

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

C.A. Appeal No. 805/96(F)
D.C. Colombo No. 12137/MR

Prins Gunasekera
26 Flodden Road
London SE5 9LH
Plaintiff

Vs.

Associated Newspapers of
Ceylon Ltd.
No35,
D.R. Wijewardane Mawatha,
Colombo 10
Defendant

AND NOW BETWEEN

Prins Gunasekera
26 Flodden Road
London SE5 9LH

Plaintiff-Appellant

Vs

Associated Newspapers of
Ceylon Ltd.
No35,
D.R. Wijewardane Mawatha,
Colombo 10
Defendant-Respondent

Before : A.W.A. SALAM, J.
Counsel : H.M. Dharmadasa for the plaintiff-appellant
Kushan de Alwis for the defendant-respondent
Written Submissions
tendered on : 02.09.2010
Decided on : 28.02. 2011

A.W.Abdus Salam, J.

This is an action for recovery of damages, assessed at a sum of Rs. 5,000,000/-, arising from a libelous publication, alleged to be *per se* defamatory of the plaintiff. It is common ground that "Ceylon Daily News" of 17 May 1990 carried the said publication. This newspaper has been self-proclaimed by the defendant as enjoying the highest circulation in Sri Lanka and considerable circulation beyond seas. The libelous statement was part and parcel of an article published under the heading "Tarbrush campaign against Lanka in London" purporting to be signed by a person describing himself as "A True Patriot". Even though the defendant admitted the publication, it took strong exception to the plaintiff being granted relief based on the defence of "privilege", and "fair comment on a matter of public interest".

The question whether the plaintiff is entitled to have and maintain the action on the grounds set out in paragraph 7 of the answer was taken up as a preliminary question of law, namely whether the plaintiff had instituted action No 1990 G 5175 in the High Court of Justice Queens

Bench Division, England, against the defendant for alleged damages arising from the said publication and obtained *ex parte* judgment in a sum of £150,000/- and subsequently filed application in the District Court of Colombo under the Reciprocal Enforcement of Judgments Ordinance (Cap 94) for the registration of the same. Admittedly, the District Court made order on the 28th August 1993 for the registration of the said judgment.

The learned district judge by order dated 28 July 1993 ruled out the preliminary objection and decided to set down the case for trial. Being aggrieved by the said order the defendant applied in revision to this Court in application No CA 580/93 and this court on 01.12.1994 dismissed the application, reserving in the defendant the right to canvass the said findings by way of final appeal. However, no appeal has been preferred by the respondent (defendant) under section 772 of the CPC against the said order. As such, the question relating to the propriety of that order does not arise for determination in this appeal.

Turning to the main dispute, it is to be seen that the trial in this matter proceeded on eight issues of which the first two were suggested by the plaintiff and the rest by the defendant. In unfolding his case, the plaintiff led the evidence of Jeyaraj Fernandopulle and closed his case reading in evidence documents marked P1 and P1 A. The document marked as P1 is a copy of the newspaper and P1A is the relevant article titled "Tarbrush campaign against Lanka in London".

The defendant closed its case without leading any evidence after formally marking two documents as D1 and D2 which are applicable to the preliminary objection. Therefore, as far as the main trial is concerned it would be correct to observe that the defendant neither adduced any oral evidence nor did it produce any documentary evidence in support of its position.

At the conclusion of the trial by judgment dated 12 September 1996 the learned district judge held *inter alia* that the said publication is neither defamatory of the plaintiff nor is capable of reasonable construction that the plaintiff was using the organizations referred to in the article to misappropriate funds given by donors. Consequently, the action of the plaintiff was dismissed.

The plaintiff has appealed from this judgment.

It is necessary at this stage to examine the evidence led by the plaintiff to establish the allegation. The only witness who testified on behalf of the plaintiff was Jeyaraj Fernandopulle who was the Deputy Minister of Policy Planning, Ethnic Affairs and National Integration. By profession the witness was an Attorney-at-law. He had known the plaintiff for nearly 25 years. According to his evidence the plaintiff had been elected as a Member of Parliament in March 1960 to represent the Habaraduwa electorate and later re-elected in 1970. The witness claimed that he had personal acquaintance with the plaintiff who had a high reputation. The witness described the plaintiff as one of the

popular criminal lawyers and one who had played a leading role in cases concerning the violation of human rights in Sri Lanka.

Testifying as to the circumstances which compelled the plaintiff to leave the country and take up residence in England, the witness maintained that some unknown people were after his life as he was appearing in violation of human rights cases. The witness also stated that the plaintiff campaigned for democracy and worked for the preservation of human rights. The plaintiff was hailed by the witness as a leading figure in Sri Lanka.

The evidence of the witness touching upon the integrity, honesty, credibility and recognition of the plaintiff has been recorded in question and answer form in the following manner.

Question: Having known Mr. Gunasekara for such a long time, do you believe for a moment that he would misappropriate any funds collected?

Answer: He was a person who appeared free of charge for litigants in cases. He was not a person who would misappropriate money.

Question: Are you aware that Mr. Gunasekara collected public funds for any organization?

Answer: He has not collected public funds for any organization. I have met him in London before this article and after this article. I met him in London twice. He has a very high reputation in London.

It is quite significant to note that under cross examination no effort has been made by the defendant to controvert the evidence of Jeyaraj Fernandopulle. Therefore, incontrovertibly his evidence vividly portrayed the true public image of the plaintiff. He gave a detailed description of his version as to what he thought the standing of the plaintiff in the society was. The uncontradicted evidence of this witness concerning the plaintiff was that he commanded great respect in the society and admired by all and had earned a good name of the public. In other words the witness was emphatic that the plaintiff was held in high esteem as a politician, lawyer and a person who tirelessly toiled towards the protection of democracy and preservation of human rights. According to the witness, the plaintiff was indeed held in very high esteem in England as well.

At this stage, it may be useful to refer to certain parts of the impugned publication, since the publication has to be read in its entirety and not in isolation as was done by the district judge, to ascertain the extent to which the publication is derogatory of the plaintiff. Some of the relevant excerpts of the publication read as follows ...

"Tarbush campaign against Lanka in London-

No Sri Lankan can forget the terror experienced till about the end of 1989.

People were so sick of the situation, that they would have no objection to Rohana Wijeweera being made a Minister-let alone even offered the Premiership, if the violence could have been halted and people allowed to live their normal lives.

Those who fostered and spawned these terrorist groups were forced to flee the country and many of them are here in the UK unable to return, now that there are "Jekyl and Hyde" existence has been exposed.

It is sad to see a small group of Sri Lankans residing in the UK, teaming up with these purveyors of violence, to engage in a campaign accusing the Sri Lankan government of violation of human rights etc.

Where were these so called campaigners of democracy and human rights when the JVP and the northern terrorists slaughtered people by hundreds and destroyed vital facilities and wrecked the economy? What right have they to claim to be patriots and champions of democracy, when all they did many years was stay away from troubled homeland, making no contribution to the rest to the situation.

Now when things are peaceful and the country making an effort to salvage the battered economy these groups dare to suggest that aid donor countries should stop all aid to Sri Lanka.

Two organizations in the UK that are in the age in this campaign of vilification are the Sinhala Balamandalaya led by petrol pumper named Gamini Keerthichandra Fernando and campaign for democracy and human rights in Sri Lanka led **by Prins Gunasekera** and Clem Perera. (Emphasis added)

It is well known that these small groups of Sri Lankans in U.K. comprise of **those who never achieved any form of recognition in their own country or even in the U.K.** now quite suddenly they appear fired by a spirit of patriotism whereas the real motive is to gain some publicity for them. (Emphasis added)

Another motive is to use this activity to fool Sri Lankans in U.K. and other philanthropic organizations to donate funds

which these scheming individuals pocket for themselves"...

No doubt the learned district judge has considered the contents of the article as being defamatory. Nevertheless, he concluded that the contents do not apply to the plaintiff. The reason behind this finding appears to be quite strange. On a perusal of the reasoning adopted by the learned district judge it appears that the article at one place refers to a "small groups of Sri Lankans in the United Kingdom comprise of those who never achieved any form of recognition in their own country or even in the United Kingdom and they now quite suddenly appear fired by a spirit of patriotism whereas the real motive is to gain some publicity for themselves". Since the plaintiff is a person of very high reputation and had achieved recognition both in Sri Lanka and in London, the learned district judge was of the view that the reference in the article is devoid of any defamatory material concerning the plaintiff as alleged by him and therefore obviously no reader of the article P1A would have understood that these paragraphs refer to the plaintiff.

It is common ground that the impugned article P1A has been published in the newspaper in the editorial page. This undoubtedly sheds light as to the prominence the defendant has chosen to give the article "Tarbrush campaign against Lanka in London".

Moreover, the defendant has published a 2 1/2" x 3 1/2" size photograph of the plaintiff with the caption printed underneath with the name "Prins Gunasekara" in the said article and conspicuously this is the only photograph the article carried. Having referred to the

plaintiff by name in the article as one of the leaders involved in the campaign for democracy and human rights in Sri Lanka, the defendant has identified the plaintiff as being in the forefront of these small groups of Sri Lankans in U.K. The article described the small groups including the group led by the plaintiff as being involved in collection of public funds and pocketing the same. On a careful reading of the article in its entirety, the objective intended to be achieved by the publisher can safely be inferred as an attempt to warn the Sri Lankans in U.K. and other philanthropic organizations against the scheming individuals and organizations involved in misusing public funds. The important question that arises at this stage is, why then publish a photograph of the plaintiff prominently in the said article unless the publisher had an ulterior motive to bring in the plaintiff into disrepute by imputing an unproven allegation of dishonesty.

The pith of the plaintiff's case therefore is that the article complained of is *per se* defamatory of him. The plaintiff contended that the question as to whether the publication is *per se* defamatory is entirely a matter for the determination of the judge and the examination of the article, clearly indicates that the plaintiff who is a senior Attorney-at-law has been dishonestly pocketing money and appropriating for himself the donations made towards the campaign for Democracy and Human Rights in Sri Lanka.

It is trite law that the words used in a publication of defamatory character need to be construed with reference to the context in which they are used. The trial judge is also duty-bound to examine such words in the light of all the circumstances surrounding the publication which are properly adduced in evidence as affecting their meaning. In the case of Stewart Printing Company Ltd vs Conray 1948 (2) SA 707 (A.D) it was held that where the defamatory words are contained in a book, the whole of the contents of the book must be taken into account.

Similarly, when defamatory words are contained in a newspaper article, unless the contents of the article in its entirety are taken into account, it would hardly be possible to arrive at a definite finding as to the actual nature of the article.

As has been urged on behalf of the plaintiff, the learned district judge has failed to attach any importance to the photograph of the plaintiff published along with his name, when he came to the conclusion that the defamatory words used in the article are not applicable or cannot reasonably be construed to be applicable to the plaintiff.

In this respect it must be observed that the omission on the part of the trial judge to give due weightage to the publication of the photograph of the plaintiff in a prominent manner accompanied by the caption carrying his name is the most serious flaw in the impugned judgment which renders it strikingly perverse and irrational. Had the learned district judge properly considered the prominently displayed

photograph of the plaintiff with his name clearly printed out beneath it, he would have had no difficulty whatsoever in coming to the conclusion that the publication of the photograph of the plaintiff would have left a lasting impression in the minds of any reasonable and prudent reader that the plaintiff having collected funds in London for the alleged cause as described in the article had appropriated the same for his own use.

As has been contended by the appellant this aspect of the matter would be clearly seen and signposted in the following extracts from the publication.

"Two organizations in the UK that are engaged in this campaign of vilification are... and the campaign for democracy and human rights in Sri Lanka led by Prins Gunasekara".

"Where were these so-called campaigners for democracy and human rights when the JVP and the northern terrorist slaughtered people by the hundreds and destroyed vital facilities and weaken the economy? What rights have they to claim to be patriots and champions of democracy, when all they did these many contributions to help restore the situation?"

"It is well-known that the small groups of Sri Lankans in the UK comprised of those who never achieved any form of recognition in their own country or even in the UK now quite suddenly appear fired by a spirit of patriotic, whereas the real motive is to gain some publicity"

"Another motive is to use this activity to fool the Sri Lankans in UK and other philanthropic organizations to donate funds

which these scheming individuals pocket for them".

It would be seen that the article in question has referred to three individuals by name and with the photograph of the plaintiff. The article clearly identifies the plaintiff and his organization amongst others as being responsible for engaging in the campaign of vilification. For purpose of clarity the relevant passage from the article is reproduced below...

"The organizations in the UK that are engaged in **this campaign of vilification** are the Sinhala Bala Mandalaya led by a petrol pumper named Gamini Keerthichandra Fernando and the campaign for democracy of human rights in Sri Lanka led by **Prins Gunasekara** and Clem Perera".
(Emphasis added)

In the circumstances, in my opinion it is a clear misdirection of law to have come to the conclusion that the article in question is not referable to the plaintiff as he does not fall into the category of people who have "never achieved any form of recognition in their own country or even in the U.K." as referred to in the article.

Whenever any reader with an average intelligence goes through the article, no difficulty would possibly experience by anyone to ascertain the individuals targeted by the author who allege dishonest conduct on their part. No reader would ever examine or reasonably expected to scrutinize the article in the light of whether the plaintiff has ever achieved any form of recognition in his own country or even in the U.K to exclude him from the *per se* defamatory publication. It is contended

on behalf of the plaintiff that if the reasoning adopted by the learned district judge is valid in law to dismiss the plaintiff's action, any eminent person, without actually naming him but giving unmistakable clue to his identity, could be defamed with impunity by merely inserting in the defamatory publication a statement that the identifiable victim is a person of no consequence. I am in total agreement with the contention of the plaintiff on this matter.

Therefore what is significant in the article is the reference made directly to the plaintiff as being responsible for the questionable conduct in the alleged act of embezzlement. Hence, the article in question in my opinion is *per se* defamatory of the plaintiff and the learned district judge has misdirected himself in holding otherwise.

For nearly two decades the defendant has not taken any interest to exclude the plaintiff from the self-explanatory defamatory publication or was so keen to exclude him from the small group of Sri Lankans or from the scheming individuals referred to in the article, in order to minimize the damage caused to the reputation of the plaintiff. The fact that no apology was forthcoming, in respect of the defamatory publication, is a matter the court can properly take into consideration in fixing the quantum of damages.

It is to be observed that the privilege of the press is not an absolute one but is qualified being circumscribed within the limits of the provisions enjoined by law. It has been reiterated by courts all over the world that the freedom of press should be exercised with greater

responsibilities and newspapers should be more cautious in making scandalous imputations.

The defendant has failed to adduce any evidence in opposition to the claim made by the plaintiff to justify the defence of privilege or fair comment. In the circumstances, it is my considered view that the learned district judge has erred himself when he came to the conclusion that the action of the plaintiff should be dismissed on the grounds relied upon by him. The said judgment of the learned district judge in my opinion has ended up in a travesty of Justice. In actual truth the article in question is *per se* defamatory of the plaintiff and is capable of being construed by the readers as a reference made to the plaintiff.

Hence the findings, judgment and the decree which ended up in the dismissal of the plaintiff's action are liable to be set aside. The learned district judge who heard the case incidentally has retired and cannot be reappointed in law to re-hear the case. Moreover, the only witness who testified on behalf of the plaintiff in the lower court is not among the living. Therefore, to send this case back to the district court to decide the quantum of damages arising from the defamatory publication would mean further litigation, unnecessary expenses for both parties, and a further meaningless appeal. Such a course, if adopted would mean prolonging the agony which would certainly be unfair and not at all beneficial or conducive to the best interest of the parties.

For the foregoing reasons, in my opinion, it is not inappropriate for this court to determine the amount of compensation the plaintiff is entitled regard being had to the applicable legal principles.

The claim for damages in sum of Rs 5,000,000/- made in this case by the plaintiff generally is comparable with the awards made by our courts in similar situations. It is of paramount importance to note at this stage that the defendant has not pleaded the defence of justification in the answer. Hence, it can safely be assumed that the publication in question, to say the least, in so far as it relates to the allegation of financial misconduct, is both reckless and malicious on its face. Taking into consideration that the plaintiff is a leading lawyer both here and abroad and that he was a member of Parliament for nearly 10 years and the conduct of the defendant both at the time of publication and thereafter, I consider it as being reasonable to fix the damages payable at 5 million (Rs 5,000,000/-) as prayed for in the plaint.

As the Plaintiff is permanently resident in U.K, although it may strictly be irrelevant and have no bearing on this decision, let me place it on record, the pecuniary disadvantages a judgment creditor may have to undergo by reason of the changes that necessarily take place from time to time in the field of global exchange rates.

On 12 September 1996, to wit on the date of the impugned judgment a sterling pound was equivalent to LKR 86.9194 LKR and by 8.02.2011 sterling pound gone up to LKR 180 LKR. Accordingly the

sterling pound conversion of Rs 5,000,000/- in 1996 would be £ 57471. The sterling pound conversion of Rs 5,000,000/- in 2011 is £ 27777.

Had the plaintiff been awarded the full measure of damages in a sum of Rs 5,000,000/- in 1996 he would have been entitled to 29694 pounds more than what he would receive by virtue of this judgment in the form of foreign exchange. The rupee value of £ 29694 as at today is equivalent to (29694x180) LKR 5,344,920/-.

For reasons stated above, I allow the appeal and fix the quantum of damages the plaintiff is entitled to claim at Rs 5 million (Rs 5,000,000/-) as prayed for in the plaint.

The plaintiff is entitled to costs in both Court.

Judge of the Court of Appeal

Kwk/-