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**(1956) 11 AHC CK 0021**  
**In the Allahabad High Court**  
**Case No : Second Appeal No. 1063 of 1951**

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| Board of Directors, Y.M.C.A. and Another | APPELLANT  |
| Vs                                       |            |
| R.H. Niblett                             | RESPONDENT |

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**Date of Decision :** 29-11-1956

**Acts Referred:**

**Citation :** AIR 1957 All 219

**Hon'ble Judges :** Beg, J

**Bench :** Single Bench

**Advocate :** G.S. Pathak and R.S. Pathak, for the Appellant; A.P. Pandey, for the Respondent

**Final Decision :** Allowed

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## Judgement

Beg, J.—This second appeal arises out of a suit for damages. The suit itself was the result of certain differences that arose amongst the office bearers of a local association called the Allahabad Young Men's Christian Association (hereinafter called the "Y. M. C. A."). The Allahabad Y. M. O. A. is a body corporate, and is controlled by a Board of Directors.

The Allahabad Y. M. C. A. has got several branches of which the Central Branch is the principal one. Each branch is controlled by a Committee of Management. The suit for damages was brought by Mr. R.H. Niblett, who was at the relevant time, the Chairman of the Central Branch of the Y. M. C. A., and the Vice-President of the Board of Directors. The damages were claimed against four defendants.

Defendant No. 1 was the Board of Directors of the Y. M. C. A. It was sued through its President. Defendant No. 2 was Dr. Malvea, the President of the Board of Directors. Defendant No. 3 was Rt. Rev. Ralla Ram, a member of the Board of Directors. Defendant No. 4 was Mr. G. Eddy, the General Secretary of the local Y. M. C. A., the Secretary of the Central Branch, and an Ex. Officio Member of the Board of Directors. Defendant No. 2 Dr. Malvea died during the pendency of the suit, and his name was struck off from the record.

2. The plaintiff came to court with the following allegations. The plaintiff retired from service as a Magistrate and Collector in the year 1945. In the beginning of 1947, he rented some rooms in the Central Branch of the Y. M. C. A., for his residence, and shortly after that, he was elected as the Vice-President of the Board of Directors.

At the end of September, 1947, Mr. Eddy who was the General Secretary of the Allahabad Y. M. C. A. also became the Secretary of the Central Branch. The plaintiff went away to Nainital about the end of April, 1948, and came back from there in the beginning of October, 1948. On his return he discovered that the accounts of the Central Branch were in a serious muddle.

When Mr. Eddy was asked to explain the accounts, he refused to do it. Thereafter, the plaintiff made a detailed report about the matter to Dr. Malvea on the 27th September, 1948 and followed it up with a summary of charges against Mr. Eddy on the 6th of November, 1948. At this instance, a-meeting of the Board of Directors was called on the 8th November, 1948, to consider the charges.

At this meeting, the defendants Dr. Malvea, Rt. Rev. Ralla Ram and Mr. Eddy in collusion with other" members of the Board maliciously caused the following resolutions to be passed:--

"(1) The Board of Directors of the Allahabad Y. M. C. A., at their emergent meeting held on the 8th November, 1948, at 6 P. M., at the Central Branch Y. M. C. A., 13, Queens Road, Examined the charges made by Mr. R.H. Niblett against Mr. G. Eddy, the General Secretary of the Allahabad Y. M. C. A. There was placed before it a report of Mr. P. Robinson, the auditor, who had been appointed by the Committee of Management of the Central Branch and with the full consent of Mr. R.H. Niblett; to audit the accounts of the Board, found these charges entirely baseless and exonerated the General Secretary of all the charges on the basis of the Auditor's report.

(2) That in our judgment, Mr. R.H. Niblett owes to the General Secretary an unqualified apology for bringing up these unwarranted charges against the General Secretary.

(3) That we authorise the President of the Board of Directors to send a communication to the National General Secretary of the Y. M. C. As." and report these actions to them.

(4) That Mr. Niblett should be asked to resign from the Chairmanship of the Central Branch, Y. M. C. A. forthwith.

(5) That in view of our opinion that it is inadvisable for Mr. Niblett to stay in the Y. M. C. A. where the General Secretary resides and works, Mr. Niblett be asked to vacate the flat that he is occupying in the Central Branch Y. M. C. A., and that a month's notice be given to him.

(6) That Mr. R. C. Dudt be requested to act as Chairman pro tern till the time of

the regular next elections."

3. The aforesaid resolutions were defamatory according to the plaintiff. They were published by being communicated to the National Council of the Y. M. C. A., at Calcutta, and by being read out at a subsequent meeting of the Board. The plaintiff refused to apologise. He was asked to vacate the flat by the 8th December, 1948.

On his refusal to do so, the waterman and sweeper of the Y. M. C. A., were forbidden by Mr. Eddy from working for him. The electric connection of his flat was also cut off on four occasions in the month of December, 1948. In depriving the plaintiff of the services of the Y. M. C. A. sweeper and waterman, and in cutting off the electric supply line, Mr. Eddy acted as the servant and agent of the Board, and in furtherance of the resolutions and intentions of the Board.

The plaintiff was put to inconvenience as a result of the aforesaid acts. The plaintiff, accordingly, claimed Rs. 2,200/- as damages in respect of the defamatory resolutions passed against him, Rs. 200/- as damages for trouble and inconvenience caused by stoppage of services of the waterman and sweeper and Rs. 600/- in respect of the expenses, trouble and inconvenience resulting from interference with the supply of electricity.

4. The suit was resisted by the defendants on a number of grounds. They pleaded that they never committed any defamation, that the plaintiff had levelled charges of embezzlement against defendant No. 4, that one Mr. Robinson was appointed to audit the accounts with his consent, that the report of the auditor was considered at the meeting of the Board in the presence of the plaintiff, and that Mr. Robinson's report having exonerated defendant No. 4, the resolutions in question were passed by the Board in the legitimate performance of their duty as members of the Board.

The said resolutions were passed bona fide. In any case, the publications on the two occasions alleged by the plaintiff were protected by qualified privilege. As to the first occasion, a copy of the resolutions of the Board was sent to their headquarters at Calcutta as a matter of duty. Further, it had to be sent as the plaintiff himself had sent his complaint to the head quarters at Calcutta before that; and, as a result of it, they had received a communication from Calcutta enquiring into the matter.

Throughout, the defendants were acting in a bona fide manner and without malice to the plaintiff. It was also pleaded that the Board of Directors, being not a registered body could not be sued as a legal entity. It was further denied that the defendants Nos. 1 to 3 had directed Mr. Eddy to stop the waterman and the sweeper from rendering services to the plaintiff or to disconnect the electric connections to his rooms.

The defendants alleged that the plaintiff's suit was the outcome of his personal enmity with Mr. Eddy. It was a device to overawe the defendants so that they

might refrain from filing a suit for ejectment against the plaintiff.

5. The trial court found that the plaintiff had failed to make out that the resolutions in question constituted defamation and, in any case, the publication of the resolutions was a privileged communication, and the defendants were protected by the doctrine of qualified privilege. It further found that the plaintiff was put to inconvenience as a result of having been deprived of the services of the waterman and sweeper, and as a result of the electric connection having been cut off. That, however, was the work of Mr. Eddy defendant No. 4 alone, and was not done in collusion with other defendants.

It assessed the plaintiff's damages at Rs. 50/- in this regard, and decreed his suit against defendant No. 4 only for this amount. The suit against defendants 1 to 3 was dismissed with full costs from the plaintiff. The plaintiff and defendant No. 4 were made to bear their own costs.

6. In appeal, the learned Civil Judge upset the decision of the trial court. He held that the resolutions in question were defamatory, that they were not protected by the doctrine of qualified privilege, that the Board of Directors was liable to be sued as a body corporate and, lastly, that defendants Nos. 1, 3 and 4 were liable for damages not only in respect of the defamation, but also in respect of inconvenience caused to the plaintiff as a result of the stoppage of services of the waterman and sweeper and of the cutting off of the electric connections.

He assessed the amount of damages at Rs. 1200/- in respect of the defamation, at Rs. 100/- in respect of the trouble and inconvenience caused by the stoppage of services, and at Rs. 300/- in respect of the cutting off of electric connections. He, accordingly, decreed the plaintiff's suit for Rs. 1600/- against defendants Nos. 1, 3 and 4, and directed that the plaintiff would get his costs of both the courts from the defendants in proportion to his success, while the defendants would bear their own costs.

7. Dissatisfied with the said judgment, this second appeal was filed in the High Court by defendant No. 1, i.e., the Board of Directors and defendant No. 3, i.e., Rt. Rev. Ralla Ram. The respondent Mr. R.H. Niblett has filed a cross-objection to the effect that the amount of damages awarded to him was insufficient.

8. I have heard the learned counsel for the appellants in this case at length, and have come to the conclusion that this appeal should be allowed. On behalf of the appellants the following four points were argued before me:--

1. That the resolutions in question are not defamatory per se and no innuendo having been alleged, the case of the plaintiff should fail;

2 that in any case, the defendants are protected by the doctrine of qualified privilege;

3. that defendants Nos. 1 and 3 cannot be liable for the tortuous acts, if any, of defendant No. 4 in respect of the stoppage of the services of the waterman and

the, sweeper and of the cutting off of the electric connections; and

4. that the suit against defendant No. 1 is not maintainable, as defendant No. 1 is not a corporate or a registered body.

9. I shall take up the aforesaid points in the order enumerated above.

10. The first point may now be taken up. The resolutions which form the basis of the action for defamation have already been quoted by me above. At the very outset some admitted or proved facts which are relevant to these resolutions may be mentioned. The plaintiff had asked for accounts from Mr. Eddy. He had also written to the President of the Board Dr. Malvea about it. Thereafter one Mr. P. Robinson had been entrusted with the work of auditing the accounts. The plaintiff himself says that:

"I did not raise any objection then to the appointment of Mr. Robinson as auditor."

Mr. Robinson has audited the accounts and prepared a report. The plaintiff further admits that "Mr. Robinson did show the report of January to October, 1948, before filing it, At that time, I could not suspect any mistake and I had no doubt about Mr. Robinson." At the plaintiff's instance a meeting of the Board was held on the 8th November, 1948, to consider the charges levelled by the plaintiff against Mr. Eddy.

Mr. Robinson's report was produced in that meeting. The effect of that report was to exonerate Mr. Eddy, There were about twelve members present in that meeting. Two of them remained neutral, and the rest unanimously voted in favour of all the resolutions. About the twelve members who were present in the meeting, the plaintiff further stated that:

"There was no personal animosity between me and the above 12 members."

After the resolutions were passed, they were sent to the National Council of the Y. M. C. A., at Calcutta, and were read out at the next meeting of the Board.

11. In order, however, to determine whether the above-mentioned, resolutions were defamatory per se, the court must ignore all the surrounding circumstances relating to the aforesaid resolutions and should view them as divorced from the context in which they were passed. It is to be remembered that a mere lowering of oneself in self-estimation will not necessarily constitute defamation.

What the court has to consider is the effect of these resolutions on the mind of an ordinary right-thinking member of the society, particularly bearing in mind the class of persons who would be interested in the resolutions. If they tend to the plaintiff in the eyes of such a person, then the resolutions should be held to be defamatory per se.

In other words, in order to determine whether the resolutions are defamatory per se, the court has to put itself in the arm chair of an ordinary person and view the matter from that stand point confining itself to the resolutions themselves.

The court should look at the resolutions as a whole, giving to the words used therein their obvious and natural meaning. If the said resolutions are open to two constructions, and their language is equally capable of two meanings the one being defamatory and the other being innocent, then the resolutions should not be held to be defamatory per se. Looking at the resolutions in the light of the above observations, I have come to the conclusion that the resolutions cannot be said to be open to one and one construction only.

On the one hand, it can be said that some words used in the resolutions do tend to have a defamatory tendency. On the other hand, it can also be argued that the resolutions are innocuous on the face of them, and do not tend to expose the plaintiff to hatred, contempt or ridicule. Thus, for example, in resolution No. 1, the charges brought by the plaintiff are alleged to be baseless. On the one hand, it can be said that they cast an aspersion on the mentality of the plaintiff, and show that he is prone to bring charges against others without foundation. On the other hand, it can be said that the charges are characterised as "baseless" in the resolution merely "on the basis of the Auditor's report", which is referred to in that very resolution, and which, in fact, had the effect of exonerating Mr. Eddy.

12. Resolution No. 2 calls for an unqualified apology from the plaintiff. On the one hand, it can be said that a demand of unqualified apology from the plaintiff was an attempt to degrade him in the eyes of others. On the other hand, it can be argued that it was not an order to Mr. R.H. Niblett, but only a recommendation to him to consider it as an act of courtesy on his part. All that the Board of Directors did was to express their own opinion. They merely stated that in their own judgment Mr. R.H. Niblett as a gentlemen owed an unqualified apology to the party against whom charges which were not warranted by the Auditor's report were brought.

13. As to resolution No. 3, on the one hand it may be said that the Board of Directors should not have communicated it to the National Council of the Y.M.C.A. at Calcutta, and their direction to communicate it to the headquarters indicated their malicious intention. On the other hand, it can be argued that the Board of Directors only advised the communication of this resolution to a higher body of their own organisation. They did not direct that the resolution should be communicated to any outsider or to any newspaper, or to any member of the public. The fact that they confined its publication to a higher body in their own organisation indicates their bona fides. In doing so they were only performing a duty which they owed to the parent body. This matter will be further discussed in detail by me when I deal with the question of qualified privilege.

14. Resolution No. 4 asked Mr. R.H. Niblett to resign from the Chairmanship of the Central Branch of the Y.M.C.A. Resolution No. 5 asked him to vacate the premises in view of the fact that the General Secretary was residing there. On the one hand, it can be said that these steps were taken as the Board considered Mr. R.H. Niblett unfit to hold the office of the Chairman. On the other hand, it can be said that this course was adopted, as they thought that in view of the

unfortunate conflict that had already taken place between him as Chairman and Mr. Eddy as the General Secretary, it was not advisable for him in his own interest, or in the interest of the organisation to continue to hold the office or to reside in the same premises.

In this connection, it may also be pointed that Mr. R. H. Niblett was asked merely to resign from his office as Chairman of the Central Branch, and not from his office as Vice-president of the Board of Directors, Resolution No. 6, which is the last one, is merely a request to Mr. R.C. Dudt to act as Chairman in the vacancy that would be created as a result of the resignation of Mr. R.H. Niblett.

15. On the question as to whether two views of the matter are possible, it is significant to note at the very outset that the two courts below have themselves taken contrary views of the same resolutions. On the one hand, the trial court has held that the resolutions in question are innocuous and not defamatory. On the other hand, the appellate court has held that the said resolutions are defamatory and disparaging to the plaintiff. The fact that the two courts have themselves differed is itself a strong argument in favour of the view that the resolutions in question are capable of two interpretations. It does appear, no doubt, that certain words used in the resolutions might be annoying to Mr. R.H. Niblett.

But the mere fact that the resolutions err on the side of discourtesy, or that they have a tendency to vex or annoy the plaintiff would not by itself be sufficient to make the statement a defamatory one. Defamation has a particular legal sense, and unless the stinging character of the alleged statement reaches that level, it is not possible for the court to predicate that the resolutions in question are defamatory per se.

16. If the resolutions are not defamatory per se, the plaintiff has to make out their defamatory character by showing that there was an innuendo behind them which by insinuation converted what prima facie was not defamation into a tortious wrong styled as defamation. For this purpose, a gloss has to be put on the obvious and natural meaning. The plaintiff has not come to the court with the allegation that there was any innuendo behind them, nor has he led any evidence to prove any such innuendo. The case, therefore, that the resolutions were defamatory per se cannot succeed.

17. At this stage, it may be relevant to refer to certain principles of law applicable to this aspect of the case. The meaning of the words "defamatory per se" and their definition, scope and effect have been copiously discussed in Clerk and Lindsell on Torts (Tenth Edition). At page 711 of the said book it is stated that:

"Language is defamatory on the face of it, either when the defamatory meaning is the only possible meaning, or when it is the only natural and obvious meaning."

At page 712 it is stated that:

"Language is ambiguous where it is equally capable on the face of it of two meanings, the one defamatory and the other innocent. The imputation that the plaintiff is "foresworn" is ambiguous. It imputes the taking of a false oath, but the oath may have been in a judicial proceedings or it may not. In the latter alternative the words are not actionable per se, in the former they are (*Holt v. Scholefield* (1796) 6 T.R. 691 (A)).... So if it is said of a person that he has set his house on fire, it may be an allegation of a felonious act, or merely of a foolish and careless act. The words are ambiguous and of themselves not actionable as conveying the imputation of a criminal act (*Sweetapple v. Jesse*, (1833) 5 B & Ad. 27) (B). In *Goldstein v. Foss* (1828) 6 B & C. 154 (C), the plaintiff sued in respect of an alleged libel, the gist of which was that he and certain other persons were reported to a society of guardians for the protection of trade against swindlers "as improper to be proposed to be balloted for as members thereof", and the words were held not defamatory in themselves. They, no doubt, might be taken to impute that the plaintiff was an improper person to be proposed by reason of his bad character, but they were equally consistent with the supposition that the ground of his exclusion was some arbitrary rule involving no question of character (*Gompertz v. Levy* (1838) 9 Ad.& E. 282 (D)).

And in such cases it is a matter of law for the Court to determine, before submitting the issue to the jury, whether or not the words complained of are capable of the defamatory meaning ascribed to them *Stubbs v. Russell* (1913) A. C. 386 .

It is further stated that the language may be innocent even

"though it may be possible for ingenious malevolence to read between the lines and interpolate some far-fetched suggestion. It is in this class of case as well as in the case of an ambiguous language that the Innuendo is important. But in such a case the facts and circumstances that give sting to a publication apparently innocuous ought to be brought to our notice."

18. At page 715 the following passage is relevant :

"If the language is defamatory on the face of it, the plaintiff has of course no further difficulty; it speaks for itself, and he need allege and in the first instance prove nothing more. If the language is ambiguous, it is equally consistent with the negative and affirmative of the proposition which the plaintiff has to establish, namely that he has been defamed, and, therefore, by proving simply the language he does not prove his case and if the evidence for the plaintiff only leads to conjecture it ought not to be put before the Jury (*Phillipson v. Hayter* (1870) 6 C.P. 38 (F)). A fortiori he fails when the language is naturally innocent.

In both these cases the plaintiff must bring forward additional facts and circumstances to point the meaning of the language where ambiguous, or qualify and alter its meaning where innocent. This is the function of the Innuendo, a gloss put by the plaintiff on the words alleged to be defamatory averring their defamatory meaning--generally introduced in the pleading by the phrase

"meaning thereby"--showing how that meaning is arrived at and the relation of the words to the plaintiff. The Innuendo must be specific and aver a definite actionable wrong (Cox v. Cooper (1863) 9 L.T. 339(G)." (p. 715).

19. The case of Sim v. Stotch (1936) 2 All E.R. 1237 (H), provides an interesting illustration in this regard. The facts of that case were that while the plaintiff was away, the defendant had come to his house, called out Edith his housemaid, induced her to leave the plaintiff's service and enter his service. Edith, accordingly, entered the service of the defendant. The defendant then sent a telegram to the plaintiff containing the following words :--

"Edith has resumed her service with us today. Please send her possessions and the money you borrowed also her wages to Old Barton. Sim." (1238).

The plaintiff brought an action for defamation On the ground that the words used therein indicated that the plaintiff was in pecuniary difficulties, that he used to borrow money from the housemaid, that he had failed to pay up her wages, and that he was, therefore, a person to whom no one ought to give any credit. It was held that the words used were not reasonably capable of a defamatory meaning.

20. At page 1240, Lord Atkin observed that:

"The question, then, is whether the words in their ordinary signification are capable of being defamatory".

The test laid down by him was :

"Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?"

He further observed that:

"It is well settled that the Judge must decide whether the words are capable of a defamatory meaning. That is a question of law."

Referring to the facts of the case he observed at page 1241 as follows :--

"But I am at a loss to understand why a person's character should be lowered in anyone's estimation if he or she has borrowed from a domestic servant. I should have thought it such a usual domestic occurrence for small sums to be advanced in such circumstances as the present, and with the assent of everyone concerned to be left outstanding for some days that the mere fact of borrowing from a servant bears not the slightest tinge of "meanness." Quoting Lord Esher, he observed that -

"But to make an imputation which is based upon the existence of facts unknown and not to be Inferred from the words attacked is surely exactly to come under the ban." Then he went on to observe that :

"It seems to me unreasonable that, when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory

sense to the document." (1241). At page 1242 Lord Atkin observed as follows :

"That Juries should be free to award damages for injuries to reputation is one of the safeguards of liberty. But the protection is undermined when exhibitions of bad manners or discourtesy are placed on the same level as attacks on character; and are treated as actionable wrongs". In the case--Capital and Counties Bank Ltd. v. George Henty & Sons. (1882) 7 A.C. 741 (I), George Henty and Sons had issued a circular to a large number of their customers to the following effect:

"H. & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the bank".

The circular became known to other persons; there was run on the bank and loss inflicted. The bank having brought an action against H. & Sons for libel, with an innuendo that the circular imputed insolvency. It was held that:

"In their natural meaning the words were not libellous: that the inference suggested by the innuendo was not the inference which reasonable persons would draw; that the onus lay on the bank to show that the circular had a libellous tendency; that the evidence, consisting of the circumstances attending the publication, failed to show it; that there was no case to go to the jury; and that the defendants were entitled to judgment". (head note).

21. The following observations of Lord Selbourne L. C. in the above case are relevant:

"It appears to me that evidence of pride, anger, ill-temper, or unreasonableness, is an entirely different thing from evidence of an Intention (not otherwise proved) to cast Imputations upon the credit or solvency of the plaintiff's bank. I think there was more than enough evidence of pride anger, ill-temper, and unreasonableness. The defendants were angry, not Indeed without reason but beyond the bounds of reason; and they determined as far as possible to have no dealings with those who had offended them". (p. 749).

On a parity of reasoning, in the present case, even if the act of the Board be construed to be an act permeated with strong discourtesy, still it cannot be said that it is one which would reach the level of the wrong styled in law as defamation. As stated in Clerk and Lindsell's Law on Torts (Tenth Edition) at p. 695:

"The mere intention to vex and annoy will not make language defamatory which is not so in its own nature."

22. If the resolutions which form the basis of the plaintiff's case are not defamatory per se, then, as observed above, the plaintiff can only succeed in his action by proving an innuendo, He has, however, not alleged any innuendo, nor has he set up any such case. The case, as set up by him would, therefore, fail on this initial ground.

23. Even if it be assumed for a moment in plaintiff's favour that a prima facie case of defamation has been made out by him, the next question that arises for consideration is whether the defendants are protected by the doctrine of qualified privilege. Having heard the learned counsel for the parties on this point and given my anxious and prolonged consideration to this aspect of the case, I am of opinion that a case of qualified privilege has been made out in the present case on behalf of the defendants. In order to sustain an action for defamation it is necessary for the plaintiff not only to prove that a defamatory statement regarding him has been made by a person, but also to prove that the person making it has published it to some person other than the person defamed.

In such a case it is open to the person who is sought to be charged with the liability to take up the defence of qualified privilege in respect of the publication. The scope of the plea of qualified privilege which the defendant might take in this regard covers a wide range of cases. Five illustrative cases of such qualified privilege which are relevant to the facts of the present case are enumerated below.

24. Firstly, it might be pleaded by the defendant that the publication was made by him in discharge of a duty owed by him. The duty owed might be public or private. It might be legal, moral or social. It might even be conventional, and may relate to the ordinary practice observed in the conduct of his affairs. This is one aspect of the doctrine of the qualified privilege.

Secondly, the defendant might also set up the defence of qualified privilege on the ground that there existed between him and the party to whom the publication was made a common interest in the subject-matter in question, and that this interest being of a reciprocal character, the publication in question was made in discharge of the duty generated by the subsistence of such interest.

Thirdly, the doctrine would also cover a confidential relationship between persons and societies as a result of which one party is empowered or entitled to tender advice or information to another party respecting a matter in which both are concerned. The communication might not be in discharge of a positive duty, but be merely in the nature of a duty imposed as a result of a private understanding between the parties and the situation created thereby.

Fourthly, where such a relationship exists, any enquiry made by one party from another might be an additional ground involving the other party in a kind of moral obligation to convey the information to the party that seeks the said information.

Fifthly, even apart from the aforementioned considerations, the publication might be made to the other party for the protection of the legitimate interests of the person or persons who make the publication or even for the protection of the interest of another person in which both the parties are concerned. The publication thus made is of a defensive nature and where it falls within the four corners of this definition, it is difficult to weigh the defence set up in golden

scales. In case such defensive defamation is bound to have been made by the defendant for the purpose of being used as a shield against a defamatory attack launched by the other party, the courts are inclined to condone minor transgressions of limits on the part of the defendant.

In such cases, sometimes even the use of rather strong and disproportionate language has been held by courts to be justified on the ground that a certain allowance should be made for the retaliatory spirit which is a part of ordinary human nature and for the generation of which the party that took the aggressive step, was itself responsible. The defamation being provoked by the plaintiff he becomes a contributory, to it and the responsibility of the minor excesses is shared by him also. In the present case, the learned counsel for the appellant has set up all the defences mentioned by me above. Before, however, dealing with the various aspects of it, in order to enable one to appreciate the bearing of the aforesaid principles on the present case, it is necessary to refer to the case of the plaintiff in this regard and certain admitted facts relevant thereto.

25. The plaintiff has relied only on two occasions of publication. The first occasion of publication is the sending of the resolutions to the National Council at Calcutta. The second occasion of publication is the reading out of the same resolutions in the next meeting of the same body viz., the Board for the purpose of confirming the minutes of the previous meeting.

26. I shall first take up the former publication namely, the publication to the National Council of the Y.M.C.A. at Calcutta. In this connection the first important question that arises relates to the relationship that existed between the local Y.M.C.A. and National Council of the Y.M.C.A. at Calcutta. So far as this point is concerned, the plaintiff himself stated in his own evidence that:--

"The National Council, Calcutta, is a sort of advisory body of all the Y.M.C.A. branches in India."

As an advisory body, therefore, the local Y.M.C.A, at Allahabad would be under a duty to send, and the National Council at Calcutta would be under an obligation to receive all the information appertaining to all the matters in which they are jointly interested. The plaintiff has also admitted that he had sent a copy of the letter which he had sent to Dr. Malvea, the President of the Board of the Directors, along with the report containing charges against Mr. Eddy, to the National Council at Calcutta. His statement on this point is as follows :--

"I sent a copy of the letter and report to the National Council at Calcutta. I did so because the matter was serious and urgent and only the Council at Calcutta could have transferred defendant No. 4."

The plaintiff has, therefore, admitted that the National Council at Calcutta had a hand in the transfer of defendant No. 4 against whom he had levelled charges of embezzlement.

27. The minutes of the meeting of the Board of Directors of the Allahabad

Y.M.C.A. dated 15-2-1946 show that the proposal that the recruitment, training and transfer of all the Secretaries should be in the hands of the National Council was considered by the Board in that meeting. The Board passed a resolution in favour of it, with the modification that the transfer of Secretaries should be made only as a result of an agreement between the National Council and the local Board of Directors. The minutes of the meeting of the Board of Directors dated 22-2-1949 show that Dr. B. B. Malvea was unanimously elected as the Official representative of the Allahabad Y.M.C.A. to the General Board of the Council of Y.M.C.As. of India whose meeting was to be held in Calcutta,

The Board further resolved that Dr. Malvea would attend the said meeting, and his travelling expenses would be met by the Board. The minutes of the meeting of the Board of Directors also show that the National Council at Calcutta had selected Mr. Eddy defendant No. 4 for receiving training abroad, and, during his absence, the Board had requested the National Council at Calcutta to depute Mr. Henry Devadas as a substitute. The above evidence shows that, at any rate, so far as the post of the Secretary was concerned, the National Council at Calcutta had a hand not only in his transfer, but also in his appointment, recruitment and training. This was a matter of mutual interest to both the parties, and therefore any communication between the parties in this regard, would give rise to a privileged occasion.

28. The plea of qualified privilege in this particular case gains further strength by virtue of the fact that, as mentioned above, the plaintiff himself admitted having addressed a communication to the National Council at Calcutta, vide Exts. 30, 31 and 51, It would appear that on the 27th October, 1948, the plaintiff had written a letter (Ext. 30) to Dr. Malvea and enclosed therewith a report against Mr. Eddy, the General Secretary of the Board of Directors and also the Secretary of the Central Branch. This report contains numerous charges of embezzlement against Mr. Eddy and the number of items extends to twenty-five. This letter further states as follows:--

"Had Mr. Eddy been in Government service, he would by this have received the attentions of the police. Truth to tell, I have seriously thought of taking such drastic action. But it would involve the good names of the Y.M.C.A."

It further stated that:

"The least I can recommend is that Mr. Eddy be transferred forthwith. If it is difficult to replace him immediately, I can make temporary arrangement"

Again, it stated that:

"I am endorsing a copy of this letter and report to the General Secretary to the National Council".

It may be mentioned at this stage that the plaintiff sent a copy of this report to the National Council at Calcutta even before the charges were enquired into. In fact the list of charges was drawn up by him on the 6th November, 1948, vide

Ext. 41. The charges in this list number 16 and, apart from embezzlement, included Mr. Eddy's unsatisfactory behaviour and his impertinence towards him as Chairman. There might be substance in the charges brought by the plaintiff against Mr. Eddy. How far they are true, it is not for this court to consider. Two facts, however, remain to be noticed.

Firstly, the charges were sent to the National Council over the head of the Board of Directors, and secondly, the charges were sent to the National Council at Calcutta, before they were examined by the Board, or any conclusion arrived at by the Board regarding them. Ext. 51 which is a letter dated the 12th November, 1948 addressed by the National Council at Calcutta to Mr. Niblett, indicates that they had received the communication sent by Mr. Niblett. This letter also shows that they had also directed an investigation into the matter by addressing a letter to Dr. Malvea, the President of the Council, and were awaiting the result of the investigation of those charges. Regarding their reaction to the resolution in question, their Secretary stated as follows :--

"I deeply regret to learn that you were unwilling to withdraw your charges, or to apologise to Mr. Eddy for having maligned and misjudged him."

The letter also expressed the appreciation of the National Council for the services which the plaintiff had rendered as Chairman of the Central Branch Committee at Allahabad. The National Council further expressed an opinion that as a Chairman, the plaintiff was fully entitled to call for accounts. This letter clearly shows that the National Council at Calcutta were interested not only in the result of the investigation that was initiated against Mr. Eddy, but also in the behaviour of Mr. Eddy towards the plaintiff as Chairman and the insolent treatment which Mr. Eddy as Secretary was alleged to have meted out to him.

Under these circumstances, there can be no manner of doubt that the communication of the resolutions to the National Council was necessary not only because the matter was one of common concern to the parties, but also because it was necessary for the protection of the interest of the Secretary. Further, the step was of a defensive nature. The Secretary was charged with serious acts of embezzlement, and the National Council of Y.M.C.A. were awaiting the result of the Investigation. Any one of the above mentioned five heads\* would be sufficient to give rise to an occasion "of qualified privilege. In the present case, however, the occasion appears to be covered by all of them.

29. Under the above circumstances, I have no doubt in my mind that the occasion of publication to the National Council at Calcutta was a privileged one, and the communication addressed by the Board to the National Council would, in law, be a privilege communication, unless the plaintiff is able to prove express malice on the part of the defendant. The burden of proving this would lie heavily on the plaintiff. What the plaintiff would have to prove at this stage is not merely malice in law which is alleged when he launches an action for defamation. Malice in law which is alleged at the first stage of the case is merely a formal allegation.

It is more or less a matter of presumption and hardly requires any proof. Malice in fact, or in other words, express malice, the burden of which is shifted on the plaintiff, once the occasion is proved to be a privileged one, is the substantial malice which the plaintiff has to prove before he can succeed in the case. The question of its proof arises at the second stage of the case. Once the defendant has succeeded in proving that the occasion was authorised or privileged, the ordinary presumption of malice in law is repelled, and the plaintiff is then called upon to prove express malice.

30. It was, therefore, incumbent on the plaintiff to prove express malice in the impugned publication. The lower court has not adverted to the question of express malice in the impugned publication to the National Council of the Y.M.C.A., at all in its judgment, and there is no finding thereon in it. So far as the defamatory statement itself is concerned, the lower court has criticised the audit report of Mr. Robinson in great detail, and has come to the conclusion that the said audit report contained errors and mistakes, and on that ground it has held that Mr. Eddy was wrongly exonerated by the Board. This procedure would have been justified if the suit had been one for accounting, or if Mr. Eddy was prosecuted for embezzlement.

In the present case, however the court is merely concerned with the question whether in passing the aforesaid resolutions the members of the Board were actuated by express malice. It might be that they were wrong in taking the audit report to be correct. The question, however, before the Court is not whether they were wrong or right in accepting the audit report, but whether they were acting in a bona fide manner. It is to be remembered in this connection that the plaintiff himself has admitted that there was no animosity between him and the members of the Board, that the auditor was appointed with his consent, that he himself had seen the audit report before the meeting had commenced and could not find any mistakes in it at the time, and that the resolutions were passed without any dissentient vote.

Further, the resolutions were not published in any paper, nor were they communicated to any outsiders. Only two occasions of publication are alleged; and both, to my mind, are privileged ones. In view of the above circumstances, it is rather difficult to hold in the present case that the plaintiff has succeeded in proving express malice. The plaintiff having failed to discharge the burden which lay heavily on him, his case in this regard should fail.

31. The other ground given by the lower appellate court for coming to a conclusion on the question of malice is that the meeting itself was invalid, having been improperly convened, the Board had no right to pass the resolutions in question. This again, in my opinion, is a matter foreign to the enquiry. In these proceedings, the Court is not concerned with the validity or otherwise of the meeting or the resolutions passed therein, but it is only concerned, as already stated, with the bona fide nature of the resolutions. It may be noted in this connection that the plaintiff himself never challenged the validity of the meeting.

On the other hand, in his own statement, the plaintiff admitted that the members of the Board "were entitled to pass legal resolutions but not illegal and perverse ones."

The meeting was an adjourned one, and was adjourned at the instance of the plaintiff. Even supposing for a moment that the meeting of the Board was invalid, the question before the Court is not whether the meeting itself was valid, but whether the resolutions were actuated by express malice. This, as I have already observed, the plaintiff has failed to prove. On the other hand, the admissions made by him and the circumstances of the case definitely repel any such case of express malice. The plaintiff's case cannot, therefore, be sustained on this ground either.

32. The legal principles governing the plea of qualified privilege in the circumstances that have arisen in the present case may now be elucidated by a reference to various texts and decisions. At page 734 of Clerk and Lindsell on Torts (Tenth Edition) it is stated that:

"The proper meaning of a privilege communication is only this that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff and puts it upon him to prove that there was malice in fact--that the defendant was actuated by motives of personal spite or ill-will independent of the occasion on which the communication was made".

33. At page 736 of the same book, the following passage is cited from the judgment in *Clark v. Molyneux*, (1877) 3 Q.B.D. 237 (J) :

"I apprehend the moment the Judge rules that the occasion is privileged the burden of showing that the defendant did not act in respect of the reason of the privilege, but for some other and Indirect reason is thrown on the plaintiff."

Referring to the case of *Pittard v. Oliver* (1891) 1 Q.B. 474 (K) and *Nevill v. Fine Art & General Insurance Co.* (1897) A.C. 68 (L) it is stated that in those cases

"It was decided that where the statement complained of has reference to the privileged occasion and therefore comes within it, the only remaining issue is that of malice, and the only way in which any excess in the statement is material is as being evidence of malice of which however it is by no means conclusive. In the last-mentioned case, the jury found that the defendants had exceeded the privileged occasion, but it was held that fact did not entitle the plaintiff to succeed in the absence of a finding of express malice."

34. In "*Hunt v. Great Northern Railway Co.*" (1891) 2 QB 189 (M), it was held that where the defendant had succeeded in showing that there was no evidence of express malice, the plaintiff's case would fail.

35. A Bench case of the Madras High Court reported in--"*Venkata Narasimha v. Kotayya*" ILR 12 Mad 374 (N), contains some relevant observations in this

connection. Dealing with this aspect of the matter the learned judges observed that;

"..... there is no distinction, as far as we are aware, in the general principles on which an action of libel is to be dealt with in this country and in England. In both countries malice is a necessary ingredient in every action of libel.

When a defamatory communication is unauthorized, malice is presumed; but when the communication is privileged by the occasion on which it is made, the ordinary presumption is repelled, and a special presumption takes its place, viz., that the communication is made not with intent to defame but in furtherance of the lawful purpose for which the privilege is recognized to exist.

This special presumption may again be displaced in its turn by actual proof that the communication is not fairly and honestly made, but that it is made with a malicious spirit or from some Indirect motive." (p. 378).

36. As to the grounds which may give rise to qualified privilege, at page 739 of Clerk and Lindsell On Torts (Tenth Edition) the following statement of law is relevant:

"A privileged communication may be made in the discharge of a duty, legal, social or moral or in the pursuance of a right or for both reasons. It may be in the interest of the person to whom it is addressed, or in the interest of the person making it, or in their common interest, or finally in the public interest. Under which of these heads a particular case may fall it is not always easy to determine; Indeed, privilege may frequently be put upon more than one ground".

37. In "Watt v. Longsdon" (1930) 1 KB 130 (O), it was held that the question of moral or social duty is for the Judge to decide. It was further held that in a matter of qualified privilege, the Court "shall not try the excess with too nice scales".

38. Referring to the ground of common interest, it is stated at page 746 of Clerk and Lindsell on Torts (Tenth Edition) that:

"Communication between parties who are alike concerned in the condition of some property or the management of some undertaking are privileged on the ground of their common interest."

In the present case, both the National Council at Calcutta as well as the Y. M. C. A., at Allahabad were concerned in the management of the Association and its affairs,

39. Referring to the Interest of the person to whom the communication is made, it is stated that the information communicated "must be for the guidance and regulation." In this case, the information communicated to the National Council at Calcutta was for the guidance and regulation of the conduct of the Y. M. C. A. Board at Allahabad.

40. It is further stated at page 741 of the same book that:

"A defendant may protect himself by showing either that he was in a position of confidence or intimacy with the person to whom he published the matter complained of, or that he acted in consequence of a request for information lawfully made, or that although a mere volunteer he had such special means of knowledge as imposed a special obligation upon him."

In the present case, there was a request for information from the defendants by the National Council at Calcutta.

41. Referring to the doctrine of confidential relationship, the following passage in the same book is relevant:

"However, the doctrine of privilege arising out of confidential relationship has been extended very widely beyond the ground of positive duty, and whenever one man stands on such a footing with another that he may reasonably and properly take upon himself to tender advice or information, he will be privileged in so doing." (p. 741).

Again, at page 743 it is stated that:

"Any answer to a question which appears to be put for the guidance of the questioner's conduct in a matter of practical importance is privileged. Thus, if one trader makes inquiries of another with regard to the solvency of persons with whom he proposes to have dealings, the latter is protected in communicating any information which he possesses, for everyone owes it as a duty to his fellowmen to state what he knows about a person when inquiry is made and a like rule applies in cases where an association makes a communication to its members respecting the solvency of an individual, whether or not that communication be detrimental to the character of the person specified, provided the communication be made in the general interest of society and from a sense of duty." (p. 743)

42. Judging the case in the light of the above legal propositions, the communication of the resolutions to the National Council at Calcutta must be held to be privileged, and the plaintiff's case should fail for want of proof of express malice. It is also to be remembered in this connection that the plaintiff himself, having gone over the head of the Board and referred the matter to the National Council at Calcutta, had, by his own action, enlarged the area of publication.

It is the width and the depth of the initial aggression that determines the area and the strength of the defensive ground. In communicating those resolutions to the National Council at Calcutta the Board had travelled over exactly the same area which the plaintiff had covered,

Further, in going to Calcutta over the head of the Board of Directors before the charges were enquired into, and in referring the same to the National Council at Calcutta before the audit report was issued and the charges were even gone into,

the plaintiff appears to have exceeded the necessities of the occasion. He took it for granted that Mr. Eddy had committed embezzlement. In fact, according to his own communication Mr. Eddy should have been in the hands of the police. The publication by the Board was, therefore, of a defensive nature.

43. The finding of the lower appellate court on this aspect of the case is as follows:--

"The Board might have been justified in sending a copy of the first resolution that they passed against the plaintiff to the National Council, but I am unhesitatingly of opinion that they were not justified nor was it necessary to send the remaining resolutions to that body."

Thus, even the lower appellate court holds that SO far as the first resolution is concerned, it is protected by the doctrine of qualified privilege. Having once held that the occasion was a privileged one, the only question which was legally left for the court to determine was whether the sending of the remaining resolutions proved express malice.

The lower court has not looked at the matter from this legal aspect at all. The judgment, therefore, suffers from a serious legal flaw. Moreover, even on merits, it is difficult to endorse its line of reasoning from a legal standpoint. The resolutions, in my opinion, formed one whole and it would not be proper to separate them. In fact, the remaining five resolutions were ancillary to the first one and depended on it.

In order to have a complete picture of what had happened in the meeting of the Board, it was necessary for the National Council to be in possession of the entire proceedings of the Board. Further, the question of Mr. Eddy's behaviour towards the plaintiff, his attitude of insubordination, insolence and disobedience was also raised in the communication by the plaintiff, a copy of which was sent to the National Council and the remaining resolutions were relevant in that regard.

Even if it be supposed for a moment that the remaining resolutions transgressed the strict limits of privilege, in view of the fact that the action was of a defensive nature, any such transgression should be treated as a minor one and liable to be condoned. The whole question before the Court is whether the mere sending of the remaining resolutions is enough to make out a case of express malice. Express malice is born out of ill-will, and is the result of an oblique motive. As already stated, the plaintiff himself admitted in his evidence that the members of the Board bore no ill-will towards him.

44. Reference in this connection might be made to the case of--"Adam v. Ward" (1917) AC 309 (P). In that case, the alleged defamatory statement was said to be a letter, and the question arose whether the whole or part of the letter should have been published. In this situation it was observed that:

"The privilege extended to the whole letter, and there is nothing either in the letter itself or in the surrounding circumstances to supply any evidence of

express malice." (pp. 319 and 320).

45. Referring again to the said letter. Lord Dunedin observed as follows:

"But the letter was a long one, and it is argued that, in so far as it went beyond the mere statement of General Scobell's innocence and proceeds to say things defamatory of the plaintiff, it was not in the exercise of any duty or right, and that for these statements there is no privilege." (p. 325)

Dealing with the above argument, Lord Dunedin made the following observations at page 329:

"My Lords, I now return to the facts of this case, and here I am of opinion, concurring with the Lord Chancellor, that the present case is a case where the defamatory statement was part and parcel of the privilege statement and relevant to it."

At page 330, approving of the judgment of Their Lordships of the Privy Council, the following observations are relevant:

"Some expressions here used undoubtedly go beyond what was necessary for self-defence; but it does not, therefore, follow that they afford evidence of malice for a jury. To submit the language communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat that protection which the law throws over privileged communications."

46. Where a charge is levelled against a man's character and he acts in self-defence, then the scope of the legal right of private defence in a case of defamation is expounded in Clerk and Lindsell on Torts (Tenth Edition) page 749 in the following words:

"If a man's character is attacked, he is not merely entitled to vindicate himself, but may retort upon, his assailant any charges which may impair the latter's credit in that particular matter which is in controversy."

47. While discussing the use of strong language, it is stated in the same book at page 772 that:

"Where, however, a man is acting in self-defence or in the vindication of the character, somewhat greater licence is allowed to him and his language is not to be scrutinised with minuteness in order to raise an inference of malice. In -- *Laughton v. The Bishop of Sodor and Man*" (1872) 4 PC 495 (Q), the plaintiff had severely inveighed against the bishop in a public speech.

The latter addressed to his clergy and published in the newspapers a charge, in which he repelled with great warmth the plaintiff's attacks, impugning his motives and speaking of him as a wicked man. It was contended that this language was in itself evidence of malice. But, said the judgment, it is enough that, having regard to the circumstances and nature of the attack upon him, the

Bishop may, in their Lordships" opinion, have honestly believed that everything which he said was true and proper for his own vindication, although in fact some of his expressions exceeded what was necessary for it and that the language of his charge was more consistent with such honest belief and with the purpose of self-vindication than with that of infuring the plaintiff." Bearing the above legal principles in mind, I am of opinion that the publication of the entire body of resolutions to the National Council at Calcutta is protected by the doctrine of qualified privilege.

48. The only other publication alleged by the respondent is said to have been made in the subsequent meeting of the Board. This publication consisted in reading the minutes of the meeting of the Board for confirmation in its subsequent meeting. The minutes containing the resolutions were read out in a meeting of the same Board. It was obviously done as a matter of routine. The reading of minutes of a society for the purposes of confirmation in a subsequent meeting of the same society is a part of ordinary procedure of every society that carries on its proceedings in a regular fashion; and is really not a publication at all. In any case, such an occasion must be considered to be a privileged occasion, and the communication made therein must be treated to be a privileged communication. Once the communication is considered to be a privileged one, the only question that arises is whether express malice can be fastened on the members of the Board because of the fact that the resolutions were read out at that meeting. If the reading out of the resolution is a part of ordinary procedure, I fail to understand how the mere act of reading out is sufficient to prove express malice.

49. On this aspect of the case, the learned counsel for the respondent argued that two persons, namely, Mr. Seetal and Mr. Massey who were present at the subsequent meeting were not members of the Board. The trial court held that both of them were members of the Board. The lower appellate court, however, held that Mr. Massey was a member of the Board, and so he should not be considered to be a stranger. In regard to Mr. Massey the lower Court's finding runs as follows:

"I would, therefore, hold that the minutes of the meeting of 8th November, 1948 when read out on 22nd February, 1949 in the presence of Mr. I. Massey was not publication and must be deemed to be privileged."

Once the lower court had held that this occasion was also a privileged one, the only question left in law before it was whether the mere presence of Mr. Seetal proved express malice. This aspect of the case has not been adverted to by the lower court, and hence the judgment of the lower court on this aspect also suffers from a grave legal error and cannot be sustained. The lower court then went on to determine the question whether Mr. Seetal was an outsider; and having held that he was an outsider the lower court considered that it was by itself conclusive of the matter, and enough to constitute the publication to be defamatory. This was a wrong approach to the question at issue.

50. Even on merits the finding of the lower court that Mr. Seetal was an outsider seems to be based on a mis-apprehension of evidence on record. The main evidence on this point consists of the minute book of the Board which is Ext. 104. A reference to this book would indicate that Mr. Seetal was re-elected a member of the Board for 1948 in the meeting held on 4-11-1947. At the meeting of 19-1-1948, he was elected as a Treasurer also. Subsequently, at a meeting of the 7th April, 1948. Mr. Seetal resigned from his office as a Treasurer. This is borne out by para 5 of the minutes. In the opinion of the lower appellate court, para 5 of the minutes shows that Mr. Seetal had resigned from the membership of the Board.

I have perused para 5 of the minutes, and I am of opinion that it relates to the resignation of Mr. Seetal from the office of the Treasurership only. The lower appellate court, therefore, mis-read this part of the minutes. Any doubts in this regard are set at rest by Mr. Seetal who was produced by the plaintiff himself as his witness. Mr. Seetal himself as plaintiff's own witness clearly stated that he was a member of the Board in 1948. The plaintiff himself did not allege in his plaint that any outsiders were present in this meeting. If the plaintiff wanted to rely on the publication to Mr. Seetal as an outsider, he should have expressly pleaded to that effect in his plaint.

51. " Nannu Mal Vs. Ram Prasad , it was held that:

"A plaint in a case of defamation ought to allege not only the publication, or set out not only the words, but that they were published or spoken to, at any rate, some named individuals at a particular time and place specified in the plaint. The plaint must not be vague, "(head-note (d)).

On the other hand, in para 15 of the plaint, the plaintiff stated that :

"these resolutions actually were communicated to the National Council of Y. M. C. A., were circulated to members of the Board, and read out at the subsequent meeting of the Board."

This statement would indirectly imply that only the members of the Board were present at the next meeting.

52. In any case, in my opinion, the question of the validity of the membership of Mr. Seetal or Mr. Massey is foreign to the enquiry in these proceedings. Once the occasion is proved to be a privileged one, the only question which is relevant is whether the plaintiff has succeeded in proving express malice on the part of the defendants. It is not the plaintiff's case that Mr. Seetal or Mr. Massey were deliberately brought in by the defendants for the purpose of broadcasting the resolution or for any malicious purpose. They were present in the ordinary course of business. The question whether they were really members or not would be relevant if a suit was brought for declaration that they were not members of the Board, and for an injunction restraining them from participating in the meetings.

Even presuming for a moment that they were not really members of the Board,

and happened to be present as outsiders, the question would be whether their presence at the time was such a malicious act on the part of the defendants as to prove express malice on their part. It is common knowledge that in the course of meetings of a society some outsiders or strangers or persons not members are sometimes present. A guest or an invitee might be present. A stenographer might be present. A clerk might be present. They might be knowing the proceedings of the meeting. They may be taking down the minutes of the meeting. But the publication to them would be covered by the doctrine of qualified privilege, because they are present at the spot in the ordinary course of business, and have not been invited to come to the place for the hostile purpose of defaming the plaintiff or lowering him in the estimation of such persons. It is not alleged or even insinuated on behalf of the plaintiff that their presence at the time was a part of any malicious design.

The plaintiff himself does not allege any enmity with either. On the other hand, according to him there was absolutely no enmity between him and them. In fact, he produced Mr. Seetal as his own witness. Even if Mr. Seetal was not actually a member of the Board, he considered himself to be a member and was taken to be so by other members and was present in that capacity. In any case, mere casual and incidental presence of an innocent outsider cannot prove express malice. The approach of the lower court to this part of the case being legally erroneous, its conclusions in this regard also cannot be sustained.

53. The law relating to the legal aspect of this question may now be adverted to. The effect of the mere casual presence of outsiders at a meeting of an association has been stated in Clerk and Lindsell on Torts (Tenth Edition). At page 737 of the said book, the law with regard to the degree of publicity is stated as follows:--

"With regard to the publicity given, it has been said that a defendant will not lose his privilege because he goes somewhat beyond the strict necessities of the case. There is also authority to show that where occasion is otherwise privileged it will not lose its character by the fact of the casual presence of one, or even of several uninterested bystanders, and that such presence is material only on the question of malice.

Some doubts arise as to the exact rule to be deduced from these cases. Of course, if a defendant has practically no opportunity of making his communication except in the presence of uninterested persons, it is right that his privilege should be unaffected. On this principle the case of--"Pittard v. Oliver", (K), seems to have been decided, where reporters were present at a meeting of guardians. The passage in--"Toogood v. Spyring" (1834) 1 GM & R 181 (S), which says that the business of life must be carried on, impliedly asserts the same doctrine.

The principle seems to be that if the occasion is privileged, a publication by the person exercising the privilege to third persons is protected if it is reasonable and

in the ordinary course of business. It is on this ground that publication to clerks, typists or copyists is protected. The mere fact that such third persons have no legitimate interest in the subject-matter will not destroy the privilege.

"To hold otherwise would practically destroy the protection of privilege in the case of companies and large firms, because as a matter of business, it is impossible that a business document can be written and pass through the hands of one partner or person only." So, where a solicitor, acting on behalf of his client, sent a libellous letter to the plaintiff and in the ordinary course of business the letter was seen by his clerk, it was held that this publication was protected.

Similarly, where the occasion of sending a letter and telegram was privileged, their incidental publication to the sender's clerks and the telegraph clerks was protected, the course adopted being reasonable and usual having regard to the circumstances." (pp. 737 and 738)

54. Again, at page 771 of the same book, it is stated that a privileged communication need not be strictly private. The fact of, the presence of a third person is only relevant as a factor determining the question of malicious motive or express malice.

55. For the above reasons, I am of opinion that the second occasion of publication alleged by the plaintiff is also protected by the doctrine of qualified privilege. The plaintiff having alleged only two occasions of publication, and both of them having been found to be covered by the doctrine of qualified privilege, his main case should fail on merits on this ground as well.

56. The next question for determination is whether defendants Nos. 1, 3 and 4 are jointly liable for the tort committed by defendant No. 4. On this point, the trial court held that only defendant No. 4 was liable and not others. On the other hand, the appellate court held that defendants Nos. 1, 3 and 4 are jointly liable. The finding of the appellate court was that the other defendants ratified the actions of Mr. Eddy. In the light of the statement of law on this point in Salmond's Law of Torts, the finding of the lower appellate Court in this regard is as follows: --

"Clearly the master is not exempted from the liability by the mere fact that the servant has acted in breach of his instructions. A subsequent adoption and ratification of the servant's act by the master is sufficient to render him liable. I am, therefore, of opinion that the defendants 1 and 3 are equally liable with defendant No. 4 in respect of the torts committed by the latter."

The case of the plaintiff was one of agency. According to his case, therefore, Mr. Eddy had prior instructions or authority from other defendants. The case found by the lower appellate court is just the reverse viz., that Mr. Eddy had no prior instructions or authority, that in fact Mr. Eddy acted in breach of the said instructions, but that his unlawful acts were subsequently ratified by other defendants and hence they are liable. It is enough to say in this connection that

the case of ratification was never set up by the plaintiff. It was held by their Lordships of the Privy Council in--" AIR 1930 57 (Privy Council) that:

"Where a claim has been never made in the defence presented no amount of evidence can be looked into upon a plea which was never put forward." (head-note),

57. The plea of ratification, being a mixed question of law and fact, should have been set out in pleadings, and cannot be allowed to be raised in this manner. Not even an issue was framed on this plea. To allow it to be raised in this fashion would, therefore, spring a surprise on the defendants and is bound to prejudice them.

58. In AIR 1942 64 (Privy Council) it was held that the procedure of allowing parties to adduce evidence on points not raised in the pleadings or issues is Irregular and should not be allowed without amending the pleadings and raising the necessary issues.

59. In Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar, , a new case of authority and ratification which was not raised by the plaintiff in his pleadings was allowed to be raised subsequently. The High Court having given effect to this new plea their Lordships of the Supreme Court reversed the decision of the High Court in this regard observing as follows-

"We are unable to uphold the view taken by the High Court on this point, it is well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint, the Court was not entitled to grant the relief not asked for and no prayer was ever made to amend the plaint so as to incorporate in it an alternative case." (p. 240, Clause 2)

In fact the plea of ratification was contrary to the initial case of the plaintiff in pleadings, which was that Mr. Eddy was acting under instructions from defendants Nos. 1 to 3 and in collusion with them. Thus the finding of the lower appellate court in this regard is also open to a serious legal objection and cannot be sustained.

60. Even on merits, I am of opinion that there is not enough evidence on record to establish the plea of ratification. The sole fact from which the lower court finds ratification established is that an amount of Rs. 500/- which was the fine imposed on Mr. Eddy in the criminal case against him relating to the cutting off of the electrical connection was made available to him by the Board. This amount might have been taken by Mr. Eddy as a personal loan. There is nothing to show that it was not a loan of this nature.

On the other hand, the evidence indicates that it was so. In the interrogatories the reply of the defendants was that the amount was an advance, and the lower appellate court itself observes in its judgment that the minutes of the meeting of the 26th April, 1950, which record the advance of this amount themselves show

that this "amount was charged to Mr. Eddy's personal account".

Under the circumstances, the data relied on by the lower appellate court appears to be altogether inconclusive for the purpose of establishing the legal ingredients of the plea of ratification, and its findings in this regard cannot be sustained on merits.

61. In this court, however, the learned counsel for the plaintiff-respondent wanted to fall back on the initial plea of agency, but that also appears to me to have no force. Mr. Eddy was neither an agent of the Board nor of the defendants 1 to 3. If at all, he was the agent and servant of the Y. M. C. A.

62. Further, the principal is not liable for the tortious acts of his agent unless the act which was the parent of wrong itself fell within the scope of his employment as an agent. It might be that an opportunity to commit a wrong is provided to an agent in the course of his employment, but that fact alone is not enough to bring the wrong itself within the scope of his employment.

Thus, an opportunity to rob a patient might be provided to a doctor in the course of a surgical operation, but from that it cannot be said that the wrong committed by him was within the scope of his employment as a doctor. In the present case, according to the plaintiff's own case the acts of Mr. Eddy were both tortious as well as criminal wrongs.

I do not think that by any stretch of imagination it can be said that such acts fell within the sphere of duties assigned to him or came within the scope of his employment or authority as the Secretary, nor can it be said that they were so intimately connected, with the area of his secretarial powers as to make them a part and parcel of his secretarial duties.

63. In "Corporation of Glasgow v. Mrs. Esher Lorimer" 1911 AC 209 (W), one Gilmour who was a tax-collector in the employment and service of a Municipal Corporation had in course of the performance of his duties as a tax-collector charged one Mrs. Esther Lorimer a tax payer with having prepared a forged receipt of the payment of tax monies. The lady charged sued the Municipal Corporation for damages in respect of the tort of slander committed by their agent. While rejecting her claim, Lord Loreburn L. C. laid down the principle governing such cases in the following words-

"I do not think the principle is really in dispute. If it was within the scope of his authority to make a statement on behalf of his principals for their benefit, then the principals are liable for utterances in the course of making that statement". (p. 214).

He again went on to elucidate the same principle thus

"Had this collector, then, a right, or rather was it within the scope of his authority as I have described it, to express his own opinion as to the falsity or genuineness of any receipt; or, indeed, was it within the scope of his authority to make any

statement or comment at all? I think he had no such implied authority because I cannot see why his opinion needed to be communicated, or in what way it could be a benefit to the corporation to communicate his opinion." (pp. 214 and 215)

He further observed that :

"I do not think it is good law to say that the corporation is bound by anything said by one of its servants which is connected with the business of that servant. The question is whether or not there is any authority to communicate on behalf of the corporation any comment or statement of opinion at all." (p. 215)

In *A. Thangal Kunju Musaliar Vs. M. Venkitachalam Potti and Another*, , it was held that

"There can be no agency in the matter of the commission of a wrong.

The wrong-doer would certainly be liable to be dealt with as the party directly responsible for \_his wrongful action." (p. 255)

64. Further, there is no evidence in this case that the tortious acts in question were authorised by other defendants or were done with their collusion. On the other hand, the evidence in the case points to the contrary. So also does the finding of the lower appellate court which runs as follows :

"Dr. Malvea later on wrote to the plaintiff saying that he had directed Eddy not to harass the plaintiff in any way. The Board of directors did not direct the defendant 4 to give the plaintiff any notice under law for ejection, but instead, the defendant 4 employed these tactics in trying to make the plaintiff either apologise or leave the premises."

Thus the foundation of facts necessary for fastening vicarious or joint liability on other defendants is itself lacking, and, in its absence, the plea cannot be sustained in law. In the above situation, I find it difficult to uphold any of the contentions of the learned counsel for the respondents on this aspect of the case.

65. For the above reasons, I am of opinion that the liability for damages resulting from harassment as a result of the deprivation of the services of the waterman and sweeper of the Y. M. C. A., and of the cutting off of the electric connection would lie on defendant No. 4 alone and the appellants cannot be saddled with any responsibility in that regard.

66. The last point that arises in connection With this appeal relates to the maintainability of the suit against the Board of Directors. The Board of Directors is not a registered body. It has been admitted by the plaintiff in his own evidence that the "Y. M. C. A. is a registered body, but Board of Directors in itself is not a registered body." Under the above circumstances, the Board cannot be sued as a corporate entity. The only way therefore, in which the Board could have been sued was by impleading all its members individually.

67. In "*Panchaiti Akhara v. Gauri Kuar*", ILR 20 All 167 (Y), it was held that:

"In a suit by an unregistered and unincorporated society, the names of the members of the company must be disclosed." (head-note)

68. In "N. W. P. Club v. Sadullah" ILR 20 All 497 (Z), the following observations are relevant:

"The question remains as to whether the action can rightly be said to have been brought against the N. W. P. club, that is, what the case mentioned above calls an abstract entity unknown to the law. To hold that an action lay against it and to give judgment in such action would be to hold that an action lay against a great number of individuals who had not been cited in the action, who had no opportunity of appearing, but who should have been so cited and who should have had such opportunity given to them to appear and contest the action. On that ground, the action should have been dismissed against the club." (pp. 498 and 499)

69. In *Ganesha Singh v. Mundi Forest Co.*" ILR 21 All 346 (Z1), another Bench case of the Allahabad High Court, it was laid down that:

"Where a company is not registered under Act No. VI of 1882, a plaintiff bringing a suit against such company must make each individual member of the company a defendant to the suit, and he cannot escape from this obligation by stating in his plaint that he has been unable to discover who the individual members of the company are." (head-note)

70. In the present case, the Board of Directors is admittedly not a registered body. It has no legal entity apart from its members. It is further admitted that there are a large number of other persons who are members of the Board and who are not impleaded in the suit. To pass a decree against the Board as a whole would be tantamount to passing a decree against all the members not impleaded behind their back and without giving them an opportunity to defend. Such a procedure is not warranted by law. The decree passed by the lower appellate court against the Board should, in my opinion, be upset on this ground as well,

71. To sum up, my conclusions in this appeal are that the alleged defamatory statement which forms the basis of the plaintiff's case being not defamatory per se, the plaintiff could only succeed by alleging some innuendo. The plaintiff having not alleged any innuendo, his case of defamation should fail on that ground.

Further, the plaintiff alleged only two occasions of publication, and both of them having been found to be covered by the doctrine of qualified privilege, the plaintiff's main case of defamation should fail on this ground as well. So far as damages resulting from tortious act of depriving the plaintiff of the services of the servants and of cutting off of electric connections is concerned, it is not possible to saddle any defendant apart from defendant No. 4 with such liability.

The lower court erred in law in relying on the plea of ratification, which was a new plea and should not have been given effect to. Further, the damages cannot

be decreed on the basis of agency, and this plea also has no force. Lastly, the Board being not a registered body, nor an abstract legal entity recognised by-law apart from its members, cannot be sued as such, and the suit as filed against it is liable to be dismissed as not maintainable.

72. It appears that the plaintiff-respondent has also filed a cross-objection claiming enhancement of the amount of damages awarded to him. In view of the fact that I am of opinion that the claim for damages against the appellants must fail altogether, the cross-objection in this regard falls to the ground.

73. The net result of the findings given by me above is that this appeal is allowed and the suit of the plaintiff dismissed against the appellants-defendants with costs in all the courts. The cross-objection of the plaintiff-respondent is also dismissed with costs.

74. Leave to appeal to a Division Bench is allowed.