IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

C.A 198/1999 (F)
D. C. Colombo 15213/MR

M. Jayantha de Silva
No. 03, Bawa Road,
Borella, Colombo 8.

PLAINTIFF

Vs.

Upali Newspapers Limited
No. 223, Bloemendhal Road,
Colombo 13.

DEFENDANT

And between

Upali Newspapers Limited
No. 223, Bloemendhal Road,
Colombo 13.

DEFENDANT-APPELLANT

Vs.

M. Jayantha de Silva
No. 03, Bawa Road,
Borella, Colombo 8.

PLAINTIFF-RESPONDENT

BEFORE: Anil Gooneratne J.

COUNSEL: Nihal Jayamanne P.C. with Noorani Amarasinghe
For the Defendant-Appellant

Uditha Egalahewa with Aloysius Michael Paiva
For the Plaintiff-Respondent

ARGUED ON: 11.01.2012

DECIDED ON: 08.02.2012

GOONERATNE J.

This is an appeal from a judgment and decree of the District Court of Colombo in an action for damages for defamation. District Court entered judgment in favour of the Plaintiff-Respondent as prayed for in his plaint, in a sum of Rs. 5,000,000/-. Plaintiff-Respondent was at all material times a member of the Colombo Municipal Council. Defendant-Appellant is a company which publishes a Sinhala Newspaper called "Divaina" which has a wide circulation in this country. This action arose out of the publication in the said newspaper on 01.9.1993, and the article relevant to

this case was marked "ඇ" and annexed to the plaint. At the trial in the Original Court the said publication was marked as 'P4a' and the entire page of the said newspaper pg. as P4. Paragraph 5 of the plaint contains the alleged defamatory words concerning the Plaintiff.

It was the position of the Defendant-Appellant in the District Court and as well as in this court that the news item marked in P4 (P4a) is substantially correct and is a correct reporting of the proceedings in the Magistrate's Court. Further it was contended on behalf of the Appellant that the newspaper concerned has a duty towards the general public to report matters of public interest and importance. The Plaintiff-Respondent being a public figure should be under public scrutiny and cannot complain of newspaper reporting proceedings in the Magistrate's Court. The appellant pleads that the publication was of public interest and justification without malice. It was submitted to this court and also pleaded in paragraph 10 of the answer that the damages claimed are excessive. It is further pleaded in paragraph 8 of the answer that the action has not been filed as required by the provisions of the Civil Procedure Code and the defamatory words have not been set out in the plaint.

At this point of the judgment I would prefer to examine the alleged defamatory publication and the reporting of same according to the court proceedings.

Article P4/P4a reads thus:

වංචාවට වරද පිළිගෙන මුදල වාරිකව ගෙවයි

රුපියල් ලක්ෂ 5 ක වංචාවක් සම්බන්ධයෙන් කොළඹ අතිරේක මහේස්ත්‍රාත් ප්‍රියන්ත ප්‍රනාන්දු මහතා හමුවේ වරද පිළිගත් එක්සත් ජාතික පක්ෂයේ කොළඹ නාගරික මන්ත්‍රී මුතුමාලගේ පයන්ත ද සිල්වා මහතා එම මුදල වාරික වශයෙන් රුපියල් 10,000/- බැගින් ගෙවීමටත් මූලික වශයෙන් පළමුව රු 75,000/- ක් ගෙවීමටත් අධිකරණයේ දී පොරොන්දු විය. ඒ අනුව පසුගිය පුනි 14 වැනි දින මූලික මුදලින් රු 75,000/- ක් වෙනුවට 20,000/- ක් ඉදිරිපත් කළ ද සිල්වා මහතා ඊලග දිනයේදී ඉතිරි මුදල 55,000/- අනිවාර්යෙන්ම ගෙවීමට නියම කළ මහේස්ත්‍රාත්වරයා එසේ නොගෙවන්නේ නම් සිරදඬුවම් විඳීමට සිදුවන බව පැවසිය.

Perusal of the Magistrate's Court proceedings, (document P2/P1) it is a charge of cheating (Section 403 of the Penal Code) and misappropriation (Section 386 of the Penal Code). The Appellant's position in this is that the above newspaper article is substantially correct and a

correct reporting of the proceedings are contained in P4a. It is further stated that Plaintiff-Respondent was charged with cheating and he came to a settlement in court and agreed to pay the full sum which was the subject matter of the charge. The narration of the Appellant is that, Plaintiff had been a member of a cheettu transaction of Rs. 500,000/- (traditional arrangement of trust between members involved in it) Plaintiff in breach of the trust, had given the complainant, Quintus Roy Thomas a cheque for Rs. 500,000/- which was dishonoured (Plaintiff describe the cheque as a 'dud' cheque) on the above basis charges were framed.

The proceedings at p2 & p3 and more particularly the journal entry dated 22.4.1993 indicates that both parties agreed to settle the case and accordingly the charge of cheating (Section 403) was withdrawn. Journal Entry of the said date gives the method and details of payment to be made by the accused (Plaintiff-Respondent). The last entry in P2/P3 is in journal entry of 4.6.1993 suggesting some payment. This court is unable to ascertain as to how the proceedings before the Magistrate was terminated. It would also be convenient at this point to consider the evidence led, of the Additional Registrar of the Magistrate's Court which evidence was led before the learned District Judge. (proceedings of 14.6.1996). The gist of the

evidence contain the settlement entered before parties and withdrawal of the cheating charge. In answer to a question from the above witness whether in default of payment of instalement would result in a sentence of imprisonment, the answer to same had been in the negative. Witness further adds that the proceedings do not refer to any form of imprisonment. In cross examination the opposing party had been very brief and no proper acceptable question had been posed and a positive reply had been given to indicate that the Plaintiff-Appellant would be sentenced in default of payment.

When one has to compare and contrast the newspaper publication relevant to the case and the Magistrate's Court proceedings the following differences are apparent.

(a) The case had been settled. That is on an agreement of both parties, where method of payment had been agreed upon. The news item does not refer to any question of settlement and withdrawal of the charge of cheating other than method of payment and the court proceedings does not reveal a plea of guilt being recorded.

(b) The Magistrate's Court proceedings in it's entirety made available to this court and the proceeding marked in the District Court, no where does it show that in default of payment, the learned Magistrate imposed a default sentence of imprisonment.

A newspaper publications should record correct and accurate court proceedings. Otherwise members of the public tend to be mislead. In this instance I have no hesitation in observing that the correct position has not been recorded and for some reason the Defendant-Appellant had given a twist to the Court proceedings and some form of exaggeration had been done. However this court is unable to ascertain as to how the Magistrate's Court proceedings terminated in the absence of the entire record being produced? In the circumstances I am unable to state precisely that the reporting of the court proceeding is correct in substance. I would be reluctantly compelled to reject that argument of the Appellant.

The learned District Judge in the judgment has narrated good part of the evidence led at the trial and has briefly given cogent reasons to enter judgment on behalf of the Plaintiff-Respondent. The learned District Judge has accepted the evidence of the Plaintiff and accept him to be a truthful witness. I have no hesitation in endorsing such views. Trial Judge refer to the admissions recorded. Paragraph 3 and paragraph 5 of plaint (partly). Judgment also refer to the fact that after publication of the news items several persons spoke to Plaintiff, who was feeling ashamed of it. The learned District Judge accept the fact that the Plaintiff is a person of repute

and several persons in the society accept him to be a person of repute, as a politician/member of a local body. I have noted the following extract form judgment of the learned District Judge which need to be endorsed and accepted by this court, other than the question of damages awarded to Plaintiff.

විත්තිකරු විසින් කිසිම සාක්ෂියක් මෙහෙයවා නැත. පැ 4 අ දරණ ඉහත පරිදි ප්‍රසිද්ධ කර ඇති ප්‍රකාශය පැමිණිලිකරු සම්බන්ධව අසත්‍ය වැරදි සහගත ප්‍රකාශයක් බව පෙනි යයි. එය බැලූ බැල්මටම අපහාසාත්මක බවත් ද්වේශ සහගත බවත් එහි දැක්වෙන වචන වලින් සනාථ වේ. විත්තිකරු විසින් වරප්‍රසාද හිමිකම සාධරණ විවේචනය හෝ මහජනයාගේ යුහසිද්ධිය උදෙසා බව හෝ වැනි කිසිම විත්තිවාචකයක් ඉදිරිපත් කිරීමට අපහෝසත් වී ඇත. තවද පැ 4 අ දරණ ප්‍රකාශයෙන් පැමිණිලිකරු කියන ආකාරයට ඔහුගේ කීර්තියට හානියක් වී තිබීම පිළිබඳව අධිකරණය සැහිමකට පත් කොට ඇත. එය ඔහු දරන තනතුර හා ඔහු සමාජයේ දරණ මට්ටම සලකා බැලිමේදි ඔහුගේ තත්වයට කලැලක් ඇති කරන වදියේ ප්‍රකාශයක් බව ඔප්පු කොට ඇත. පැමිණිලිකරු කියා ඇත්තේ එම ප්‍රකාශය ඔහු පිලිබඳව අපහාසාත්මක ප්‍රකාශයක් බවයි. ඒ හේතුව උඩ ඔහුට අලාභ සිදු වූ අතර එම අලාභය ලක්ෂ 50 කට තක්සේරු කරන බවයි. පැ 4 අ දරණ ප්‍රකාශය අපහාසාත්මක ප්‍රකාශයක් බවට පැමිණිලිකරු ඔප්පු කර තිබිය දී එහි ඇති අපහාසාත්මක ස්වභාවය පිලිබඳව විත්තිකරු විසින් ප්‍රමාණවත් හා සාධරණ පැහැදිලි කිරීමක් හා/හෝ විත්ති වාචකයක් ඉදිරිපත් කිරීමට අපහෝසත් වී ඇත.

I would reject the argument that withdrawal of the 1st charge is of no consequence as the 2nd charge is based on the 1st charge. This is not the way to consider a case of defamation. One has to bear in mind that parties agreed to settle the matter in the Magistrate's Court and pay the amount due, and on that basis withdrew the charge of cheating. Once it is withdrawn no liability is attached to same. That would be the end of the matter where cheating is concerned. I do not wish to discuss the basics of criminal law and make this already prolix judgment more prolix.

I must also once again refer to paragraph 5 of the plaint where the words complained of are embodied in the said paragraph. Pleadings would require the very words upon which the allegation of defamation is founded should be included in the plaint. Sirisena Vs. Ginige 1992 (1) SLR 320, in my view there is due compliance with the above dicta and the provisions of the Civil Procedure Code.

There are some ingredients in the law of defamation that should be proved. In this context I would take the simplest approach to decide on this. Defamation is the publication of false and defamatory statements respecting another person without law justification. It may be words written or spoken or by action. A defamatory statement is one which has the

tendency to injure the reputations of the person to whom it refers 18 NLR 73, publication is essential. In an action for defamation where the words are libelious perse no innuendo need be alleged. In the case in hand the article in it's entirety is aimed at to injure the reputation of the Plaintiff who was and is a politician. Let me also consider the aspect of intention to insult (animus injuriandi). It is the conscious intent to attack wrongfully a person's good name.

In this case some evidence had transpired in the Original Court about the Plaintiff's political activities and the social service done by him to the society in general. Therefore he may be held in high esteem at least among some members of the society though in todays context different view are expressed by very reasonable right thinking persons about politicians in general, which tend to express good and bad views of politicians. The general views do not prevail as far as the case in hand is concerned.

There is always animus injuriandi if an attack is desired as an end in itself as where person say something defamatory in order to insult another. Equally there is animus if such an attack is foreseen as the result of obtaining some other object as where a news item publish sensational news in order to increase the sake of a newspaper. In Reading Dr. C.H Gunasekera Vs. Associated Newspapers Ceylon Limited 53 NLR 481, I could gather, it

is a state of mind by having regard to the nature of the occurrence and to all external facts and circumstances from which an inference may be made whether it exist or not. Animus injuriandi could not be negatived in the absence of circumstances showing privilege.

The publication in the case in hand has no privilege aspect. It is either directly or indirectly a method employed to cause insult and injury to Plaintiff-Respondent. At this point I would also consider the defense of qualified privilege. Though the case of David Appuhamy Vs. Associated Newspapers of Ceylon Limited 58 NLR 241 discussed the defence of privilege in favour of the above newspaper Company, I would with much interest on the topic refer to certain extracts from the judgment of Basnayake C.J to demonstrate that the requirement of a fair and substantially accurate reporting is essential to avail the defence of privilege and in the case in hand I cannot find a substantial accurate report of the Magistrate's Court proceedings.

At Pgs. 245/246....

Basnayake, C.J.

I agree with the Judgment of my brother Gunasekara.

I wish to add that the learned trial Judge has made a careful examination of the evidence and I am in entire agreement with his finding of fact that the publication is a fair and substantially accurate report of the proceedings before the Magistrate.

The only question for decision is whether the report is privileged. It is well established that newspapers and newspaper reporters enjoy a qualified privilege in respect of fair reports of proceedings of Courts of Justice. By "proceedings" is meant such of the judicial business as is conducted in open Court. The privilege does not attach to reports of anything that has not transpired in open Court.

The principle governing the privilege is thus stated by Barry J.P. in Webb v. Sheffield:-

"Though the publication of injurious words was taken to be evidence of an intention to injure, inferred from publication, even though such intention was really absent, still it was of public importance that cases heard in Court should be reported by newspapers, and the publishers held blameless for any injurious statements made, if reported with fairness and substantially accurate, because the necessity for publicity of legal proceedings took precedence over private interests."

In the same case Shippard J. stated:

"There is no proposition of law more firmly established than this, that a fair report of a trial in a Court of law is privileged, nor can we allow it to be questioned. In order to be privileged, the report must be substantially correct and impartial".

I have also to observe that Newspapers have a very responsible role to play in the society. When the media attempt to disclose to the public an accurate news item of matters that concern the general public or of which are interest to the general public such material should be made available to the public. It would be in breach of a fundamental right to curtail the media reporting news items that concerns the public when it is accurate in

substance. In the case in hand reporting is precisely not accurate in substance. (except for the mode of payment in several instalements) on the other hand Plaintiff-Respondent is not entirely free of blame .

The principal remedy for a tort is an action for damages and the question of damages is a question of fact to be decided on the merits of each particular case.....

> The assessment of damages is ordinarily therefore a somewhat difficult matter but there are certain principles in Roman Dutch Law which should guide a Court in awarding damages. One of them is the status and social position of the plaintiff. In the case of Botha vs. the Pretoria Printing Works (b) where General Botha was libelled the Court said "Although no special damage has been proved it is clear that some damage must have been caused to a man in General Botha's position by the imputation made against him. I think the Court should by its attitude impress upon all concerned that attacks upon the private character of public men are not to be lightly made and that, if they are made, apart from privilege they must be justified". – The Law of Delict in Ceylon – E B Wickramanayake Q.C., Pg. 114

Issue No. 4 relates to the question of relief prayed for by Plaintiff. In other words can the court grant the amount prayed for in the prayer? The trial Judge has awarded the sum prayed for in the plaint and awarded a sum of Rs. 50 lakhs (5 million rupees). The trial Judge is bound to give his or her judicial mind in awarding damages. In my view the damages awarded are very excessive in the circumstances of this case. Is it the

position that even if a sum over and above the amount prayed for in the present case was pleaded or the plaint prayed for more than 5 million rupees, i.e 10 or 100 million, should the court award whatever the sum prayed for in the plaint? Usually the Appellate Court would not interfere with the trial Judge's award if all other matters are acceptable. But in this instance in awarding damages several aspects need to be considered. I would very seriously give my mind to the following, if some damages are to be awarded: (not as prayed for)

1. Notwithstanding the defamatory article, what led the Defendant-Appellant to publish same was the very basic fact about Plaintiff-Respondent entering into some kind of money transaction with the complainant, which was not settled by him prior to filing charges in the Magistrate's Court. Plaintiff-Respondent being a politician who has at all times to hold himself to be a honourable person in eyes of the public should have settled the transaction at the very outset and not given the complainant a cheque that was dishonoured. Plaintiff-Respondent settled the amount due at a later stage because he was at least morally bound to pay the complainant Thomas on the "cheettu" transaction. The Appellant having had material about a case where the Plaitiff-Respondent was involved, of course published the news item in question and the appellant had in the process exceeded the authority or went beyond the acceptable professional standards expected out of a reputed newspaper, by not reporting correct facts.

2. It was the Plaintiff-Respondents initial conduct that caused the publications, though wrong by his own act, at least by implication.

3. Rights of the press/media should be protected (to an extent) though facts had been exaggerated or misrepresented to the public.

4. Public also has a right to know and be aware about activities of a member representing the public in Parliament, Local Body, Pradeshiya Sabha etc. This is so because the public always thought it fit and with much hope, select a member of their choice by a process of election with the hope that a member would serve the society and his constituent in a hounourable manner for the betterment of the society in every respect, at all times.

This right should always be protected and promoted in the best Interest of the public. In any democratic society, the right to comment upon and criticize public Institution, legislation and persons occupying public authority are necessary. But to regard the comment as a defence, it should be a fair comment. (principles of Ceylon Law H. W Tambiah Q.C pg. 43). The measure of damages is determined by loss of reputation, pain of mind caused to the Plaintiff. When words are actionable perse it is not necessary to give proof of special damages but the Plaintiff could recover a verdict for damages without giving evidence of actual pecuniary loss (1937)39 NLR 547

In all the above circumstances and the facts applicable to the case in hand, I would affirm the judgment of the District Judge except the award of damages as prayed for in the plaint. The amount awarded by the Original Court is excessive and need to be reduced having regard to the matters discussed by me in this judgment (1 – 4 above). Therefore whilst affirming the judgment of the District Court I direct that judgment be entered in favour of the Plaintiff-Respondent in a sum of Rs. 1 million with legal interest from date of plaint to the date of payment in full of the said sum. This appeal is dismissed without costs subject to the above variation on quantum of damages.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL