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* **IN THE HIGH COURT OF DELHI AT NEW DELHI***Reserved on: 18.01.2024*

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Pronounced on: 21.02.2024+ **R.F.A. (O.S.) 14 OF 2023****PANKAJ OSWAL THROUGH HIS CONSTITUTED ATTORNEY
SANJAY WALI APPELLANT****Through: Mr Kamal M. Gupta, Mr Amber
Shehbaz Ansari, Mr Aslam Khan and
Mr Gorakh Nath Yadav, Advocates.****versus****VIKAS PAHWA RESPONDENT****Through: Mr A.S. Chandhiok, Senior Advocate;
Mr Arvind Nigam, Senior Advocate;
Mr Sanjiv Kakra, Senior Advocate
with Mr Bharat Arora, Mr Himanshu
Tanwar, Ms Simran, Ms Vidushi
Keshan and Mr Akash Madan,
Advocates.****CORAM:****HON'BLE MR. JUSTICE RAJIV SHAKDHER****HON'BLE MR. JUSTICE AMIT BANSAL****[Physical Hearing/Hybrid Hearing (as per request)]****RAJIV SHAKDHER, J.:****I. Prefatory facts:**

1. This appeal is directed against the judgment dated 09.02.2023 rendered by the learned Single Judge. *Via* the impugned judgement, the learned Single Judge has rejected the plaint instituted by the appellant.
2. The appellant instituted a defamation action against the respondent,



who is a senior advocate, for the following utterances, allegedly made by him in proceedings held on 14.07.2022 before the Sessions Court, Patiala House Courts:

“Plaintiff has used unparliamentary language and abused his mother during mediation proceedings.”

3. The statement is claimed to have been made in the proceedings carried on in criminal revision petition no. 554/2018. The appellant instituted the criminal revision proceedings to assail the order dated 13.08.2018 passed by the concerned Magistrate. *Via* the order dated 13.08.2018, the learned Magistrate had disposed of the appellant's application under Section 156(3) of the Code of Criminal Procedure, 1973 [hereafter referred to as “Cr.P.C.”], which propelled the appellant to file the criminal revision proceedings.

4. In the application under Section 156(3) of the Cr.P.C. preferred before the learned Magistrate, the appellant had alleged that the accused persons had refused to transfer, in his favour, the shares held in Oswal Agro Mills Limited [O.A.M.L.] and Oswal Greentech Limited [O.G.L.] by his father, Abhey Kumar Oswal, who had died intestate.

4.1 According to the appellant, since he was a class-I heir, he was entitled to a share in his late father's estate, which included shares held in O.A.M.L. and O.G.L. The contention was that his mother, i.e. accused no.1, was a nominee of deceased Abhey Kumar Oswal and, hence, in law, was required to divide and distribute the shares among the legal heirs.

5. As noticed above, the learned Magistrate disposed of the application made under Section 156(3) of the Cr.P.C. since, according to him, it did not require a “field investigation” by the police. According to the learned



Magistrate, the concerned authority would have considered, in effecting the change in the shareholding *qua* the subject shares, the relevant documentation, and there being no allegation that the transferring authority had acted illegally, a police investigation was not required. However, the learned Magistrate gave the appellant the liberty to pursue his case by recourse to Section 200 of the Cr.P.C. If he chose to do so, the learned Magistrate opined that sufficient material should be placed on record, which would disclose that a *prima facie* case was made out against the proposed accused persons.

6. This order, as noticed above, impelled the appellant to file the aforementioned criminal revision petition, in which the statement by the respondent formed the basis of the defamation action.

7. Although the appellant and his mother are embroiled in both civil and criminal actions, for brevity, we have skirted clear of the same as the defamation action centres around the statement made by the respondent in the criminal revision proceedings referred to hereinabove.

7.1 That said, it would be relevant to note that the parties were referred to a mediator in Criminal M.C. 3799/2019 taken out by the appellant against the remand ordered by the Sessions Court on 30.03.2019, for reconsideration of the application moved by the appellant's mother under Section 340 of the Cr.P.C. Evidently, the appellant's mother had filed an application under Section 340 of the Cr.P.C. in proceedings taken out by the appellant under Section 200, read with Section 156(3) of the Cr.P.C. The appellant's mother had contended that the appellant had perjured in the proceedings pending before the Magistrate.

7.2 These proceedings had been closed *via* order dated 13.08.2018, which



was set aside by the Session's Court, as indicated above, on 30.03.2019, and the matter was remanded to the Magistrate for reconsideration.

7.3 This compelled the appellant to file Criminal M.C. 3799/2019, to which we have made a reference hereinabove. Pending consideration of this matter, the parties were referred to a mediator to arrive at a possible settlement.

7.4 Besides this, the appellant had also instituted an operation and mismanagement action under Sections 241, 242 and 244 of the Companies Act 2013 before the National Company Law Tribunal (Chandigarh Bench). The appellant's mother stood arrayed as a party in the operation and mismanagement action.

8. Only to reiterate, the alleged defamatory statement in criminal revision petition no. 554/2018 impelled the appellant to file a suit on the original side of the Court on 24.08.2022.

9. The learned Single Judge, as noticed above, rejected the plaint *via* the impugned judgment at the threshold without issuing the summons as, according to her, the action was bereft of cause of action. In sum, the learned Single Judge took recourse to the provision of clause (a) of Order VII Rule 11 of Code of Civil Procedure, 1908 [hereafter referred to as "C.P.C."]. The rejection of the plaint led the appellant to prefer the instant appeal.

II. Submissions by counsel:

10. Mr Kamal Mohan Gupta advanced arguments on behalf of the appellant, while Messrs A.S. Chandhiok and Arvind Nigam, learned senior counsel, advanced submissions on behalf of the respondent.

11. Mr Gupta's submissions can, broadly, be paraphrased as follows:



- (i) The suit action ought not to have been dismissed at the threshold. The learned Single Judge failed to appreciate that lawyers are not conferred with absolute privilege if, in exercising their right of audience before a Court, they infringe a person's fundamental right to reputation, which is embedded in Article 21 of the Constitution.
- (ii) The privilege conferred on a lawyer is not absolute in the real sense as a lawyer can be held guilty in a contempt of the Court action for misconduct or criminal defamation under Section 499 of the Indian Penal Code, 1860 [hereafter referred to as the "I.P.C."].
- (iii) The judgments relied upon by the learned Single Judge were rendered before the decision of the Supreme Court in the matter of ***Subramanian Swamy vs. Union of India***.¹ The judgments considered by the learned Single Judge did not address or deal with the issue that the reputation of an individual has been raised to the status of a fundamental right.
- (iv) The learned Single Judge failed to address the issue concerning the relevancy of the defamatory statement made by the respondent to the proceedings being carried on before the Session's Judge. Because the defamatory statement was irrelevant to the said proceedings, it was not protected by the privilege that the law confers on a lawyer.²
- (v) The learned Single Judge ignored the observations made in paragraphs 67 and 68 of the judgment rendered by the Delhi High Court in ***Ram Jethmalani vs. Subramanian Swamy***.³ A perusal of the said paragraphs of the judgement would show that the Court has held:

¹ (2016) 7 SCC 221.

² *B Sumat Prasad Jain vs Sheodutt Sharma*, A.I.R. (1946) All 213.



“67. Even the issue of absolute privilege has remained a subject matter of considerable debate. Is absolute privilege absolute in the sense of being infinite? As late as 1998, in the decision reported as 1998 (1) All ER 625, Waple v. Surrey County Council, it was held:

“The absolute privilege which applies to statements made in the course of judicial or quasi-judicial proceedings and in the documents made in such proceedings, would only be entitled where it was strictly necessary to do so in order to protect those who were to participate in the proceedings from being sued themselves.”

68. The decision brings out that absolute privilege is not absolute in the context of being infinite. Even when the occasion is privileged one gets no licence to utter irrelevant and scandalous things unrelated to the proceedings. If what is stated is necessary or relevant to the proceedings, immunity would be absolute.”

(vi) The learned Single Judge ought to have permitted the parties to adduce evidence to prove their case on merits and should have taken into account the aspects concerning irrelevancy, malice and reputation of the appellant, reputation being a fundamental right and forming part of Article 21 of the Constitution.

(vii) The learned Single Judge was not justified in assuming that a senior advocate had made the defamatory statement on instructions. The matter ought to have proceeded to trial instead of the action being thrown out on a bare assumption.

(viii) The learned Single Judge erred in not trying the suit action concerning, at least, reliefs sought in prayer clauses (a), (b) and (c) of the plaint. *Via* these prayers, the appellant, broadly, sought the following reliefs:

(a) Declare that the statement made by the respondent was

³ (2006) 87 DRJ 603.



per se defamatory and infringed the appellant's fundamental right under Article 21 of the Constitution.

- (b) Grant permanent injunction to restrain the respondent from fabricating and/disseminating false and prejudicial imputation directly or indirectly against the appellant.
- (c) Grant mandatory injunction directing the respondent to tender an unequivocal and unconditional apology to the appellant for making false, unwarranted and defamatory statements and imputations against the appellant, causing damage and harm to his reputation.

12. In sum, Mr Gupta submitted that the learned Single Judge had misdirected herself both in law and on facts in rejecting the plaint at the very threshold.

13. Messrs Chandhiok and Nigam, on the other hand, in opposition, made the following submissions:

- (i) The learned Single Judge reached the correct conclusion while rejecting the petition at the threshold, as the respondent was conferred with absolute privilege founded on public interest while conducting proceedings in Court.
- (ii) If a lawyer is denuded of this privilege, the administration of justice would suffer as the lawyer would be ridden with anxiety and fear that utterances made in the Court would be subjected to defamation action(s).
- (iii) This privilege, thus, extends not only to lawyers but also to judges, witnesses and parties participating in judicial proceedings. The privilege is attached to the occasion and not to an individual.



(iv) At times, lawyers, parties and witnesses misuse the privilege accorded to them while participating in judicial proceedings by making false and malicious statements. That said, misuse of privilege or malicious utterances cannot, by itself, be the reason to deny the protection granted to lawyers, *albeit*, in public interest. The reason for extending the privilege to judges, lawyers and witnesses during judicial proceedings is to keep the administration of justice free of such constraints.

(v) Senior advocates do not deal directly with clients. They appear on instructions. The respondent, a senior counsel, had appeared for the appellant's mother in the proceedings held on 14.07.2022 before the Sessions Judge, and had no personal knowledge of what had transpired before the mediator. It is the counsel-on-record present during the mediation proceedings who had informed the respondent as to what had transpired in the said proceedings.

(vi) The alleged defamatory statement was based on instructions received in conference with the counsel-on-record. Therefore, no malice or motive could be imputed to the respondent for making the alleged defamatory statement as it was based on instructions received in the matter.

(vii) The appellant has filed the defamation action only to prevent the respondent from representing his mother in their *inter se* disputes, which are pending before various forum/Courts.

(viii) The suit action is both frivolous and vexatious.

(ix) The Sessions Court's order sheet of 14.07.2022 would show it only refers to the fact that that the matter was part-heard. There is



nothing on record concerning the alleged defamatory statement said to have been made by the respondent. Furthermore, the said order sheet does not record the presence of any friend or family member of the appellant. Thus, the assertion of the appellant that his reputation was damaged due to the alleged defamatory statement is *ex-facie* false. Moreover, the plaint does not disclose any cause of action.

(x) The judgment rendered by the learned Single Judge is consistent with the view held by Courts for around 140 years that statements made by lawyers during judicial proceedings are privileged and that the privilege is absolute.⁴

14. Thus, in a nutshell, the contention was that since the respondent made the alleged defamatory statement in Court, *albeit*, during judicial proceedings, it was protected by absolute privilege. Consequently, the appellant could not have triggered the suit action against the respondent.

III. Reasons and Analysis:

15. We have heard the learned counsel for the appellant and perused the record.

16. As noticed right at the outset, the entire suit action veers around the alleged defamatory statement said to have been made by the respondent during criminal revision proceedings.

16.1 Since the learned Single Judge rejected the plaint at the very threshold, a power which she exercised *suo motu*, one would have to accept the assertions made by the appellant in the plaint, that the alleged

⁴ See *Munster vs Lamb*, (1883) 11 Q.B.D. 588; *Chunni Lal vs Narsigh Das*, (1917) SCCOnline All 262.



defamatory statement, *albeit*, orally, was made by the respondent before the learned Sessions Judge, in proceedings carried on before the Sessions Judge, on 14.07.2022, concerning criminal revision petition no. 544/2018.

16.2 The statement attributed to the respondent by the appellant has been extracted hereinabove in paragraph two (2).

16.3 Briefly put, according to the appellant, the respondent stated that the appellant had used unparliamentary language and abused his mother in previously held mediation proceedings.

16.4 The appellant asserted that the alleged statement was *per se* false and defamatory, which had harmed and lowered his reputation amongst relatives, friends, business circle and society in general. It was averred that the alleged statement had no relation to the proceedings carried out before the learned Sessions Judge and that the respondent had no personal or direct knowledge of what transpired in the mediation proceedings. The appellant also alleged that the respondent had made the alleged defamatory statement only to cause harm to the appellant's reputation and malign him before his relatives, friends, employees of companies referred in the plaint, advocates and litigants present in the Court on that date.

16.5 Significantly, the appellant foregrounded the averment made concerning the alleged defamatory statement with the following assertions:

"...it is submitted that during the proceedings on 14.07.2022, the learned Sessions Court had inquired from the parties as to the possibility of amicably settling the dispute in the mediation proceedings. In response to the said query, the defendant stated thus:

"Mr Pankaj Oswal has used unparliamentary language and abused his mother during mediation proceedings."

[Emphasis is ours]

17. Given the fact that the plaint was summarily rejected and that we



would have to accept, for the moment, that the respondent made the alleged defamatory statement, the question which arises for consideration is: whether the statement alleged to have been made by the respondent on 14.07.2022, during judicial proceedings, if accepted as the correct state of affairs, would be actionable?

17.1 In other words, was the learned Single Judge right in concluding that the alleged defamatory statement by itself [which forms the core of the suit action] failed to provide a cause of action due to absolute privilege conferred by law on the respondent concerning utterances made in Court in the course of judicial proceedings.

18. It needs to be emphasized [and something which is not in dispute] that the proceeding sheet of 14.07.2022 does not refer to any utterances said to have been made by the respondent. The proceedings sheet of that date simply records that the matter was part-heard. Therefore, the case set up by the appellant was, in substance, one of slander and not libel.

19. It is well-established that, broadly, the following defences are available to the defendant in a defamation action: truth, fair comment, and privilege. Truth or justification can provide a complete defence. The defendant is required to establish that the statement made was substantially true. Insofar as fair comment is concerned, which is a defence ordinarily set up by publications, journalists and opinion-makers, all that the Court has to examine is whether the views expressed could have been honestly held by a fair-minded person based on facts known at a point in time, when the opinion was expressed.⁵

⁵ See Supra Note 1.



19.1 As regards the defence of privilege, it is of two kinds: qualified and absolute privilege. Qualified privilege ring-fences a defendant from a defamation action only when the privilege is properly exercised in performing legal or moral duties. Qualified privilege is also termed as conditional privilege. It occupies the space between two extremities, i.e., total absence of privilege and presence of absolute privilege.⁶

19.2 Conversely, absolute privilege immunizes a defendant, no matter how wrongful or motivated the action is. This contrasts sharply with the defence of truth, fair comment or qualified privilege, where motive plays a significant role. If the plaintiff is able to establish that the defamatory statement was made with malice, the defence that it was a true or fair comment or that the defendant was invested with qualified privilege would not suffice.⁷

19.3 Thus, the doctrine of privilege seeks to relax the principle of strict liability for certain occasions, such as public interest and common convenience and where the welfare of the society will suffer if persons do not express their view(s) freely on matters of importance. Likewise, where Court and Parliamentary proceedings are concerned, the doctrine of privilege kicks in based on public interest. At times, when the defence of absolute privilege is not available, in exceptional cases, public policy can also preclude the Court from entertaining a claim.

19.4 Thus, the doctrine of absolute privilege prohibits the entertainment of claims made against judges, counsel, witnesses or parties *qua* judicial proceedings made in Courts or tribunals. This privilege extends to witness

⁶ BLACK'S LAW DICTIONARY, 8th Edition, pg. 1235.

⁷ HALSBURY LAWS OF ENGLAND, 5th Edition, Vol. 32, para 647.



statements, testimonies, and documents properly used and regularly prepared for use in judicial proceedings. The only exception that is carved out concerns a statement which is not uttered for the purposes of judicial proceedings by a person who has a duty to make a statement in the course of the proceedings, or the statement made has no reference at all to the subject matter of the proceedings. The doctrine of absolute privilege does not protect such statements.⁸

20. Therefore, in the given facts and circumstances, one would have to conclude that, since the alleged defamatory statement was made by the respondent, *albeit* orally, in the course of judicial proceedings held before the Sessions Court, it would be protected by the doctrine of absolute privilege, unless one were to hold that it had no reference to the subject proceedings.⁹

20.1 Mr Gupta has sought to bring the case of the appellant within the exception and in this behalf, submitted that the alleged defamatory statement had no relevance insofar as the criminal revision proceedings were concerned.

20.2 As was indicated by us hereinabove, it is the appellant's specific assertion in the plaint, that while proceedings were going on 14.07.2022, in criminal revision petition 544/2018, the learned Sessions Judge had suggested that the parties should attempt an amicable settlement *via* the mediation route, which is when the respondent made the alleged defamatory statement. It is alleged by the appellant that when such a suggestion was made, the respondent uttered that the appellant had taken recourse to

⁸ *Id*, para 596.



unparliamentary language, and abused his mother in an earlier mediation proceeding.

20.3 Clearly, if this is the backdrop, in our opinion, the utterances of the respondent have to be contextualized and referenced to what, even according to the appellant, transpired in Court, in the presence of the learned Sessions Judge.

20.4 The utterance, even if assumed to be true, in our opinion, would be protected by the doctrine of absolute privilege. Thus, the argument advanced by Mr Gupta on behalf of the appellant that, utterances had no connection with the action pending in the Sessions Court if accepted, would result in taking a very narrow view of exception.

20.5 The respondent, in our view, was well within his right and within the framework of the doctrine of absolute privilege available to him to respond to the suggestion of the learned Sessions Judge as to why settlement through mediation was, perhaps, not feasible.

21. This brings us to the other submission advanced by Mr Gupta, that the reputation of the appellant [which now is part of a mélange of fundamental rights conferred on a person under Article 21 of the Constitution] could not be trumped by invoking the doctrine of absolute privilege is, in our view, misconceived.

21.1 While one cannot quibble with the broad proposition that a person, while exercising his right to free speech, cannot make reckless utterances, which tantamount to defaming another person, it has certain exceptions which we have referred to hereinabove. The exception, to reiterate, concerns

⁹*Id.*



claims for defamation involving utterances made during Parliamentary or Judicial proceedings. As alluded to above, the rationale is to subserve public interest and do away with the anxiety that the defendant may experience while making utterances, which may expose a defendant to defamation action(s).

21.2 As mentioned above, the utterances should be made for the purpose of judicial proceedings by the persons charged with the duty to make such statements in the course of the proceedings or at least have reference to the subject matter of the proceedings. The reliance placed by Mr Gupta on the ratio of the judgment of the Supreme Court in ***Subramanian Swamy's*** case, in our opinion, does not, in any way, run counter to the doctrine of absolute privilege enunciated by Courts as far back as the 19th century.¹⁰

21.3 Therefore, in our view, the learned Single Judge was right in invoking the provisions of Order VII Rule 11 of the C.P.C. It is well-established, contrary to the submission made by Mr Gupta, that the Court can, *sou motu*, exercise this power without waiting for a formal application being filed by the defendant.¹¹

21.4 Since the cause of action for instituting the suit was founded on the alleged defamatory statement, in our opinion, because of the protection offered to the respondent by the doctrine of absolute privilege, the Court could not have entertained such cause. Therefore, the plaint was rightly rejected by the learned Single Judge. Such cause is not recognized by the Court and in any event, is barred from being entertained.

21.5 The submission advanced by Mr Gupta that the suit should have been

¹⁰ See *Munster vs. Lamb*, supra note 4.



allowed to go to trial, in our opinion, would have been an exercise in futility since the law prohibits such claims from being entertained. Prayers (a), (b) and (c) embedded in the plaint, which have been paraphrased hereinabove by us, clearly could not have been entertained. Hence, no purpose would have been served in entertaining the suit and issuing summons to the defendant.

IV. Conclusion:

22. Thus, we are not inclined to entertain the appeal for the foregoing reasons. The appeal is, accordingly, dismissed. However, there shall be no order as to costs.

RAJIV SHAKDHER, J

AMIT BANSAL, J

FEBRUARY 21, 2024/pmc

¹¹ *Sopan Sukhdeo Sable v. Asstt. Charity Commr.*, (2004) 3 SCC 137; *Patil Automation (P) Ltd. v. Rakheja Engineers (P) Ltd.*, (2022) 10 S.C.C. 1 (para 94.3).