JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.F.A. no. 48 of 2011
Sher Afghan Khan
versus
Atta ul Haq Qasmi and others

Appellant by:	Mr. Muhammad Saqib Bhatti and Syed Sabee ul Hassan, Advocates
Respondents:	*Ex parte*
Date of Hearing:	**13.03.2024**

Sardar Ejaz Ishaq Khan, J:- This regular first appeal is from the impugned judgment and decree dated 25.04.2011, whereby the appellant's suit for recovery of damages for libelous publication was dismissed.

2 By way of brief background, respondent no.1 wrote, and respondents no. 2 to 4 published, an article in the daily Jung on 01.05.2008, eulogosing respondent no. 5 as an upright officer in the foreign service. Recounting respondent no.5's attributes, respondent no.1 made an *assertion of fact* about the appellant in the following words:

> میرے پیشرو سفیر شیر افگن صاحب پاکستانی سفارت خانے کی سابقہ عمارت اپنی صاحبزادی کی معرفت 34 ملین بھات میں بیچنا چاہتے تھے لیکن شاہ صاحب[1] ان کی راہ میں چٹان کی طرح کھڑے ہو گئے کہ جانتے تھے کہ اس جائیداد کی قیمت اس سے کہیں زیادہ ہے چنانچہ میرے بعد جو بھی سفیر بنکاک تشریف لائے اور فوج کے سابق جرنیل تھے ان کا نام یاد نہیں رہا۔ اتفاق سے وہ بھی شاہ صاحب کی طرح انتہائی دیانت دار شخص تھے۔ چنانچہ جو جائیداد 34 ملین بھات میں بیچنے کی کوشش کی جارہی تھی وہ 99 ملین بھارت میں فروخت کی گئی۔

The event reported above purportedly occurred in the year 1999. The appellant retired from service in February 2008. Respondent no.1's column in 2008 reported the above event of 9 years' vintage, and that too after the appellant's retirement.

[1] Respondent no.5

3 The respondents pleaded the defences of public interest and fair comment in their written statements.

4 I have reviewed the judgment under appeal with reference to the record and cannot bring myself round to agree with the conclusions reached therein.

5 A statement which is libelous *per se* will lead to damages being awarded for defamation, unless the defendant can establish any of the defences recognized in law. The law of defamation was codified by the *Defamation Ordinance, 2002*, and the common law position stood subordinated to the statutory formulation of the defences by the 2002 Ordinance. The defences claimed by the defendants (in a rather roundabout manner) that fell to be considered in the scheme of the Ordinance were the defences of 'fair comment'[2], 'truth of publication in public interest'[3], and 'qualified privilege'[4]. Defendant no.1, the originator of the article in question, had pleaded fair comment defence in paragraph 23 of his written statement. Defendants no. 2 to 4 had pleaded good faith and public interest defences.

6 The truth of publication was neither pleaded nor established by the defendants in their evidence, so it becomes irrelevant.

7 The libelous statement in question before us does not fall within any of the categories enumerated in section 5(h) of the Ordinance for the defence of qualified privilege to arise. The defence of qualified privilege was recognized in common law as arising out of the 'occasion' that justified publication of a libelous statement in the public interest. The common law had been assertive that the categories of the defence of qualified privilege could never be closed. Driven primarily by the policy objective of protection of freedom of speech in the public interest, it encompassed myriad occasions and, hence, the common law leaned against limiting the situations to which the defence of qualified

[2] section 5(b) of 2002 Ordinance.
[3] section 5(c), ibid.
[4] section 5(h), ibid.

privilege could extend[5]. However, the 2002 Ordinance has closed the categories by limiting them under section 7 as follows:

> Qualified privilege.– Any fair and accurate publication of parliamentary proceedings, or judicial proceedings which the public may attend, and statements made to the proper authorities in order to procure the redress of public grievances, shall have the protection of qualified privilege.

I must confess my inability to comprehend why the drafters of the 2002 Ordinance thought it fit to eliminate the flexibility of common law to rule whether the defence of qualified privilege could extend to a given situation, or to the situations not covered under section 7, but which have always been or ought to be recognized and encouraged by the common law in the public interest. However, once codified, the scope of qualified privilege as a defence would stand circumscribed by the statutory language, and therefore I do not find myself at liberty to import the situations countenanced by the common law as upholding the defence of qualified privilege but which do not find mention in section 7.

8 As for the defence of fair comment, the position under the common law, as well as under the 2002 Ordinance, remains largely the same. A comment is not the same as an assertion of fact; a comment is a matter of opinion but an assertion of fact is not. This common law position acquired statutory recognition in the description of the defence of fair comment under section 5(b) of the 2002 Ordinance as follows:

> The matter commented on is fair and in the public interest and is an expression of opinion and not an assertion of fact and was published in good faith.

Duncan and Neill on Defamation[6] clarify the distinction between a comment and an assertion of fact in paragraph 13.14 as follows:

> If the defendant sets out the facts correctly, and then gives his inference, stating it as his inference from those facts, such inference will, as a rule, be deemed a comment.[7]

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[5] The courts have always emphasized that the categories established by the authorities are not exhaustive. "The list is not closed", per Lord Nicholls of Birkenhead, *Reynolds vs Times Newspapers Limited* [2001] 2 AC 127

[6] Lexis Nexis, Fourth Edition

[7] Citing Odgers on Libel and Slander (6th edn, 1929), p 166, cited with approval in *Kemsley v Foot* [1952] AC 345 at 357 (Lord Porter).

9 When we look at the excerpt from the impugned article recorded above, there can be no two opinions that the aforesaid excerpt was made as an assertion of fact, and not as an inference from facts, that could be accorded the status of a comment only. Under the 2002 Ordinance, for the defence of fair comment to succeed in respect of an *ex facie* libelous publication:

i) it must be fair, that is, it is not exaggerated or not one that no reasonable person possessing the knowledge of the circumstances would deduce from the facts;

ii) it must be in the public interest;

iii) it must be an expression of opinion and not an assertion of fact; and

iv) it must have been made in good faith.

All these four ingredients must be fulfilled and met in any given case for the defence of fair comment to succeed. Merely asserting, as the defendants did, that a publication was made in good faith and in the public interest is not sufficient. Therefore, I rule that, for being an assertion of fact and not a comment only, the libelous publication in question did not meet the statutory threshold to qualify as a fair comment.

10 But the trial Court nonetheless required proof of malice on the part of the defendants, and that too with the burden placed on the appellant qua plaintiff. Relying primarily on *Sheikh Muhammad Rashid vs Majid Nizami, Editor-In-Chief, The Nation and Nawa-e-Waqat, Lahore and another*[8], the learned trial Court held that not only malice was not pleaded by the plaintiff, it was also not proved by him, and that, when a plea of fair comment on a matter of public interest was raised, then it was incumbent on the plaintiff to prove malice on the part of the defendant, which the plaintiff had not been able to establish in the instant case. In other words, the learned trial Court placed the burden of proof of malice on the plaintiff entirely. This constituted an error of law for the reasons stated below.

[8] PLD 2002 Supreme Court 514

(a) The trial Court did not appreciate the record properly, in that the appellant had expressly pleaded malice in paragraphs no. 3 and 8 of the plaint.

(b) A presumption of malice arises out of an *ex facie* libelous statement. Duncan and Neill elaborate this point well in paragraph 19.02 as follows:

> The publication of false and defamatory matter is, unless excused on some recognised ground, a wrongful act. The publication is therefore said to give rise to a presumption or inference of what has been called legal malice or malice in law. But this malice in law may be rebutted if the circumstances surrounding the publication, typically an occasion of qualified privilege, provide an excuse. It is then for the claimant, if he is to succeed, to establish express or actual malice or, as it is sometimes called, malice in fact.

(c) The onus on the plaintiff to prove malice arises when the defences of fair comment or qualified privilege are taken, which, as noted above, are not available when the publication in question is not a comment but is an assertion of fact or where the statutory tests for qualified privilege are not met. It takes no genius of interpretation to arrive at this conclusion. Section 5(c) – the truth of publication made in the public interest – would be rendered otiose if the distinction between an expression of opinion and an assertion of fact was obliterated because, in that case, anyone could make a false assertion of fact and, even though its truth was not established by the publisher, the burden would be cast on the plaintiff *ab initio* to show that the publication was untruthful and actuated by malice; that would indeed be a licence to defame. It is for this reason that the crucial distinction between an assertion of fact and an expression of opinion has always been recognised by common law, and received statutory recognition in section 5 of the 2002 Ordinance. The rationale is very simple: a commentor is entitled to draw inference from circumstances and to express an opinion as to what might his inference be and, as long as such inference is fair and can be held to be in the public interest and in good faith, the

law allows such fair comments to be made, but the law by no means permits someone to make a positive assertion of fact and then evade responsibility by throwing the onus on the plaintiff to prove malice. This was explained succinctly by Eady J. in *Hamilton vs Clifford* [9] as follows:

> One is not entitled to shelter behind a defence of fair comment when the defamatory sting is one of verifiable fact.

(d) It must be kept in mind, and this distinction is crucial, that the proof of malice - and its burden - varies with whether the defence of fair comment or the defence of qualified privilege is under consideration. Not only the defendants in this case did not plead the defence of qualified privilege, it would also not have been available to them in the circumstances of this case given the restricted categories encompassed by this defence enumerated in section 7 of the 2002 Ordinance. In substance, the only defence taken by them was that of fair comment under section 5(b) of the Ordinance.

(e) A publication that is *ex facie* defamatory would *ipso facto* raise a presumption of malice and, where a defence of fair comment is under consideration, it is for the defendant to discharge the initial burden of the absence of malice before the onus to prove it is shifted to the plaintiff. The learned trial Court turned the burden of proof on its head and required the plaintiff to prove malice *ab initio*, when it was for the defendants to rebut that presumption if the occasion for that arose at all, which did not for the reason of the publication being an assertion of fact.

(f) The learned trial Court confined itself to the headnote of *Majeed Nizami* and did not appreciate the law report in detail. The learned trial Court's reliance on *Majeed Nizami's* case was misplaced because, when we look closer at that case, we find several factors

[9] [2004] EWHC 1542(QB)

which were before the Supreme Court which enabled, rather necessitated, the shifting of the burden from the defendant publisher back to the plaintiff. The case concerned various statements made by political leaders against each other, which were published by the newspaper in question. In the High Court, a difference of opinion arose between the two judges of the Division Bench hearing the case. The case was then referred to the referee judge, whose findings were so material that the Supreme Court found it fit to reproduce them in the law report. The law report reads that the publishers were careful by seeking clarifications and confirmations from the parties, and when that clarification did not come forth initially, and came forth later in disparaging terms against the other party, that the publisher reported them as stated. With the record demonstrating a visible effort at clarifying the truth after giving an opportunity to the makers of those statements being afforded by the publishers, the learned referee judge concluded from those circumstances that the defendants did not entertain any malice against the plaintiff. It was on this basis that the learned referee judge recorded at paragraph 40 of his opinion as follows:

> When a plea, especially of malice and motive has not been raised in the pleadings and is not actually or seemingly incorporated in the evidence and is not deducible even circumstantially, it will be going too far to presume its existence notionally. A publication cannot be deemed to be malicious merely because it is found to be incorrect unless the relevant circumstances indicate the absence of bona fide. As already stated, the defendants not only published the statements of both the parties and were all the way willing to publish further statements and contradiction to be supplied by the plaintiff, but it was the plaintiff who first dismissed Naveed Malik as Tom, Dick and Harry and then declined the offer extended by the defendant No. 1 personally as well as through Muhammad Shafi (Meem Sheen, an old political worker and a legend in the field of journalism) and Mr. Justice (Rtd.) Zaki ud Din Paul.

It was in this context that the Supreme Court went on to record at paragraph no. 7 of the law report that the onus to prove malice was on the plaintiff. To the extent paragraph 7 of the said judgment is

read to mean (reproducing the sentence used in paragraph 7) that *malice must always be proved as a fact irrespective of the mere inference arising from the libelous character of the publication*, the said sentence must, of necessity, be now read subject to the provisions of the 2002 Ordinance because the aforesaid judgment was rendered on 06.03.2002, whereas the 2002 Ordinance was promulgated on 01.10.2002 and expressly excluded an assertion of fact from an expression of opinion from the scope of the defence of fair comment and, with the 2002 Ordinance in field, it can by no means be held that an *ex facie* libelous assertion of fact, the truth of which has not been established by the defendant, would fail as actionable libel unless actual malice were proven by the plaintiff.[10]

(g) It must also be remembered that the timing of publication is a materially relevant factor in evaluating the defence of fair comment[11]. One cannot see what public interest lay in asserting as a positive fact, 9 years after the event, that the plaintiff had made an unsuccessful attempt at selling the Pakistan ambassador's residence in Thailand at an undervalue. If such publication had been made contemporaneously with the alleged circumstances, or had been made while the plaintiff was still in the foreign service, it could be said in the former case that the publication had a useful public element to put the brakes to any such attempts succeeding, and in the latter case, to preclude the posting of the officer at any similar key post where he might be able to perpetrate a similar scheme, but no possible public benefit could be gleaned in reporting such incident 9 years later, the truth of which was

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[10] I cannot resist but observe, with the utmost respect at my disposal, that the Supreme Court in *Majid Nizami* overlooked the deep-rooted distinction in the common law for over a century, whereby the question and proof of malice entailed different preconditions depending on whether the defence of fair comment or qualified privilege was under consideration. The common law did not require even in the defence of fair comment for malice to be proven by the plaintiff where the libel was not an expression of opinion but was an assertion of fact. The excerpt from Salmond's Law of Tort cited in paragraph 7 of the law report, by its express terms, was written in the context of the defence of privilege and not in the context of the fair comment defence. For a detailed rendition of the common law on this point, see *Joseph versus Spiller*, UK Supreme Court (2010 UKSC 53), reported in Pakistan at 2012 SCMR 1791.

[11] *Loutchansky v Times Newspapers Limited* [2001] EWCA Civ 536, see Duncan and Neil, paragraph 14.26.

admittedly not verified by the originator and the defendants per the evidence led for them at the trial, and where the said defamatory statement was made in a rather reckless disregard of what its impact might be on the plaintiff's reputation, and where the said reckless statement was made in an article the tenor and purpose of which was extolling and praising defendant no.5.

(h) Above all, it was admitted by the defendants in their evidence that they took no steps to verify this hearsay allegation conveyed by respondent no.5 to respondent no.1, and then by respondent no.1 in the form of a written article for publication to respondents no.2 to 4. The defence witness no. 2, appearing on behalf of respondents no.2 to 4, admitted that the newspaper and its editorial staff did not seek to verify the veracity of the defamatory allegations either from the appellant or from the relevant Government authorities.

11 Under the circumstances, I conclude that the learned trial Court fell in error in reasoning from the premise that the defamatory paragraph noted above necessitated the proof of malice to be led and established by the plaintiff *ab initio*, instead of concluding that, for being an assertion of fact and not a mere expression of opinion, and for being *ex facie* libelous, the onus lay on the defendants to prove their defence, which, in this case, for being an assertion of fact and therefore excluded from the purview of the defence of fair comment or qualified privilege, could only be successful by establishing the truth of the publication under section 5(c), for which the defendant had not led any evidence whatsoever, rather, they admitted that they had not taken any steps for verification of the truth before publication. The only logical and legal conclusion is that the aforesaid publication constituted actionable libel.

12 The learned trial Court also concluded that the Ministry of Foreign Affairs was a necessary party in the case and that the suit was bad for non-joinder of the necessary party. This conclusion was also wrong because no relief was prayed for against the Ministry of Foreign Affairs for the suit to succeed. The only role of the Ministry in the suit would have been that of a keeper of record, and a record keeper is not a necessary party in suits.

13 Resultantly, this appeal is allowed, the impugned judgment and decree are set aside, and the following remedies under section 9 of the 2002 Ordinance are awarded:

(a) The appellant is awarded general damages in the sum of Rs.1,000,000/- (one million), of which respondent/defendant no.1, qua originator, will pay Rs. 500,000/- (five lacs), and respondents/defendants no. 2 to 4 shall pay, jointly and severally, Rs. 500,000/- (five lacs); and

(b) Respondents/Defendants no. 1 to 4 shall publish an apology in Jung newspaper for the libelous content of the article aforesaid.

14 No damages are awarded against respondent no. 5 because the record does not depict any role played by him in the act of publication of the libel. Further, special damages are not awarded because, except for general assertions of his inability to procure a job after retirement due to the libel, no material evidence to that effect was led by the plaintiff at the trial.

(Sardar Ejaz Ishaq Khan)
Judge

Announced in open Court on _____.

Judge

Imran