

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC
OF SRI LANKA.**

Associated Newspapers of Ceylon Ltd,
No. 35, D.R. Wijewardena Mawatha,
Colombo 10.

Defendant-Appellant

SC. CHC (APP) No.30/2003

H.C. (Civil) 12/2001/(3)

Vs.

Pituwana Liyanage Shantha
Chandraguptha Amarasinghe,
320/C/2, Jothikarama Mawatha,
Thalawathugoda.

Plaintiff-Respondent

BEFORE : **TILAKAWARDANE, J**
MARSOOF, PC, J &
HETTIGE, PC, J

COUNSEL : Mr. Kushan D' Alwis with Prasanna de Silva and
Kanchana Ratwatte for Defendant-Appellant.
Mr. Saliya Pieris with Upul Kumarapperuma, Irusha
Kalidasa and Varuna de Saram for Plaintiff-
Respondent.

ARGUED ON : 13th June, 2012

DELIVERED ON : 05th October 2012

Ms. SHIRANEE TILAKAWARDANE, J.

The Defendant-Appellant (hereinafter referred to as the “Appellant”) preferred this Appeal against the judgment entered in case No HC (CIVIL) 12/2001 (3) of the Commercial High Court of Colombo dated the 11th of September 2003 on the following grounds:

- i. Did the Learned High Court Judge err in holding that damages occurred to the Plaintiff-Respondent (hereinafter referred to as the “Respondent”) on the basis that the Respondent had economic rights to the photographs?
- ii. Did the Learned High Court Judge err in awarding damages to the Respondent in the sum of Rs. 1,000,000/-?
- iii. Did the Learned High Court Judge improperly rely on a Gazette submitted by the Respondent without notice to the Appellant?

In considering these questions of law it is opportune to analyze the pleadings, documents and evidential facts relevant to the case.

The Respondent filed action alleging that his intellectual property rights had been violated by the Appellant’s publication of the 9 photographs in issue, taken by the Respondent, (hereinafter referred to as the “Photographs”) in the “Daily News” and “Dinamina” newspapers on the 24th of July 1999. More specifically, the Respondent pleaded that the aforementioned publication violated his economic rights as guaranteed by Section 10 of the now repealed Code of Intellectual Property Act No. 52 of 1979 (as amended, hereinafter referred to as the “Code”) and his moral rights as guaranteed by Section 11 of the Code, as the Photographs were published without his consent or knowledge. Though this law is now repealed in terms of section 69(3)(b) of the Interpretation Ordinance the Rights acquired under the repealed law would not be affected. Accordingly, the Respondent prayed for a declaration that his intellectual property rights had been violated by the Appellant and claimed for damages in the sum of Rs. 2,500,000/-.

In the presentation of his evidence before the learned High Court Judge, the Respondent explained that he took the Photographs in Borella during the communal riots of July 1983. The Respondent further stated that he was in possession of the negatives of the Photographs, a fact corroborated by a witness, Nihal Asoka Siriwardane.

In explaining the volatile context in which the Photographs were taken, the Respondent spoke of the great difficulty he endured - including intimidation, threats of harm and actual assault - to photographically capture the unfolding events of the communal riots of 1983. So dangerous and unpredictable was the atmosphere of the riots that the Respondent, according to his testimony, would sometimes expose only a single frame on a roll before storing it for safekeeping, so as to prevent the loss of precious footage due to the imminent danger of his camera being snatched and/or broken at any moment. His simple narrative of the facts disclose succinctly, the risk to life and limb that he willingly exposed himself, in probably recognizing his social responsibility and seeing himself as the conduit in supplying explicit and vivid information, which he discerned and recognized as being the need of the hour, for the people of a nation to make informed choices. It was only due to the promulgation under Emergency Regulations of the Gazette No 245/8 dated 18th May 1983 of a ban on the publication of incendiary photographs (that could foment communal instability) that the Respondent could not publish his photographs immediately.

When the Photographs were taken in 1983, the Respondent was in the employment of "Aththa" newspapers. By July of 1997, the Respondent was working for "Ravaya" newspapers and had consented to Ravaya's publication of the Photographs in connection with the 14th anniversary of the 1983 riots. In July of 1999, the said photographs were again published by "Ravaya" newspaper but, at this time, the Appellant also published them in its "Dinamina" and the "Daily News" newspapers. The Respondent, at trial, asserted the fact that he did not at any time directly or indirectly authorize the Appellant to publish the Photographs in the Appellant's newspapers and took the opportunity to note that the Photographs were published by the Appellant as parts of news articles which even lacked a citation listing the Respondent as the source of the Photographs and otherwise failed to mention how the Photographs were obtained. It is important to note here that, during these proceedings, the Appellant unequivocally conceded that (i) the Respondent, in fact, took the Photographs during the July 1983 riots and that (ii) the Appellant did, in fact, publish the Photographs in the manner and on the date as alleged by the Respondent.

In considering the first question of law this Court examines the judgment aforesaid as to whether the Learned High Court judge erred in holding that damages occurred to the Respondent on the basis that the Respondent had economic rights in the photographs.

As it is not in doubt whether the Respondent took the Photographs or whether the Appellant published them, the High Court was left to consider two principle questions: (i) Did the Respondent tender consent to the Appellant to allow the latter's publication of the Photographs and (ii) did the Respondent have the capacity to consent to their publication in the first place or put another way did the Respondent's employment arrangement between "Aththa" newspapers allow the Respondent to retain ownership of the Photographs. These aforementioned questions, and therefore, the larger question of whether the Respondent is entitled to economic rights arising from the copyright of the Photographs in terms of the Code is a question of fact and not of law and, to be properly tried before this Court, would require the ascertainment of new facts - this is especially so with respect to the question of the Respondent's capacity to consent, as the contract of employment between the Respondent and "Aththa" newspapers was not an issue at the time of trial.

It is well established that appellate review is a forum restricted only to reviewing questions of law. In **Jayawickrama Vs. Silva 76 NLR 427**, the Learned Judge stated that "a pure question of law can be raised in appeal for the first time, but if it is a mixed question of fact and law it cannot be done." The case of **Leechman Co Ltd., Vs. Rangalle Consolidated Ltd. (1981) (2) SLR. 373** espouses the same principle in inverse terms, with the Learned Judge stating that "a pure question of law which does not require the ascertainment of new facts can be raised for the first time in appeal." The scope of jurisdiction established by a breadth of case law from which the above examples are picked guide this Court to conclude that questions of fact brought to this Court's attention at the time of appeal, and which necessarily require the ascertainment of new facts, cannot be considered. The Appellant's failure during the proceedings before the High Court to (i) challenge the originality and ownership of the work or to (ii) lead any evidence during the course of the trial or at the time of cross-examination, are errors in litigation strategy that cannot be rectified through appeal.

Even assuming that this Court is not precluded from considering the economic rights questions placed before us, an analysis of the relevant legislation reveals that there exists no applicable safe harbor or exemption under which the Appellant's actions can be deemed legitimate. A brief outline of the body of relevant copyright law can be summed up as follows:

1. Section 7(h) of the Code sets out a definition of the scope of work to be protected by copyright. This section expressly includes photographic work.
2. Section 10(a) of the Code sets out the framework for the economic rights of the author and provides the author with exclusive rights to do or authorize reproduction.
3. Section 11(1) of the Code discusses the moral rights of an author and states that the author of a protected work shall have the right to claim authorship of his work in connection with acts referred in Section 10 and therefore reproduction of the said photographs under Section 10(a) is a violation of the author's moral rights.
4. Section 13(b) of the Code states that notwithstanding Section 10, protected work can be used without the author's consent:

...in the case of any article published in newspapers or periodicals on current economic, political or religious topics...the reproduction of such article or such work in the press or the communication of it to the public, unless the said article when first published...was accompanied by an express condition prohibiting such use, and that the source of the work when used in the said manner is clearly indicated.

5. Section 17(1) of the Code indicates that the rights protected under Section 10 are those of the author who created the work.
6. Section 17(3) of the Code discusses works created in the course of employment indicating that where in the course of the author's employment under a contract of service or work commissioned, the rights in Section 10 will be transferred to the employer or commissioner, where terms to the contrary are not stipulated.

From the above review of the rules governing copyright, it appears that the Appellant's case rests solely on the application of Section 13(b)'s "newsworthiness" exemption or, alternatively, the availability of the allocation of presumed employer ownership under 17(3). Neither, rule, however, is applicable to the case at hand for reasons that will be dealt with later in this judgment.

Section 13(b)'s exemption is unavailable to the Appellant for the simple reason that, at the time of the Appellant's publication of the Photographs in 1999, the communal riots of 1983 were no longer current "political" events. While it could be argued that the 14th anniversary of the 1983 riots was itself the current event to which the Appellant's publication was connected, the legislative intent of 13(b), clearly was to allow for the dissemination of information surrounding actual transpired events, and not to serve

as a loophole for use of material in subsequent “news cycles” of an initial event. This determination, combined with the fact that the Appellant appears to have added insult to injury by failing to even acknowledge the source from which the said photographs were taken leads this Court to conclude that the High Court Judge was correct in finding that the Appellant could not rely on Section 13(b) of the Code.

The presumption established under Section 17(3) that an employer holds ownership in employee-created work is also unavailable to the Appellant. The words crucial to our determination of the inapplicability of Section 17(3) are; “in the absence of contractual provisions to the contrary”. While it may well be that the Respondent’s contractual relationship with “Aththa” newspapers – his employer at the time the Photographs were taken – did not stipulate that the Respondent would retain ownership of them, the Appellant’s failure to introduce or request the introduction of the contract between Respondent and “Aththa” newspapers into evidence for review, precluded the High Court from being able to determine whether Section 17(3)’s presumption was met. Had the contract been presented for the High Court’s review, an analysis of the terms of the contract of service or the specific nature of the work commissioned would have been undertaken. An analysis of, among other things, (i) whether the Photographs were taken for personal interest or investigation, (ii) whether the Photographs were taken during or outside of working hours, (iii) whether the Photographs were taken in furtherance of the Respondent’s work assignment and professional objectives, may well have led the High Court to have concluded that ownership remained with “Aththa” newspapers and not the Respondent. As the High Court was not afforded the opportunity to undertake such a factual analysis – and since such questions of fact cannot be reviewed at the appellate level as have hereinabove been explained – this Court finds that the Learned High Court Judge did not err in holding that damages occurred to the Respondent on the basis that the Respondent had economic rights in the photographs. The evidence before the Court therefore leads the Court to conclude that the photographs were taken for personal interest or investigation and not in furtherance of a work assignment that the Respondent had, at the risk of personal safety and with his camera and film. Therefore the photographic works are owned exclusively by the Respondent, who being the author is the first owner of the copyright in his photographs especially as the evidence is that he never transferred his ownership and he therefore continued to retain ownership.

The importance of this topic requires this Court to examine and refer to several relevant international legislative instruments in relation to the rights of the author of copyrighted works. Firstly, this Court will refer to the Berne Convention for the Protection of Literary and Artistic Works 1886 (as

amended, hereinafter referred to as the “Berne Convention”), to which Sri Lanka is a signatory. Under Article 5 of the Berne Convention, copyright for creative works do not have to be asserted or declared, as they are automatically in force at creation and are not subject to any “formalities” such as registration or application in countries adhering to the Convention. As soon as the work is written or recorded on some physical medium, the author is automatically entitled to all copyrights in the work, as well as any derivative works. In addition, Article 2 ensures that the rights are protected until the author explicitly disclaims them or the copyright expires. Consistent with Section 17(3) of the Code, which refers to photographs taken in the course of employment under a contract of service, the Berne Convention also deems that the photographer is the sole owner of the copyright in a work upon its creation, in so far as the image was not made under an agreement to the contrary, in which case the ownership of the copyright would vest in the employer.

Under the current system of law in Sri Lanka, the author is not encouraged to create works outside the ambit of the employment contract or terms of work commissioned out of fear of losing rights to the work. This disincentive, in the future, could lead to lack of journalistic motivation and therefore deterioration in investigatory reporting and subsequent communication to the public. The public has a right to information both communicated via articles, photographs and other medium. As a result of narrowly interpreted laws this right to information may be restricted and ultimately confine the media, which would ultimately impact the fabric of social justice that holds a nation together.

In this regard, the Court wishes to draw attention to the approach taken in continental European States where employers must purchase the usage rights from the author by means of an individual or collective agreement. The authors retain any usage rights not licensed to the employer by that contract, for example the right to reuse photographs already published would require permission from the original creator unless the right to reproduce is explicitly stated in the contract, the rights have expired or such reproduction is restricted by law. They are usually entitled to receive further remuneration for uses that go beyond those covered in the contract of employment. The law must at all times balance the exercise of an authors copyright with public interest. This is seen clearly in the United Kingdom where Section 171(3) of the Copyrights Designs and Patents Act 1988 provides the courts with the jurisdiction to refrain from enforcing copyright claims on the grounds of public interest.

This Court next considers whether the Learned High Court Judge erred in awarding damages to the Respondent in the sum of Rs 1,000,000/-.

It is the opinion of this Court that the Learned High Court Judge was correct in awarding damages of Rs 1,000,000/- to the Respondent for several reasons.

The Photographs were taken during the communal riots of 1983, a period of extreme unrest and conflict among ethnic communities in Sri Lanka. The Photographs captured by the Respondent were not merely photographs of the aftermath of the riots, but of actual live incidents that took place in the Borella area in real time. The Photographs taken by the Respondent seem to be exclusive photographs which represent the appalling violence that took place during the communal riots of July 1983 and it is alleged that there are no other photographs by any other photographer depicting the scenes as seen in the Photographs. Further, the Respondent was subjected to assault, intimidation and threats and in fact his camera was destroyed during the course of taking the Photographs. There is no dispute that the Photographs were taken in difficult and dangerous circumstances and with grave danger to the Respondent's life.

Section 13(b) of the Code states that the source of the work reproduced needs to be clearly indicated and therefore despite the fact that the Photographs had been published in the "Ravaya" newspaper in 1997, the Appellant, quite apart from failing to exercise the common courtesy of obtaining permission from the Respondent, not only failed to obtain permission from the Respondent but also failed to indicate even the source of the Photographs when the Appellant published them in 1999 as evinced in the evidentiary facts.

According to the evidence of the Respondent, one of the Photographs was sold at the value of Rs 10,000/- in 1996. Despite this being the only indication of value, the Court is in agreement with Cornish as expressed in his work on Intellectual Property, that the work of a humble photographer is in the same category as the work of a great artist and, this Court will not disturb the Learned High Court Judge's assessment of the commercial value of the Photographs. This Court agrees that the "exclusive, historical and invaluable" nature of the Photographs is independent of how often they were sold and how much they were sold for - the lack of an existing market does not alone suggest an absence of value.

Finally the Court also considers whether the Learned High Court judge improperly relied on a Gazette submitted by the Respondent without notice to the Appellant.

The Gazette at issue - the Extraordinary Gazette Notification No. 251/21 dated 2nd July 1983 read with Regulation 14 of Extraordinary Gazette Notification No. 245/8 dated 18th May 1983 - is a

document, of which the High Court was statutorily empowered to take judicial notice. Under Section 57(1) of the Evidence Ordinance 1896, the Court is mandated to take notice of "...[a]ll laws or rules having the force of law, now or heretofore in force or hereafter to be in force in any part of Sri Lanka." Nowhere in this mandate is there a requirement that the Appellant be notified of the High Court's reliance on established law. It is the opinion of the Court that the Learned High Court judge had correctly considered the Gazette and the absence of notice to the Appellant was not in any way a deficiency of due process.

There is indeed an urgent need for protection of journalists like the Respondent who with skill and commitment respond to the journalistic duty to honor the citizenry of our nation by fulfilling their primary obligation to report on facts in an unbiased, independent, undistorted, and disciplined manner, providing the unvarnished truth whilst maintaining an objective perspective of the people and events they cover. Their journalistic lens needs to be strengthened and empowered by law and their skills be developed through education and investment, propelling them in turn to report with a higher degree of accountability, independence and fairness. A nation of people who make their life's choices on the information they receive from the media need to support and acknowledge their bravery and fearlessness especially when they become independent monitors of power and the checks and balances in exposing the truth, thereby being a cornerstone in creating a fair and just society. The extended lens of dedicated, fearless and responsible journalists has oft been the tool in effecting social justice and they must be protected, nurtured and supported, as much as an irresponsible journalist who distorts and violates the truth for biased reasons must be soundly condemned and exposed as they shame a noble profession.

In the light of the foregoing, this Court rules that the Respondent is in possession of the economic rights of the said photographs for the reasons stated above and that the judgment of the Learned High Court Judge is affirmed. The sum of Rs 1000,000/- awarded as damages to be paid within one month . The Appeal preferred by the Appellant be accordingly dismissed with costs in a sum of 25,000/-.

JUDGE OF THE SUPREME COURT

MARSOOF, PC, J

I agree

JUDGE OF THE SUPREME COURT

HETTIGE, PC, J

I agree

JUDGE OF THE SUPREME COURT

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