

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

In the matter of an Appeal with Special Leave to Appeal granted by the Supreme Court against the Judgment of the Court of Appeal under Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka

S.C. Appeal No. 141 / 11

S.C.Spl. LA No. 68/2011

C.A. Appeal No. 805/96(F)

D.C. Colombo No.12137/MR

Prins Gunasekera,
No. 26, Flodden Road,
London, SE5 9LH.

Plaintiff

Vs.

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

Defendant

And Between

Prins Gunasekera,
No. 26, Flodden Road,
London, SE5 9LH.

Plaintiff-Appellant

Vs.

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

Defendant - Respondent

And Now Between

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

**Defendant-Respondent-
Appellant**

Vs.

Prins Gunasekera,
No. 26, Flodden Road,
London, SE5 9LH.

**Plaintiff-Appellant-
Respondent**

* * * * *

BEFORE : **Chandra Ekanayake, J.**
S.Eva Wanasundera, PC.J .&
Sisira J.deAbrew, J

COUNSEL : Gomin Dayasiri with Palitha Gamage and Ms. Manoli
Jinadasa for Defendant-Respondent-Appellant.
Manohara de Silva, PC. with R.Hathurusinghe and Hirosha
Munasinghe for Plaintiff – Appellant - Respondent.

ARGUED ON : **16 .07.2014 & 05.09.2014**

WRITTEN
SUBMISSIONS FILED: By the Defendant-Respondent-Appellant on 04.11.2014
By the Plaintiff-Appellant-Respondent on 21.10.2014

DECIDED ON : **23. 03. 2015**

* * * * *

S.Eva Wanasundera, PC.J.

In this matter, Special Leave to Appeal was granted on the questions of law in paragraph 17(a) and (c) in the Petition dated 08.04.2011, which read as follows:-

- 17(a) Does the alleged newspaper article carry the ingredients necessary to establish the alleged defamation as set out **in paragraph 16** of the Petition?
- (c) Was the relevant law considered in determining damages and quantifying of damages set out in the said judgment of the Court of Appeal?

The facts pertinent to this case can be narrated in brief as follows. An Article of news under the heading “Tarbrush Campaign Against Lanka in London” appeared in the ‘Daily News’ newspaper on 17.05.1990. On 08.05.1992, the Plaintiff-Appellant-Respondent (hereinafter referred to as the “Plaintiff-Respondent”) instituted legal action against the Defendant – Respondent -Appellant (hereinafter referred to as the “Defendant- Appellant”) in the District Court of Colombo, for the recovery of a sum of rupees five million (Rs. 5000,000/-) claiming that the publication in the newspaper was defamatory to the Defendant - Appellant. The Defendant - Appellant filed answer on 11.12.1992 seeking a dismissal of the action. The District Court commenced the trial with 2 issues raised by the Plaintiff - Respondent and 7 issues by the Defendant - Appellant. Issues Nos. 3 and 4 were raised as preliminary issues of law by the Defendant – Appellant and the District Judge at that time answered the issues in favour of the Plaintiff – Respondent by order dated 28.07.1993 and commenced the trial. The Plaintiff-Respondent did not give evidence on his own behalf as Plaintiff but led the evidence of one witness and marked 2 documents P1 and P1(a) and closed the case. The Defendant-Appellant did not lead any oral evidence but formally marked two documents marked as D1 and D2 which were applicable only to the preliminary objection and closed the case on 19.09.1995.

By judgment dated 12.09.1996 the District Judge dismissed the plaint with costs on the basis that the case was not proved. On 25.10.1996 the Plaintiff - Respondent filed an appeal in the Court of Appeal. The Court of Appeal delivered judgment on 28.02.2011 allowing the Appeal with costs and granting 5 million rupees to the Plaintiff - Respondent as damages. The Defendant - Appellant is before this Court being aggrieved by the said judgment of the Court of Appeal.

The 1st question of law to be determined by this Court as stated above refers to **paragraph 16 of the Petition** of Appeal by the Defendant – Appellant. What is contained in that paragraph can be summarized to read that,

- (a) The Court of Appeal judgment is erroneous,
- (b) the Court of Appeal has not properly considered the contents of the said Newspaper Article
- (c) the Court of Appeal has not considered the elements of public benefit / interest and fair comment in the publication,
- (d) the Court of Appeal has not considered animus injuriandi as the main ingredient of the tort of defamation,
- (e) the Court of Appeal has not considered that the statements in the Article are not defamatory in the mind of a reasonable man
- (f) the Court of Appeal has not considered the evidence placed in favour of the Appellant,
- (g) the Court of Appeal has not considered the fact that the Appellant had not given evidence on his own and not considered the elements necessary to establish damages, and
- (h) the Court of Appeal has not considered the ambiguous statements in the publication.

I am of the view that the whole of the publication should herein be set down for an analysis in order to decide on the two questions of law aforementioned to adjudicate on this matter. It is as follows:-

["Tarbrush Campaign Against Lanka in London"]

The disruption to the educational institutions and the way of life in Sri Lanka caused by terrorist activity forced me to enter the U.K. in June 1989 to continue my studies. 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 had 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 own lives.

The People blamed the government – the President in particular for not coming down hard on the terrorists till ultimately the President's patience exhausted – the crackdown commenced and the situation brought under control.

Those who fostered and spawned these terrorist groups were forced to flee the country and many of them are here in the U.K. unable to return now that their "Jekyll and Hyde" existence has been exposed. Many have now come to realize that the people who were in the most dangerous were not so much the assassins who pulled the trigger, but the political masters drawn from the intelligentsia and the leadership who fingered those who had to be destroyed and those who gave the orders to do so.

It is sad to see a small group of Sri Lankans residing in the U.K. teaming up with these purveyors of violence, to engage in a campaign accusing the Sri Lankan government of violations 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 the 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 these many years was stay away from the troubled homeland, making no contribution to help restore the situation?

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

Two organizations in the U.K. 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 and Human Rights in Sri Lanka led by Prins Gunasekera and Clem Perera.

The enclosed documents are just a few of the type they keep churning out trying to influence people in high office to think badly of Sri Lanka. Does the British P.M. have to depend on such dubious individuals when she has her ambassador in Colombo who should be in the best position to tell her the truth.

It is well known that these small groups of Sri Lankans in the 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 themselves .

Another motive is to use this activity to fool Sri Lankans In the U.K. and other philanthropic organizations to donate funds which these scheming individuals pocket for themselves.

I am not for a moment condoning any excesses by the Armed Forces or Police. What we have to realize is that during the last 2 years it was a veritable war situation and in such a situation we have to accept that innocents do get caught up in the crossfires and conflicts. This sad to say is inevitable and is the sad experience all over the world.

Sri Lankans have come to realize that all the havoc and chaos was created by minority sick and demented individuals who were hell bent on destruction. I am sure that no right thinking Sri Lankan will ever allow a resurgence of the terrorist situation.

They have come to realize that they too should be prepared to even sacrifice their lives and resist such activity if they are to ensure that their children would have a future to look forward to.

It was only today that I received a telephone call from my brother in Colombo who is now in the university. He said that the May Day that was held this time was an excellent barometer of the feelings of the people. In previous years May Day was a day of clashes between rival groups, burning and stoning of buses and general tension but this

time he said the people treated it like a festive occasion thrilled that they could get about without any fear.

Isn't this a loud and clear message from the people of the present state of peace and quiet in the country and a rebuff to those Political parties and Trade Unions that have been exploiting them for their own ends.

I would be grateful if you could find space in your esteemed journal to publish this letter of mine

London

A True Patriot]

.....

The Plaintiff-Respondent's position in this case is that the article is **per-se defamatory** of the Plaintiff-Respondent, Mr. Prins Gunasekera. The Defendant-Appellant's position is that it is not defamatory but written and published **in the interest of the public and it was a fair comment**. The Defendant-Appellant submitted that the Plaintiff-Respondent has **failed to prove his case** and **calculation of damages did not have any basis**.

It is interesting to note that the preliminary issues of law raised at the beginning of the District Court case was on 'res judicata'. The Plaintiff-Respondent had filed action No. 1990 G 5175 in the High Court of Justice, Queen's Bench Division, England against the Associated Newspapers of Ceylon Limited, the Defendant-Appellant in this case, and had obtained an ex parte judgment in a sum of UK pounds of 150,000/- against the Defendant-Appellant. Thereafter, the Plaintiff-Respondent had instituted the application No. 3583/Spl in the District Court of Colombo under the Reciprocal Enforcement of Judgments Ordinance (Cap.94) for the registration of the said judgment in Sri Lanka which was obtained in the U.K. on the said same newspaper article. The District Court had made order for registration of the same on 28.08.1993. The Defendant-Appellant had filed an application to set aside the District Court order of registration dated 28.08.1993 and as such the matter of consideration of registration to be set aside was pending at the time that this case (D.C. Colombo 12137/MR) was about to start the trial. The District Court overruled the preliminary objection of res-judicata on the basis that the registration of the U.K. Judgment had not at that time reached a finality, and

made order to set down the present District Court case to be taken up for trial. I observe that neither party to this Appeal has brought to the notice of this Court whether it has reached a finality or not as of today.

The Plaintiff-Appellant's only two issues in the District Court were as follows;

(1) Is the publication **per se defamatory** to the Plaintiff?

(2) If the answer is 'Yes', is the Plaintiff entitled to claim **damages and in what sum?**

It is observed that what the Plaintiff-Respondent contends is that the publication by itself is defamatory of himself, namely Mr. PrinsGunasekera.

In the case of ***Muir Vs January 1990 BLR 388***, it was held that, any person who brings an action for defamation should set out in his plaint the very words about which the complaint is made. It is not sufficient to give the substance or purport of it. In the said case, Chief Justice Livesay Luke stated, *"In an action for defamation the actual words used are the material facts. It is an elementary rule of pleading that all material facts must be pleaded. Therefore in an action for defamation the actual words used, or the part complained of, must be pleaded by setting them out in the declaration. It is not enough to describe their substance, purpose or effectFailure to comply with this rule of pleading rendered the pleading defective, and in the absence of an amendment to cure the defect, the plaintiff could not obtain judgment on the basis of the pleading"*.

The Plaintiff –Respondent has not pointed out to any specific words that is defamatory but has kept his stand that "the publication per-se is defamatory to the Plaintiff" in his plaint. I observe that when the evidence of the only witness for Plaintiff-Respondent, Mr. JeyarajFernandopulle was led, he was never asked to point out which part or which words of the article has defamed Mr. PrinsGunasekera and Mr. J. Fernandopulle did not point out to any part of the publication which was defamatory of the Plaintiff – Respondent.

In any publication, **defamation can be 'per se' or by 'innuendo'**. The Plaintiff should prove that the contents of the newspaper article is false. Then only the defense gets the chance to show that the contents of the article is true.

I observe that the article reads in the middle as “Two Organizations in the U.K. engaged in the campaign of vilification are the Sinhala Bala Mandalaya by a petrol pumper named Gamini Keerthichandra Fernando and the Campaign for Democracy and Human Rights in Sri Lanka led by Prins Gunasekera and Clem Perera.” In this paragraph it can be understood by a reasonable person that Prins Gunasekera leads the campaign for Democracy and Human Rights in Sri Lanka and he is engaged in the campaign of vilification. **If it is defamatory to him, he must prove either that he does not lead that campaign or if he leads the campaign that he does not engage in vilification.**

The Plaintiff’s only witness Mr. Jeyaraj Fernandopulle did not utter a word about anything with regard to the Plaintiff’s position in this regard. I hold therefore that it was not proved at all. The truth of the statement stands unchallenged. If ‘X’ says what is written in the article is defamatory, ‘X’ must at least state that it is wrong firstly and then state how it defames him. **Evidence only, to the effect that the person alleged to be defamed is a ‘very good person with a good image in the society’ does not help at all in proving that he was defamed.** It is different from a case where the words used in the printed article straightly abuses using abusive words which need no explanation at all, like in the case *of Claude Perera Vs. Arasu 1983 2 SLR 484* where the Plaintiff called the Defendant , “Bloody swine, Bloody rogue, Bloody crook who robbed the University “ , where the words of defame were crystal clear.

Publication of the Statement was admitted. To decide whether the statement is ‘per se defamatory’, **the test to be adopted is the test of a reasonable man.** C.F. Amarasinghe in his book “Defamation and other Aspects of the Actio Injuriarum in Roman Dutch Law (in Ceylon and South Africa)” states that the first to be determined is whether the words have a particular meaning and then the question must be answered whether the meaning has the effect of lowering the Plaintiff in the situation of the society. The words complained of must tend to lower the Plaintiff in the situation of reasonable persons or persons of ordinary intelligence, the court taking the place of these reasonable persons. The evidence led through Mr. Jeyaraj Fernandopulle did not point to any particular portions of the Article defaming the Plaintiff – Respondent. He did not say that any particular sentence or set of words had the meaning to lower the Plaintiff in the situation of the society. He placed evidence before court that Mr. Prins

Gunasekera was a lawyer practicing in Sri Lanka who left to U.K. and was practicing as a lawyer in U.K.; he was a gentleman of high reputation; he was not aware of Mr. Gunasekera collecting funds for any organization and that he did not believe for a moment that he would misappropriate any funds collected. That was all the evidence led through the Plaintiff – Respondent’s only witness, Fernandopulle, which evidence I find totally lacking in proof of defamation alleged by the Plaintiff – Respondent against the Defendant – Appellant.

Nevertheless, giving the mind of Court as a reasonable man would do, I would like to consider the paragraph which contains Mr. Prins Gunasekera’s name in it, mentioning that he is in the campaign of vilification. It cannot be held that it is per-se defamatory. Vilification means “speaking ill of” or “slandering”. So the article states that Mr. Prins Gunasekera speaks ill of the Sri Lankan Government or slanders the Government. If Prins Gunasekera by name is called a ‘rogue’ or a ‘swindler’, it would mean per-se defamatory. I don’t see this paragraph as defamatory per se or by innuendo.

Wille’s Principles of South Africa in Law, eighth edition, edited by Dale Hutchinson, Belinda van Heerden, D. P. Visser and C. G. van der Merve at page 687, states “Some statements are defamatory per se, that is, in their plain and ordinary meaning, namely the meaning which an ordinary reasonable man would give to the statement, and not necessarily that intended by the author. The fact that the audience or readers of the statement do not believe the allegation, does not affect the question whether or not they are defamatory in their natural and ordinary meaning. The plaintiff need prove nothing more than that the publication was by the Defendant.” In the case in hand, the statements are not defamatory, in their plain and ordinary meaning.

Reading the article, I find that the writer connects the 1st paragraph of the article to the penultimate paragraph of the same, from which anyone reading the article can perceive that it is written in the interest of the public. It has no words of directing any meaning to defame anybody. It has brought to the notice of the public what is going on in the U.K.. The Plaintiff is mentioned by name in the 8th paragraph along with the names of two more persons. He is not singled out and defamed. The word ‘vilification’ does not carry any per-se defamatory meaning. It simply means ‘speaking ill of’. It can be gathered that what the writer says is that Mr. Prins Gunasekera is speaking ill of the

government. I fail to understand how such a statement could be a defamatory statement towards Mr. Prins Gunasekera.

The Court of Appeal has discredited the District Court Judge for not having given due weightage to the publication of the photograph of Mr. Prins Gunasekera with the newspaper article in question. I observe that the photograph of the Plaintiff is not distorted. I feel that it has been used to attract the attention of the reader. Underneath the photograph only his name is written. The name is not distorted either. The case of ***Independent Newspaper Vs. Nissanka Wijeratne 1995 2SLR 253*** is a case where the Plaintiff relied on 'per-se defamation'. Supreme Court held that; "Where a *Plaintiff pleads per-se defamation*, then the passage complained of or its photographs and the sub-title as in this case **must be by themselves defamatory** and the *Plaintiff cannot contend that they convey such and such a meaning.*". In the U.K. case of ***Charleston & Smith Vs. News Graph Newspapers Ltd. (1995) 2 AC 65; 1995, 2 WLR 450, 1995 2 AER 313***, the issue being whether the publication of the photographs was capable of bearing a defamatory meaning, whether viewed on their own or with the headlines and captions, the House of Lords held that a claim for libel could not be founded on a headline or photograph in isolation from the related text.

The focus of the newspaper article is obviously not on the plaintiff alone but on the conduct of small groups of Sri Lankans who have formed themselves to various organizations in the guise of patriotism. Mr. Prins Gunasekera is merely referred to as a member of a group. The Plaintiff – Respondent cannot claim damages for defamation on the basis of any references to the entire group. **He did not give evidence on his behalf in his case.** Instead only one witness giving evidence said that he has a very good character and placed him in a different category from the groups that were referred to in the article.

The Plaintiff – Respondent did not give any clue as to how the damages alleged to have been caused to the Plaintiff – Respondent should be calculated. The judge of the Court of Appeal has just granted what was asked for in the Plaint going out of the way calculating even the conversion in foreign currency, of the sum of money in rupees to be granted to the Plaintiff in the District Court. The judgment of the Court of Appeal in

favour of Mr. Prins Gunasekera, the Plaintiff – Respondent, simply has no basis whatsoever for calculating the damages granted.

I am of the opinion that the Court of Appeal has misinterpreted the principles in the law of defamation without recourse to the judgments of our courts or courts of other jurisdictions. The Court of Appeal has misguided itself in law on the photograph by reading into it, much material, unsupported at all by the evidence led in the case. I hold that the newspaper article is not per- se defamatory to the Plaintiff – Respondent and as such no damages could be granted to him. I answer the questions of law before this Court as enumerated above in favour of the Defendant – Appellant.

I set aside the judgment of the Court of Appeal dated 28.02.2011 and affirm the judgment of the District Court dated 12.09.1996. However, I order no costs.

Judge of the Supreme Court

Chandra Ekanayake, J.

I agree.

Judge of the Supreme Court

Sisira J. de Abrew, J

I disagree.

Judge of the Supreme Court