
(2011) 11 BOM CK 0126

In the Bombay High Court

Case No : Suit No. 651 of 1983 and Suit No. 652 of 1983

Kokan Unnati Mitra Mandal and Others

APPELLANT

Vs

Bennet Coleman and Co. Ltd. and Others

RESPONDENT

Date of Decision : 09-11-2011

Acts Referred:

Citation : (2012) 1 ALLMR 359 : (2011) 6 BomCR 475 : (2012) 114 BOMLR 92 : (2011) 113 BOMLR 4016 : (2012) 2 MhLj 338

Hon'ble Judges : Roshan Dalvi, J

Bench : Single Bench

Advocate : Rajendra Pai assisted with Mr. Rajendra Desai assisted with Mr. Vikram Trivedi assisted with Mr. Faisal Sayyed assisted with Mr. Aloukik Pai assisted with Mr. Mayur Bhojwani assisted with Ms. Vishnupriya Kumar instructed by M.K. Ambalal and Co, for the Appellant; V.V. Tulzapurkar a/w. Ms. Alpana Ghone instructed by . Kanga and Co., for the Respondent

Judgement

1. The Plaintiff No.1 is a registered society having Plaintiffs 2 to 13 as its trustees. Plaintiff No.2 is the Chairman of the Society and served as the Chief Minister of the State of Maharashtra immediately prior to the cause of action having arisen in this suit. Defendant No.1 is the owner of the newspaper "Times of India" and its Marathi publication and Defendants 2 to 4 are the Editor, Printer and Photographer respectively of the publications. The Defendants together shall be referred to as the Defendants.

2. The Defendants published an article and two photographs in its newspaper publication dated 3rd April 1982 which the Plaintiffs claim as defamatory per se. The Plaintiffs also claim that the article carries an innuendo with regard to certain activities alleged to have been carried out by the Plaintiff No.2 in the capacity as the then Chief Minister.

3. During the tenure of Plaintiff No.2 as such Chief Minister there were certain allegations made and petitions filed by certain parties alleging certain corrupt practices of Plaintiff No.2 in respect of the allotment of cement which was at the

relevant time, a rationed commodity under the Essential Commodities Act. On 11th January 1982 a judgment of this Court indicted Plaintiff No.2. Plaintiff No.2 resigned as Chief Minister the next day. The article along with the two photographs with regard to an incident relating to the transportation and allotment of cement came to be published by the Defendants and is claimed to have been seen by its Reporter and photographed by its Photographer. The article and the photographs were reported in the English as well as Marathi publications dated 3rd April 1982.

4. The Plaintiff No.1 addressed a letter on behalf of Plaintiff No.2 on 3rd April 1982 informing the Defendants that the publication was defamatory containing deliberate misstatements and stated certain facts which the Plaintiff No.1 directed the Defendants to publish in their publication to clarify the facts. The Defendants published in both their publications another article inter alia stating the facts directed by the Plaintiffs to be reported.

5. The Plaintiffs claim that the further publication showing further facts does not indicate any apology for having published the initial articles and the photographs and is, in fact, more insinuating than clarificatory.

6. The Plaintiffs have sued for damages for defamation in a sum of Rs.5 crores with interest @ 6% p.a from the filing of the suit till payment upon their case that the publications as well as by innuendo are defamatory per se. The Plaintiffs are required to prove the publication and the nature of defamation. The publications are not denied. It would be for the Plaintiffs to prove whether the publication initially made as well as the further publications claimed to be clarificatory by the Defendants made upon the directions of the Plaintiffs are indeed defamatory. It may be mentioned that if the articles are shown to be defamatory their falsity would be presumed and the malice, if any, in publishing them need not be shown.

7. The Defendants claim that the articles are not defamatory because they show the truth of what transpired and the Defendants were justified in publishing the same for the knowledge of the public and in public interest. The Defendants accordingly claim that they have made a fair comment upon the facts that transpired on 2nd April 1982 to prove before the public the incident and further upon the Plaintiffs' directions the claim made by the Plaintiffs in respect thereto. They claim that the public would need to know what transpired initially and how the Defendants clarified their position upon the Plaintiffs' contention with regard to the initial publications. The Defendants have, accordingly, made out the defence of fair comment in public interest. The Defendants deny malafides or malice. If the Defendants show the truth of the statements in the articles as also that their comments thereupon were fairly made the Plaintiffs would have to prove malice to succeed in the claim of defamation.

8. The Defendants, in essence, claim truth and justification. Consequently, the Defendants have not tendered the apology that the Plaintiffs demanded.

9. Based upon the respective cases of the parties 5 issues came to be framed by Justice Nirgude on 25th July 2008 as follows and are answered as follows:

ISSUES

FINDINGS

1. Do the Plaintiffs prove that the Defendants have, by publication of the photographs in juxtaposition with each other and/or in conjunction with the article published thereunder at Exhibit ?A? to the Plaint, per se and/or in any manner defamed the Plaintiffs (collectively) or any of the Plaintiffs (individually), having caused them or any of them to be the subject matter of defamation, contempt, hatred and/or ridicule in the eyes of the public and particularly people known to them.

No

2. Do the Plaintiffs further prove that the Defendants published the above mentioned material with malafide intention to cause defamation of all the Plaintiffs or any of the Plaintiffs individually.

No

3. Do the Defendants prove that the publication of the said photographs and the said Article at Exhibit ?A? to the plaint is not malafide, malicious, false, calculated to defame the Plaintiffs (collectively) or any of the Plaintiffs (individually) and does not have the effect of defaming the Plaintiffs (collectively) or any of the Plaintiffs (individually).

Yes

4. Whether the Defendants prove that the clarification published in ?The Times of India? issue dated 8th April 1982 adequately published views of the Plaintiffs and whether the said Article read with above referred clarification amounts to balanced reporting of the issue in public interest.

Yes

5. What order?

As per final order

10. The Plaintiffs have examined Plaintiff No.2. The Defendants have examined Defendant No.4. The parties have relied upon a number of documents which are affidavits, orders and other Court records of the previous litigations with regard to the allotment of cement in the rationed era during the tenure of the Plaintiff No.2. It may at once be stated that those documents merely show the position of facts at the relevant time and are wholly irrelevant to the issue whether the publications dated 3rd April 1982 of the incident dated 2nd April 1982 and the further clarification dated 7th April 1982 upon the Defendants direction in the letter dated 3rd April 1982 would tantamount to defamation as being a false and

malicious statements of facts or whether it was the truth that would justify the publication or is a fair comment of what transpired. Amongst the documents produced by the parties the only material ones are certain charge receipt showing allotment of certain plots by the Government through the Collector of Bombay to Plaintiff No.1 without the annexures mentioned therein, a consequent application made on behalf of the Plaintiffs for development of the said plots, a plan of development and a letter issued by the Executive Engineer, Building Proposals, City of Greater Mumbai (MMC) dated 23rd April 1982 with regard to the plots shown to be allotted in the charge receipt and certain other plots sought to be developed by the Plaintiffs. Other than these documents it would be material for the Court to consider only the aforesaid publications themselves.

11. Further since the publications and photographs are admitted and are sought to be interpreted by both parties, whether or not they are defamatory per se or by innuendo would have to be seen upon reading the publications and the photographs themselves.

12. Issue Nos.1 to 4 :

It would be proper to consider the publications themselves in the light of the fact that the Plaintiff No.2 had come in the line of fire in certain Writ Petitions filed against him alleging allotment of cement not in accordance with law to various parties.

13. The initial publication in the English as well as Marathi newspapers of the Defendant on 3rd April 1982 shows that a truckload of cement was removed on 2nd April 1982 from the plot of Plaintiff No.1 at Worli despite an affidavit filed by the Plaintiff No.1 that there was no cement at the site. It shows that certain porters (hamals) were loading a truck with cement bags from the former police barracks in the plot. It also states that porters and the driver did not indicate where the truck was to go. Thereafter the truck moved out, and was followed. It went up to Borivli and halted in a lonely area. After 45 mts the reporter of the Defendant thereafter gave up the chase. The article makes a reference to the said incident as a sequel to the High Court proceedings in which one Mr. Kamat who was a resident of a building opposite the plot had filed an affidavit stating that he had witnessed 70 truck loads of cement being unloaded at the plot of the Plaintiffs between 5th February 1982 and 14th February 1982 though the funds of Plaintiff No.1 were frozen since 16th October 1981. The article further showed that the said Kamat's affidavit showed imported cement bags being delivered at the site of Plaintiff No.1 which were thus illegally procured and stored, facilitated by two Trustees who were Ministers in Maharashtra Government named in the article.

14. The publication was made with two photographs taken by Defendant No.4. One photograph shows the police barracks, the open space and a truck with several porters loading bags. Another photograph shows the board of the Plaintiffs. It is admitted that these are two photographs. The board of the

Plaintiffs is, therefore, not at such a place near the barracks or the truck shown in the first photograph, but is printed and published alongside it. It is argued on behalf of the Plaintiffs that it is so juxtaposed as to give an impression to the public that the Plaintiffs' board was where it was shown on the open space in front of the barrack which was allotted to the Plaintiffs upon the premise there was only one photograph.

15. The photograph of the site shows a faint barbed wire fence. It is the Plaintiffs' contention that the truck is on the other side of the barbed fence which is not the land allotted to the Plaintiffs. The Plaintiffs claim that only the open land on the other side of the barbed wire fence was allotted to the Plaintiffs. That is shown in the foreground of the photograph. The bags being loaded in the truck are in the adjoining plot of land belonging to the Government of Maharashtra where the police barracks were and with which the Plaintiffs have nothing to do. The Plaintiffs, therefore, contend that upon what is going on in the adjoining plot, unknown to the Plaintiffs, an insinuation is made that uploading of the bags into the truck took place on the Plaintiffs' plot of land which is false. The Plaintiffs further claim that taking the photograph of the Plaintiffs' board which was on the completely different side of the Plaintiffs' property and publishing it next to the photograph showing the loading of bags also shows the insinuation that the loading was done where the board of the Plaintiffs was which is false. The Plaintiffs, therefore, claim that the two photographs shown as one, though they are admittedly two photographs, is malicious and defamatory.

16. It may, at once, be mentioned that the two photographs are seen as two photographs in the publication rather clearly. In fact the barbed wire fence is not as clear in the photocopy of the publication shown to the Court. (The original publication has not been produced by either party).

17. It is an admitted position that the plot adjoining the Plaintiffs' plot belonged to the Government of Maharashtra. It was used to house police barracks. The Plaintiffs' plot was admittedly allotted to the Plaintiff No.1 by the Government of Maharashtra. Prior to such allotment, therefore, it was the plot of Government of Maharashtra. Consequently, both the plots initially belonged to the Government of Maharashtra. The Plaintiffs claim that a part of that plot was allotted to the Plaintiffs. The Plaintiff No.2, the then Chief Minister of the State of Maharashtra, who was the President of Plaintiff No.1, claimed that the plot allotted was to Plaintiff No.1 in such capacity. He would claim the plot of Government of Maharashtra as its then first Minister. The two plots, therefore, do not belong to wholly separate distinct, different parties. These two plots are admittedly separated only by a barbed wire fence running alongside their common boundary. It is not shown when the fence was put and by whom. Well prior to the publications the affidavit of Kamat in the writ petitions had shown unloading of cement including delivery of imported cement bags at the Plaintiffs' plot, which statement in the writ petitions was neither claimed to be defamatory nor proved to be false. The indictment of Plaintiff No.2 therein, followed by his resigning,

would in fact at least prima facie show otherwise. Consequently, the loading of cement bags from the police barracks stated to be IN the Plaintiffs' plot was an allegation earlier made on affidavit. It has only been shown by way of the additional truck and the porters in the photograph. The fact that the Reporter of the Defendant followed the truck and then gave up the chase has not been denied by the Plaintiffs.

18. The only aspect, therefore, that remains to be considered is whether aside from the open plot shown in the foreground on one side of the barbed wire fence which is admittedly the Plaintiffs' plot with the Plaintiffs board at some place therein, the Government plot with barracks and having the truck with the porters loading the bags thereon admittedly of cement was the plot with which Plaintiff No. 2, who claims to be defamed, had anything to do.

19. The test of defamatory character of the publication read along with the two photographs would be to see whether the Plaintiffs' plot and the adjoining plot are two separate, distinct, identifiable plots of two different and distinct parties. That would be to see that the adjoining plot is a plot with which the Plaintiffs would have nothing to do, directly or indirectly.

20. It would be apt to show the most appropriate documentary evidence with regard to the two plots before considering the Plaintiffs' exception taken to the publications and the photographs and the Defendants further publications.

21. The charge receipt marked ExhibitP9 in evidence shown to be dated 28th April 1981 is for plot Nos.73A, 74, 74A and 74B. This is admittedly the land allotted to the Plaintiffs alone. The charge receipt describes these plots as being encumbered with two structures and one overhead tank as well as occupants thereon. A list of the occupants annexed to the charge receipt along with a plan is not produced in evidence. The Plaintiffs desired the said plot allotted by Government of Maharashtra to Plaintiff No.1 to be developed. One Mr. S.Y. Madan, the Architect on behalf of the Plaintiffs addressed a letter dated 15th June 1981 to the Assistant Engineer, Buildings and Factories, of MMC marked ExhibitP28 in evidence. The letter was in respect of the plots allotted to the Plaintiffs. The letter shows that the author would be submitting the plans for development of the property on behalf of the owners. The owners desired a temporary site office to be set up on the plot. A plan for setting it up was enclosed in triplicate along with a site plan. The letter requests approval for construction of the site office. The site plan annexed to the letter shows an L-shaped site office proposed to be constructed. The location plan shows the plot in red. It also shows the adjoining plot. The adjoining plot shows two rectangular structures. It may be mentioned that the land adjoining the plots allotted to the Plaintiffs was government land and had police barracks. It, therefore, stands to reason that the two structures are the police barracks shown on the plan.

22. Upon such description of the plots allotted to the Plaintiffs and the adjoining plots of the Government of Maharashtra, a copy of a letter addressed by the

Executive Engineer, Building Proposals of the MMC to one Professor Warde dated 23rd April 1982 must be appreciated. The said letter makes a reference to the Architect Mr. S.Y. Madan who had written to the MMC on 15th June 1981 as aforesaid. It shows the proposal made for development of the aforesaid plots allotted to the Plaintiffs AND three other plots being Plot Nos.242, 243 and 244 all of scheme No.52 at Worli. Plaintiff No.2, examined on behalf of the Plaintiffs, has been confronted with a copy of this letter in his cross examination. In question No.132, upon being shown this letter, he agreed that Plaintiff No.1 had applied for construction on plot Nos.242, 243 and 244 of Scheme No.52 Worli also. These are admittedly the plots of the Government of Maharashtra where the police barracks are. These are admittedly the adjoining plots. These are admittedly also the plots where the truck was located being loaded with cement bags as shown in the photograph published by the Defendants. Plaintiff No.2 has not refuted what is stated in the letter about the allotment of those plots. He has instead stated that one Mr. P.K. Sawant looked after the daytoday matters of Plaintiff No.1. He further stated that Mr. P.K. Sawant who was a man of great integrity could never have instructed Mr. Madan to write to the Municipal Corporation for construction on the plots which do not belong to Plaintiff No.1. He claimed that the letter was an insult to Mr. Sawant and the name of the Trustee was misused by Mr. Madan. Mr. Madan as aforesaid was the Architect on behalf of the Plaintiff No.1, the owners of the plots. He stated that Mr. P. K. Sawant and others had briefed Mr. Madan and "whether Mr. Madan had exceeded his brief".

23. It is to the credit of Dr. Tulzapurkar that he relied only upon this most important document, from amongst a mass of documents admitted by both parties. This letter was shown to Plaintiff No.2 in confrontation in his crossexamination. The witness himself could not explain the letter and did not refute its contents, but sought to blame the Architect. Hence the fact that Plaintiff No.1 had also sought to apply for construction on the adjoining plots being Plot Nos.242, 243 and 244 as its own plot cannot be bypassed. This aspect further shows that that plot was sought to be used by Plaintiff No.1 as its own plot at an earlier point in time when it sought to put up certain development on that plot also. The Plaintiff No.1, therefore, did have some connection with the said plots. Plaintiff No.1 did try to at least usurp the plots even if they were not allotted to it and remained to be the property of the State of Maharashtra. The land of Plaintiff No.1 was adjoining those plots. The Plaintiff No.2, the President of Plaintiff No.1 and the then Chief Minister of the State of Maharashtra, was a common entity to represent both the plots. Plaintiff No.1 through its Architect did at least try to develop it. The Plaintiff No.1 has taken no steps against the Architect at any point in time. It is that plot over which the truck was parked. It is that plot on which the truck was loaded and it is that plot from which the cement bags were delivered.

24. Allegations had been made earlier on affidavit in a Court proceeding. They were only graphically illustrated by way of the photograph later in the impugned publications. The plot of Plaintiff No.1 and the activities of Plaintiff No.2 is not

wholly distinct and different from the adjoining plots. In his capacity as the Chief Minister of the State of Maharashtra, Plaintiff No.2 would be in a very comfortable position to utilize the plot adjoining the plot allotted to Plaintiff No.1 whose President he was. Consequently, the publication showing that the truck was being loaded with cement bags from the former police barracks IN the plot is not far remote from the truth. The barbed wire fence is the only thin dividing line between the two plots. Since initially the two plots belonged to the State of Maharashtra, the barbed wire fence would not have been there. It is only after allotment of the plots to the Plaintiff No.1 which was a part of the plots of the State of Maharashtra that Plaintiff No.1 may have put up the fence. Despite that the activities alleged to have been carried out by Plaintiff No.2 were carried out not only on the plot of Plaintiff No.1 but also the adjoining plot as is shown in the photographs.

25. It is in view of these facts that the affront taken by the Plaintiffs to the two publications and the two photographs in the letter written to the Defendant on the date of the publications must be seen.

26. The Plaintiffs by their letter dated 3rd April 1983 took strong exception to the aforesaid publication. The Plaintiffs and more specially its President, Plaintiff No.2 claimed that it contained false and misleading statements. The letter of Plaintiff No.1 more specially stated that the barracks which appear in the photograph in the aforesaid two publications were owned by the State of Maharashtra and were in the physical possession of the Executive Engineer, Public Works Department (PWD) Bombay Central Division, Worli, Mumbai. The Plaintiffs sought to clarify a certain information gathered by them and stated that cement was stored in those barracks by one A.N. Shaikh, Executive Engineer, Bombay Central Division, Worli, Mumbai of the PWD of the State of Maharashtra and that the department had "received the cement in the ordinary course of their work for using it in the works concerned". The Plaintiffs, however did not specify what could be the ordinary course of the business of the State of Maharashtra to receive and hoard cement. This very first communication by the Plaintiffs taking umbrage at the contents of the publication must be understood in the light of the fact that the Plaintiffs had themselves claimed ownership of not only the plots which were allotted to them, but the adjoining land also belonging to the State of Maharashtra and had sought, under their Architect's letter, even to develop it. The Plaintiffs, as the principals, must be held primarily responsible for the acts of their agent, the Architect under the seminal rule *Qui facie per alium, facie per se*. Though then unknown to the Defendants, the Plaintiffs claimed that the land was of the State of Maharashtra since it was yet not transferred to the Plaintiffs to shrug off their connection and responsibility with what happened on that plot. The Plaintiffs called upon the Defendants to publish the entire letter of the Plaintiffs in their publication at the same space occupied by the initial publication.

27. The Defendants have, of course, not published the entire letter. The contents of the news which was at that time an important part of current affairs was

published by the Defendants upon their own research alongside the Plaintiffs' claim. The Defendants, therefore, set out in the later publication dated 7th April 1983 the fact that their Journalists were taken by the first Plaintiff to the said plot to demonstrate that "no cement had been stored there". Their officials offered to produce before the Defendants the details regarding the plot allotted to the Plaintiffs by the State of Maharashtra. The publication showed the factum of the meeting and the offer followed by the most essential part of the Plaintiffs' letter to the Defendants dated 3rd April 1983 cited above. Having published that fact about the claim of the Plaintiffs in their letter relating to the possession of the plot, the Defendants further showed in the said publication how they learnt about the storage of cement, not by the State of Maharashtra, but by the Plaintiffs and recited that that arose out of an affidavit filed by one G.R. Kamat in the proceedings in the High Court in which Plaintiff No.2 came to be indicted. The said Kamat was a neighbour; he lived on the opposite plot. His affidavit threw "direct light on the plot" and claimed that "cement belonging to the Government had been directed in a clandestine manner to the trust". These facts came to be shown in the said publication followed by the Defendants' analogy showing the fact that in the affidavit filed by the Plaintiffs' trust in the High Court proceedings the Plaintiffs had not referred to "barracklike rooms on the plot". The defendants published also that the emphasis on "physical possession" was claimed by the Plaintiffs for the first time in their letter dated 3rd April 1983 with a further clarification of its own that on the plot itself there was no indication that the barracks were in control of the PWD.

28. It is the Plaintiffs' case that though Plaintiffs called upon the Defendants to publish their letter showing the correct facts, the Defendants did not do so. The Defendants also did not apologize for the incorrect publication made on 3rd April 1983 and merely sought to explain the situation. This main case of the Plaintiffs must be understood from what has appeared on record later relating to the Plaintiffs' connection with the Government plot as shown by the Architect's letter referred to above.

29. It may be mentioned that the publication itself was made not upon rumours or upon hearsay. It was made upon the Defendants' Journalist, Reporter as well as Photographer going to the suit site and actually documenting what was going on there and publishing it for the public. If, however, the physical possession of the ownership of the plot came up for question, the Defendants went back to the plot with the Plaintiffs to satisfy themselves that the Plaintiffs' cement was not stored there. The Defendants would not know the true legal position of the plot of land or what the Plaintiffs were doing with it. The Plaintiffs would know that aspect fully. The Plaintiffs would know how they were seeking to deal with the plot which was allotted as also the plot which was until then not allotted to the Plaintiffs, whether it be for the purpose of the trust or for extraneous purpose like the storing of cement. Consequently, what the Plaintiffs informed the Defendants about the legal position of ownership and possession of the plot shown in the photographs is seen to be misleading, if not untrue. The barracks

were indeed owned by the State of Maharashtra; the land itself belonged to the State including the Plaintiffs' land which was adjoining that land just prior to its allotment to the Plaintiffs. The statement that the Executive Engineer of the PWD was in physical possession is not a statement of fact, but a statement of what is expected to be the position and consequently, giving details including naming the Executive Engineer who received the cement would not disconnect the Plaintiffs entirely from the episode or the photographs. The Plaintiffs stated the position as it should have been. The Plaintiffs have not proved that statement by examining Mr. A.R. Shaikh. The Plaintiffs have even otherwise not proved by documentary evidence how the cement was purchased by the Government of Maharashtra and received by its officer, the Executive Engineer of the PWD of the State of Maharashtra. The Plaintiffs have also not shown how much cement was required, purchased and used by the Government in what they call its ordinary course of work. And this is when the Plaintiffs have sought to develop that same plot which stood in the name of the Government of Maharashtra along with the adjoining plot allotted to the Plaintiffs. Consequently, the explanation of the Defendants of how they came to learn about the plot and the affidavit of Mr. Kamat without any affidavit of the Plaintiffs about its physical possession and how they verified the facts by going to the plot and photographing it to show the removal of the cement is well explained. It is not understood why the Defendants can have any regret or remorse at publishing its first publication. The consequent publication itself seeks to justify how the first publication was made. It seeks to show the comment upon the publication as also the Plaintiffs' action. It has to be seen whether the justification is enough and sound and whether the comment is fair.

30. It may be mentioned that some time later on 4th June 1983 a further publication was made in the Defendants' newspaper which is apparently consequent upon the initial publication. It shows that the State Government had asked the Anti Corruption Bureau (ACB) to look into the removal of 240 bags of cement on 2nd April 1983 from the police barracks used as a temporary godown by the PWD near the Plaintiffs' plot. The publication shows how the Government took action upon the Defendants reporting about the movement of the truck carrying the cement bags from the Government barracks on what was called the Plaintiffs' plot (or what was adjoining the Plaintiffs' plot, but under active control of the Plaintiffs then) towards Borivli in the Northern suburb instead of towards the construction site at the JJ School of Arts in South Bombay. That publication further shows that this movement came to light when one of the reporters followed the truck until Borivli where it halted for a long time at a lonely place. The Defendants further published the allegations of the Plaintiffs of slander and the fact that their Reporters were motivated and made bold to state that the cement was unauthorisedly diverted for some other project. The report also showed that PWD officials insisted that the cement was dispatched to JJ School of Arts on 2nd April 1983, but could not explain why the truck carrying a specified registration number went to the North of Bombay. It further published that the officers of the PWD were also unaware that the barracks were used to

store cement until they read the Defendants' newspaper and that the cement stored in the barracks by the Government was far in excess of the PWD's regular godowns at Parel and Worli. This was the usage of the rationed commodity reported by the Defendants.

31. The said publication further reported about the ownership of the plots as being a matter of dispute. It is interesting to note how that dispute is also set out in that publication:

PWD officials insist that the land has been allotted to the Mandal (Plaintiffs) although it has not been handed over to it, while the Mandal contends that it has not been allotted the land though it asked for it.

32. This is to be appreciated in the light of the Architect's letter known to the Plaintiffs and unknown to the Defendants then. Consequently, the Defendants' further research resulting in further reporting in that publication shows that these plots were included in the sketch plan drawn out by the Plaintiffs' Architect Mr. S.Y. Madan. It also refers to the talk the Defendants had upon the Plaintiffs taking the Defendants' Reporters to the plot when the Defendants met the Plaintiffs' representative one S.A. Bhise and the Architect, both of whom are named in the publication. The publication culminates with the Architect's statement that those plots were necessary for the Plaintiffs' construction "which is described as a 600 sq. ft. Cinema Hall for Marathi films, a restaurant, a small banquet hall and 80 roomed hotel of which 12 would be used for a hostel with 6 beds each".

33. Pertinently the Plaintiffs have not taken exception to the later publication of the Defendants. These publications explain the initial publication including the photographs. These publications show why and under what circumstances the first publication came about. These publications show the Defendants' comment upon the publication. The Defendants being a newspaper publication of a print media constitute the nations fourth estate. The Defendant is the repository of the information required to be disseminated to the public in public interest and for allowing the public the access to constitute its right of information which is the corollary to the Defendants' freedom of expression.

34. Consequently, the dispute in this case is within a very narrow compass and upon the admitted facts and documents - essentially one - upon a litigation which was in progress and which was talk of the day. It has, therefore, to be seen whether the Defendants could have justified the publication and/or whether the Defendants made a fair comment upon a fact of general public information so as not to constitute any defamation or even the innuendos allegedly the Plaintiffs.

35. The freedom of the press for publishing reports in a newspaper, which is commensurate with the freedom of speech and expression of individuals, was considered as regards the publication of debates of the houses of Parliament similar to the publication of proceedings in a Court in the case of *Wason v. Walter* 1868 1869 4 L.R.Q.B. 73. Since the last about 150 years the Court in England

held that the faithful report in a public newspaper of a debate in either house of Parliament, containing a matter disparaging to the character of an individual was not actionable at the instance of the person whose character was in question. Those proceedings were as privileged as an accurate report of the proceedings of the Court of Justice in as much as the advantage of publicity to the community at large outweighs any private injury resulting from the publication. The Court held that reporting such proceedings was of great public concern and hence the newspaper had the full right to comment thereon provided they were done honestly and made in a fair spirit and could be justified by the circumstances as disclosed in the debate. In that case a certain attribution was made to one Sir F. Kelly who denied having made the statement attributed to him. Lord Chief Justice Cockburn paraphrased the question of law which came up for consideration thus:

The main question for our decision is, whether a faithful report in a public newspaper of a debate in either house of parliament, containing matter disparaging to the character of an individual, as having been spoken in the course of the debate, is actionable at the suit of the party whose character has thus been called in question. We are of opinion that it is not.

On page 88 the broader principle which was an exception to the general law of libel came to be considered from the standpoint and advantage to the community from the publicity given to the proceedings of the Court of justice. Importing from the decision in *Rex v. Wright* 8 T.R., at page 298, it was considered that by such publication the people obtain a knowledge of the law by which their dealings and conduct can be regulated and though it may be of disadvantage to the particular individual concerned, such publication is of vast importance to the public and would counterbalance the inconvenience to the private persons whose conduct may be the subject of such proceedings. Similarly taking from Lord Justice Campbell in the case of *Davison v. Duncan* it was observed that the balance of public benefit from publicity of Court proceeding is great. "It is of great consequence that the public should know what takes place in Court....., the inconvenience, therefore, arising from the chance of injury to private character is infinitesimally small as compared to the convenience of publicity". Hence upon the analogy of reasoning from *Rex v. Wright* it was held that those same principles would apply to Parliamentary proceedings "to allow the public to know what passes within their walls, so that nothing therein can be shrouded in secrecy and concealed from the knowledge of the nation". Thus the communications between the representatives of the people and their constituents can be made known to the people as it was their undoubted right not to be kept in ignorance of what happens in Parliament.

36. It is the basis upon which the press publications are made of what may become a corollary to the Court proceedings and the Court orders. The publications in these cases are the illustrations of analysing truth or the falsity what transpired in Court upon the affidavits of the parties which were considered

by the Court. Subject, therefore, to the only exception that it was a false publication, it could not be taken exception to.

37. In the case of *Khashoggi v. IPC Magazines Ltd. & another* 1986 3 AER 577 CA the publication of a report of an individual of otherwise private character leading to further publications were not injuncted merely upon the Defendants' publication seeking a justification which could be prima facie shown to Court. In that case an article about a divorce of a lady from her husband and her affair with another man sought to be injuncted from publication was refused. The publication informed the Court that they would not publish anything which they would not be able to justify. Affirming the words of Lord Coleridge Chief Justice in *Bonnard v. Perryman* (1891) 2 Chancery 269 at 284 the Court upheld the right of free speech which individuals should possess in public interest and held that it could be exercised without impediment so long as no wrongful act is done. It held that no wrong could be committed unless the libel was untrue.

38. It could, therefore, be seen that the salutary right and freedom of expression and the consequent publication is a cornerstone for a true and meaningful democracy, which we uphold and cherish. Courts would be rather reluctant to put fetters upon even an apprehended and expected libel if it could be justified and was not untrue.

39. In the case of *Bookbinder v. Tebbit* (1989) 1 AER 1169 CA the plea of justification of the Defendant would have been so heeded by the Court that upon the Defendants showing justification of a charge of the Plaintiff's claim, the Plaintiff sought to withdraw a part of his charge against the Defendants and cause them to have their defence struck off for such charge.

In that case the school stationary was printed with a caption "Support Nuclear Free Zones". The County Council incurred a cost of ? 50,000. The Defendant described it as "damn fool idea". The Plaintiff alleged an innuendo that such an expression would mean that the Counsel acted irresponsibly in causing large scale squandering of public funds by the Council under the Plaintiff's leadership. The Plaintiff made his claim only in respect of a particular charge of squandering ? 50,000 on printing the aforesaid caption on the stationary and applied for defence of justification passed on the general charge of squandering public funds to be struck off. The Appeal Court directed it to be struck off upon the Plaintiff withdrawing the charge that he would be shown to be irresponsible for squandering public money generally.

40. This judgment would go to show how the discipline of publishing any opinion about public figure in a democracy could be maintained in the interest of the public so that the actions of the public servants can be brought to the public and not stifled upon charges that they would expose such public figures or upon innuendo made out from the expression or publication.

41. The aspect of innuendo was brought out best in the case of *Lewis v. Daily Telegraph Ltd.* 1963 1 Q.B. 340 considered by the Court of Appeal in 1963 1QB

340 and reconsidered by the House of Lords in [1963] 2 AER 151. In that case two newspapers published statements that officers of the City of London Fraud Squad were inquiring into the affairs of R.Co. and its subsidiary companies and that the chairman of the R.Co., was one Lewis who brought actions for libel against each newspaper. The two sets of actions were tried separately. L pleaded an innuendo to the effect that the statement meant that he had been guilty of fraud or was suspected by the police of having been guilty of fraud or dishonesty in connection with R.Co.'s affairs. R. Co., pleaded an analogous innuendo. The plaintiffs did not allege special damage. The defendants admitted that the words were defamatory in their ordinary meaning, but pleaded justification in that the fraud squad were at the time of publication inquiring into the affairs of R.Co."

This concept has been explained by Lord Justice Reid to show thus: In an action for libel the question that is to be considered is what the words would convey to the ordinary man and not its construction in the legal sense. To hold that there was no innuendo in the true sense he took into consideration what the ordinary man would infer without any special knowledge from the publication. He set out the test laid down by Lord Selborne in the case of *Capital and Counties Bank v. George Henty & Sons* (1882) 7 App. Cas. 741 at p. 745 as to whether a reasonable man to whom the publication was made would be likely to understand it in a libellous sense. He visualised the conversation amongst ordinary men who are neither too suspicious nor too naive thus:

one of them might say - "Oh, if the fraud squad are after these people you can take it they are guilty". But I would expect the others to turn on him, if he did say that, with such remarks as - "Be fair. This is not a police state. No doubt their affairs are in a mess or the police would not be interested. But that could be because Lewis or the cashier has been very stupid or careless. We really must not jump to conclusions. The police are fair and know their job and we shall know soon enough if there is anything in it. Wait till we see if they charge him. I wouldn't trust him until this is cleared up, but it is another thing to condemn him unheard.

What the ordinary man, not avid for scandal, would read into the words complained of must be a matter of impression. I can only say that I do not think that he would infer guilt of fraud merely because an inquiry is on foot.

Lord Morris enunciated this very concept at page 163 thus:

..... a reasonable reader will probably be a fairminded reader. The fairminded reader would assume that a responsible newspaper would also be fair. If there was some private police inquiry in progress, the purpose of which was to ascertain whether or not there had been fraud or dishonesty what possible justification could there be for proclaiming this far and wide to all the readers of a newspaper?

.....a reasonable reader might well consider that no responsible newspaper would dare to publish, or would be so cruel as to publish, the words in question unless

the confidential information, which in some manner they had obtained, was not information merely to the effect that there was some kind of inquiry in progress but was information to the effect that there was fraud or dishonesty. Some reasonable readers might therefore think that the words conveyed the meaning that there must have been fraud or dishonesty. Furthermore, a reasonable 27 S.651.83-S.652.83.sxw reader might reflect that while the police may be concerned with inquiries as to whether some crime has or has not been committed, they are probably more often only concerned after a crime has been committed. They have to inquire whether they possess the necessary evidence for the launching of a prosecution. Reasonable readers might also think that inquiries into the affairs of a company if such inquiries were not concerned with fraud or dishonesty would not be conducted by the police at all. They would be conducted by persons or departments having no connexion with the City of London Police Fraud Squad. Some of such readers might therefore be led to believe that if there was an inquiry by the City of London Fraud Squad, which a newspaper felt justified in mentioning, it must have been an inquiry to collect and marshal evidence in order to launch a prosecution for some offences involving fraud or dishonesty which had been committed.

42. This illustrated elucidation would encompass what would transpire in the minds of the readers with which the Plaintiffs could have a serious objection. In this case the readers would visualise what was a part of the affidavit of Mr. Kamat. The readers would see the truckload of cement at the plot stated to be of the Plaintiffs. Since the plot seen in the background of the photograph was indeed the one on which the Plaintiffs exercised control even for developing it, what the readers would understand would not be far from the truth. When a truthful position is shown and when the position which is shown is later proved to be truthful there would be no question of any innuendo. Hence in this case it would not be correct that the readers would wrongfully conclude that the plot of land on which the truck carrying bags of cement stood belonged to the Plaintiffs when it did not. A reading of the entire publication as also the later explanation would show nothing remote from the truth, and it is the truth that not only the Court upholds, but our democracy stands for. It is that truth which is a matter of great public importance to be informed to the people as held in the case of *Wason v. Walter*. It is that truth which would be the right of the community to receive, the injury resulting to the Plaintiffs, if any, notwithstanding. Consequently, the Defendants' right to communicate in their newspaper publication upon the actual state of current affairs which was the right of the citizens to receive would not be actionable and consequent upon the proceedings in the Court which had already indicted Plaintiff No.2, which were earlier reported, and which could be explained and illustrated by the Defendants, their publication would be of vast importance to the public though they may be of disadvantage to the Plaintiffs; the advantage to the public would "more than counter balance the inconvenience to the private persons whose conduct may be the subject of the proceedings" as held in *Wason v. Walter* from the observations

in the case of *Rex v. Wright*. Consequently, the Defendants' publication brought out the corollary to the proceedings before the Court. It showed the matter which could not be "shrouded in secrecy and concealed from the knowledge of the nation" as it related to the representatives of the people, in this case the people's first representative in the State. Hence as in the case of parliamentary proceedings, so also relating to Court proceedings, the people could not be kept in darkness and ignorance, which was not only the function, but the duty of the Defendants, subject only to their libel not being untrue. In this case the Defendants have shown that it was not untrue.

43. The aspect of fair comment considering the right of expression of the Defendant and the right of obtaining information by the public specially for a matter of public concern, which at the relevant time was the current affairs, is, therefore, required to be considered from the English and Indian precedents. The House of Lords in England considered the aspect of fair comment at least since the case of *Dr. Marie Stopes in Sutherland & Ors. v. Stopes* 1925 AC 47 HL. In that case Dr. Stopes brought an action against the publishers who criticized her controversial work contained in a book showing aspects in favour of artificial prevention of conception for constructive birth control as a "monstrous campaign of birth control". The publication sought to show the dangers alleged to be involved in artificial birth control and contended that Dr. Stopes was taking advantage of the ignorance of the poor to subject them to experiments, and that her work was "a more serious crime than for which Charles Bradlaugh was condemned to jail". It was seen by the trial Court that the conviction of Bradlaugh was upon his book recommending methods of birth control which was seen as an obscene libel and the obscenity was seen in describing and recommending such methods of control.

The case of the Defendants was that their work was in substance and in fact expressions of opinion which were fair comments made in good faith and without malice upon matters of public interest. The Court had to consider whether the statement of monstrosity and the reference to another person who was committed to jail was a justification and/or a fair comment upon the work of Dr. Stopes.

This was considered upon the Defendant's contention that the Plaintiff had subjected poor persons to a social experiment which was contrary to the laws of nature and that the experiment was the most harmful method of doing so. The Defendants were seen to have made a comparison of the Plaintiff's campaign by means of literature not less obscene than that for which Charles Bradlaugh was prosecuted.

The Court of Appeal considered two expressions upon which the question of fair comment would arise:

(1) "instincts of the poor"

and

(2) "monstrous campaign"

The Court considered that the statement about the instincts of the poor being against the practice of using contraceptives was not a comment upon the Plaintiff's conduct at all though it was an expression of opinion. It expressed the opinion of the writer about the practice even if it made a reflection upon the Plaintiff. It was seen not to be unfair. On the other hand the word "monstrous" was seen to be undoubtedly a comment and if that was unfair it could be complained against. The Court considered that if the campaign circulated obscene and criminal matter, the description "monstrous" would not constitute that libel though it may accept that the Plaintiff's offence was more serious than Bradlaugh's. Hence the Court observed:

If the substantive charge, that the campaign is obscene and criminal, may justly be made, a description of the same campaign as "monstrous" or "serious" is not a new and separate charge, but a mere shadow of the substantive charge for which a separate justification is not required. Upon this point there is considerable authority. Thus in *Edwards v. Bell Burrough J.* said that "as much must be justified as meets the sting of the charge, and if any thing be contained in a charge which does not add to the sting of it, that need not be justified.

This therefore is the test of fair comment - the persons against whom a charge was made had to only show the substance of the charge. If that is shown they need not justify the additional words [See. *Morrison v. Harmer* 3 Bing. N. C. 759,767].

The Court accepted the conclusion of Coleridge J. in *Cooper v. Lawson* 8 Ad.& E. 746 753.

If you prove the fact you prove the correctness of the comment. The Court further observed:

It is clear that the truth of a libel affords a complete answer to civil proceedings. This defence is raised by plea of justification on the ground that the words are true in substance and in fact. Such a plea of justification means that the libel is true not only in its allegations of fact but also in any comments made therein.

The defence of fair comment on matters of public interest is totally different. The defendant who raises this defence does not take upon himself the burden of showing that the comments are true. If the facts are truly stated with regard to a matter of public interest, the defendant will succeed in his defence to an action of libel if the jury are satisfied that the comments are fairly and honestly made. To raise this defence there must, of course, be a basis of fact on which the comment is made.

These are, therefore, the parameters of the two separate defences made out since 1925.

In a given case both the pleas can be simultaneously taken, as in this case.

When a publication is made, comment is the essence. Whether it is fair or not has to be seen even if it is not true. When a justification is made, it has to be on truthful fact. Hence the Defendants may state that the facts are truthful based upon his conduct and that the as comments are fair.

The Defendants in this case have sought to show that the publication was truthful by what their reporter saw and what their photographer photographed. That was the scene that actually prevailed. The Defendants commented upon that scene in the very first publication on 3rd April, 1983. The Defendants had relied upon certain statements made on oath in the litigation which was in progress and which had reader value and in which the public were interested. The Defendant thereafter justified how even the adjoining plot was essentially the Plaintiffs' plot and how the Plaintiffs could have exercised control over that plot by using it for storing and later transporting the cement bags in the godown and then in the trucks. This was what has been called a "rolled up" defence.

Hence it was observed that even if the comments are not true, if they are made in good faith and if they are fair they could be made; if they exceeded the bounds of fair comments the defence would fail.

The Judgment observes and extracts from the case of *Parmiter v. Coupland* (1840) 6 M&W. 105 @ 108.

Every subject has a right to comment on the acts of public men which concern him as a subject of the realm, if he do not make his commentary a cloak for malice or slander.

This would be even more applicable to a case of a public officer of the highest rank who was then under the scanner.

The Court also considered the case for which Bradlaugh appeared to be on the wrong side of the law.

Hence the Court concluded,

To make written language libellous, or spoken language slanderous, it is fundamental and essential that they be of and concerning a person, be untrue in substance and in fact, and be defamatory in nature. There is no exception to these rules, whether the language be the language stating fact or stating opinion. When facts are stated they can be justified as being, although defamatory and of and concerning the plaintiff, yet true; when opinions are stated they can be justified on precisely the same groundsnamely, that although of and concerning the plaintiff and defamatory, yet they also are true. In the next place, when in the course of the statement of defamatory matter both facts and opinions are set forth, it is upon similar principles open to a defendant to say that in the entirety, both fact and opinion, is true in substance and in fact.

In this case the basis of the fact was that the adjoining plot was used and developed by the 1st Plaintiff and hence could be used by the Plaintiffs as their

plot and hence the cement bags could have been stored there and could have gone out of the plot as shown in the photographs.

44. In the case of *Kemsley v. Foot and Ors.* 1952 AC 345 HL the expression "lower than Kemsley" was objected to by the Plaintiff. Kemsley owned a newspaper. In an article in his publication another author unconnected with Kemsley was criticized as being an artist lower than him. In an action of libel, fair comment was pleaded. It was held:

.....in order to admit the plea of fair comment it was unnecessary that all the facts on which the comment was based should be stated in the alleged libel. Here a sufficient substratum of fact was to be implied from the words, viz., that the plaintiff was responsible for the press of which he was the active proprietor. The criticism was that the press was low and any facts sufficient to justify that statement would entitle the defendants to succeed. Failure to establish all the facts given in the particulars of defence would not necessarily disentitle them to succeed.

The relevant questions to be determined were: (1), Is the subjectmatter indicated with sufficient clarity to justify comment being made ? And (2) Is the comment actually made such as an honest, though possibly prejudiced, man might make ?

It was observed per Lord Porter:

The comment upon these matters is said to be criticism of the way in which the plaintiff's newspapers are conducted and to assert that that conduct is of a low character, that the defendants are entitled to criticize that conduct, and, as it is a matter of public interest, to comment fairly upon it.

Although the article complained of uses the phrase "Lower than Kemsley," that language is accompanied by an attack on Lord Beaverbrook's papers, and it is at least arguable that the attack is on the Kemsley Press and not on Lord Kemsley's personal character save in so far as it is exhibited in the press for which he is responsible. Nevertheless, libel must reflect upon a person and Lord Kemsley is held up as worthy of attack on the ground that he is a newspaper proprietor who prostitutes his position by conducting his newspapers or permitting them to be conducted in an undesirable way.

If an author writes a play or a book or a composer composes a musical work, he is submitting that work to the public and thereby inviting comment. Not all the public will see or read or hear it but the work is public in the same sense as a case in the Law Courts is said to be heard in public. In many cases it is not possible for everyone who is interested, to attend a trial, but in so far as there is room for them in the court all are entitled to do so, and the subjectmatter upon which comment can be made is indicated to the world at large.

The same observation is true of a newspaper. Whether the criticism is confined to a particular issue or deals with the way in which it is in general conducted, the

subjectmatter upon which criticism is made has been submitted to the public, though by no means all those to whom the alleged libel has been published will have seen or are likely to see the various issues. Accordingly, its contents and conduct are open to comment on the ground that the public have at least the opportunity of ascertaining for themselves the subjectmatter upon which the comment is founded.

Quoting from Odgers on Libel and Slander (6th ed., 1929), at p. 166 it was further observed :

it is difficult to distinguish an allegation of fact from an expression of opinion. It often depends on what is stated in the rest of the article. If the defendant accurately states what some public man has really done, and then asserts that "such onduct is disgraceful," this is merely the expression of his opinion, his comment on the plaintiff's conduct. So, if without setting it out, he identifies the conduct on which he comments by a clear reference. In either case, the defendant enables his readers to judge for themselves how far his opinion is well founded; and, therefore, what would otherwise have been an allegation of fact becomes merely a comment. But if he asserts that the plaintiff has been guilty of disgraceful conduct, and does not state what that conduct was, this is an allegation of fact for which there is no defence but privilege or truth. The same considerations apply where a defendant has drawn from certain facts an inference derogatory to the plaintiff. If he states the bare inference without the facts on which it is based, such inference will be treated as an allegation of fact. But if he sets out the facts correctly, and then gives his inference, stating it as his inference from those facts, such inference will, as a rule, be deemed a comment. But even in this case the writer must be careful to state the inference as an inference, and not to assert it as a new and independent fact; otherwise, his inference will become something more than a comment, and he may be driven to justify it as an allegation of fact.

any facts sufficient to justify that statement would entitle the defendants to succeed in a plea of fair comment. Twenty facts might be given in the particulars and only one justified, yet if that one fact were sufficient to support the comment so as to make it fair, a failure to prove the other nineteen would not of necessity defeat the defendants' plea.

Quoting the observation of Fletcher Moulton L. J. in *Hunt v. Star Newspaper Co. Ltd.* 1908 2 K.B. 309 31920 it was observed thus :

The law as to fair comment, so far as is material to the present case, stands as follows: In the first place, comment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment: see *Andrews v. Chapman*.

The distinctions between the facts and comments are succinctly laid down thus :

If the facts are stated separately and the comment appears as an inference drawn from those facts, any injustice that it might do will be to some extent negated by the reader seeing the grounds upon which the unfavourable inference is based. But if fact and comment be intermingled so that it is not reasonably clear what portion purports to be inference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer though not necessarily set out by him. In the one case the insufficiency of the facts to support the inference will lead fairminded men to reject the inference. In the other case it merely points to the existence of extrinsic facts which the writer considers to warrant the language he uses..... In the next place, in order to give room for the plea of fair comment the facts must be truly stated. If the facts upon which the comment purports to be made do not exist the foundation of the plea fails.

The aspect of the fair comment and the extent of fair comment is, therefore, clearly laid down. The motives of the publisher are also required to be considered. They should be warranted by the facts. There should be absolute allowance of expression once the publisher bonafide believed the facts to be true. In this case the publication is warranted by the facts. The parameters of fair comment laid down in the Judgment, therefore, must show the report of the facts and the comments about them. The facts must be truly stated and the comments must be bonafide and warranted.

Hence it is laid down:

if a newspaper publishes exactly what took place with no comment whatever, they would be justified in so doing as a matter of public interest, but if they add to that comment of their own, then the question is whether that comment was bona fide and fair comment.

This is because it is observed that the comment based on facts untruly stated can never be fair and the explanation in the Judgment about the statement that the newspaper was as low as of the Plaintiff was not a fact but a comment. However the Defendant can prove the facts but justify the comments and that is exactly what has been done by the Defendants in this case by producing the letter of the architect of the Plaintiff and confronting Plaintiff No.2 with the same in the cross-examination which, Plaintiff No.2 has not been able to satisfactorily explain to disclaim the Plaintiffs' entitlement to the adjoining plot completely.

45. In the case of *Tse Wai Chun Paul v. Albert Cheng* 2001 EMLR 777 the Court of Final Appeals of Hongkong held that,

The comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. The reader or hearer should be in a position to judge for himself how far the comment was well founded.

The purpose for which the defence of fair comment exists is to facilitate freedom

of expression by commenting upon matters of public interest. This accords with the constitutional guarantee of freedom of expression. And it is in the public interest that everyone should be free to express his own, honestly held views on such matters, subject always to the safeguards provided by the objective limits mentioned above. These safeguards ensure that defamatory comments can be seen for what they are namely, comments as distinct from statements of fact. They also ensure that those reading the comments have been material in enabling them to make up their own minds on whether they agree or disagree.

The defence of honest comment is available even if the comment was made with intent to injure, as where a politician seeks to damage his political opponent. The comment must be on a matter of public interest, recognisable as comment, be based on true or privileged facts, indicate the facts on which the comment is based, and "must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views.

This upheld the fundamental rights of expression and information of the publisher and the public which are two sides of the same coin. The justification of making the publication and the explanation upon the facts that arose from the litigation which were facts stated on oath and sought to be verified before publishing, would show the truth of the statements and consequently propriety of the justification as also the fairness of the comment in the rollup defence.

46. In the case of *London Artists Ltd. v. Littler* 1969 2 QB 375 CA also a rolled up pleading was considered upon an action for defamation. The Defendant published a letter suggesting that the Plaintiffs' play which was running at a particular theatre in London would end. The four players in the play sent notices, alleging an defamation against them, which was claimed to be unprecedented in the theatre would, and likely to stop the play.

It was considered that the contents of the letter stating that it was a plot of the 4 artists was a fact. That fact was seen to be false. If that was so it would be defamatory upon the suggestion that it was a combined effort.

Lord Denning considered that the contents of the letter; the statement of the facts as well as comment. The two had to be distinguished. He observed at page 391 that what is the matter of public interest must not be confined within the narrow limits thus :

Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment.

He gave an illustration of the case of a colliery whose sanitary conditions were commented upon in a publication. That was held to be a matter of public interest as the public would be legitimately concerned with those facts.

Hence Lord Denning drew the analogy with the stars in the theatre. What happens to a particular play would be a matter of public interest. Hence Lord Denning concluded that if the article would set out the facts which are defamatory to the public it must prove them to be true. The publisher must be ready to prove all the facts set out to be true and give particulars of the basic facts but he need not give particulars of the comments and the inference drawn from the facts. He held thus:

It is indeed the whole difference between a plea of fair comment and a plea of justification. In fair comment he need only prove the basic facts to be true. In justification he must prove also that the comments and inferences are true also.

If a publication is not held to be a statement of fact but a comment, he questioned whether there would be facts on which a fair minded man may make honestly such a comment and hold that opinion. The Defendant need not prove that the opinion was correct. The Plaintiff would have to prove the no fair minded man could honestly hold that opinion.

47. Lord Denning hence concluded what he held on behalf of the law of fair comment thus :

In the upshot it comes to this: the fate of The Right Honourable Gentleman was a matter of public interest. Mr. Emile Littler was fully entitled to comment on it as long as his comment was fair and honest. He was entitled to give his views to the public through the press. But I think he went beyond the bounds of fair comment. He was carried away by his feelings at the moment. He did not wait long enough to check the facts and to get them right. He had no defence except as to damages.

In this case what is to be seen is the fact that cement bags were stored as also the fact that they were transported in trucks as shown in the photographs. It was on or just outside the Plaintiffs' plot. Even if it was just outside of Plaintiffs' plot and adjoining the plot and it was the plot on which the Plaintiffs had sought to assume control and the plot which they were seeking to develop. The comment, therefore, that cement was stored on the Plaintiffs' plot and transported therefrom was neither far fetched, nor beyond bounds, nor without verifying the facts.

48. In the case of *Burstein v. Times Newspapers Ltd.* 2001 1 W.L.R. 579 CA, the matters directly relevant to the background of the case for damages were considered as admissible. The Plaintiff associated with a group called "The Hacklers". This group opposed modernist music. They encouraged the public to boo at the end of the performance of an opera. It was published by the Defendant that the Plaintiff "used to organise bands of hecklers to go about wrecking performances of modern atonal music". The Defendants did not seek to justify the meaning of the words complained of. They only pleaded that they were fair comment on a matter of public interest. It was reported that the Plaintiff actively and publicly sought to vilify the music. His action was

deliberately provocative and insulting to the composers as also the listeners. The Plaintiff described such music as "sonic sewage". The Plaintiff's manifesto was in arrogant and insulting language. The Plaintiff, amongst others, was one of the opponents of modernist performance. He booed at the end of the performance. It was observed:

The context of that publication was in short as follows. It was written in relation to a musical composer who had in the past (a) widely publicised his distaste for modernist atonal music; (b) publicly claimed to have organised a band of people to boo at the end of at least one performance of modern atonal music; (c) himself joined in the booing after such a performance; and (d) later boasted that he had done so.

It was held that those matters were directly relevant to the consideration of the claim of damages for libel and hence were admissible.

In our case the fact that the other plot was sought to be developed was relevant and constitutes a fair comment, in fact, truth, upon the admission in the cross-examination by the evasive reply of Plaintiff No.2.

49. The defence of fair comment has been considered in India since the case of Subhas Chandra Bose v. R. Knight & Sons 1928 ILR Cal 1121. Subhas Chandra Bose sued for defamation upon an article published in the Defendant's newspaper imputing that he was a member of a terrorist organization. The Defendant claimed privilege and fair comment in the matter of public interest. Those were the years of the freedom movement. There could have been various acts which were termed disobedience to the rule of law. Under such state of circumstances it would certainly be in public interest to publish what had transpired upon the activities of all persons. The specific statutory privilege that was granted to newspapers in England under the specific legislation passed in 1888 was not prevalent in India. The privilege in newspapers was therefore, exactly the same as that of any ordinary person to make comment in public interest. The comment which was made in the newspaper related to the speech of the then Governor of Bengal made at Malda, Bengal. In the publication of the article it was claimed that highly defamatory statements were made and that certain facts and comments of the newspaper were mixed up. The result was an accusation of a criminal offence which went beyond fair comment of what was the Governor's speech. The publication showed "the directing brain" and asserted that "every single man arrested is a member of a terrorist organization". The Governor's speech was that the man who lived outside the law - the outlaws - were danger to the State, sought to attain their objects by violence and intimidation and if not checked would carry out more murders. Those persons were arrested upon evidence of many different sources unknown to each other. The article, however, showed that the persons who are arrested belong to a prominent political party and that they were arrested in that behalf. The article spoke about the "foul and far-reaching conspiracy". It added that it left "men murdered, shops wrecked, rails removed, bombs and imported weapons

found". There was a difference in the Governor's speech and in the article. Whereas one aimed at the putting down crime, the other aimed at the political party. The article, therefore, referred to an innuendo that the Plaintiff was the terrorist steeped in crime. The Court considered what an ordinary reader would imply from the article. He would gather the impression that "Subhas Chandra Bose was not arrested because he was a Swarajist, he was arrested because he was terrorist". The Governor's speech would show evidence against him. It had to be seen whether that was a fair comment. If the article was correct the Plaintiff would be seen to be guilty of a crime of the most heinous character. Though, therefore, the article could refer to the fact that the Governor had caused the arrest of persons who he was satisfied were terrorists, but should refrain from conveying to the ordinary reader the opinion of their own which was in effect the reiteration of a charge of criminal conduct. It was observed that the fact of the arrest, and the reasons for the arrest as stated by the Governor were matters of public interest and were correctly stated. However the views of the publisher added thereto in justifying criminal conduct by criminal conspiracy to murder made an innuendo that the Plaintiff was the criminal which was certainly unfair comment. Upon such a reading of fair comment the suit of Subash Chandra Bose for damages for defamation was decreed with costs in both the Courts.

50. In the case of *Mitha Rustomji Urzban v. Nusserwanji Nowroji Engineer* AIR 1941 (28) Bom 278 it was held that a publication in a newspaper commenting upon an individual must be fairly made. If the comment is defamatory the Defendant is required to prove the truth and the Plaintiff need not prove malice. The journalist has right to hold his views and express them. Whether or not his views are correct or just or moderate, but he cannot go beyond the limits which the law calls "fair".

In that case the Plaintiff conducted certain dancing classes. The Defendant published an article commenting that the moral future of the girls would be spoiled by attending classes of the type which the Plaintiff conducts. It was contended that that was a bonafide comment on a matter of public interest. The comment was as regards the social, religious and moral future of the participants including their matrimonial prospects. It imputed that the Plaintiff was unfit to care for those girls making them "act as actresses on the stage". The expression of the criticism, which was held must be fair quoting the decision of Lord Esher M.R in the case of *Marivale v. Carson* (1887) 20 Q B D 275 thus:

Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work. It is very easy to say what would be clearly beyond that limit if, for instance, the writer attacked the private character of the author. But it is much more difficult to say what is within the limit. That must depend upon the circumstances of the particular case.

The Court held that the subject was of public interest, but the comment was not

warranted by the facts and hence "it takes the statements out of the sphere of fair comment".

51. The case of Tushar Kanti Ghose v. Bina Bhowmick 1952 ILR 2 Calcutta 161 also dealt with the requisites of fair comment. In that case the Plaintiffs' newspaper published an account of the workers represented by the Defendants' union. The imputations were made by the Plaintiffs upon the Defendants that they were guided and instigated by her. There was an earlier dispute between the Plaintiff's paper and its workmen which had resulted in a certain incident. The incident was reported under the title "another daylight robbery by discharged employees". The report inter alia showed that the Defendant had held the meeting with the workers 2 days ago. The newspaper did not state what advice was given. It then referred to the so called strike being conducted under her guidance. It showed that when the country was in the grip of a grave national emergency her workers under her guidance deprived them of record of news from various sources. The innuendo in the article suggested that she was behind the incident. The newspaper contended that in view of the past conduct of the Plaintiff who sued for defamation, their comment upon the conduct of the workers was fair and just and what they believed was true. The Court observed that the article showed that the Plaintiff was associated with the commission of daylight robbery and employment of hirelings. The Court observed that the article associated the Plaintiff both with the commission of robbery and the employment of higherlings. Even affiliation of one union to the other mentioned in the article made a direct reference to her. It would show that the Plaintiff had intention and continued the strike under a pretence of trade unionism. The Court dissected each para of the article showing the incorrect assertions and the unfair comments, as also the surrounding circumstances and observed "there could be no mistaking the fact that the Plaintiff was the target of the attack".

In a case where the comments were so distinctly unfair, the Court held that the malice was a surplusage and need not be proved since the plain meaning of the words in the articles clearly accused the Plaintiff of tricky communication, disloyalty to true trade union principles and other forms of dishonourable conduct imputing her character and credit. The Court, therefore, laid down the principles of fair comment thus:

that the right of fair comment is not a special right of a newspaper but is available to every person. The comment must be fair, on a matter of public interest and based on a true statement of facts or on inferences reasonably warranted and honestly drawn from such facts. After facts, and not mere matters of belief, have been stated truly, observations may be added, by way of comment, and they will be protected as fair comment, if they consist in inferences which might be legitimately drawn from the facts; provided they were not made with a malicious motive.

The Court further observed that the statements which were under examination, but were offensive allegations of unproved facts cannot uphold the defence of fair

comment. In fact in that case malice of the newspaper against the Plaintiff was shown in which circumstances the Court held that upon malice being shown the plea of fair comment failed. Of course, the Plaintiff would have to prove malice.

52. The aforesaid are the cases relied upon by the Plaintiffs of earlier decades as would be envisaged from the citations. The law constituting the freedom of expression and publication in public interest coupled with the freedom of obtaining information by the public has undergone a sea change in recent decades. The law laid down in England would demonstrate how since the last Century it has evolved initially from common law and then into international statutes and conventions.

53. In England the case of *South Hetton Coal Co. v. NorthEastern News Association Ltd. & Ors.* 18914 AER 548, more than a century ago, considered the fairness of comment in a newspaper in public interest. The published article dealt with the housing situation in a small village in England where the Plaintiffs carried on colliery business and provided readymade housing without much sanitation to the colliers. The article showed conditions in which the workers lived which would be proclaimed unfit and uninhabitable according to rules and moralities. It did not take the Court long to conclude that the people would have a right to know how their fellowmen lived and hence the article was in public interest. The conduct of the colliery properties should be criticized. Yet Lord Esher, M.R laid down the parameters of making such comment in public interest thus:

Yet, if the matter is one of public interest, the person who criticises must do so with moderation, and if it is shown that the criticism was malicious, or so unfair as to be exaggerated, then such criticism is not fair comment upon a matter of public interest, but is a libel for which damages can be recovered. If, however, it is a fair comment upon a matter of public interest, then it is not a libel at all, and the defendant is entitled to a verdict. If the matter complained of is fair comment upon a matter of public interest, that takes it out of the category of libels.

Lord Justice Lopes laid down the parameters of free and proper comment constituting no liable applying the test laid down by Bowen L.J in *Merivale v. Carson* thus:

... only when the writer goes beyond the limits of fair criticism that his criticism passes into the region of libel at all. It is for the jury to consider what impression would be produced in the mind of an unprejudiced reader who reads the report straight though, knowing nothing about the case before. They must not dwell too much on isolated passages; they must consider the report as a whole. If there are such deviations from absolute accuracy as to make the comment unfair, they must find for the plaintiff; but if there are no such deviations, or the deviation is minute, and within the latitude of fair discussion and within the region of that diversity of opinion which may be fairly and reasonably entertained by different persons upon the same subjectmatter, they should find for the defendant.....

54. The parameters of commenting have taken a quantum leap after about a century in the case of *Reynolds v. Times Newspapers Ltd & Ors.* 1999 4 AER 609 which has thereafter being known as "Reynold's Privilege".

In that case Mr. Reynold resigned as Prime Minister of Ireland following a political crisis in Ireland. He had been leader of the party. Mr. Reynold was one of the chief architects of that process, his resignation was therefore, a matter of public interest and of significance in the U.K. Two newspapers in England and Ireland published his account differently. The newspaper in England accused him of deliberately and dishonestly misleading the Irish House of Representatives and his coalition cabinet colleagues, especially the deputy prime minister. It failed to mention Reynold's explanation of the events. The Court observed that epithet "fair" as applied to the defence of comment on a matter of public interest was meaningless and misleading and "the true test is whether the opinion, however exaggerated, obstinate or prejudiced, was honestly held by the person expressing it". This new definition of fair comment has come to be the rule of law upon the salutary democratic principle of free speech and expression which cannot be curtailed merely because it might insinuate or insult an individual. Lord Nicholls expressed that the matter concerned the interaction between two fundamental rights: the freedom of expression and protection of reputation. In the context of a matter of political importance at page 614, accepting the dictum laid down by Lord Denning MR in the case of *London Artists Ltd. v. Littler* 1962 2 All ER 193 that public interest should not be confined within narrow limits for commenting fairly upon it, he observed that the fairness had to be judged by an objective standard of any fairminded person who could honestly express the opinion. He observed:

comment must be relevant to the facts to which it is addressed. It cannot be used as a cloak for mere invective"..... "It is important to keep in mind that this defence is concerned with the protection of comment, not imputations of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere. Further, to be within this defence the comment must be recognisable as comment, as distinct from an imputation of fact. The comment must explicitly or implicitly indicate at least in general terms, what are the facts on which the comment is being made"..... "One constraint does exist upon this defence. The comment must represent the honest belief of its author. If the plaintiff proves he was actuated by malice, this ground of defence will fail.

55. Lord Steyn referred to the new parameters as "the new legal landscape" for reconciling the right of free speech and the right to reputation. He, therefore, not only restricted himself to the parameters laid down by Lord Diplock J in *Silkin v. Beverbrook Newspapers Ltd.* 1958 2 All ER 516, which took out of the pervuew of fair comment statements made which were untrue, but included within it also effectually any false statement which the newspaper honestly believed to be true. Following the acceptance of Lord Justice Goff in *AG v. Guardian Newspapers ltd (No.2)* 1988 3 All ERR 545 at 660 that there was no difference between the

English law and the later article 10 of the European Convention for the Protection of Human Rights and Fundamental freedoms as well as Lord Justice Keith of Kinkel in *Derbyshire CC v. Times Newspapers Ltd.* 1993 1 All ER 1011 at 1021 he set out the reasons of how that was so - that he was the principal of liberty allowing individuals to be free to do everything other than what was forbidden by law and the constitutional right to freedom of expression in England later incorporated also into the Human Rights Act 1998. He, therefore, held that any exception to the freedom of expression must be justified as being necessary in a democracy.

56. The judgment referred to the general and special privilege of the publishers and the publications and took the parameters of every publication and expression far ahead of its times.

57. This principle known as Reynolds' privilege was followed with approval by the House of Lords in *Jameel and another v. Wall Street Journal Europe SPRL* 2006 4 All ER 1279. In that case typed brochures regarding funding various organisations specially by large business houses in Saudi Arabia came under the scanner of the detective agencies in the USA. A managing director of a large business house in the USA carrying on business in Brussels, Belgium was alleged to be a target of an article in the European publication of the Defendants newspaper. Following the dictum in the case of *Lewis v. Daily Telegraph Ltd.* *Lewis v. Associated Newspapers Ltd.* 1963 2 All ER 151 at 156 and *Derbyshire CC v. Times Newspapers Ltd.* 1993 1 All ER 1011 Lord Bingham extended the principle of Reynolds' privilege as enunciated in Article 10 of the above convention and observed that: Reynolds' Privilege "...carried the law forward in a way which gave much greater weight than the earlier law had done to the value of informed public debate of significant public issues". Lord Hoffmann observed that :

....Until very recently, the law of defamation was weighted in favour of claimants and the law of privacy weighted against them. True but trivial intrusions into private life were safe. Reports of investigations by the newspaper into matters of public concern which could be construed as reflecting badly on public figures, domestic or foreign were risky. The House attempted to redress the balance in favour of privacy in *Campbell v. MGN Ltd.* 2004 UKHL 22 : 2004 2 All ER 995 : 2004 2 AC 457 and in favour of greater freedom for the press to publish stories of genuine public interest in Reynolds.

Setting out the facts of the case he observed that the public money and the funds were channeled to terrorist funds in Saudi Arabia by their domestic supporters was undoubtedly of considerable public interest. The bank accounts of the Plaintiffs' Company were being monitored unknown to them. Certain revelations have been made against various institutions and banks including the Plaintiffs. Their names were recorded in an infamous list. The Plaintiff himself was in Tokyo. His legal advisers did not know about the secret inspection of its accounts and believed it could not be so in view of his reputation. The

newspaper, however, did not want to comment without consulting the Plaintiff who was away. The newspaper informed him that the report would be published the next day stating that the Plaintiff was not available for comment. The published report was held to fall within the parameters of "responsible journalism". The comment was allowed under "Reynolds privilege".

58. Though Counsel on behalf of the Plaintiff Mr. Pai argued that malice could be presumed and need not be proved if defamation was showed and has sought to place on record various judgments in that behalf, I find it unnecessary to deal with them as in this case there is absolutely no malice that is justifiably attributed to the Defendants. The Defendants acted in public interest; they sought to bring before the public a matter of great public interest at the relevant time at least locally in the State and hence there was total absence of malice.

59. In fact in the case of *Thomas v. Bradbury Agnew & Co. Limited* 1906 2K.B. 627 it was held that if fair comment was shown the Plaintiff would have to prove malice.

In that case the Private Secretary of a renowned Journalist authored a book on his employer after the latter's death titled "Fifty Years of Fleet Street: being the Life and Recollections of Sir John R. Robinson", the deceased Journalist. The Defendants' Editor reviewed the book. In its critique it made various comments derogatory to the Plaintiff showing not only his incapacity of the subject as a biography of the well known personality, but of mixing up his own material with that of his Master, dishonestly putting forward such work and passing off as his own, telling them clumsily with incompetence as a writer and to deceive the public that the matter was the Plaintiffs' original work. The Defendants' defence was that it was the bona fide criticism and comment upon the book in public interest. That being seen, the Plaintiff had to prove malice. The Plaintiff in fact gave evidence of such proof by the strong relations between the author and the critic and himself, the demeanour of the Plaintiff in Court as well as a separate article published instead of only a review of the book. Holding that that was not sufficient, it was observed that :

Proof of malice may take a criticism prima facie fair outside the right of fair comment, just as it takes a communication prima facie privileged outside the privilege.

60. In this case the long and verbose evidence of the Plaintiff No.2, (thanks to his long and verbose cross examination by the Defendants) has not shown, much less proved, malice. It has contended essentially that the statement itself is untrue requiring the Defendant to prove its truthfulness and justifying its publication. The rulings of malice is, therefore, of limited significance in this case.

61. The Defendants have shown and proved the truthfulness of the statements and the fair comment made by them in public interest. The defamation of the Plaintiffs alleged by them is, therefore, amply justified. The Plaintiffs' own conduct in dealing with the property by themselves, though not claimed by them,

itself takes the statements of the defendants outside the realm of defamation. The defamation or the malice and malafides alleged by the Plaintiffs is, therefore, not proved. Issue Nos. 1 and 2 are, therefore, answered in the negative and Issue Nos.3 and 4 are answered in the affirmative.

62. The damages claimed by the Plaintiffs cannot be granted.

63. The suit is dismissed. No order as to costs.