. Plea of fair comment also fails as the fairness of the comment often depends upon the language used and the words have not been justified in the tweet. Therefore, the Defendant asserts Defamation.

58. An internet publication has wider viewership, or a degree of permanence, and has greater accessibility, than other fixed (as opposed to intangible) mediums of expression. The mode of publishing the defamation in this case is extremely objectionable as anything posted on the internet has propensity to cause greater and lasting damage.

59. Therefore, the Defendant is not liable to pay damages to the Plaintiff.

[42] Radheshyam Tiwari v Eknath Dinaji Bhiwapurkar and Others AIR 1985 BOM 285

[43] Ogilvie v. The Punjab Akhbarat & Press Co., (1929) 11 ILR Lah 45; Lt. Col. Gidney v. The A.I. & D.E. Federation, (1930) 8 ILR Ran 250; Narayanan v. Narayana, AIR 1961 Mad 254; Clarke v. Malyneux, (1877) 3 QBD 237, 247, followed in Ratan v. Bhaga, (1896) PJ 376.

PRAYER

Therefore, in the light of the issues raised, arguments advanced, reasons given and authorities cited, it is humbly prayed before the Tribunal to adjudge and declare:

I. **That** the Defendant i.e. the Travel Services Private Limited is not liable for the tort of Negligence.

II. **That** the act of posting on social media by the Plaintiff amounts to Defamation.

III. **That** the Travel Solutions Private Limited is not liable for the tort of Negligence and is therefore not entitled to pay the damages worth Rupees 1 Crore.

The Hon'ble High Court may also be pleased to pass any other order, which it may deem fit in light of justice, equity and good conscience.

All of which is respectfully submitted.

SD/-

(Counsels *for* the Defendant)