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

The Associated News Papers of Ceylon Ltd
D.R.Wijewardena Mawatha
Colombo 10.

1st Defendant-Appellant

Ajith Samaranayake
Editor Sunday Observer
D.R.Wijewardena Mawatha
Colombo 10.

Deceased 2nd Defendant- Appellant

Dinesh Weerawansha
Editor Sunday Observer
D.R.Wijewardena Mawatha
Colombo 10.

Substituted 2nd Defendant-Appellant

C.A.NO.606/98 (F)
D.C.COLOMBO CASE NO.15533/MR

Vs

Brigadier L.D.S.Wijesekara
No.27B, Asiri Uyana
Sumudu Pedesa
Katubedda
Moratuwa.

Plaintiff-Respondent

BEFORE : **K.T.CHITRASIRI, J.**

COUNSEL : Kushan D'Alwis P.C.with Chamath Fernando for the Defendant- Appellants

Chrishmal Warnasuriya with Dushantha Kularatne for the Plaintiff-Respondent.

ARGUED ON	:	27.03.2014, 30.04.2014 and 19.05.2014
WRITTEN SUBMISSIONS FILED ON	:	16.06.2014 by the Defendant-Appellants
	:	16.06.2014 by the Plaintiff-Respondent
DECIDED ON	:	24TH JULY 2014

CHITRASIRI, J.

Being aggrieved by the judgment dated 20.08.1998 of the learned District Judge of Colombo, the two defendant- appellants preferred this appeal seeking to set aside the said judgment and also to have the action of the plaintiff dismissed. Action of the plaintiff-respondent is to obtain damages amounting to Rupees Ten Million with interest thereto from the defendant-respondents for defaming him by having published a news paper article in the "Sunday Observer". The aforesaid article had been published on 03.04.1994 in the "Sunday Observer" in its front page as the headline news and it was marked as P4 in evidence.

The defendant-appellants in their amended answer, having denied the averments in the amended plaint had pleaded that the matters contained in the document P4 is of a matter of public interest and also it amounts to making a fair comment. In the answer filed by the two defendant-appellants, they, among other matters have also stated that the manner in which the two defendants were joined as parties to the action is erroneous and that the 2nd defendant had been made a party without any reason being assigned. Accordingly, they have prayed

to have the plaint dismissed on the basis of mis-joinder of parties. Learned District Judge decided that the 2nd defendant was the editor of the Sunday Observer, at the time the newspaper which contained the document marked P4 was published and has declined to accept the said contention of the appellants.

Moreover, it must be noted that it is settled law that no action shall be defeated by reason of mis-joinder of parties. [Section17 of the Civil Procedure Code] Therefore, such a matter will not be a reason to have this action dismissed. Furthermore, the 2nd defendant had been named as a party to the action merely due to the office he held then. Also, the reliefs that had been prayed for were to make the defendants jointly and severally liable. Therefore, this action shall not fail due to the alleged mis-joinder of parties. Indeed, the appellants have not pursued this ground of appeal when it came to the argument stage in this Court.

The appellants in their amended answer have also pleaded the defence of Privilege. Instances where the defence of Privilege is applicable are referred to in the book "The Law of Delict" by Mckerron. Accordingly, the defence of qualified privilege is generally taken up only when the;

(1) statements made in the discharge of a duty,

(2) statements made in the furtherance or protection of an interest,

(3) statements made in the course of judicial proceedings; and

(4) reports of parliamentary, judicial and certain other proceedings.

[at page 189 in **"The Law of Delict" by Mckerron 7th Edition**]

Circumstances of this case do not fall into the categories referred to above and therefore the appellants are not in a position to plead the defence of privilege in this instance. In fact, the appellants have not pursued this appeal relying on the defence of Qualified Privilege.

I will now turn to consider whether the learned District Judge is correct or not when he decided that the contents in the document marked P4 amounts to defame the plaintiff-respondent. The publication of the article P4 had been admitted by the appellants at the commencement of the trial in the District Court. It is also not in dispute that the news paper in which this article was published had been the news paper that had the largest circulation in this country. The said newspaper article marked P4 is reproduced herein below for convenience.

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Permits issued to transport banned goods to Tiger territory

Brig. Wijesekera to be court martialled

Retired Brigadier Daya Wijesekara is to be court martialled on charges of misusing his official position while in service to enable the transport of banned goods to Tiger territory in the North.

One charge against him states that Brigadier Wijesekara acted outside his authority by obtaining for a trader named Yoosoof a number of permits to transport restricted items to the North.

The other charge states that while he was Officer-in-Charge of the Media Section, Operational Headquarters, Ministry of Defence, he had ordered the release of trader Yoosoof, who was under interrogation by the Military Police at Anuradhapura.

After retirement from service Brigadier Wijesekera was re-employed as Director of Psychological operations in the Defence Ministry.

In January this year, President D.B.Wijetunga ordered a probe into how Brigadier Wijesekera's name was included in a delegation to the United Nations for Human Rights Conference.

The name of Senior State Counsel Mr.Nihara Rodrigo had been left out and Brigadier Wijesekera's name had been included instead describing him as Mr.Wijesekera Director of Human Rights in the Ministry of Justice. There is no such post in the Justice Ministry.

This was detected before the departure of the delegation and Brigadier Wijesekera was left out of it.

Following are the full charges made against him for the Court Martial on conduct prejudicial to military discipline.

In that you whilst serving as the Officer-in-Charge of the Media Section Operational Headquarters Ministry of Defence Colombo did on 16th June 1991 instruct the Officiating Commanding Officer 2 Coy Sri Lanka Corps of Military Police Anuradhapura Major Asoka Thoradeniya to release one Yoosoof a civilian trader under interrogation by the Military Police, at Anuradhapura, to enable him to go home, and report back to the Military Police the following morning, consequently interfering with the ongoing investigations of the Sri Lanka Corps of Military Police and thereby committing an offence punishable under Section 129(1) of the Army Act No.17 of 1949.

In that you whilst serving as the Officer-in-Charge of the Media Section Operational Headquarters Ministry of Defence Colombo did during the period First March 1990 to August 1991 misuse your official position as a Senior Officer at the Operational Headquarters of the Ministry of Defence and acted outside your authority by obtaining for civilian trader Yoosoof a number of permits which are a mandatory requirement to transport restricted items to the North of Sri Lanka which said act, is in violation of the procedure set out by the said Operational Headquarters, thus enabling the abovementioned civilian to sell the permits at a profit and did thereby commit an offence punishable under section 129(1) of the Army Act No.17 of 1949.

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It is the burden of the plaintiff-respondent to establish that the publication of the document marked P4 has led to injure his name; and if so, whether it was published with malice. Mackerron's view on the aspect of burden of proof is as follows:

> *"Where no secondary meaning is attributed to the words complained of, the test for determining whether they are defamatory is whether in the circumstances in which they were published ordinary reasonable men to whom the publication was made would be likely to understand them in a defamatory sense. The onus of proving this rests, of course on the plaintiff."*
> [At page 176]

Having referred to the law as to the party who is responsible to discharge the burden to prove a case filed to claim damages for defamation, I wish to refer to another decision mentioned in the book "Defamation and other aspects of the Actio Injuriarum" by C.F.Amerasinghe, in respect of the substantive law concerning defamation. In that book, the following passage from the decision in **Jayawardane v. Aberan [1864] Ram. [1863-1868] at page 4]** had been quoted and it reads thus:

> *"Defamation is maliciously publishing either by word or mouth, by writing, by printing, or by pictorial or other representation, either in his presence, or his absence, publicly or secretly, anything whereby a person's honour or good name is injured or damaged."*

I will once again refer to some of the passages in the book "The Law of Delict" by Mckerron relevant to the matters that have arisen in this case since it is a book that is being used as a guide, in determining the issues in the sphere of the Law of Delict. In that book at pages 171 & 172 it is stated that:

> *"A defamatory statement is one which tends to diminish the esteem in which the person to whom it refers is held by others. The typical example of a defamatory statement is a statement reflecting upon the moral character of the plaintiff; for example, a statement attributing to the plaintiff the commission of a crime, or imputing to him untruthfulness, dishonesty, immorality, or any other kind of dishonourable or improper conduct."*

At page 177, it is thus been mentioned:

> *"Thus, if a newspaper publishes an article which might reasonably be regarded by the ordinary reader as reflecting upon the moral character of the plaintiff, it is responsible for the impression which the article would produce upon the mind of the ordinary reader, and it is immaterial whether the writer of the article intended to produce that impression or not."*

The authorities mentioned above show that the applicable test in order to determine whether or not a particular publication is defamatory of a person is the "test of a reasonable man". Therefore, it is necessary to ascertain whether a reasonable and/or a prudent person who looks at the contents of the article P4, would come to the conclusion that those matters contained in the said publication amount to defamatory character of the respondent.

When a reasonable and prudent person sees the front page headlines in the "Sunday Observer" published on 03.04.1994 which reads that the respondent is to be court martialled, he/she would obviously think that the person, to whom it is being referred to, is not fit to be a Brigadier in the Sri Lanka Army. When such a person reads even the full text of the publication, he would certainly get the impression that the respondent is not a person who performs his duty in the manner required by an officer in the rank of a Brigadier in the Sri Lanka Army. Such news would amount to lower his standing in the society as well. It also may lead to ridicule that person by the ordinary people of the country. Therefore, it is clear that the publication marked P4 *per se* is of defamatory character of the respondent.

However, since the appellants have taken up the position that they had no malice towards the respondent when they published the article P4, then it is necessary to look at the *animus injuriandi* on the part of the appellants to ascertain malice on their part. In "The Law of Delict" by Mackerron, it is stated that the existence of *animus injuriandi* is an essential basis of such a cause of action. This position had been followed in **Perera v. Peiris [50 NLR at 145]** as well.

The manner in which *animus injuriandi* is determined is described in the book titled "Defamation and other aspects of the *actio Injuriarium*" by C.F.Amerasinghe. At page 65 in that book, it is mentioned that:

"animus injuriandi being a state of mind has in the generality of cases to be inferred from the words and the occasion on which and the context and the circumstances in which they are used."

Also, in **Associated Newspapers of Ceylon Ltd v. Gunasekera,** Nagalingam A. C.J. [53 NLR at 481] has stated thus:

"The position, therefore, is that defamatory words relating to the plaintiff have been published and animus injuriandi would be presumed in the publications."

As mentioned hereinbefore in this judgment, the matters contained in the article marked P4 amount to defame the respondent. Hence, malice on the part of the appellants is to be presumed when the law referred to in the authorities referred to above is applied. Then, it is the burden of the appellants to show that they had no malice to injure the character of the respondent when they published the articled marked P4.

I am unable to find any evidence forthcoming to show that the appellants had no malice towards the respondent when the article marked P4 was published. In the circumstances, it is clear that the presumption created establishing that the appellants had published the article with malice would prevail. This is more so, when the contents of the article is basically false. I will be dealing with this aspect of falsity of the news contained in the article marked P4 at a later stage in this judgment.

Also, in **De Costs v. The Times of Ceylon Ltd and another, [62 NLR at 265]** Privy Council's view on this point is that the matter tending to bring a person into condemn or ridicule would be defamatory. Therefore, the article P4 *per se* would be defamatory of the plaintiff-respondent and therefore it had been published with malice. Accordingly, it is seen that the *animus injuiriandi* on the part of the appellants also have been established by publishing the article P4. In the circumstances, it is clear that the learned District Judge is correct when he decided that the contents of the article P4 would be defamatory of the plaintiff-respondent.

Then the issue is to ascertain whether the appellants were successful in establishing the defences that they have advanced in this instance. As I have already dealt with the defence of Privilege, I will now turn to consider the merits in the defences of public interest and fair comment. At this stage it is necessary to note that in the submissions filed in this Court upon the conclusion of the argument, the appellants have restricted their defences to fair comment & justification. (paragraph 7 of the submissions dated 16,06,2014)

Hence, it is necessary to consider whether the appellants have established the defences of fair comment and justification, successfully. When the defence of justification is taken up, it is up to the defendants to show that the contents in the alleged statements are true and the said publication is for the benefit of the public. Therefore, it is necessary to ascertain whether the contents of the document P4 are in fact true or false.

The headline of the article which is in bold font and in bigger characters is to read as **"Brigadier is to be court martialled".** There is clear and unambiguous evidence to show that there is no such decision taken by the Sri Lanka Army. Edward Seneviratne Jayasinghe, an Attorney-at-Law attached to the Legal Services Division, Sri Lanka Army has testified that no Court Martial was to be held against the respondent. His evidence to this effect is as follows:

ප්‍ර. පැමිණිලිකරු සම්බන්ධයෙන් පවත්වන ලද සාක්ෂි සම්පිණ්ඩනයෙන් පසු යුධ අධිකරණයක් පැවැත්වීමට තීරණය කරලා නැහැ ?

උ. නැහැ

ප්‍ර. යුධ අධිකරණයක් තිබුනේ නහැ ?

උ. නැහැ. තිබුනේ නැහැ.

(vide proceedings at pages 180 and 181 in the appeal brief).

He has further said in evidence that there had been an inquiry called "Summary of evidence" and no court martial was to be held. The evidence to that effect is as follows:

ප්‍ර. තමන්ගෙන් ප්‍රශ්න කළා වෝදනා පත්‍රය ගැන "පැ4" හි තිබෙන ?

උ. ඔව්.

ප්‍ර. ඒ සම්බන්ධයෙන් තමයි සාක්ෂි සම්පිණ්ඩනයක් තිබුනේ ?

උ. ඔව්.

ප්‍ර. ඒ සම්බන්ධයෙන් යුධ අධිකරණයක් තිබුනේ නැහැ ?

උ. නැහැ

ප්‍ර. වෝදනා කිහිපයක් තිබෙනවා කිව්වා සඳහන් කරලා ?

උ. වෝදනා 02 ක් තිබෙනවා.

ප්‍ර. වෝදනා 02 සම්බන්ධයෙන් සාක්ෂි සම්පිණ්ඩනයක් තිබුණා කියලා කිව්වා ?

උ. තිබුණා.

ප්‍ර. ඒ පිළිවෙත අනුව යුධ අධිකරණයක් පවත්වා නැහැ ?

උ. යුධ අධිකරණයක් පවත්වා නැහැ.

(vide proceedings at pages 189 and 190 in the appeal brief).

Furthermore, the document marked P3, which is the final clearance certificate issued by the Sri Lanka Army, upon completion of 60 years in age by the respondent, show that he had an unblemished character whilst in the service.(vide at page 90 of the appeal brief) The document marked P11 also indicate that the then Commander of the Sri Lanka Army, Lieutenant General G.H.de.Silva, having examined the proceedings of the summary of evidence had held that there was lack of evidence to proceed with a court martial on the charges alleged to have been made against the respondent. In the circumstances, it is clear that the newspaper publication, published by the 1st defendant-appellant contained no truth. Hence, justification could not have been pleaded as a defence in this instance particularly when the publication contains falsehood.

In the book "Defamation and other aspects of *actio Injuriarium*" by C.F.Amerasinghe, [at page 89] it is stated that:

> *"past crimes or conduct may not be resurrected and there are many cases which have held that statements which refer to such conduct are not for the public benefit."*

Hence, it is necessary to look at the contents of the document P4 in its entirety with that of the circumstances attached to it to ascertain whether the contents in P4 amount to fare comment. In the latter part of the article, it is alleged that the respondent was charged for interfering with investigations of the Sri Lanka Corps of Military Police by having allowed a civilian trader by the name of Yosoof to sell the permits to transport restricted items to the North of Sri Lanka.

Learned District Judge having considered the evidence of Lieutenant P.J.M.Perera recorded on 19.8.1996, had decided that there had not been a disciplinary action against the respondent on such allegations. (vide proceedings at page 277 in the appeal brief). Moreover, the document marked P3 show that the respondent had been released from the Sri Lanka Army honourably upon completion of 60 years in age. In the circumstances, it is clear that there is no justification and it is not a fare comment either, to have published the news item found in the document marked P4, with the comments made therein referring to the plaintiff-respondent.

I will now examine whether the publication of P4 could be considered as an article published for the benefit of the public. When this point is to be considered, it is necessary to note that the conduct of public officials has to be made known with impunity. That is because it is for the public benefit such conduct should be exposed. In "The Law of Delict" by Mckerron at page 201, it is stated as follows:

"Comment is fair if it is honest that is, a genuine expression of the critic's real opinion and relevant to the fact commented upon."

In this instance, is it fair to state that the respondent is to be court martialled when no such decision had ever been taken? My opinion is NO. Comments are to be considered fair, only when it is genuinely expressed. As referred to above, the contents of the article basically contain no truth. Therefore, there is no genuineness in the comments made in that article as far as the respondent is concerned. Therefore, I am not inclined to decide that the appellants are in a position to take up the defence of fair comment either, in this instance.

For the reasons set out hereinbefore, it is my opinion that the plaintiff has proved his case on a balance of probability and the defendant-appellants were not successful in establishing the defences that they have advanced in this instance. Hence, I do not see any reason to interfere with the findings of the learned District Judge.

Also, it must be stated that the learned District Judge has awarded only Rupees Two Million to the plaintiff-respondent though he has prayed for Rupees Ten Million as damages for the injury caused to him by the publication of the news contained in the article marked P4. Both parties have not made submissions on the question of damages and therefore it is clear that the appellants have not canvassed the quantum of damages awarded to the plaintiff-respondent. Therefore, it is not necessary to consider the quantum of damages awarded to the respondent by the learned District Judge.

For the aforesaid reasons, this appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL