

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

S.C. Appeal 195/2015
SC/HCCA/LA No. 485/2014
SC/HCCA/LA No. 489/2014
H.C Appeal No. WP/HCCA/COL/365/2004F
D.C Colombo Case No. 16900/MR

Sea Consortium Lanka (Pvt) Limited
174, George R de Silva Mawatha,
Colombo 10.

PLAINTIFF

Vs.

1. The Associated Newspapers of Ceylon Limited
Lake House
No. 35, D.R. Wijewardena Mawatha,
Combo 10.
2. E. Weerapperuma
No. 21/22, Maradana Road,
Hendala.
Wattala.

DEFENDANTS

AND BETWEEN

In the matter of an Appeal under Section 754(1) of the Civil Procedure Code, read together with Section 5A of the High Court of the Provinces (Special Provisions Amendment) Act No. 54 of 2006

- 1 The Associated Newspapers of Ceylon Limited
Lake House
No. 35, D.R. Wijewardena Mawatha,
Combo 10.
2. E. Weerapperuma
No. 21/22, Maradana Road,
Hendala.
Wattala.

DEFENDANT-APPELLANTS

Vs.

Sea Consortium Lanka (Pvt) Limited
174, George R de Silva Mawatha,
Colombo 10.

PLAINTIFF-RESPONDENTS

AND NOW

In the matter of an Application Leave to
Appeal under Section 5C of the High
Court of the Provinces (Special
Provisions) Act No. 54 of 2006

1. The Associated Newspapers of Ceylon Limited
Lake House
No. 35, D.R. Wijewardena Mawatha,
Combo 10.
2. E. Weerapperuma
No. 21/22, Maradana Road,
Hendala.
Wattala.

DEFENDANT-APPELLANT-PETITIONERS

Vs.

Sea Consortium Lanka (Pvt) Limited
174, George R de Silva Mawatha,
Colombo 10.

And presently of

256, Sri Ramanathan Mawatha,
Colombo 15.

PLAINTIFF-RESPONDENT-RESPONDENT

BEFORE: Sisira J. de Abrew J.
Upaly Abeyrathne J. &
Anil Gooneratne J.

COUNSEL: Palitha Kumarasinghe P.C., with Nuwan Rupasinghe
for the Appellant

Ananda Kasthuriarachchi for the Respondent

ARGUED ON: 15.02.2017

DECIDED ON: 23.05.2017

GOONERATNE J.

This was an action filed in the District Court of Colombo on or about 05.09.1995 claiming damages in a sum of Rs. 50 million by the Plaintiff Company against the 1st and 2nd Defendants for a publication of an Article in the Sunday Observer of 25.6.1995, alleging that the Article published is defamatory per se and by innuendo. The Article in question is pleaded in paragraph 10 of the plaint

and its heading reads as “Ports Authority Ultimatum to Shippers”. The said Article was written by the 2nd Defendant. In paragraph 15 of the plaint the Plaintiff Company pleads the items (a to g) of innuendo to prove its case.

Two Leave to Appeal Applications were filed in the Supreme Court by the Plaintiff and Defendant respectively against the Judgment of the High Court (485/14 and 489/14). This court granted leave on both Applications. Both matters were consolidated. The question of law on which leave was granted are as follows:

By the Defendant-Appellant-Petitioners

1. Are the Defendant-Appellant-Petitioners entitled to defence of justification qualified privileged against the action of the Plaintiff-Respondent-Respondent, in view of the evidence adduced at the trial?
2. Did the learned High Court Judges err in holding that the Article published by the Defendant-Appellant-Petitioners is defamatory of the Plaintiff-Respondent-Respondent in view of the evidence adduced at the trial in particular in absence of any independent evidence of the alleged defamation and innuendo?
3. Did the learned High Court Judges err in law disregarding evidence of the 2nd Defendant-Appellant-Petitioner who was present when Hon. Minister of Ports made inspection at Sri Lanka Ports Authority premises when particularly no other witness gave evidence to contradict the evidence of the 2nd Defendant?

4. Did the learned High Court Judges err in law in holding that
- (i) The pith and substance of the Article was that the Respondent had used some undue influence and/or had bribed certain officials of Sri Lanka Ports Authority in order them not to present the cheques that were given by the Respondent in that, *ex facie*, the pith and substance of the said Article is to disclose inefficiency and remiss of 2duties by employees of a State Instituted as discovered by Hon. Minister in charge of the Institute at an inspection held in presence of Media and no allegation of bribery whatsoever ever mentioned in the said Article and no independent witness had given any such evidence;
 - (ii) The allegation in the Article triggered a shockwave in the business community, banks and overseas as the Plaintiff is considered the biggest leading shipping Company when no such admissible evidence has been adduced at the Trial?
5. Did the learned High Court Judges err in awarding damages without proper analysing or evidence or quantification particularly since, the business activities increased after the publication of the alleged defamatory Article by the Defendant-Appellant-Petitioners, the Net profit of the Plaintiff-Respondent-Respondent was only Rs. 2 million per annum and the Respondent incorporated in September 1994 whereas the publication made in June 1995?

By the Plaintiff-Respondent-Respondent

1. Is the Judgment of the learned High Court Judges dated 21.08.2014 contrary to law and evidence before the Court?
2. Did the Honourable Judges of the High Court err in holding that the quantum of damages should be reduced to Rs. 30 million without fresh evidence or facts?
3. Did the Honourable Judges of the High Court exercising Appellate powers err in substituting its judgment on quantum of damages where damages are awarded for defamation?

What really happened was that the then Hon. Minister of Ports, to the Sri Lanka Ports Authority along with the 2nd Defendant a journalist attached to the “Sunday Observer” visited the Ports Authority and personally witnessed what had taken place, in an inspection tour and the newspaper reported same in a news item. It would be convenient to reproduce that part of the Newspaper Article as follows which according to the Plaintiff is defamatory of the Plaintiff by innuendo.

“But when the Minister went through a register checking with cheques at hand at the time of sudden inspection, he found that some of the cheques entered into the register were not of that day but several months old. He also found that the document together with the cheques did not have the date stamp. He also found that most of the cheques that had not been entered

into the register were in respect of a single shipping firm – Sea Consortium Lanka (Pvt.) Ltd.”

The above version is the gist of the main Article which could give rise to a cause of action to the Plaintiff. However if that was something the Minister and the 2nd Defendant observed, then the question is whether the defences pleaded such as on privileged occasion and published in good faith on a matter of public interest was justifiable, and a fair comment without any malice or ill will towards the Plaintiff. It is to be noted that the 2nd Defendant who gave evidence states there was no ill will or malice towards the Plaintiff but reported what was observed and detected by the Minister. On the other hand Plaintiff's position was that the above news item is false, as payments are made to the Ports Authority within 2/3 days and a document could be produced to indicate such payments. Position of the Defendant on this aspect was that no such document was produced at the trial. In fact it was not produced.

One Mr. Abeywickrema on behalf of the Plaintiff Company gave evidence, and several pages of evidence had been recorded. This witness testify that the news item was a false news item. Cheques were promptly presented to the Port Authority when invoices were sent to the company. Cheques given to the Ports Authority by the Company were deposited in the Bank within 2/3 days. Plaintiff Company makes a profit of Rs. 2 million per year. The Plaintiff Company

was not privy to the Ministers visit on 19.06.1995. He also stated in evidence that several of his customers inquired from him after the publication of the news item as to any fraud was committed ඇති එසේ වරායට ගෙවීම සම්බන්ධයෙන් වංචා සිදු කරන්නේ කියා. Several letters were also received (Pg. 146) subsequent to the news item, company had more business.

The 2nd Defendant a journalist as stated above gave evidence for the Defendants. He accompanied the Minister on an inspection tour. It was the 2nd Defendant who wrote the Article in question. He saw several cheques that were spread over a table at the Accounts Division and most of the cheques were not registered in the relevant books, and not credited to the Bank Account. There was a failure of the Ports Authority Officials to perform their duties properly and bank the cheques properly. All these facts were revealed at the visit to the Finance Division and the 2nd Defendant directly participated in this visit. The Minister found that most of the cheques that were spread on the table were cheques of the Plaintiff Company.

It was the position of the 2nd Defendant that he should bring the fact of inefficiency to the notice and knowledge of the general public. This Article was published to demonstrate the inefficiency, negligence and the remiss in duties on the part of the officials of the Ports Authority. There is also no evidence led to show that the Plaintiff Company failed to make payments, on the invoices

submitted by the Ports Authority. As such the Plaintiff is not a defaulter. 2nd Defendant testified that he has no animosity towards the Plaintiff Company and had not defamed the Plaintiff.

The case consists of several pages of evidence and submissions. The issue is whether the Article is defamatory of the Plaintiff Company and the question whether Plaintiff had discharged his burden of proof. In this background I note the following matters, highlighted by the Defendant party.

- (a) There was no other independent evidence led of a witness other than the Plaintiff, to demonstrate that the reading public understood the Article to be defamatory of the Plaintiff.
- (b) No documentary proof placed before court to establish that the cheques were promptly banked by the Plaintiff Company, though the only witnesses for the Plaintiff in his evidence undertook to produce documentary proof.
- (c) Plaintiff failed to call the Ports Authority to prove that the cheques given by the plaintiffs were promptly presented for payments, and that such cheques were not kept in the Ports Authority, as reported by the Defendant.
- (d) In the oral testimony of the Plaintiff it was submitted that several of Plaintiff's customers inquired from the Plaintiffs witness about a fraud, on

reading the Article in question. However none of those customers were called to support such a view. This is in a way hearsay evidence.

(e) Evidence was placed by the Plaintiff that after the publication of the Newspaper Article, the Plaintiff Company made profits and the business was improving for the Plaintiff Company, irrespective of the alleged defamatory Article. This is indicative of the position that the allegation had no impact on the Plaintiff Company and its business. In other words the Plaintiff has not suffered as a result of the alleged defamatory Article. Plaintiff's position was that it continued to make a net profit of Rs. 2 million per annum. Plaintiff has not been able to prove that there was an injury to trading reputation whereas no damages whatsoever had been proved.

In the above circumstances I cannot accept the views of the learned High Court Judges and the High Court has erred in holding that the Article refers to the Plaintiff and the pith and substance of the said Article was that the Plaintiff used influence or bribed officials at the Ports Authority not to present the cheques for payment.

I also note that documents P1 to P4 were produced and marked in evidence. A point had been made that these documents are inadmissible in law and cannot be acted upon as evidence. More emphasis is on P4, and at the closure of Plaintiff's case the documents were not read in evidence. It is the *curia* of the District Court that documents produced and marked

through a witness should be read in evidence at the close of the case. This is a practice adopted from time immemorial and which has developed and recognised by our courts. Vide *Sri Lanka Ports Authority and Another Vs. Jugolina 1981 (1) SLR 18* This practice had been accepted in several decided cases. *Jamaldeen Abdul Lateef Vs. Abdul Majeed Mohomed Mansoor and Another 2010(2) SLR 333 SC at 371, 372 and 373*. It is observed that P4 was marked subject to proof. As such the proof of document P4 is in doubt.

The Article was published, no doubt for the benefit of the public and educate the reader of the state of affairs of an Institution like the Ports Authority. Public no doubt should be aware of what happened at the Ports Authority perusal of the Article does not bring about any complication. Nor can a normal reader pin point any fraud on the part of the Plaintiff Company, but the Ports Authority has to take the blame. No independent witness supported Plaintiff's case. There is no 'Animus Injuriandi' on the part of the Defendants. The existence of Animus Injuriandi is an essential basis of the cause of action. *De Costa Vs. Times of Ceylon (1963) 65 NLR 217 at 224*.

The other matter is whether the allegations triggered a shockwave in the business community. There was no proper evidence placed before court to prove above. Documents P2, P2A and P3 relied by Plaintiff refer to total volume handled by x-press container line, performance in the year 1998 and

awards received. It is not possible to conclude by these documents of any calculations to establish damages. Defendants describe it to be self serving documents. The newspaper Article is certainly not calculated to injure the business reputations of the Plaintiff Company.

The 1st and 2nd Defendants merely reported facts which arose as a result of an inspection tour of the relevant Minister of the Ports Authority. It is justifiable to do so. A case of this nature would require independent evidence. It is the view of a normal reader of the newspaper that could throw some light to the Article and call it defamatory. If it is defamatory per se and by innuendo it need to be proved, independent evidence. It would be necessary. In the case in hand as stated above no such evidence was placed before court. In all the above circumstances the questions of law (1) to (5) are answered as 'Yes' in favour of the Defendant-Appellant-Petitioners. In view of the above answers the questions of law (1) to (3) raised by the Plaintiff-Respondent-Respondent does not arise. I hold that the Judgment of the High Court is contrary to law and evidence led. Therefore the 1st and 2nd Defendant-Appellant-Petitioners' appeal is allowed and are entitled to relief as per sub paragraphs (b) and (c) of the

prayer to the petition. Plaintiff-Respondent-Respondent appeal is dismissed with costs.

Defendant-Appellant-Petitioners' appeal is allowed.

JUDGE OF THE SUPREME COURT

Sisira J. de Abrew

I agree.

JUDGE OF THE SUPREME COURT

Upaly Abeyrathne J.

I agree.

JUDGE OF THE SUPREME COURT