

# INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

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Volume 3 | Issue 6

2021

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# Cyber Defamation of an Employer

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## ABSTRACT

*While explicit and implied defamation by individuals or groups has been discussed at length, employees' defamatory comments on employers seldom get enough attention. Legal scholarship in this regard had become necessary given the rise in such cases. This essay focuses on the defamation in the online world over social networking websites like Facebook, Twitter, Instagram, etc. The main focus is on the cyber defamation of an employer by an employee. This area of law is not developed in India, and with vast increments in technology, the cases of the same would inevitably emerge in large numbers. Examples of various nations have been given, and analysis of a few cases will be done too.*

## I. INTRODUCTION

Gone are the days when only high-profile personalities and newspapers were suing one another for defamation. Nowadays, 'normal' people take on 'keyboard knights' on social media who have attacked their reputations.<sup>2</sup> It is the defamation law that protects an individual's reputation or feelings from unwarranted attacks.

This essay focuses on the defamation in the online world over social networking websites like Facebook, Twitter, Instagram, etc. The main focus is on the cyber defamation of an employer by an employee. This area of law is not developed in India, and with vast increments in technology, the cases of the same would inevitably emerge in large numbers. Examples of

various nations have been given, and analysis of a few cases will be done too.

### *What is defamation?*

The essential concept of defamation law is that a person's reputation, the respect with which he/she is deemed by society, the trust and confidence it places in his ability, knowledge, dignity, and ethics, all of these being essential assets for him, and they should be given protection by the law.<sup>3</sup> A man's reputation is his property, more valuable than other property.<sup>4</sup> The hound of reputation is the driving force behind human behavior, and as such, it must be shielded and promoted for the sake of society's advancement.<sup>5</sup>

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<sup>1</sup> Author is a B.A.LLB Student in India.

<sup>2</sup>Stewarts law, The Rise of Defamation on social media, September 14, 2021 available at <https://www.stewartslaw.com/news/the-rise-and-rise-of-defamation-on-social-media/> (Last visited November 12, 2021).

<sup>3</sup> See supra note 1.

<sup>4</sup> Dixon v. Holden, (1869) 7 LREQ 488.

<sup>5</sup> See supra note 1.

In *Sim v. Stretch*, a defamatory statement was defined as "A statement which tends to lower the claimant in the eyes of right-thinking members of society in general, and in particular to cause him/her to be regarded with feelings of hatred, contempt, ridicule, fear, and disesteem."<sup>6</sup>

In India, defamation is both a civil as well as a criminal offense.<sup>7</sup> Civil defamation is primarily based on reputational harm to a private entity, but criminal defamation is based on harm to the community.<sup>8</sup> The criminal law of defamation is codified, whereas civil law is not.<sup>9</sup> The existing laws of defamation put reasonable restrictions on freedom of speech and expression conferred by Article 19(1)(a) of the Indian Constitution and is saved by clause (2) of Article 19.<sup>10</sup> Defamation law strives to balance allowing the free flow of ideas, opinion, , and information, a right under article 19 under the Indian Constitution, and protecting the reputation of individuals and businesses.<sup>11</sup>

### *Types of defamation*

Broadly defamation can be either a civil tort or a criminal offense. Criminal defamation laws are inherently strict and harsh, with a

disproportionate chilling effect on free expression. The accused faces a continuous threat of being arrested or be held in pre-trial custody. Civil defamation does not involve the criminal justice system's machinery, thus less chilling effect.<sup>12</sup> In India, defamation is both a civil as well as a criminal offense.<sup>13</sup>

There are two main types of defamation under civil law: libel and slander.<sup>14</sup> When a defamatory statement is made online or through social networking sites -- such as Facebook, Twitter, or LinkedIn which involves the written (or "posted") word, it is considered libel.<sup>15</sup> The wrong of defamation may be committed either by way of writing, or its equivalent, or by way of speech. The term 'libel' is used for the former kind of utterances, 'slander' for the latter.

## **II. CIVIL DEFAMATION IN INDIA**

"Defamation under civil law in India is primarily governed by English common law principles".<sup>16</sup> For success of any defamation suit under civil law of torts, the four essential elements must be proved in front of the adjudicating authority, that (i) "the statement must be defamatory";<sup>17</sup>(ii) "it

<sup>6</sup> *Sim v Stretch* [1936] 2 All ER 1237.

<sup>7</sup> Samistilegal, *Legal Recourse for Defamation*, July 16, 2021 available at <https://samistilegal.in/legal-recourse-for-defamation/> (Last visited on November 12, 2021).

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> Constitutional Law of India, 3rd edition, Vol. 1, p. 495; S.N.M. Abdi v. Prafulla K. Mahanta, AIR 2002 Gau 75, p. 76.

<sup>11</sup> Gordon legal, defamation privacy law, available at <https://gordonlegal.com.au/services/archive-defamation-privacy-law/social-media-defamation/> (Last visited on November 12, 2021).

<sup>12</sup> Article 19 org, *Civil Defamation: Undermining Free Expression*. Available at

<https://www.article19.org/data/files/pdfs/publications/civil-defamation.pdf> (Last visited on November 12, 2021).

<sup>13</sup> Samistilegal, *legal recourse for defamation* available at <https://samistilegal.in/legal-recourse-for-defamation/> (Last visited on November 12, 2021).

<sup>14</sup> Nolo, social media online defamation available at <https://www.nolo.com/legal-encyclopedia/social-media-online-defamation.html>

<sup>15</sup> *Ibid.*

<sup>16</sup> Govind Ramchandra Chitale vs Gangadhar Mahadeo Wadekar (1944) 46 BOMLR 417.

<sup>17</sup> SCC Online, *Defamation, a tort*, February 12, 2021 available at <https://www.sconline.com/blog/post/2021/02/12/defamation-2/> (Last visited on November 12, 2021).

should refer to the plaintiff";<sup>18</sup>(iii) "publication of it by the defendant"<sup>19</sup>; and (iv) "the statement must be substantially untrue."<sup>20</sup>

### ***Defenses of defamation in India***

- Justification of truth.
- Fair and bona fide comment.
- Absolute privilege.
- Consent
- Apology.

The defense of truth and fair comment on a matter of public interest is not libel. However, an apology in suits for libel is available against newspapers and other periodical publications.<sup>21</sup>

### ***Freedom of Speech vis-à-vis Defamation***

Freedom of speech is a highly protected and cherished right across all modern legal jurisdictions. Article 19 (2) of the International Covenant on Civil and Political Rights, 1966 provides:

*"Everyone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or print, in the form of art, or through any other media of his choice."*<sup>22</sup>

<sup>18</sup> Hulton & Co. v Jones (1909) 47 SLR 591.

<sup>19</sup> R. Rajagopal versus State of Tamil Nadu (1995) AIR SC 264.

<sup>20</sup> *Ibid.*

<sup>21</sup> The chambers of law, *Defamation in civil courts- an analysis* available at <https://www.tclindia.in/defamation-in-civil-courts-an-analysis-indianlaws/> (Last visited on November 14, 2021).

Similarly, Article 19 of the Universal Declaration of Human Rights states:

*"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."*<sup>23</sup>

However, some limitations exist on freedom of speech. Even some international instruments include provisions that express the same limitation to the exercise of freedom of expression. Article 17 of the International Covenant of Civil and Political Rights says that: *"1. No one shall be subject to...unlawful attacks on his honor and reputation. 2. Everyone has a right to the protection of the law against such interference or attacks."*<sup>24</sup>

Article 19(1)(a) of the Constitution states that: *"All citizens shall have the right to freedom of speech and expression."*<sup>25</sup>

Article 19(2) of the Indian Constitution has an exception to the freedom of speech and expression as enshrined under Article 19(a) It states: *"Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said*

<sup>22</sup>International Covenant on Civil and Political Rights, Art 19, December 16, 1996 available at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (Last visited in November 12, 2021).

<sup>23</sup> Universal Declarations of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (December 12, 1948).

<sup>24</sup> *Ibid.*

<sup>25</sup> CONSTITUTION OF INDIA, 1950, ART. 19(A).

*sub-clause ... concerning contempt of court, defamation or incitement to an offense,"*<sup>26</sup>

In short, defamation is a reasonable restriction on freedom of speech in both international law and constitutional law.

### III. CYBER DEFAMATION OF EMPLOYER

With the advancement of technology, speech publication has become easier and more accessible to the general masses. While explicit and implied defamation by individuals or groups has been discussed at length, employees' defamatory comments on employers seldom get enough attention. Legal scholarship in this regard had become necessary given the rise in such cases. The general framework of such cases goes as follows:

An employee named A works for company X, and his information is available in the public domain or A's social media. A, on his social media platform, comments something racist, sexist, or maligning, which harms the company's reputation. The company thus decides to fire A, citing that his conduct has led to defamation of the company.

Some of the case laws on this subject are

In *Preece v J.D.Wetherspoon Plc*<sup>27</sup>, P, a pub worker posted offensive comments on *Facebook* regarding customers. While nowhere did P mention her work, it was understood or implied by the nature of comments.

In *Stephens v Halfords Plc*<sup>28</sup>, S had a Facebook page entitled, '*Halford workers against working*

*three out of four weekends,*' which contained dissatisfaction with proposed workplace changes. After realizing that the content violated the terms and conditions of the company, it was brought down quickly by the owner. The comments were not very grossly offensive, and S also apologized, stating that it was done impulsively due to stress. The tribunal held that he had been unfairly dismissed.

Similar cases have erupted in jurisdictions such as Canada, France, Ireland, and the United States. These cases highlight the need for proper mechanisms in such institutions because SSN's and digital media is a medium growing at a breakneck pace. The author thus deems it pertinent to discuss one of the most critical cases in this regard- *Smith v Trafford Housing trust*.

#### ***Analysis of Smith V Trafford Housing Trust***

Adrian Smith was working as a manager at Trafford Housing Trust. The employee posted some comments on Facebook on the legalization of gay marriage. The law made gay marriage in churches legal, on which he commented that it was "an equality too far." There were exchanges of posts on his Facebook feed on the given topic.

The posts, however, were not visible to the general public but only to the friends and colleagues of Adrian Smith. Many of his friends opposed this. It was not during work hours that he posted it; The Housing Trust had an agreement with the employees with a specific clause which stated- "Employees should not engage in activities which may bring the Trust

<sup>26</sup> CONSTITUTION OF INDIA, 1950, ART. 19(B).

<sup>27</sup> Preece v JD Wetherspoons plc ET/2104806/10

<sup>28</sup> Stephens v Halfords plc ET/1700796/10.

into disrepute, either at work or outside work. This includes not engaging in any unruly or unlawful conduct where you can be identified as an employee... via any web-based media such as... Facebook".

After initiating disciplinary action against Adrian, the company found him to violate the code of conduct and equal opportunities policy. After finding him guilty of misconduct, he was demoted to a no managerial position and cut 40% of his pay. Although Mr. Adrian was demoted more to the junior position, he brought a breach of contract proceedings in the court against the trust.

The court upheld none of the grounds which the trust had relied upon to demote and cut down the pay. The court held that it was the personal cyberspace of the employee where the contract did not extend to. Furthermore, the court also said that even though he was visible on his Facebook bio that he worked for the Trust, it cannot be contended that any reasonable individual would deem it the position of trust on the given matter. It was inferred that the individual's position was explicit, and it did not harm the reputation of the Trust. The court considered that the employee's opinion was relatively moderate, and since it was shared casually on the weekend outside the work hours, it could not sensibly bring any mistrust to the Trust.

Dealing with dignity and respect, the court held that Mr. Smith did not treat his colleagues disrespectfully. They agreed that the views might

cause uproar or offense to some individuals, but it was a reasonable price to pay for the freedom of speech. The court said that the conduct of Mr. Smith did not amount to a breach of Trust's code of conduct. The trust was asked to pay for the difference in payment and reinstate him to his earlier possession.

Concluding comments on the case: This case, however, does not mean that the employee's freedom of speech outweighs the employee's obligation regarding the posting of comments on Facebook.

Another critical case is that of *Teggart v TeleTech UK Ltd.*<sup>29</sup> In this case, the Northern Ireland Tribunal upheld the dismissal of an employee based on his Facebook posts regarding a co-worker woman. The court said that his behavior brought disrepute to the institution and also violated the code of conduct. In the Smith case, however, the court did not believe that the employee's conduct brought any serious disrepute to the Trust.

#### ***Are such cases not in India?***

Events similar to the above cases occur in India, but the Indian law does not address such issues. In one case, the Bombay High Court issued an injunction against a former employee for defamation directing him to delete the defamatory content. The order prevented the defendant from "issuing, disseminating or communicating any defamatory comments against the employer". The court found merit in the defendant's argument that it was not a fair

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<sup>29</sup> *Teggart v TeleTech UK Ltd* (2012) NIIT 00704\_11IT.

comment. This order shows that companies need to deal with employers defaming it.

In fear of losing reputation, companies take action against the employee. The Indian example of the same is the recent incident when a Zomato employer allegedly said that everyone should know Hindi. This offended the customer who took it to social media. The employee was fired "for negligence towards diverse culture," but the apparent underlying reason is fear of being defamed.<sup>30</sup>

Another case that could be viewed similarly is SMC Pneumatics<sup>31</sup>, where the employee sent vulgar mail to other fellow employers and subsidiaries. The Delhi High Court granted an interim injunction restraining the Plaintiff.

It is interesting to note that the proper law dealing with such matters is absent despite such incidents.

#### **IV. LESSONS FOR INDIAN CIVIL JURISPRUDENCE**

The cases discussed above clarify that employers' civil liability and disciplinary actions are on the rise—the smith case per se demands a principled and new approach in defamation cases. Employers need effective social networking sites policies monitoring their usage—an individual needs to keep their pages distinct from work-related matters. A profile mentioned that the workplace of an individual runs with risk of the workplace being defamed. Posting of common,

non-offensive views will not create the danger of disciplinary action. Hence, India and other nations need to devise law for the same, either through judgments or legislation. Law must adapt to the new technologically advanced world.

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<sup>30</sup> The Hindu, *Zomato lands in a row after customer care agent says 'Hindi is our national language'* available at <https://www.thehindu.com/news/national/zomato-lands-in-a-row-after-customer-care-agent-says-hindi-is-our-national->

language/article37068308.ece (Last visited November 12, 2021).

<sup>31</sup> SMC Pneumatics (India) Pvt. Ltd vs Shri Jogesh Kwatra (2014).