
(1888) 07 AHC CK 0002
In the Allahabad High Court

Mahip Singh

APPELLANT

Vs

Dawan Singh

RESPONDENT

Date of Decision : 02-07-1888

Acts Referred:

Citation : (1888) ILR (All) 425

Hon'ble Judges : Mahmood, J; Brodhurst, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Brodhurst, J.—In this case Mahip Singh, the plaintiff-respondent, stated in his plaint that one Sheobadan Singh had instituted a suit in the Court of the City Munsif of Jaunpur against Dawan Singh, the present defendant-appellant, and that in that suit Sheobadan Singh had cited him (Mahip Singh) as a witness; that on the 10th May 1887, whilst he was being examined as a witness before the Munsif, Dawan Singh abused him, making imputations against his mother, whereby he (Mahip Singh) was greatly defamed, was subjected to mental pain, and suffered loss of honour and of respect among his equals, and he therefore prayed that, with reference to the defendant's means, a decree might be passed in favour of him, (the plaintiff), against the defendant for Rs. 300 with costs.

2. Dawan Singh, in his written statement, denied that he had used any abusive language and averred that he had, in reply to a question asked by the Court, made a statement explaining why he had ceased to eat with Mahip Singh, and why there consequently was enmity between Mahip Singh and himself.

3. The Munsif recorded the deposition of each of the parties.

4. Mahip Singh stated: "The defendant abused me whereby I was dishonoured among the members of my brotherhood. As I was considered before the defendant abused me, so am I now also considered; no loss has occurred in this respect. He abused me, imputing bad conduct to my mother. At the time of giving evidence on a question asked by the then Munsif, the defendant gave

abuse to me. On the deposition being concluded the Munsif asked Dawan Singh the question, "What is the reason that so respectable a man (as the witness Mahip Singh) came to tell a lie," and thereupon Dawan Singh uttered abuse. He said: "Mahip Singh ke ma bap men farq hai; isse wajeh se Khana pina nahin hai."

5. Dawan Singh deposed: "I was being examined in my case, in which the plaintiff had come to give evidence on behalf of my opponent. I told the Munsif that there existed enmity between Mahip Singh and myself. The Munsif asked me,- "What is the enmity ?" I replied: There is enmity between myself and Mahip Singh in respect to eating and drinking. The Munsif again asked" What is the enmity and why has eating and drinking (together) ceased?" Thereupon I replied that food and drink were forsaken on account of Mahip Singh's mother." Of three issues framed by the Munsif, the first and the only one that need be specially referred to is,- "Did the defendant abuse the plaintiff, and if he did, does the suit lie for slander?"

6. The Munsif recorded the following judgment:

Issue I.-I took down the statement on oath of the plaintiff, He stated in his cross-examination that when Dawan Singh, defendant, was being examined by this Court in the former case, he was questioned by the Munsif Saheb- "Then what was the reason that Mahip Singh came to swear against you? "In answer he said: "Iske ma bap men farq hai; aur isse wajeh se khana pina nahin hai." Hence it is proved that the defendant then was in the witness-box, and, as such, he was bond fide answering a question put to him. I am therefore of opinion that he was privileged and the suit does not lie, for statements of witnesses can never be the subject of an action {vide para. 2, p. 117, Underbill's Torts). There are many cases in Addison's Torts. The plaintiff's pleader quoted I. L. R., 12 Cal., 109. That ruling has no bearing upon this case, for here the defendant was in the witness-box, whereas in the case cited the defendant abused when the plaintiff was in a mandir or temple, and so on. I need not, therefore, enter into the merits of the other issues.

7. "It is therefore ordered that the plaintiff's suit be dismissed with costs. He is to bear his own costs."

8. From this judgment the plaintiff preferred an appeal. The appeal was disposed of by the Subordinate Judge. He framed the following issues:

1. Is abuse actionable?

2. Was the defendant privileged in uttering it?

9. And in his judgment the Subordinate Judge observed: "On the first point I find that abuse in this country is certainly actionable. A suit for damages can be preferred against the persons who take so much liberty in Court without any provocation. The defendant pleads that he was privileged in doing so. He was bound to produce a copy of his deposition in support of his contention that he had used abuse while he was standing in the witness-box and answering

questions put to him, of this there being no iota of evidence. The plaintiff, in his deposition, has plainly stated that he was abused after the defendant's deposition was over. If this is a fact, and probably it is so in absence of any evidence to the contrary, then, in my opinion, he had no right to use the ill expression towards the plaintiff, a respectable person in his retired life. The Court of First Instance has misconstrued his deposition, in which he stated that after the deposition of the defendant, in answer to the question put to him by the Court, and not during the course of his examination in the witness-box, he was abused. The privilege of a witness lasts so long only as he is deposing on oath in the witness-box, but not after it."

10. With reference to these remarks the Subordinate Judge allowed the appeal and remanded the case to the first Court, u/s 562 of the Civil Procedure Code, for re-trial on the merits.

11. The pleas taken before us in second appeal are:

(1) Because the Court below has erred in ruling that abuse is actionable.

(2) Because the learned Subordinate Judge has misconstrued the respondent's deposition, which, taken as a whole, fails to disclose any cause of action.

(3) Because the statement was admittedly made in answer to a question put by the Court.

12. The suit, as shown by the plaint, was brought merely with reference to statements made by Dawan Singh on the 10th May 1887, in the Court of the City Munsif of Jaunpur. We have called for the former record and have examined it. The deposition of Dawan Singh does not contain any question or answer as referred to above and as admitted by both the parties to this suit. The evidence of Mahip Singh, however, is concluded with the following remarks: "There is no dispute between me and Dawan Singh."

13. This tends to show that ill-feeling between Mahip Singh and Dawan Singh had been alleged, and it affords corroboration to the statements of the parties.

14. The whole of the parol evidence was recorded on the 10th May 1887, and in the following order:

Plaintiff's witnesses.

Mahip Singh.

Dhan Lal Dubey.

Defendant's witnesses.

Jugrup Dasondhi.

Debi Dayal Singh.

Persons examined by the Court.

Dawan Singh, defendant.

Sheobadan Singh, plaintiff.

15. Not only was Dawan Singh examined in compliance with the order of the Munsif, but his evidence, as recorded in the vernacular, clearly shows that he was certainly twice called up and examined by the Munsif on the 10th May 1887. It was optional with the Munsif to re-examine Dawan Singh as often as he thought necessary whilst Dawan Singh was in Court and the suit was pending. It will be noticed that Mahip Singh's evidence was recorded first of all and that of Dawan Singh last but one. From the concurrent statements of the parties to this suit there is not, I think, any room for doubt that the Munsif, after having recorded the evidence of Dawan Singh as shown in the vernacular record, asked him why Mahip Singh had given evidence against him, and that, in reply to the Munsif's question, Dawan Singh stated that there was enmity between them, and when pressed by the Munsif to explain the cause of enmity, answered that there was enmity in respect to eating and drinking, and on being further pressed to explain what the reason for discontinuing eating and drinking together was, he replied, "Iske ma bap men farq hai, aur isse wajeh se khana pina nahin hai," which no doubt means there is a difference (of caste) between his father and mother, and on this account there is no eating and drinking ("together between him and myself")

16. I see no reason to think that Dawan Singh would have made use of the expressions taken objection to had he not been required to reply to questions put to him by the presiding Munsif. It is not Dawan Singh's fault that the Munsif asked him those questions and did not record the questions he put and the answers he received.

17. That such questions were asked of Dawan Singh by the Munsif is proved by the statements of both parties, and to punish Dawan Singh because the Munsif omitted to record the questions would be most inequitable.

18. Dawan Singh is a mere cultivator. Apparently he replied to the Munsif's questions on the spur of the moment. In doing so he did not make use of any coarse expression, and in fact, it would be almost impossible for any witness who, in answer to questions put to him by the presiding Judge, thought himself called upon to state that another witness, referred to by the Judge, was illegitimate, to convey his meaning in more delicate language than was used for that purpose by this illiterate peasant.

19. When the Munsif asked the questions of Dawan Singh, he doubtless did not expect to elicit the answer he finally received; and when that answer was given, the Munsif may, not unnaturally, have thought that all the questions and answers on that point had better be omitted from the record.

20. Witness-boxes are not amongst the articles of furniture supplied to our Civil Courts, but when a witness, after having been duly sworn, is during the

pendency of the suit being examined or re-examined in Court, either by counsel, by vakil, or by the presiding Judge, he is, in the "witness-box" within the ordinary acceptation of the phrase, and, with reference to what I have above written, I have no hesitation in holding that Dawan Singh at the time he answered the questions put to him by the Munsif, was in the "witness-box."

21. The only point now remaining for consideration is whether, under the circumstances I have mentioned, Dawan Singh, in deposing as he admits he did, was privileged or not.

22. In *Seaman v. Netherclift*, L.R., 2.C. P.D. 53, the head-note is as follows:

A witness in a Court of justice is absolutely privileged as to anything he may say as a witness having reference to the inquiry on which he is called as a witness.

A statement as to another matter, made to justify the witness in consequence of a question going to the witness's credit, has reference to the inquiry within the above rule.

Defendant, an expert in hand-writing, gave evidence in the trial of *D. v. M.* that, in his opinion, the signature to the will in question was a forgery. The jury found in favour of the will, and the presiding Judge made some very disparaging remarks on defendant's evidence. Soon afterwards defendant was called as a witness in favour of the genuineness of a document, on a charge of forgery before a Magistrate. In cross-examination he was asked whether he had given evidence in the suit of *D. v. M.* and whether he had read the Judge's remarks on his evidence. He answered "yes"; counsel asked no more questions, and defendant insisted on adding, though told by the Magistrate not to make any further statement as to *D. v. M.*, "I believe that will to be a rank forgery, and shall believe so to the day of my death."

An action of slander having been brought by one of the attesting witnesses to the will:

Held, that the words were spoken by defendant as a witness and had reference to the inquiry before the Magistrate, as they tended to justify the defendant, whose credit as a witness had been impugned, and that the defendant was absolutely privileged."

23. Cockburn, C. J., observed: "If there is anything as to which the authority is overwhelming, it is that a witness is privileged to the extent of what he says in the course of his examination. Neither is that privilege affected by the relevancy or irrelevancy of what he says; for then he would be obliged to judge of what is relevant or irrelevant, and questions might be, and are, constantly asked which are not strictly relevant to the issue. But that beyond all question this unqualified privilege extends to a witness is established by a long series of cases, the last of which is *Dawkins v. Lord Rokehy*, L. R. 7 H. L. 144, after which to contend to the contrary is hopeless. It was there expressly decided that the evidence of a witness with reference to the inquiry is privileged, notwithstanding it may be

malicious, and to ask us to decide to the contrary is to ask what is beyond our power. But I agree that if in this case, beyond being spoken maliciously, the words had not been spoken in the character of a witness or not while he was giving evidence in the case, the result might have been different."

24. With reference to the circumstances of this case and to the above ruling, I am of opinion that Dawan Singh was absolutely privileged in making the statements that he admittedly did make when he was examined as a witness in the Court of the City Munsif of Jaunpur.

25. I would therefore allow the appeal, reverse the judgment of the Lower Appellate Court, and restore the decree of the first Court dismissing the suit, and I would further order that all costs should be borne by the plaintiff-respondent.

Mahmood, J.

26. The plaintiff in this case came into Court alleging what has been briefly stated by the Munsif in this case in the following words:

That the plaintiff is a respectable person and was in the service of the Government. Sheobadan Singh had brought a suit against the defendant in this Court, and in that case Sheobadan had cited the plaintiff (present) as his witness; that on the 10th May 1887, the plaintiff was giving his deposition when the defendant abused him, making imputations upon his mother; that the abuse caused great insult to him and he suffered much mentally, and there was loss of respect amongst the brotherhood; hence the suit.

27. The learned Judge of the Lower Appellate Court in describing the suit has stated it to be one "for recovery of Rs. 300, the compensation of pain to plaintiff's soul and defamation, "by which terms I understand that the action is one ex delicto for recovery of damages arising out of the action of the defendant in having used insulting expressions on the 10th May 1887. The expressions then used were, as stated in the judgment of the first Court, that, with reference to the plaintiff, the defendant said: "Iske ma bap men farq hai; aur isse wajeh se khana pina nahin hai," which, as interpreted in English, means that the plaintiff's descent was illegitimate, and that he was therefore out of caste. This language was used in open Court and in answer to a question put to the defendant by the Court itself.

28. It does not appear that in the suit brought by Sheobadan Singh against the defendant Dawan Singh any question as to the legitimacy or illegitimacy of the plaintiff, or as to his being in or out of caste was a matter in issue, or otherwise relevant in the strict sense of the law of evidence, and indeed Mr. Kashi Prasad, who appears for the defendant in this Court, has conceded that the language was in its signification abusive, and that the grounds upon which it would not furnish a cause of action for a suit such as this would be only two-the first being that no special damage having accrued to the plaintiff by reason of the abusive language having been used, no action would lie; and, secondly, that even if the language

by itself were to be taken as abusive and actionable, it was privileged and such as would not furnish a cause of action for recovery of damages in a suit such as this.

29. It is not disputed that the language, taken in its ordinary Hindustani meaning, was abusive, and, as such, calculated to hurt the feelings of the plaintiff", to lower him in the estimation of his fellow-castemen, and such as might involve his being out-casted, if these statements were believed.

30. The defence set up is represented by the Munsif in the following words:

The defendant contends that he did not abuse the plaintiff; that the plaintiff had deposed that he could not eat with the defendant, whereupon the defendant had thrown some hints about its cause; that the suit cannot lie for slander; that the plaintiff has inflated his status: he is a cultivator and a pensioner.

31. Upon this state of the pleadings the Munsif as the Court of First Instance framed three issues, the first being whether the defendant abused the plaintiff, and if so, whether a suit would lie for slander; the second issue was whether the imputation was, as a matter of fact, true, and the third issue related to the measure of damages.

32. The Munsif however, after examining the parties, did not take evidence upon the issues, but held that the statement was made in the witness-box, and that the defendant "was bond fide answering a question put to him," and, as such, was not liable to the action, because such statement was privileged. In holding this view the Munsif has relied upon the cases cited at page 117 of Underbill's Law of Torts, where the summary of the cases is to the effect that "statements of a Judge acting judicially, whether relevant or not, are absolutely privileged: *Scott v. Stansfield*, L. R., 3 Ex. 220; and so are those of counsel, however irrelevant and however malicious: *Munster v. Lamb*, L. R., 11 Q. B. D., 588. Solicitors acting as advocates have a like privilege: *ibid*, and *Mackay v. Ford*, 29 L. R. Ex. 404. Statement of witnesses can never be the subject of an action: *Seaman v. Netherclift*, L. R., 2 C. P. D., 53; and a military man giving evidence before a military Court of enquiry, which has not power to administer an oath, is entitled to the same protection as that enjoyed by a witness under examination in a Court of justice: *Dawkins v. Rokeby*, L. R., 7 H. L., 744. If the evidence is false, the remedy is by indictment: *Henderson v. Broomhead*, 28 L. J. Ex. 860." The Munsif has also relied upon the English Law of Torts as contained in the work of Addison on that subject.

33. Upon this ground of law alone the Munsif, without entering into the merits of the case or taking any evidence in it other than the statements of the parties, dismissed the suit; but upon appeal the learned Judge of the Lower Appellate Court, reversing that order, has remanded the case for trial u/s 562 of the Civil Procedure Code. The view taken by the learned Judge of the Lower Appellate Court seems to be based upon two propositions, one being that the abusive language used by the defendant was in itself actionable without proof of special

or actual damage; and the other that the defendant could not be held to be privileged in making the statement which he did make. In remanding the case, the learned Judge of the Lower Appellate Court was inclined to hold that the abusive language used by the defendant towards the plaintiff was uttered after the defendant's deposition had already been taken in the Court, and the learned Judge goes on to say: "The privilege of a witness lasts so long only as he has been deposing on oath in the witness-box, but not after it.

34. Holding this view, the learned Judge was of opinion that this particular point as to whether or not the use of abusive language above mentioned was made under circumstances of privilege had not been duly dealt with by the first Court on evidence, as no evidence on the issue had duly been taken. And the remand proceeds upon that hypothesis.

35. What we have to determine in this case are two important questions of law:

36. The first is whether abusive language which aims at insulting a person is not per se actionable in tort under the law of British India (when the language is such that it causes injury to the feelings of the person towards whom it is used), without proof of any special or actual damage.

37. The second question is, whether under the circumstances of this case the words used by the defendant were such as can be held to be privileged by any rule prevailing in this country as a rule of law.

38. Upon the first of these points Mr. Kashi Prasad, in arguing the case for the appellant, has relied upon the authority of English cases as they are represented in the latest edition of Addison on Torts, the general effect of which cases is that abusive language is not per se actionable, unless it falls within certain limitations imposed by the common law of England. Indeed, all that Mr. Kashi Prasad relies upon is best formulated in Folkard's Treatise, Starkie's Law of Slander and Libel, by Folkard, 4th ed., 70, and in the most recent work upon the law of tort by Mr. Frederick Pollock at page 206 of his work, where the law of England, as it now stands, is laid down in the following words:

Slander is an actionable wrong when special damage can be shown to have followed from the utterance of the words complained of, and also in the following cases:

Where the words impute a criminal offence.

Where they impute having a contagious disease which would cause the person having it to be excluded from society.

Where they convey a charge of unfitness, dishonesty, or incompetence in an office, profession, or trade, in short, where they manifestly tend to prejudice a man in his calling.

39. Relying upon the authority of English law, the learned pleader argues that, inasmuch as in this case no special damage is either alleged in the plaint or

proved, the action was in itself not maintainable, because it did not furnish sufficient elements for a cause of action in tort. I have no doubt that the learned pleader is perfectly right so far as the English law of torts is concerned upon this particular point, and that if the suit had to be dealt with by me as a Judge sitting in England, I should have accepted his contention and decreed this appeal, the effect of which would be to dismiss the suit. But the matter, in my opinion, does not rest upon the exact position taken up by either the common law of England or the cases decided there. There is no authority with which I am acquainted which entitles any Court of justice sitting here in India to apply the English common law to the lives and liberties of the people of this country, irrespective of statutory provisions and of the rule of "justice, equity and good conscience," where no statutory provisions are available. There is no statute which renders that law applicable to this country, and if difficulties arise in dealing with questions such as those with which we have to deal in this case, it is because the Legislature has not yet thought fit to frame any special rules which would govern actions of this character. And further difficulty which arises in such cases is what, in the absence of statutory provisions, should be the line of action upon which the Courts of Justice should proceed in British India. Speaking for myself, I am perfectly willing, sitting here as one of her Majesty's Judges, to take the responsibility of saying that for the purpose of deciding such questions which affect a population vastly different to that of England in nationality, creed, and social conditions, the English common law, though it must always be referred to for guidance in questions of difficulty and regarded with respect, is not necessarily fit to be adopted in its integrity, irrespective of the conditions of this country. These, however, are views which affect the Legislature more than the Bench, and holding as I do that the law of British India upon this particular point is silent so far as legislative enactments are concerned, I proceed to state, or rather repeat what I have said before now as to what should be the rule in determining such questions when they arise for adjudication.

40. There is, indeed, a series of decisions to be found in the published reports upon the subject, but they are so silent as to general principles and so conflicting with each other that I cannot accept them to represent any defined rule of the common law of India. The state of the present law and my views thereupon are represented in what I have before now said elsewhere in the following words:

Defamation, as representing slander and libel consolidated, is an offence against reputation only, and, therefore, as the English law now stands, publication to a third person or persons is a condition precedent to its being regarded as actionable wrong; so that insulting words of however grave a nature, when addressed only to the plaintiff, do not amount to a tort, even though the insult be directly followed by mental distress or vexation leading to inability to attend to one's ordinary avocations of life. Again, even where insulting words are orally uttered in public, proof of special or actual damage is necessary, except in certain well-defined cases, to render them actionable. An "imputation, for example, by words however gross and on an occasion however public, on the

chastity of a modest matron or a pure virgin is not actionable, without proof that it has actually produced special temporal damage to her; neither is it actionable to call a man a swindler or a cheat, a blackguard or a rogue, or to say that he is a low fellow, a disgrace to the town, and unfit for decent society, unless it can be proved that actual legal damage has resulted to the plaintiff from the slander "(Addison on Torts, p. 37).

The truth seems to be that the English law of tort, whilst attaching considerable importance to physical injuries and to matters which result in pecuniary loss, does not attach sufficient significance to mental distress, and does not, therefore, afford sufficient protection against personal insult as distinguished from bodily injury and defamation. It is a question of no small consequence whether this characteristic of the English system should be introduced in India. I use the word "introduced," because, as the case-law now stands, the weight of authority is undoubtedly in favour of recognising mental distress caused by insulting words as in itself actionable, irrespective of special or actual damage. The following rulings of the Calcutta High Court are authorities for this proposition:

Kanoo Mundul v. Rahumooollah Mundul, W. E., January to July 1864, p. 269.

Moulvie Ghulam Hossein, Vakeel v. Hur Gobind Doss, Tushildar, 1 W. R., 19.

Shaikh Tukee v. Shaikh Khoshadel Biswas, 6 W. R., 151.

Osseemooddeen v. Fateh Mahomed, 7 W. R., 259.

Gour Chander Puteetundee v. A. L. Clay, 8 W. R., 256.

Sreenath Mookerjee v. Komal Kurmokar, 16 W. R., 83.

Kalee Coomar Mitter v. Ramguttee Bhattacharjee, 16 W. R., 84, note.

The reports of these various cases are not very complete, but so far as they go they leave no doubt that injury to feelings has been held as sufficient in itself to constitute a cause of action for recovery of damages, regardless of actual loss or harm. In the first of these cases, NORMAN, C. J., observing that the words, which are of the coarsest abuse, do undoubtedly impute that to the plaintiff which would, if believed, have been hurtful to the feelings of his family and have lowered his character in respect of his caste," goes on to say: "No doubt, actions for slander are often vexatious. But to prevent people from taking the law into their own hands, and for the preservation of peace and order, it is a matter of the greatest importance that Courts of justice should afford an effectual remedy to persons feeling themselves aggrieved by wanton and virulent abuse." In the second and the third cases it was held that actual injury and damage was not necessary to render the action maintainable, and it was observed in the latter case that injury might result to a man's feelings such as would entitle him to damages and the same view was adopted in the fourth case. These rulings were followed in the fifth case, where it was observed that "it does not follow that

because a man's professional position or gains are not injured by abuse received by him that his feelings are not injured and outraged." Again, in the sixth and the seventh cases similar rules were laid down, mental distress being taken to be a sufficient cause of action. Similarly, the Bombay High Court in *Kashi Ram v. Bhadu Bapuji*, 7 Bom. H. C. Rep., p. 17, A. C, after stating that the English law upon the subject was different, adopted the view of the Calcutta High Court, as the suit was brought in the mufassal and the parties to it were Hindus.

In none of these cases does it appear that the question of publication was raised or determined, and injury to feelings seems to have been regarded as the sole ground of action. On the other hand in *Phoolbasee Koer v. Barjun Singh*, 12 W. R. 369, and *Chundarnath Dhur v. Issurree Dassee*, 18 W. R. 531, the Calcutta High Court, without noticing any of its previous rulings, laid down the rule that abusive and threatening language without proof of actual damage did not constitute a cause of action at all for recovery of damages. Again, a learned Judge of the same Court (PONTIFEX, J.) in *Nilmadhub Mookerjee v. Dookeeram Khoitah*, 15 B. L. R. 161, observed that "actions for verbal slander ought not, in my opinion, to be encouraged, and that, unless there are special damages proved, the Court will be very reluctant to give any damages.

It can scarcely be doubted that these various rulings leave the law in a very unsatisfactory condition and there is need for legislative interference. What form that interference should take is a question which, in my opinion, should be determined according to the conditions of life and the feelings of the people of India. And, looking at the matter from this point of view, I have no doubt that the seven rulings of the Calcutta High Court which I have enumerated above lay down the rule most suitable for India, though it is more in conformity with the Roman than the English law. There is a passage Many incidents were founded on the doctrine of the Roman law, that contumely was the ground of action, in which it differs from the law of England. If an infant, or one in a state of intoxication, defamed another, the action failed, for the mens rea, the contumelious intention, was wanting; in England such a defence, if the act were voluntary, would be unavailable. By the Roman law, a party was not only entitled to sustain an action for contumelious words spoken concerning himself, but also in respect of those spoken of others of his family, if they tended collaterally to subject him to degradation and contempt. Thus, a father was entitled to recover, in respect of a contumelious injury offered to his wife, in *Starkie's Law of Slander and Libel*, by Folkard, 4th ed., p. 19, which shows that even in Scotland anything defamatory is the foundation of an action without proof of special damage. The case of *Aitken y. Read*, 2 Mur. Rep., 149, is relied upon for this proposition, and it is stated that in the case of *Mackenzie v. Read*, *ibid*, 159, the Court, after observing that the law on the subject of slander in England was very particularly defined, added that anything that produces uneasiness of mind is actionable in Scotland.

I confess I can see no reason why personal insult and consequent mental distress should not be recognised as constituting a substantive cause of action in

our proposed law of torts. In enumerating personal rights the Civil Code of New York (Section 27) lays down that every person has the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations." If, then, personal insult is a wrong as distinct from defamation as assault, there seems no reason why it should not be regarded as distinct tort. A tort is only an injury to a legal right not arising out of contract between the wrong-doer and the person wronged; and, in my opinion, if the right of protection from personal insult is violated, such violation should be recognised as a cause of action for recovery of damages as much as assault. Such is apparently the rule of the Roman civil law and of the law of Scotland, both of which recognise mental distress as in itself constituting an injury. Moreover, the view which I have here ventured to express would, if adopted, be in keeping with the notion of injury as understood in the Indian Penal Code (Section 44), where it is taken to denote any harm whatever illegally caused to any person in body, mind, reputation or property.

The observations which I have ventured to make above do not, however, necessarily lead to the conclusion that anything should be added to the law of defamation in which the doctrine of publication to third persons naturally occupies an essentially important position. According to my view, the exigencies of the matter would be sufficiently met by adding personal insult" as a distinct head under the category of personal wrongs, the question whether the insult is offered in public or in private being left to take its place as an element bearing upon the assessment of damages, as in cases of assault. The effect of this would, of course, be that personal insult would be a wrong in itself, irrespective of the question whether the abusive language is published or not and whether it is expressed orally or in writing. As an illustration of my meaning, two cases to be found in the Indian Reports may be referred to. In *Komul Chunder Bose v. Nobin Chunder Ghose*, 10 W. E., 184, Macpherson, J., held that a letter addressed to the plaintiff himself, though containing insulting and abusive language, did not constitute a cause of action in tort, because the only damage alleged is damage to the feelings of the children, or domestics, provided the offender knew the relationship of the party so offended. So far was the principle carried by the Roman law, that even the heir was entitled to an action for an insult to the remains, or even the memory of the deceased. It is *forte cadaveri defuncti fit injuria cui haeredes bonorum possessores exstitimus, injuriarum nostro nomine habemus actionem. Spectat enim ad existitimus nostram si quae ei fiat injuria. Idemque it is fama ejus cui hceredes exstitimus acessatur*. The same degree of indefiniteness which characterizes this branch of the Roman law naturally pervades, also, the codes of those nations which have adopted the principles of that law. In Scotland, for instance, the limits of civil as well as criminal liability are exceedingly wide. Thus, in the ease of *Aitken v. Read and Fleming*, 2 Mur. Rep 149, the Judge observed, "There are disadvantages in allowing actions of this sort, where there is no accusation of a crime, or allegation of specific damage. By the law of Scotland, however, anything defamatory is the foundation

of an action." In the case of *Mackenzie v. Read*, *ibid.* 159, the Court, after observing that the law on the of slander in England was very particularly defined, added, "here anything that uneasiness of mind is actionable plaintiff caused by the receipt of the letter" and "such injury is not in itself a ground forgiving damages in a civil action." The ruling was followed by the Allahabad High Court in *Mahomed Ismail Khan v. Mahomed Tahir*, N. W. P. H. C. R., 1874, p. 38, and is no doubt in conformity with the English law. In the latter of these cases I was myself engaged as counsel for the plaintiff, and I well remember how I failed to induce the Bench to depart from the rule of English law and to adopt the view that personal insult causing mental distress should in itself be recognised as actionable wrong in India, apart from the subject of defamation.

The reasons ordinarily employed against this view are that abusive, insulting and unmannerly language which affects not a man's liberty or estate are of too indefinite and uncertain a character to be the subject of an action for pecuniary damages. Such injuries, rather affronts to the feelings, are as incapable of definition as they are of admeasurement. They depend upon the rank, situation and condition of the parties, and on circumstances which may be felt hut not defined; they may depend on the tone of voice, the gestures, even looks by which they are accompanied, and, in some instances, silence may be more contemptuous and insulting than direct expressions" (Starkie, p. 17). It is submitted that these objections apply equally to almost all personal injuries (such as assault, defamation, false imprisonment, &c.) in which mental suffering is recognised as an element of assessing damages; so much so that there is no fixed rule for estimating damages in such cases, and the matter is usually left to the discretion of the jury with reference to the circumstances of aggravation or mitigation as the case may be. In India such questions would have to be decided by the Judge, and I can anticipate no impossibility in arriving at a fair assessment of damages in cases of personal insult as distinguished from defamation. The cases cited in Addison's Treatise (p. 151) show that the state of the English case-law as to what words are actionable is of a most unsatisfactory and contradictory nature; and judicial opinion seems to have wavered from time to time between discouraging actions for slander and favouring them. "The opinions of later times," observes HOLT, C.J., "have been in many instances different from those of former days in relation to action for words, and judgments have gone different ways; but, for my part, whenever words tend to take away a man's reputation, I will encourage such actions, because so doing will contribute much to the preservation of peace.

If, then, rendering verbal slander actionable contributes to the preservation of the peace, the recognition of personal insult would a fortiori achieve a similar result. Defamation is an offence against reputation, having falsehood or misrepresentation as its instrument. Personal insult, on the other hand, would be an offence independent of the element of misrepresentation, the primary object of the offender being not injury to reputation, but the humiliation of his victim or injury to his peace of mind. This distinction, which does not seem to be clear in

the English law, has probably gone far to throw personal insult into the background and to prevent its being recognised as a tort in itself. Thus a distinct wrong remained practically without a remedy: and Bentham, in his *Principles of Penal Law*, Chap. XIV, has shown how the practice of duelling arose out of this circumstance. In India violent breach of the peace often results from abusive language; and, indeed, the Indian Penal Code (Section 504) recognises insult as a distinct offence from defamation (Section 499), provided that it is likely to cause breach of the peace. This limitation is no doubt suited to the genius of the criminal law, but why should this limitation be imposed upon personal insult as a civil wrong? Mr. Starkie, as usual with English text writers, does not recognise personal insult as a wrong distinct from defamation, and after stating that the only mode of proceeding in respect of mere abusive and unmannerly and insulting language is by causing the offender to be bound over to good behaviour," goes on to say that "it is expedient on principles of general policy and convenience that the law should define by sufficient limits in what instances simple defamation unaccompanied by special damage should constitute a substantive ground of action." But whatever limitations it may be expedient to impose upon defamation, it does not necessarily follow that those same limitations should be imposed upon the law of personal insult, because, as already observed, the one is an injury to reputation, and the other constitutes an offence against mental comfort. Mr. Starkie himself admits that "it is obvious that the application of these principles in particular instances must, in a great measure, depend on the state and circumstances, manners and habits of the society for whose use such rules are to be applied." And bearing this in mind, it seems to me that unadvanced countries like India present a state of society where personal insult needs more checks than in more civilized countries like England.

Another objection, so far as I can gather from the English textbooks, to recognising personal insult as a distinct tort, is that it "would afford far too large a scope for vexatious litigation, and the ordinary intercourse of society would be impeded and fettered by the apprehension of vexatious and harassing suit for trifling causes." The answer to such an argument is, I think, furnished best by the celebrated dictum of Lord HOLT in *Ashby v. White*, 1 Smith's L. C, 268: "As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no, not so much as a little diachylon, yet he shall have this action, for it is a personal injury. And it is no objection to say that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too ; for every man that is injured ought to have his recompense." Indeed, the objection that vexatious litigation will be multiplied if personal insult is recognised as a civil wrong, seems to me to raise a general question applicable to all kinds of torts, viz., the question whether slight injuries should not form an exception to the general principles of liability for civil wrongs. The Indian Penal Code (Section 95) lays down the general rule that "nothing is

an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm." Whether this rule should be adopted wholly or in a modified form in the law of civil wrongs is a question which I shall discuss later on; but I may observe here that in most cases the ordinary common sense of mankind may be taken as a sufficient guarantee against trifles being made the subject of litigation.

I may add that if any further guarantee is required, it is furnished by the discretionary power conferred by the rules of procedure in England and America, and by Section 220 of our own CPC in regard to the apportionment of costs.

The real question seems to be whether personal insult causing mental distress deserves a substantive place in the list of civil wrongs. In other words, should protection from personal insult be recognised as a right in itself distinct from the right of protection from defamation? If no such right exists, personal insult cannot, of course, constitute civil injury, nor would any remedy be needed. Such, however, is practically the state of the English law of torts, which provides no remedy for unpublished insult, which does not recognise mental distress in itself as a civil wrong, and which even, where the insult is publicly offered, causing distress of mind, insists, except in certain well-defined cases, upon proof of special or actual damage before granting any remedy. Speaking of personal insults, I may quote the language of Bentham in support of my view:

In order to understand all the evil which results from these offences, they must be considered without reference to any remedies: it must be supposed that there are none. According to this supposition, these offences might be repeated at will; an unlimited career would thus be opened to insolence; the person insulted to-day might be insulted to-morrow, and the day after, every day and every hour; and each new affront would facilitate the next, and render more probable a succession of outrages of the same class....Thus the individual obliged by his relative weakness to submit at the pleasure of his persecutor to similar vexations, and deprived, as we have supposed, of legal protection, would be reduced to the most miserable condition. Nothing more is required for establishing on the one part an absolute despotism and on the other an entire slavery.

I still adhere to the views expressed by me in the above quotation, and I am of opinion that personal insult and abusive language by itself, whether such insult or abuse does or does not amount to actionable slander in England, is in this country a cause of action for maintaining a suit such as the present. In this view I am supported by the authority not only of the cases which have already been referred to in the above quotation, but also by more recent rulings. Among these perhaps the most important is the case of *Srikant Roy v. Satcori Shaha*, 3 C. L. R., 181, in a footnote to the report of which case many of the previous rulings have been referred to, and which case was followed by the Calcutta Court in *Ibn Hosein v. Haider* I. L. R., 12 Cal., 109. The effect of this last case seems to me to

be somewhat misrepresented in the head-note. I say this because I understand the effect of this last ruling to be that (to use the words of FIELD, J., who delivered the judgment of the Court in that case) "language which, having regard to the respectability and position of the person abused, is calculated to outrage his feelings, lower the estimation in which he is held by persons of his own class, and so bring him into disrepute, is actionable." In the case before the learned Judges it does not appear from the report that any special or actual damage was proved, and the judgment appears to have proceeded upon the ground that injury to personal feelings, that is, mental distress, caused by abusive language, is per se a cause of action for a suit of this character, and, as such, actionable without proof of any further damages, pecuniary or temporal, in any other sense.

41. I am of opinion that the view taken in the case last cited is the right view of the law as applicable to British India, that view being consistent with the ruling of Mitter, J., and Maclean, J., in the case of Srikant Roy v. Satcori Shaha, 3 C. L. R., 181, which it followed. In the case last mentioned the question seems to have been similar to the one with which we are concerned in this case, because here, as in the case last referred to, the obvious object in using the abusive language was due to discredit the plaintiff, who had been summoned as a witness. But among the Indian reported cases upon the subject none is more important than the ruling of the Madras High Court in Parvathi v. Mannar, I.L.R., 8 Mad., 175, where Turner, C. J., in delivering the judgment of the Court, held that the rule of English law which prohibits, except in certain cases, an action for damages for oral defamation unless special damage is alleged, being founded on no reasonable basis, should not be adopted by Courts of British India; and that learned Chief Justice, in considering the matter, went on to say, with the concurrence of Mr. Justice Muttusami Ayyar:

In this country we are not bound to adopt the rules regulating compensation for injuries which are recognised by the English Courts, though it has been the practice of Judges in British India to regard the decisions of the English Courts with the highest respect as embodying the wisdom and experience of a judiciary whose reputation is second to none for independence and ability. But the distinction drawn by the English law between written or printed and oral slander, which is said to have its origin in the circumstance that the most frequent instances of oral slander were at one time punishable by Ecclesiastical Courts (2 Salked, 694). has been condemned by many eminent English lawyers. Mr. Starkie observes that the distinction must be regarded as an absolute peremptory rule not founded on any obvious reason or principle. In Roberts v. Roberts, 33 L. J. Q. B., 248, Cockburn, C. J., and Crompton and Blackburn, J J., pronounced the law of England unsatisfactory and regretted they were bound by it. In Lynch v. Knight, 9 H. L. Cas., 593, the Lord Chancellor Campbell expressed the same views, and Lord Brougham, in the same case, declared that the English law was in this respect not only unsatisfactory but barbarous. The Indian Law Commission, of which Lord Macaulay was a member, in its report on the proposed Penal Code, demonstrated that the English law regarding defamation

was inconsistent and unreasonable (Introductory Report, Note, p. 7, Macaulay's Works, p. 546). The civil law does not recognise the distinction, nor does the law of Scotland; and the recommendations of Lord Macaulay's Commission were approved and accepted by the British Indian Legislature. We therefore feel justified in giving effect to our conviction that the rule we are considering is not founded on natural justice and should not be imported into the law of British India.

There is thus ample authority in the Indian case-law to show that the English law of torts, as to verbal abuse and slander, is not the law of British India, and that we should be importing that law, regardless of the conditions of the people, if we were to apply wholesale the very peculiar rules of that law, on this point denounced by many eminent English lawyers themselves, and called by Lord Brougham as "not only unsatisfactory but barbarous.

42. There is one more point which was pressed upon us by Mr. Kashi Prasad, and that is, that if the statement of the defendant as to the plaintiff being "illegitimate and out of caste" (because such is the only interpretation which the idiom of Hindustani would warrant in respect of the words used by the defendant) be true, no cause of action arises for such an action. Now, in the first place, this contention, which amounts to raising a plea of justification, was not clearly raised in the defence, and in the next place, even if it had been clearly set up, I hold, for reasons to be presently stated, that such a plea could not by itself furnish a full defence to the action.

43. It is perfectly true that under the English law of defamation a plea of justification supported by proving the truth of the statement is a valid defence to a civil action, though even under that law such plea was not allowed in criminal proceedings until recent legislation provided that "the truth of the matter charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published" (Starkie, p. 718). Similar is the effect of the criminal law of India (Section 499 of the Penal Code, Except. 1), and my brother Straight in *Abdul Hakim v. Tej Chandar Mukarji I. L. R.*, 3 All., 815, went the length of saying that "although the provisions of the Penal Code with regard to defamation are applicable to criminal charges, the principles therein embodied are well adapted to supply the tests by which the liability or otherwise of defendants to civil suits should be decided.

44. It is however, not necessary for me to rule how far I am prepared to adopt either the English law of defamation as to the plea of justification in civil cases or the dictum of my brother Straight which I have just quoted; though I confess I incline to the latter view, as I think the distinction drawn by the English law between civil and criminal liability (so far as the plea of justification is concerned) proceeds upon grounds (Starkie, pp. 529, 718) which can scarcely be reconciled with juristic reasoning.

45. I do not regard the ease now before me as one of defamation, pure and simple, but one of personal insult, though it may be that that insult was conveyed by words of a defamatory character.

46. In the long quotation which I have already made in this judgment I have stated my reasons for holding that defamation must not be confounded with personal insult: the one being an offence against reputation having falsehood or misrepresentation as its instrument, the other an offence independent of the element of misrepresentation, the primary object of the offender being not injury to reputation but the humiliation of his victim or injury to his peace of mind. Personal insult therefore is in itself a substantive wrong, and independent either of the falsehood of the statements contained in the abusive language employed, or of publication, though the publicity of the occasion may be an element for consideration in assessing damages.

47. I am aware that in laying down this rule I am departing from the English common law, but there is no legislative authority for holding that that law is applicable to such cases in the mufassal, whilst the case-law of British India, as I have already shown, does not adopt the rules of the English law on the subject, the reason being that such rules in their entirety are not fitted for the conditions of the Indian populations. Language may be abusive and insulting, though it states the truth, and it may cause grave injury to the most tender feelings of the human heart. No person who for example is illegitimate or an out-caste or has a bodily infirmity likes to be reminded of these facts in abusive terms, and if the gentlest touch or even attempt to touch under certain circumstances amounts to assault and battery and as such an actionable wrong, I fail to see why violent abuse should not be an actionable wrong, unless, indeed, it can be said that mental pain is not to be compared with bodily suffering in granting compensatory relief.

48. But whilst laying down this rule, I must guard myself against being understood to hold that malice is not a necessary element of the wrong, for I am of opinion, that when abusive and insulting language is employed, the law will infer and presume malice, unless the defendant proves his conduct to be bond fide or shows that the occasion was privileged. I wish also to point out that nothing that I have said is to be understood as contradicting the rule laid down by the Madras High Court in *Sri Raja Sitarama Krishna Rayadappa Ranga Baz Bahadur Garu v. Sri Raja Sanyasi Razu Pedda Baliyara Sim-hulu Bahadur Garu*, 2 Mad., H. C. E., 4, where it was held that the omission of a mere courtesy cannot be taken to be equivalent to slandering or libelling a man and is not an actionable wrong. The case was not dealt with as one of personal insult nor was the question of malice or the question of special or actual damage considered in the case. It may have been that the omission complained of was bond fide and having been made in a judicial proceeding was privileged. Again, the ruling of this Court in *Oodai v. Bhowanee Pershad*, N.W. P. H. C. Rep., 1866, p. 264, and of the Madras High Court in *Subbaiyar v. Kristnaiyar*, I. L. E., 1 Mad., 383, are no

authorities against my view, because in both those cases the turning point of the decision was that male members of a family cannot sue for the injury or insult which they have sustained indirectly in consequence of ill-treatment of certain female members of the family. Indeed, in the former of these cases it was left an open question whether the female members of the family who had been insulted could not maintain an action in their own behalf, whilst the latter case, leaving the same question open, proceeded entirely upon the technical ground of the absence of locus standi in the plaintiff. How far I am prepared to accept the ground upon which those two rulings proceeded is a question which I am not called upon to determine in this case, though both those rulings are consonant with the English law, so far as I can understand those cases from the facts stated in the published reports. There is, however, another case to which I wish to refer--*Pitamber Dass v. Dwarka Pershad*, N.W. P. H. C. Rep., 1870, p. 435, in which it was held that making and publicly exhibiting an effigy of a person, calling it by the person's name, and beating it with shoes, are acts amounting to defamation of character for which a suit for recovery of damages will lie. The case was no doubt dealt with as falling under the rule of the English law of libel, though the learned Judges in regarding the case as one of defamation do not appear to have considered how far the effigy and its maltreatment were subject to the plea of justification. Under the English law of libel, if no such plea could be raised, the conduct of the defendants would no doubt be actionable; but according to the view which I have taken, I should probably have regarded the case as not one of defamation as understood in the English law of slander and libel, for which falsehood and misrepresentation are necessary elements, but simply as a case of personal insult and, as such, actionable, *per se*, as a substantive tort in itself, without proof of actual or special damage.

49. I now proceed to deal with the second question in this case, viz., the plea of privilege. And in dealing with this part of the case, I think the analogies of the English law furnish a good guide, though of course that law deals with the matter as relating to defamation, and not to mere abusive or insulting language, for that law does not recognise personal insult as in itself an actionable wrong. The grounds of privilege as to statements made in the course of judicial proceedings are stated to be those of public policy in the interests of justice, and they are well set forth at p. 173 of Starkie's work, and the same author summarizes the English law so far as it relates to the privilege of witnesses (p. 179) in the following words: "By the general policy of the law the witness is privileged; and therefore no action will lie for a statement made by him in the course of a judicial proceeding, whether by affidavit or *viva voce*, even though it be alleged to have been made falsely and maliciously, and without any reasonable or probable cause, and that the plaintiff has suffered damage in consequence." The same seems to be the effect of the cases cited by Mr. Bigelow (*Leading Cases on Torts*) at p. 162 of his work. The question of the extent of the privilege of a witness in making statements was, however, well considered in a more recent case--*Seaman v. Netherclift*, L. R. 2 C. P. D., p. 53, in which there are valuable dicta of

CockBurn, C.J., Bramwell, J.A., and Amphlett, J. A., who presided in the Court of appeal. The judgments of those eminent Judges show that whilst they were not fully agreed upon all minor points, they were unanimous in laying down the broad proposition of law that the privilege of a witness is limited to the time when he is actually under examination. Whether such privilege has application to statements having no reference to the matter which the Court is investigating was left an open question in that case. CockBurn, C. J., after laying down that " a witness is privileged to the extent of what he says in course of his examination," went on to say: "Neither is that privilege affected by the relevancy or irrelevancy of what he says; for then he would be obliged to Judge of what is relevant or irrelevant, and questions might be, and are, constantly asked which are not strictly relevant to the issue." But he added: "I am very far from desiring to be considered as laying down as law that what a witness states altogether out of the character and sphere of a witness, or what he may say dehors the matter in hand, is necessarily protected." Upon the same point Bramwell, J.A., in delivering his judgment, drew a distinction between relevant facts in evidence and matters "having reference to the enquiry," and he held that the latter phrase was preferable to and wider than mere questions of relevancy, as defining the limits of the privilege of a witness. And in dealing with the argument of counsel, the learned Judge went on to say (p. 60): "Mr. Clarke said he was prepared to maintain that as long as a witness spoke as a witness in the witness-box, he was protected, whether the matter had reference to the inquiry or not. I am reluctant to affirm so extreme a proposition. Suppose, while the witness is in the box, a man were to come in at the door, and the witness were to exclaim "that man picked my pocket." I can hardly think that would be privileged. I can scarcely think a witness would be protected for anything he might say in the witness-box wantonly and without reference to the inquiry. I do not say he would not be protected. It might be held that it was better that everything witness said as a witness should be protected than that witnesses should be under the impression that what they said in the witness-box might subject them to an action. I certainly should pause before I affirmed so extreme a proposition, but without affirming that I think the words "having reference "to the inquiry" ought to have a very wide and comprehensive application, and ought not to be limited to statements for which, if not true, a witness might be indicted for perjury, or the exclusion of which by the Judge would give ground for a new trial, but ought to extend to that which a witness might naturally and reasonably say when giving evidence with reference to the inquiry as to which he had been called as a witness.

50. Amphlett, J.A., in delivering his judgment in the same case, after saying that there were "many reasons why a witness should be absolutely protected for anything he said in the witness-box" went on to say: "Anything that tended to disparage the credit of a witness may be said to be relevant to the enquiry in which the witness is giving his evidence....No doubt the strong language the defendant used, which was quite unnecessary, prejudiced him with the jury; but

the unnecessary strength of the language cannot affect the question of privilege.

51. In the present case the plaintiff's deposition shows, and the Lower Appellate Court has interpreted it to mean, that "he was abused after the defendant's deposition was over," and that Court goes on to say: "If this is a fact, and probably it is so in the absence of any evidence to the contrary, then in my opinion he (defendant) had no right to use the ill expressions towards the plaintiff, a respectable person in his retired life....The privilege of a witness lasts as long only as he has been deposing on oath in the witness-box, but not after it.

52. The passage in the plaintiff's deposition to which these remarks refer clearly shows that the abusive language was employed by the defendant against the plaintiff after the defendant had finished his deposition and was no longer in the witness-box. But this question, as pointed out by the Lower Appellate Court, has not been tried upon the merits, and I may observe, that the deposition given by the present defendant in the suit of Sheobadan Singh v. Dawan Singh would be, perhaps, the most important piece of evidence for determining whether the abusive language now complained of in this suit was uttered by the defendant in the course of his examination as a witness. The language is stated to have been uttered in answer to a question put by the Munsif who presided in the Court, requiring the defendant to give some explanation why the present plaintiff had deposed against the case set up by the present defendant, who was also defendant in the former action.

53. I agree with the Lower Appellate Court in holding that the case has not been tried upon the merits, and I shall uphold the order of that Court now under appeal directing a trial de novo.

54. But because the points of law which have arisen in this case are of considerable importance; because upon these points the Legislature has not yet settled the law; because the English common law of torts, in my opinion, is not in its integrity applicable to this country; because I have in this judgment departed from that law in some important points, I consider it necessary before concluding this judgment to formulate the exact propositions of law upon which this judgment proceeds. Those propositions are the following:

55. Firstly, that the English law of slander as forming part of the law of defamation, and, as such, drawing somewhat arbitrary distinctions between words actionable per se and words requiring proof of special or actual damage, is not applicable to this country either by reason of any statutory provision or by any uniform course of decision sufficient to establish such distinctions as part of the common law of British India.

56. Secondly, that whilst the English law of defamation recognises no distinction between defamation as such and personal insult in civil liability, the law of British India recognises personal insult conveyed by abusive language as actionable per se without proof of special or actual damage.

57. Thirdly, that such abusive and insulting language, unless excused or protected by any other rule of law, is in itself a substantive cause of action and a civil injury apart from defamation.

58. Fourthly, that malice is an element of liability for abusive and insulting language.

59. Fifthly, that such malice will be presumed or inferred unless the contrary is shown.

60. Sixthly, that where the defendant is not absolutely privileged and protected by reason of the office or the occasion on which he employed such language, he renders himself subject to a civil liability for damages, irrespective of any plea of justification based upon proving the truth of the statements contained in the abusive and insulting language complained of.

61. Seventhly, that the rule of English law as to the privilege or protection of a witness in regard to defamatory statements made in the witness-box is based upon a public policy which is equally applicable to insulting and abusive language used by such witness.

62. Eighthly, that such statements when made in the witness-box are privileged and protected, even though made maliciously and falsely, so long as they are relevant to the inquiry, or have reference to the inquiry in the broadest sense of the phrase.

63. Ninthly, that even where such statements have no reference to the inquiry, the defendant may prove the absence of malice and that such statements were made in good faith for the public good.

64. As the case has not been tried upon the merits, it is impossible to determine at this stage which or how many of these propositions would be applicable to the facts, beyond the rule that abusive and insulting language is actionable per se without proof of special or actual damage, unless such language is excused or protected by some other rule of law.

65. The case was therefore rightly remanded by the Lower Appellate Court for trial upon the merits, and that trial must, in my opinion, proceed with reference to the legal propositions which I have already enunciated. My brother Brodhurst is, however, of opinion that the case as it stands already is ready for final adjudication, and that the question of privilege obviates the necessity of entering into the vaster question as to whether abusive and insulting language is actionable per se. I wish I had been able to take the same view of the record of the case as it now stands. But I find that in the first place the plea of privilege was neither pleaded by the defendant before the Munsif, nor was it made the subject of an issue so as to enable the parties to produce evidence upon that issue. The record of the case shows that the issues were framed on the 7th November 1887, and the Munsif examined the parties on the same day, and without taking any further evidence dismissed the suit. Under these

circumstances, I cannot help agreeing with the Lower Appellate Court in the view that, even in respect of such defence as the doctrine of privilege might furnish, there has been no proper trial upon the merits, and that the Munsif in this omission was influenced entirely by a misapprehension of the meaning of the plaintiff's deposition. According to the view which my learned brother is inclined to take of the doctrine of privilege in such cases, the question of good faith is a question of fact, which must be determined upon its own individual merits, with reference to the circumstances of each case, proved by evidence, for producing which the parties must have such opportunities as the law of procedure allows them. This was not done here, because, as the record shows, the examination of the parties was virtually an examination such as Sections 117, 118, and 119 of the Code contemplate, an examination the primary object of which is to enable the Court to frame proper issues. In this case neither the question of privilege at large nor the question of bona fides was made the subject of an issue, and I should have been willing to consent to any order made by my learned brother such as would admit the trial of those points of fact before final adjudication.

66. But the facts which might sustain a plea of privilege have not been ascertained by judicial trial in this case, nor has the question of bona fides been made the subject of inquiry. I have indeed, in deference to my learned brother's views, consented to an order sending for the record of the former suit, that is, the one in the course of which the defendant used the abusive language complained of in this action. But the record of that case affords no help, even if we as a Court of second appeal could deal with that record as evidence in this case. That record, if it shows anything, shows that the abusive language was not incorporated in the defendant's deposition, and in the absence of a total want of the trial of the point as to privilege, it cannot be the result of a judicial inquiry, but a mere surmise to hold that the abusive language complained of was employed whilst the defendant was under examination as a witness, or that it was so employed bona fide.

67. It is perfectly true, as admitted in this case, that the abusive language was employed in an answer to a question put by the Munsif. But it is equally true that the question was not needed, and it would be extending the doctrine of privilege far beyond its bounds, even as known to the English law, to hold that the mere incident of such a question being put by the Court is to afford the person to whom such question is put an unbounded privilege of abusing another in open Court, without a proper ascertainment by trial of the facts which might furnish a legal basis for such privilege, a trial which we as a Court of second appeal can scarcely hold ourselves.

68. So far as the question of bona fides is concerned, I hold the same opinion as my brother Straight expressed in *Abdul Hakim v. Tej Chander Mukerji* I. L. R., 3 All., 815, and re-affirmed by him in *Queen-Empress v. Dhum Singh*, I.L.B., 6 All., 220. And I may add that so far as the quantum of damages claimed is concerned, nothing that I have said in this judgment must be taken to lay down

any rule as to assessment. The considerations which regulate the assessment of damages in such cases necessarily rest upon the determination of the facts and circumstances of each case, and I do not think that the case is in its present state ready for any adjudication as to the amount of damages. The question will, however, no doubt be determined by the Court of First Instance, to which, by the order of the Lower Appellate Court, the case has been remanded for re-trial.

69. I would dismiss this appeal with costs.