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

C. A. 965/97 (F)

D. C. Puttalam Case No. 616/M

O. Octtar Issadeen
3rd Cross Street, Puttalam
Plaintiff

Vs.

Seinul Abdeen Marikar
Liyaudeen
3rd Cross Street, Puttalam
Defendant

AND NOW BWTWEEN

Seinul Abdeen Marikar
Liyaudeen
3rd Cross Street, Puttalam

Defendant-Appellant

O. Octtar Issadeen
3rd Cross Street, Puttalam

Plaintiff- Respondent (diseased)

AND BETWEEN

Seinul Abdeen Marikar
Liyaudeen
3rd Cross Street
Outtalam

Defendant-Appellant-Petitioner

Vs.

O. Octtar Issadeen
3rd Cross Street, Puttalam

Plaintiff-Respondent (Deceased)

BEFORE : **M. M. A. GAFFOOR, J.**

COUNSEL : Anil Silva P.C. with D. Gunaratne for Plaintiff-Respondent
Nuwan De Silva for the Defendant-Appellant

WRITTEN SUBMISSIONS TENDERED ON : 10.05.2018 (Plaintiff-Respondent)

04.08.2014 (Defendant-Appellant)

DECIDED ON : **21.09.2018**

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M. M. A. GAFFOOR, J.

The Plaintiff-Respondent (hereinafter referred to as the 'Respondent') instituted this action bearing case number 616/M in the District Court of Puttalam on 27th October 1987 against the Defendant-Appellant (hereinafter referred to as the 'Appellant'), claiming damages to the value of Rs.100, 000/- for loss caused to the Respondent by the Appellant flinging a bucket of excrement at the house of the Respondent.

The Respondent and his wife gave evidence and stated that on 30.03.1986 morning the Appellant came to his house and spilt a bucket of excrement and asked the Respondent to eat it. The Respondent further stated that the Appellant called him with a filthy language and the neighbors rushed to the scene. He further explained the reasons for the Appellant to commit this offence as the Appellant's brother-in-law owing some money to the

Respondent and the Respondent having had a strong worded conversation with him sometime prior to this incident.

When the trial is commenced in the District Court, the Respondent and his wife gave evidence and the brother of the Appellant gave evidence for the defence, because the Appellant left a Power of Attorney with his brother and had gone abroad. During the trial the brother of the Appellant denied all these allegations leveled against the Appellant.

According to the answer filed by the Appellant dated 13.02.1990, he had denied the claims of the Respondent but did not give any further explanation as to the incident. However, he stated that this was a malicious complaint and the Respondent was taking such measures because he was prevented by the Appellant from stopping the scavengers taking excrement through a road adjacent to the Respondent's house.

At the end of the trial the learned District Judge pronounced his judgment dated 08.10.1997 and awarded damages of Rs.100, 000/- to the Respondent.

Being aggrieved by the said judgment this appeal was filed by the Appellant praying to set aside the said judgment of the learned District judge dated 08.10.1997.

In this appeal, the Appellant's main averment was that the learned District Judge has failed to consider and evaluate the evidence led by him; he further stated that the judge has shifted the burden of disproving the case on the Appellant and thereby erred in law.

However, Counsel for the Respondent submitted that, what the learned District Judge had said was that the Appellant had failed to provide any plausible answer to the claims made by the Respondents. The answer filed by the Appellant (page 64 of the appeal brief) only deny the claim made by the Respondent but did not give evidence at the trail. His brother giving evidence (at page 50 of the appeal brief) merely stated that his brother did not mention to him that he had done the things alleged by the Respondents and that he did not believe that his brother would do such thing.

I agree with the Respondent's submission, and I observe that during the trial the Respondent and his wife gave evidence but the Appellant has failed to participate or give evidence on behalf of him; the brother of the Appellant testified as:

> " අයියා මේ වගේ අසුවි විසි කලා කියලා කවතාවත් මට කියලා නෑ. අයියා එහෙම දෙයක් කරයි කියලත් මා විසින් පිළිගන්නේ නැහැ " *(Page 50 of the brief)*

Further I observe that, the Appellant has failed to present his defence at the trial. Therefore, Appellant's aforementioned ground fails.

The Appellant's other averment was that the according to section 40 of the Civil Procedure Code, Respondent has failed to give a plain and concise statement of the cause of action or when and where it arose at all. But when I consider the plaint dated 27.10.1987 that the Respondent stated on 30.03.1986, in front of his door step that the alleged act was done by the Appellant. The learned District Judge also satisfied with this statement. Therefore I see no merit in this issue. It is clear law that if the plaint is good

in *ex facie* it can be sustainable; if there are any objection from the contesting party it must be taken by the answer.

In ***Actalina Fonseka and Others vs. Dharshani Fonseka and Others*** *(1989) 2 S.L.R. 95* the Supreme Court held that:

> *"The plaint discloses a cause of action founded on fraud by forging a will and non-disclosure of heirs. The law does not require that the plaint should make out prima facie case nor carry the evidence by which the claim would be proved. Hence the case must be heard"*

Kulatunga, J. further held that:

"I am of the view that categories of fraud are not closed and that it should be left to the Court to decide whether any particular contrivance constitutes a fraud on the Court having regard to the facts and circumstances of such case." If the real grievance of the defendant-appellant is that the plaint does not contain sufficient particulars or even in a case where it is alleged that the plaint does not disclose a cause of action the correct procedure under section 46(2) of the Civil Procedure Code is to move, before pleading to the merits, to have the plaint taken off the file."

In ***Read vs. Samsudin,*** *1 N.L.R. 292,* Bonser, C. J. held that:

> *It is not the duty of a judge to throw technical difficulties in the way of administrating justice. He ought to remove them out of the way upon proper terms as to costs and otherwise.*
>
> *In a Court of Requests all technicalities of law should be avoided.*
>
> *When a plaint, defective in some material respect, has been filed, it is not necessary to move that it be taken off the file, but it is the duty of the court,*

of its own accord, or upon its attention being called, to reject the plaint or return it to plaintiff for amendment. If the plaint is good ex facie, any objection thereto must be taken by the answer.

The Counsel for the Appellant further stated that the Respondent had failed to prove the quantum of damages suffered by him due to the alleged incident. To answer this averment, the Respondent stated that he is seeking damages for the humiliation and mental agony; further stated that he and his family had suffered due to this incident which is not quantifiable by the Respondent in any way except by what the Respondent feels is justified to be claimed. And the Respondent and his wife had clearly given evidence as the humiliation and mental agony suffered by them. (at pages 38 to 49 of the brief)

In ***Mahipala and Others vs. Martin Singho*** *(2006) 2 S.L.R. 272,* Wimalachandra, J. held that:

"The plaintiff can claim compensation not only for the physical injury that had been occasioned by the accident and its aftermath, but also for the inconvenience and loss of amenities. This includes the deprivation of the ability to participate in normal activities in day by day life. This may also include the deprivation of sexual pleasure, mental suffering and frustration resulting from the victim's inability to lead a normal life..." (Page at 279)

Further His Lordship Justice Wimalachandra quoted Mickerron's view (The Law of Delict, page at 114) as follows:

"...there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainly. The

usual method adopted is to take all the circumstances into consideration and award substantially an arbitrary sum."

In all the circumstances of this case, I observe that the Respondent has a valid claim; he and his wife gave evidence at the trial and explained the mental pain and suffering incurred to him by the acts of the Appellant. But the Appellant never give evidence nor explain his version of defense. Therefore I see no any merit in this appeal.

For the forgoing reasons, I uphold the judgment of the learned District Judge of Puttalam and dismiss the appeal. I also award costs in a sum of Rs. 15,000/- payable to the Respondent by the Appellant.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL