

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 113 of 2019
(Civil Action No. HBC 99 of 2018)

BETWEEN : **AVINESH NARAYAN**

Plaintiff / Appellant

AND : **ALI HASSAN KHAN**

Defendant / Respondent

Coram : **Guneratne P**
Basnayake JA
Lecamwasam JA

Counsel : **Mr. R. Chaudhary for the Appellant**
Mr. R. Charan for the Respondent

Date of Hearing : **1 February 2023**

Date of Judgment : **24 February 2023**

JUDGMENT

Guneratne P

[1] I agree with Justice Basnayake's Judgment that the appeal be dismissed.

Basnayake JA

- [2] This is an appeal filed by the Appellant/Plaintiff (hereinafter referred to as the Plaintiff) to have the judgment of the learned Judge of the High Court reversed and for an order in favour of the Plaintiff. By judgment dated 4 December 2019 (Tab 2 pgs. 4-16 of the Record of the High Court (RHC)) the learned High Court Judge has dismissed the Plaintiff's claim with costs \$1000.00 payable to the Respondent/Defendant (hereinafter referred to as the Defendant). The Plaintiff has filed a notice of appeal with seven grounds (Tab 1 pgs. 1-2 RHC).
- [3] The Plaintiff in a writ of summons (Tab 3 pgs. 18-19) claimed damages, exemplary, aggravated and punitive etc. from the Defendant. The Plaintiff states that the Defendant has falsely and maliciously published the following words in bold red letters in an A4 size paper; **DO NOT ACCEPT AVINESH NARAYAN'S (COPPER) CHEQUE (AUTRONICS SERVICES) Dated 23/04/18 Management.**
- [4] The Plaintiff claims that the words in their natural and ordinary meaning are understood to mean that;
- a) The Plaintiff was a dishonest and unethical person.
 - b) That the Plaintiff was not creditworthy.
 - c) That the Plaintiff's cheques were being dishonoured and cheques should not be accepted from him.
 - d) That the cheque or cheques given by the Plaintiff to the Defendant was or were dishonoured.
 - e) That it is not safe to do business with the Plaintiff.
 - f) That the Plaintiff is not a trustworthy person.

- [5] The Plaintiff claims that the said words were calculated to and in fact did bring disparage to the Plaintiff personally and as a businessman. As a consequence of the said words published by the Defendant the Plaintiff has been greatly injured in his credit, character and reputation and has been brought into public scandal, ridicule, odium and contempt and has been subjected to mental agony and distress. The Plaintiff claimed that his business reputation also has been adversely affected.
- [6] The Defendant in his amended statement of defence (Tab 4 pgs. 23-26) admits the displaying of the notice inside the service station. The Defendant states that the notice was displayed on the office door of the Accounts Department which is a separate area inside the service station with access to the staff and the management of the service station only and not to customers. The Defendant states that the notice was issued to the staff to remind them not to accept cheques from the Plaintiff. The Defendant admits that the notice was on display from 23 April 2018 to 19 May 2018. The Defendant states that the Defendant has been accepting and cashing the Plaintiff's cheques from the year 2016 up to February 2018 (or April). From the cashed amount the Plaintiff would purchase fuel for \$10 or 20 from the service station and keep the rest of the cash. This was done about two or three times or more in a month. On 23rd April 2018 the Defendant made the decision to stop accepting and cashing the plaintiff's cheques.
- [7] The Defendant denies that the words were calculated to disparage the Plaintiff personally and as a businessman. The words in its natural and ordinary meaning are not capable of imputing any derogatory or disparaging meaning towards the Plaintiff. The Defendant claims that the notice was privileged between the Defendant and his staff.
- [8] At the pre-trial conference 9 issues were raised; I reproduce issues (vi), (vii) and (viii) which are as follows;
- (vi) Whether the publication of the notice was on an occasion of qualified privilege etc.

(vii) Whether the words in its natural and ordinary meaning were capable of imputing a derogatory and disparaging meaning towards the Plaintiff.

(viii) Whether the Plaintiff has been greatly injured in his credit, character and reputation and has been brought into public scandal, ridicule, odium and contempt and has been subjected to mental agony and distress and whether his business reputation has been adversely affected.

[9] It was admitted that the notice was displayed in bold red letters on A4 size paper in the service station.

Judgment

[10] The learned Judge found that the words complained of were not defamatory of the Plaintiff in its ordinary context or in its inferential meaning to which the Plaintiff attributed. Even if the words are capable of being categorized as a defamatory statement the Defendant would have been entitled to claim the defence of qualified privilege as they were made under a privileged occasion and thereby dismissed the Plaintiff's claim.

[11] The learned Judge stated that in the notice the Plaintiff has been properly identified by name and by referring to his workplace. However the learned Judge has categorically stated that the words "Copper" and Autronics Services" are not defamatory. Leaving these two words aside the learned Judge considered the remaining words to ascertain whether they would be defamatory of the Plaintiff. The remaining words are, "DO NOT ACCEPT AVINESH NARAYAN'S CHEQUES, Management". The learned Judge said that the Management may give instructions to employees. Only the employees are bound by the instructions given by the management and not others including the public. The learned Judge held that the purpose was to inform its employees of its business decisions. The word "Management" suggests that the notice is addressed to the employees, particularly the cashiers who were on shift at the service station. By that notice the management instructs. The learned Judge specifically stated that the notice did not state not to accept Avinesh

Narayan's cheques as the cheques were dishonored. The notice instructs the cashiers not to accept the Plaintiff's cheques which is a business decision taken by the management.

[12] Quoting Lord **Halsbury in Nevill v Fine Art General Insurance Co.** [1897] AC pg. 68 at 73 that, "*What is the sense in which any ordinary reasonable man would understand the words of this communication so as to expose the Plaintiff to hatred or contempt or ridicule. It is not enough to say by some reason or another the words might be understood in a defamatory sense*". One of the witnesses the Plaintiff relied on to establish that he was ridiculed was Mr. Aman Dayal, a lawyer. However he was not called as a witness. The other witness is an Acting Police Inspector who is also a law student. The learned Judge said that they cannot be considered as ordinary reasonable men. Hence the learned Judge concluded that the Plaintiff has failed to establish that an ordinary reasonable man who reads the notice would be likely to understand the notice in a libelous sense.

[13] The learned Judge held that the notice conveys a decision of the management that the staff should not accept cheques from Avinesh Narayan, the Plaintiff. There is nothing libelous in that. The notice was given to the employees by the management in a business situation. It is not necessary to go beyond the words themselves. The learned Judge further held that, "*No reasonable person would draw a defamatory inference from the words in the notice themselves...The words in the notice are not capable of having a particular meaning the Plaintiff attributes to them*" (para. 48 at pg. 14 RHC).

[14] If the words did amount to defamation the learned Judge considered the defence of qualified privilege that would be available to the Defendant. Having quoted Lord Esher MR in **Pullman v Hill & Co** (11) [1811] 1 QB at 528 that, "*an occasion is privileged when the person who makes the communication has a moral duty to make it to the person whom he does make it, and the person who receives it has an interest in hearing it. Both these conditions must exist in order the occasion may be privileged.*" The learned Judge held that the Defendant an employer notifies his business decision by way of the notice to his staff that have an interest in hearing and obeying the business decision taken by their employer. This satisfies the two conditions as stated in the above case in order to claim the

occasion to be privileged. The learned Judge held that on the evidence the notice was affixed in a privileged occasion.

Evidence

[15] The Plaintiff stated that he having cashed cheques from the Defendant used the money to buy juice from the shop next door. He would cash a cheque for \$50.00 and spend \$20.00 on fuel. He said the Defendant charged \$1.00 every time when cashing cheques. He said the Defendant too runs a shop and the Defendant got angry with the Plaintiff for having made purchases from the adjoining shop. That was the reason for the Defendant to display the notice. It is to be noted that the Plaintiff in his statement of claim stated that the Defendant has falsely and maliciously displayed the notice. Now the Plaintiff gives the reason that made the Defendant put out the notice. The Defendant too in his evidence gives this as one reason to stop accepting cheques from the Plaintiff. The Defendant said that he had been cashing cheques for the Plaintiff from the year 2016 and stopped accepting cheques from the Plaintiff from 23 April 2018. The Defendant stated in evidence that he started a grocery business in March 2018. The adjoining shop was given on rent by the Defendant to Karan's Mini Mart to do a grocery business. The Defendant having just started a grocery business would have been keen on picking up business. It appeared that there was competition between the Defendant's grocery shop and Karan Mini Mart. The Defendant said that he was not in good terms with Karan's Mini Mart as they were breaching the contract. The evidence shows that the Defendant could not stand to see the Plaintiff who had been his childhood friend patronizing the rival shop without patronizing the Defendant's shop. The Plaintiff had been doing it with the cash taken from the Defendant after cashing cheques.

[16] The Plaintiff said that he was insulted by his friend Aman Dayal over this notice saying that the notice indicates that the Plaintiff's cheques bounced. The Plaintiff said under normal circumstances when a cheque bounces, that cheque is displayed for everyone to see. However in this case the Defendant did not display the Plaintiff's cheque. If that is the case there is no reason for anyone to tease the Plaintiff with a story that the notice infers

bouncing. The Plaintiff himself answered the question that the notice does not indicate a bounced cheque. If bounced one will find the cheque on display. No display of a cheque means no bouncing. The Plaintiff did not call Aman Dayal who had been his good friend to give evidence. Hence the story of teasing appears to be made up to build up a case against the Defendant.

[17] The Plaintiff said that some big businessmen refused to accept cheques from the Plaintiff on account of this notice. Ba Motor Parts, Bombay Trading, Island Tyre were mentioned as some of them. However the Plaintiff did not call evidence to prove it. He said outside Ba, he was able to cash cheques. He mentioned the names of The City Spares, Lautoka Motor Parts as some of them. Further the Plaintiff said that his business was affected due to the publication of this notice. Yet the Plaintiff never produced any documentary or other evidence to prove that his business was affected. He said that he was inconvenienced due to the Defendant not accepting his cheques as he had to queue up in Banks and waste time. The Plaintiff said he never cashed cheques from Karan's Mini Mart which is the shop adjoining to the Defendant's shop as he purchased only a coke costing \$3.00. Against this evidence the shopkeeper Ms. Karan who was called by the Plaintiff said in evidence that the Plaintiff used to spend \$20.00 sometimes. The story about the coke could be to justify not cashing cheques at the Mini Mart. The reason for the notice is as confirmed by the Plaintiff as well as the Defendant which is the making purchases from a rival shop. The Plaintiff whilst hiding this fact intended the court to believe that the Plaintiff was defamed by the Defendant with a notice indicating that the Plaintiff's cheque bounced.

[18] The Plaintiff said that he had been cashing cheques from the Defendant quite often and none of those had bounced. One reason to cash cheques with the Defendant was to avoid standing in queue in the Banks. The Plaintiff said however that gradually people started to trust him. The Plaintiff said, that, "*Slowly, slowly, people started to trust him*". The Plaintiff's evidence appears to be like a fairy tale. It is succinctly clear the reason behind the display of the notice. To stop the Plaintiff from using the money taken on cheques from the Defendant and spending in a rival shop. If the Plaintiff averred this as a reason for the Defendant to display the notice, on the face of it the Plaintiff would not have had a good

case, as the Plaintiff himself has shown a good cause for the Defendant to display the notice. There is no indication of dishonouring in this case. The Plaintiff's evidence is to the contrary as the Plaintiff said in the event of a dishonouring the cheque is displayed. Therefore I am of the view that the learned Judge was correct in dismissing the Plaintiff's claim. Although the learned Judge made reference to qualified privilege due to an abundance of caution, it does not arise in this case. If the court finds there is no defamation the matter ends and there is no necessity to consider the defences.

The Grounds of Appeal

- [19] i) *The Learned Judge erred in law and in fact in holding that the words as published were not defamatory and would not be understood in a defamatory sense by an ordinary reasonable man in view of all the evidence before the Court.*
- ii) *The Learned Judge erred in law and in fact in holding that the Plaintiff's witness (Ravi Narayan) and Aman Dayal (whose text messages were tendered in Court) formed their opinion based on their legal knowledge and were not ordinary reasonable people because they have legal background.*
- iii) *The Learned Judge erred in law and in fact in completely ignoring the evidence of the Plaintiff's Second and Third witnesses (Rikashni Lata and Vikashni Lata).*
- iv) *The Learned Judge erred in law and in fact in failing to properly consider the concept of innuendoes and inferential meaning of the published words.*
- v) *The Learned Judge erred in law and in fact in holding that the Defendant could rely on the defence of qualified privilege. The Learned Judge failed to consider Excess of Privilege as submitted in the Appellant's Submissions.*
- vi) *The Learned Judge erred in law and in fact in allowing the Defendant's Counsel to file his submissions one day before the Judgment was to be delivered (i.e. on 20th November 2019) and adjourning the Judgment date to 4th December 2019 without any reference to the Plaintiff's Counsel who had filed his submissions well in time*

on 24th October 2019 when submissions were due on 31st October 2019 and hence giving the perception of unfairness to the Plaintiff.

vii) *The Learned Judge erred in law and in fact in failing to analyze and give proper weight to the evidence provided by the Plaintiff in chief and the evidence extracted from the Defendant's witnesses in cross examination.*

[20] For the reasons given the above grounds are answered in the negative. The appeal of the Plaintiff/Appellant is therefore dismissed with costs in a sum of \$5000.00 to be paid to the Defendant/Respondent within 21 days from the date of this judgment.

Lecamwasam JA

[21] I agree with the conclusion arrived at, by Basnayake JA.

Orders of Court are:

1. *The appeal is dismissed.*
2. *The Plaintiff/Appellant to pay costs \$5000.00 to the Defendant/Respondent within 21 days from the date of this judgment.*



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Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL

Handwritten signature of Hon. Justice Eric Basnayake in blue ink.

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Hon. Justice Eric Basnayake
JUSTICE OF APPEAL

Handwritten signature of Hon. Justice S. Lecamwasam in blue ink.

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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL