

DEFAMING IN CROSS –EXAMINATION: PRIVILEGE OF AN ADVOCATE? *

From Rumour's tongues

They bring smooth comforts false, worse than true wrongs.¹

Introduction

A lawyer representing a client in litigation may choose to make untrue and false statements which may tarnish the reputation of the person. He may do so hoping that his action will protect his client or he may have some vendetta against the person. The statements may be made any time during the trial, may be made in the Court or outside it.² However, it will blemish the image and reputation of the person who would want to initiate action against such lawyer for defamation³. Yet the Indian law protects and accords immunity to the advocate from any defamatory action against him (though no absolute protection is provided to him in criminal action), provided that he fulfills the obligatory essentials of Exception 9 of Section 499 of the Indian Penal Code, 1860 ("IPC").

Victim's Right to Reputation v. Advocate's Immunity

Every individual has a right to protect his/her reputation. Defamatory statements made about a person to a third person(s) without lawful justification are actionable in law. As a principle of equity, every man is entitled to have his reputation preserved intact, and any words calculated to infringe this right afford a good cause of action. The Supreme Court in the decision **State of**

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¹ William Shakespeare, *Henry IV* Part 2, Act 1, Scene 1, Introduction (cited in **Richard P. Carmody**, "The Boundaries of Litigation Privilege", *American Bankruptcy Institute Journal*, 22-6 ABIJ 14).

² See Paul T. Hayden, "Reconsidering the Litigator's Absolute Privilege to Defame", 54 *Ohio St. L.J.* 985.

³ Defamation, as defined by Justice Cave in the case of **Scott v. Sampson** ((1882) Q.B.D. 491) means a "false statement about a man to his discredit". For criminal action, it is defined under Section 499 of IPC as "Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in cases hereinafter excepted, to defame that person."

Bihar v. Lal Krishna Advani⁴, observed that reputation is an integral and important aspect of dignity of every individual. The right to preservation of one's reputation is acknowledged as a right *in rem*, a right good against the entire world.

On the other hand, a lawyer has a right to freedom of speech and expression under Article 19(1) (a) of the Constitution but that does not give him the right to misuse this freedom. Article 19(2) of the Constitution provides that the right is subject to the laws made on defamation. The Indian Courts have also reiterated the same and have reprimanded the lawyers who have crossed the boundaries of their profession in the garb of performing their duties. In the case of **L. Gendan Lal v. Rex through B. Banarsi Das**⁵, the Allahabad High Court observed the following words in relation to the right to freedom of expression that a lawyer has:

"The privilege of free speech which counsel enjoy is not intended for the protection of benefit of such counsel as can be proved to be guided by corrupt or malicious motives... It is highly improper for counsel to misuse the privilege of free speech which they enjoy when examining witness or presenting arguments for consideration of the Court. They owe it to the Court and the profession of which they are members not to indulge in their arguments in defamatory remarks of a gratuitous nature about the complainant, accused or witnesses in the cases, entirely irrelevant for the purpose of protection of the interest of the party whom they are representing."⁶

Similarly, in the case of **In Re: Ajay Kumar Pandey, Advocate**⁷, the advocate committed contempt of Court by using highly abusive language in pleadings. The main charge against him was that the plaint contained highly objectionable, unparliamentary and abusive words. The Supreme Court observed that the contemnor acted like person above law but lawyer would be treated like layman in such cases. The lawyer had no privilege and that the contemnor committed contempt of Court by use of objectionable and intemperate language. The Court held that the liberty of free expression not to be confused with licence to make unfounded, unwarranted and irresponsible aspersions and held the contemnor liable for gross contempt.

Hence on one hand lies the fundamental right to freedom of speech and expression enshrined under Article 19(1) (a) of the Constitution of India, on the other is the right of individual to have his reputation intact. The law of defamation seeks to attain a balance between these two competing freedoms.

⁴ AIR 1998 SC 236.

⁵ AIR 1948 All 409.

⁶ *Id.*, 410.

⁷ AIR 1998 SC 3299.

Absolute Privilege under Civil Law

The lawyers are absolutely privileged if a suit is filed against them for damages under torts for defamation. The Indian Courts follow the principle of common law that no action lies against a counsel for words spoken in the ordinary course of any proceedings before any court or tribunal recognised by law. This principle of common law was extended by their lordship of the Privy Council of Indian in **Baboo Ganesh Dutt Singh v. Magneeram Chaudhary**⁸.

Qualified Privilege under Criminal Law

A counsel has protection for the defamatory words or pleadings said or written during the course of the proceedings. This is perhaps necessary as it would help the lawyer from discharging of his duties. However, the advocates cannot claim unlimited protection. For him to claim protection from prosecution, his case must come under Exception 9 of Section 499 of IPC, which reads as follows:

Ninth Exception: It is not defamation to make an imputation on the character of another provided that the imputation is made in good faith for the protection of the interests of the person making it, or any other person, or for the public good.

The essence of the exception is that for the immunity to be accorded, firstly, the lawyer must have made the statement in good faith, i.e., honesty of purpose. **In the matter of Shibo Prosad Pandah**⁹, the Court explained what exactly constitutes good faith.

“In good faith, an essential ingredient is honesty of purpose. The accused must firstly, honestly believe his imputation to be true, and, secondly, he must honestly make it from a sense of duty to himself. He must not exaggerate or say unnecessary things. He must not make his duty the cover for spreading the libel. The question for enquiry in such cases will be whether the accused had reasonable grounds for believing the imputations to be true and for believing that it was necessary for his safety to give publicity to them.”¹⁰

Secondly, the statement must be in client's interest, i.e., the imputation must have been made or published by the accused for the protection of his interest.¹¹ In **Rahim Bakhsh v. Bachcha Lal**¹², one Bachcha Lal was sued for cheating. A witness during cross examination was asked whether his partnership firm was the biggest in town. He answered yes it was. The advocate commented that it

⁸ (1872) 11 Beng LR 321.

⁹ AIR 1904 Cal 124.

¹⁰ Cited with approval in **Promotho Nath v. Emperor**, AIR 1923 Cal 470.

¹¹ **Queen Empress v. Slater**, AIR 1915 Bom 351.

¹² AIR 1929 All 214.

was also the most dishonest. He was later sued for defamation. The advocate took the defence that as his statement was made during the trial it was privileged. The Court however held that the statement had no connection with the proceedings and hence he could not raise the defence of privilege.

Thirdly, it must be uttered in the course of judicial proceedings and in the capacity of a lawyer.

Lastly, the statement must be made without malice, i.e., the question must have been in regard to the case and without any ulterior motive.

Misuse of the Privilege

Prima facie the law as discussed above seems to be fair, after all the lawyers need such protection for them to be able to discharge their duties effectively. However, in reality the law is heavily tilted in their favour. The Courts too more often than not take to protect their own instead of protecting the hapless victim who was defamed in the open Court.

Firstly, the Courts tend to presume that the remark made by the lawyer was made in good faith. The burden of proving that it was made in bad taste and *malafide* is on the prosecution. In the words of the Court in the case of **Nazir Ahmad v. Jogesh Chandra**¹³:

“The presumption is that a question asked in cross-examination, making an imputation on the character of a witness in good faith, affords no ground, ordinarily, for a criminal prosecution. There may be circumstances showing that the remark was made, or the question put, wantonly, or from malice or private motive, but the greatest care should be taken to enquire into the circumstances and an opportunity should be given to the Advocate to offer an explanation before summons is issued.”¹⁴

Now if an advocate asks a question that is reasonable, keeping in mind the circumstances of the case, then the Courts would not hesitate before granting protection to him. This is because he would fail in his duty as an advocate if he does not cross-examine the opponent's witness well. However, the lawyers tend to abuse the privilege bestowed upon them. The following examples will help me in supporting the argument.

¹³ 1929 Cri LJ 889.

¹⁴ *Id.*, 891.

In Re: A Vakil¹⁵, the respondent, knowing perfectly well that there was not the slightest shadow of foundation for the allegation, said to a *mukhtar*¹⁶ in open Court: "Did you not have a notice served on you under Section 476 in Mt. Chillo's case?" Mr. Indar Prasad quite truthfully said, "No." The Court held that it was a wicked thing to ask of a man of the same type of profession, in his own native town, a man who was probably finding it quite hard enough to make a livelihood, when Raj Bahadur knew full well that no notice had been served because he himself had been the counsel for Mt. Chillo in the execution proceedings and in the appeal out of which the notice was suggested to have been served. The Court thereby held the respondent guilty of professional misconduct and of defamation.

It is not in every case that the lawyer will be held liable for defamation. One such instance is when the statement is made for the client's interest. Care must be taken that the lawyer is not fulfilling his personal vendetta in the garb of client interest. To substantiate, in the case of **M. Banerjee v. Emperor**¹⁷, the complainant was cross-examined by the petitioner, who asked him whether it was not a fact that he was low born and untrustworthy, and that his mother had led a life of shame in Calcutta. The advocate's contention was that the question was asked in entire good faith and with the bona fide object of shaking the credit of the witness. The petitioner later expressed his deep regret that he should have asked such a question, even in good faith which has given pain to the opposite party and apologized. He insisted that the proceedings be quashed.

The Courts too are often biased towards the legal fraternity as can be seen from the case of **G. Narayan Reddy v. P. Sitapathi, Advocate and Special Prosecutor**¹⁸, the main allegations were that in the course of cross-examination, the advocate suggested that the present complainant was in impecunious circumstances and that the marriage proposals for his daughters failed because of his cantankerous attitude and it was beyond his capacity to think of having an alliance with an I.P.S. Officer because of his poor financial position.¹⁹ Shockingly, the Court did not find this defamatory and observed:

"It is clearly a case where the action of the advocate is fully protected. There are absolutely no allegations of private malice or private vengeance and there is nothing to indicate that the advocate was making the remarks for any ulterior purpose and not for the purpose of advancing the cause of his client."²⁰

¹⁵ AIR 1925 All 641.

¹⁶ A *mukhtar* is another name of an advocate.

¹⁷ AIR 1927 Cal 823.

¹⁸ 1991 (2) ALT 683.

¹⁹ *Ibid.*

²⁰ *Id.*, 686.

However, it is not that a blanket protection is available to the advocates. The Indian Evidence Act, 1872 also puts a bar on the questions that an advocate can ask while cross-examining a witness or the accused. Section 149²¹ of the Evidence Act restricts the lawyer from putting up questions unless he has reasonable grounds for doing so. Moreover Section 150²² of the Evidence Act provides that the Court has the power to report the matter to the High Court if it is of the opinion that the questions were asked by him without reasonable grounds. Hence, the counsels must use their discretion before asking any slanderous question to the witness. In the case of **Deepchand v. Sampatraj**²³, the Court observed that a counsel had to use common sense and caution in asking defamatory questions.

In these prejudicial circumstances the remedies that are open to the witness are three-fold viz.: (a) protection by the Court; (b) self-help in the shape of setting the criminal law in motion; or (c) filing a suit for damages.

Solution: Self-regulation essential

To uphold professional responsibility and the profession's respectability, attorneys must tread with caution when considering the publication of possibly defamatory information. The case law establish a framework that can guide the advocates through. The lawyers need to practice self control and use their words wisely without harming the reputation of any. As the Supreme Court in **U. P. Sales Tax Services Association**²⁴ observed:

“However, it should be imperative to remind ourselves that self-regulation alone would retrieve the profession from lost social respect and enable the profession to keep the law, as useful instrument of social order.”

In other words, **Play It Safe: Curb Thy Tongue**

Conclusion

An advocate being an officer of the Court has certain duties towards the client and towards the Court. To fulfill the duties effectively and efficiently, it is necessary that he enjoys certain immunities like action for defamatory words or pleadings or for the defamatory questions asked during the cross-examination. The reason for immunity for this is the special position that a lawyer

²¹ Section 149: No such questions as is referred to in Section 148 ought to be asked; unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.

²² Section 150: If the Court is of the opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, *vakil* or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, *vakil* or attorney is subject in the exercise of his profession.

²³ 1970 Cri L.J. 260.

²⁴ (1995) 6 JT 306.

enjoys in Court proceedings. He must have this exemption from action if he is to conduct his case fairly and effectively. He must be able to speak freely and with no fear in his mind that he may be held liable for his words later. The absence of such privilege may give rise to a large number of vexatious claims. However, he must not abuse this privilege. He must exercise some self restraint as although privilege is available to the counsel; the protection comes with various riders. The protection will only be available when the question that he asks is reasonable, in his clients' interest and in the discharge of his duties and that too without malice.

