

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

In the matter of an appeal against the judgment of the
Court of Appeal in CA Appeal No. 805/96(F)

Prins Gunasekera
Plaintiff

SC Appeal 141/2011
SC/CA/SPL/LA/68/2011
CA Appeal 805/96 (F)
DC Colombo 12137/MR

Vs

Associated News Papers of Ceylon Limited
Defendant

And Between

Prins Gunasekera
Plaintiff-Appellant

Vs
Associated News Papers of Ceylon Limited
Defendant-Respondent

And Now Between

Associated News Papers of Ceylon Limited
Defendant-Respondent-Appellant

Vs
Prins Gunasekera
Plaintiff-Appellant-Respondent

Before : Chandra Ekanayake J
Eva Wanasundera PC J
Sisira J De Abrew J

Counsel : Gomin Dayasiri for the Defendant-Respondent-Appellant
Manohara de Silva PC for the
Plaintiff-Appellant-Respondent

Argued on : 18.6.2014 and 5.9.2014

Written Submission

tendered on : By the Appellant on 4.11.2014
By the Respondent on 21.10.2014

Decided on : 23.3.2015

Sisira J De Abrew J.

I have read the draft judgment of Justice Eva Wanasundera. As I am unable to agree with the said judgment, I have decided to write this judgment.

The Plaintiff-Appellant- Respondent in this case (hereinafter referred to as the Plaintiff) filed a case in the District Court of Colombo against the Defendant-Respondent-Appellant (hereinafter referred to as the Defendant) for recovery of damages in a sum of Rs.5,000,000/- arising from a libelous publication published in Ceylon Daily News of 17 of May 1990. The learned District judge, after trial, dismissed the action of the Plaintiff. Being aggrieved by the said judgment, Plaintiff appealed to the Court of Appeal. The Court of Appeal, by its judgment dated 28.2.2011, set aside the judgment of the learned District Judge; held in favour of the Plaintiff and granted damages in a sum of Rs.5,000,000/- to the Plaintiff. Being aggrieved by the said judgment of the Court of Appeal, the Defendant appealed to this court. This court, by its order dated 29.9.2011, granted leave to appeal on questions of law set out in paragraph 17(a) and 17 (c) of the petition of appeal which are reproduced below.

1. Does the alleged article carry the ingredient necessary to establish the alleged defamation as set out in paragraph 16 of the petition?
2. Was the relevant law considered in determining damages and quantifying of damages set out in the said judgment?

Since the above questions of law refer to paragraph 16 of the petition of appeal, the said paragraph is reproduced below.

“Being aggrieved by the aforesaid judgment delivered on 28.2.2011, the Defendant-Respondent-Petitioner seeks Special Leave to Appeal from Your Lordship’s Court against the said judgment on the following among other grounds that may be urged on behalf of the Defendant-Respondent-Petitioner at the hearing of this application.

1. *The said judgment is contrary to and/or inconsistent with the evidence placed before court and in the circumstances erroneous in law;*
2. *It is submitted with respect that the Court of Appeal has erred in law and failed and/or neglected to consider the fundamental ingredients necessary to establish defamation and had failed and/or neglected to correctly and/or properly evaluate and/or analyze the contents of the said article accordingly;*
3. *It is submitted with respect that the elements of public benefit/public interest and fair comment which are the prime factors for the publication of the aforesaid alleged article and the matters in issue have not been considered by the Court of Appeal.*
4. *The Court of Appeal has erred in law by failing to take cognizance of the fact that there is a complete failure on the part of the Plaintiff-Appellant-Respondent to establish *animus injuriandi* on the part of the Defendant-Respondent-Petitioner and the burden is on the Plaintiff-Appellant-*

Respondent to aver, put in issue and prove this ingredient and as such the main ingredient for the tort of defamation has not been established;

5. *The Court of Appeal has erred in law and failed and/or neglected to consider that the evidence of the witness presented on behalf of the Plaintiff-Appellant-Respondent does not establish and/or support a claim of defamation and in fact the said evidence establishes that the purported defamatory statements in the said article were not attributed to or associated with the Plaintiff-Appellant-Respondent in any manner in the mind of a reasonable man. The non consideration of the aforesaid important evidence amounts to an error of law.*
6. *It is submitted that the Court of Appeal has failed to consider the aspect of evidence of the Plaintiff's witness which are favourable to the defendant-Respondent-Petitioner;*
7. *It is submitted that the Court of Appeal has failed to consider that the Plaintiff-Appellant-Respondent did not give evidence and has awarded the full amount of damages sought without considering the elements necessary to establish and quantify damages where reputation is in issue has not been led or presented by the Plaintiff-Appellant-Respondent;*
8. *It is submitted that the Court of Appeal has erred in law and failed and/or neglected to consider the evidence in a defamation case where ambiguous statements are under consideration, such as in this present case."*

The main issues in this case are whether (1) the Article is attributable to the Plaintiff and (2) the Article is per se defamatory of the Plaintiff.

At the trial the Defendant admitted the publication of the Article in the Ceylon Daily News of 17th of May 1990 which was marked as A1. The said Article is reproduced below.

“The disruption to the educational institutions and the way of life in Sri Lanka caused by terrorist activity forced me to enter the UK in June 1989 to continue my studies. No Sri Lankan can forget the terror experience 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 normal 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 UK unable to return now that their Jekyl and Hide existence has been exposed. Many have now come to realize that the people who were 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 who gave the orders to do so.

It is sad to see a small group of Sri Lankans residing in the UK teaming up with those purveyors of violence to engage in a campaign accusing the Sri Lankan Government of violations of human rights etc.

Where were those 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 trouble 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 aid donor countries should stop all aid to Sri Lanka.

Two organizations in the UK that are engaged in this campaign of vilification are the Sinhala Balamandalaya led by a petrol pumper named Gamini Keerthichandra Fernando and the Campaign for Democracy and Human Rights in Sri Lanka led by Prins Gunasekara 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 UK comprise of those who never achieved any form of recognition in their own country or even in the UK. 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 UK 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 two years it was a veritable war situation and in such a situation we have to accept that innocents do get caught up in the crossfire 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 groups sick and lamented 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 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 tensions but this time he said that 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.

A True Patriot

London."

The defendant has, in the middle of the article, published a photograph of the plaintiff and below the photograph the words 'Prins Gunasekera' are printed. I will now consider whether the said article is attributable to the Plaintiff. Two organizations in the UK have been identified in the said article as being 'engaged in the campaign of vilification'. One is Sinhala Balamandalaya led by a petrol

pumper named Gamini Keerthichandra Fernando and the other one is the ‘Campaign for Democracy and human Rights in Sri Lanka’ led by Prins Gunasekara. The only photograph published in the article is that of the plaintiff. When I consider the above matters, there is no difficulty in deciding that the said article has referred to the plaintiff and many groups of people. For the above reasons, I hold that the article is attributable to the Plaintiff. I must mention here that the Defendant did not give evidence nor did it produce any evidence.

Next question that must be decided is whether the article is per se defamatory of the Plaintiff. In deciding this question, it is interesting to note that the article carries the following matters.

*“Another motive is to use this activity to fool Sri Lankans in the UK and other philanthropic organizations to donate funds which these scheming individuals **pocket for themselves**. (Emphasis added).*

Those who fostered and spawned these terrorist groups were forced to flee the country and many of them are here in the UK unable to return now that their Jekyl and Hide existence has been exposed. Many have now come to realize that the people who were 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 who gave the orders to do so.

It is sad to see a small group of Sri Lankans residing in the UK teaming up with those purveyors of violence to engage in a campaign accusing the Sri Lankan Government of violations of human rights etc.

Where were those 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 trouble homeland making no contribution to help restore the situation.

Two organizations in the UK that are engaged in this campaign of vilification are the Sinhala Balamandalaya led by a petrol pumper named Gamini Keerthichandra Fernando and the Campaign for Democracy and Human Rights in Sri Lanka led by Prins Gunasekara 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?"

The only witness who gave evidence on behalf of the plaintiff was Jeyaraj Fernandopulle who was the Deputy Minister of Policy Planning, Ethnic Affairs and National Integration. Mr. Fernandopulle who was an Attorney-at Law knew the Plaintiff from 1970. It is important to consider certain portions of Mr. Fernandopulle's evidence which are reproduced below.

Q. What sort of a gentleman the plaintiff is.

A. He is a gentleman of high reputation in Sri Lanka.

Q. was he a practicing lawyer in Sri Lanka.

A. In 1970 he was appearing for cases in Negombo Courts. He was a very popular criminal lawyer.

Q. He also played a leading role in Human Right cases in Sri Lanka.

A. Yes. Fighting for the rights of people.

Q. latter part of 1960 he was in Parliament and sometime later he left for England.

A. He was forced to leave the country as his stay in Sri Lanka was dangerous for his life. He was appearing for Human Right cases and therefore some unknown elements were after his life.

Q. For his safety he left the country.

A. Yes. He campaigned for democracy and human rights in Sri Lanka.

Q. Mr. Prins Gunasekera was a leading figure in Sri Lanka.

A. Yes.

Q. You said that you saw the defamatory article in the papers.

A. Yes. I read the article dated 17th May 1990.

Q. Having known Mr. Gunasekera for such a long time, do you believe for a moment that he would misappropriate any funds collected?

A. He was a person who appeared free of charge for litigants in cases. He was not a person who would misappropriate money.

Q. Are you aware that Mr. Gunasekera collected public funds for any organization.

A. He has not collected public funds for any organization. I have met him in London before this article and after this article. I met him in London twice.

He has a very high reputation.

Defendant, in cross-examination did not make any attempt to controvert the evidence of Mr. Fernandopille. According to the evidence of Fernandopulle, the Plaintiff who had a high reputation was a leading Criminal Lawyer in Sri Lanka. He was elected as a Member of Parliament in 1960 and held that post for twelve years. In considering the question whether the article is per se defamatory, I would like to consider a passage from a book titled "Defamation and other aspects of the

action iniuriarum in Roman-Dutch Law (in Ceylon and South Africa)” by Chittharanjan Felix Amerasinghe wherein the learned Author at page 19 states thus: *“It must be determined 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 estimation of society. It has repeatedly been stated that the words complained of must tend to lower the Plaintiff in the estimation of reasonable persons or persons of ordinary intelligence, the court taking the place of these reasonable persons”*

In “Wille’s Principles of South African Law 8th Edition edited by Dale Hutchinson, Belinda Van Heerden, D P Visser and CG Van der Merwe at page 687 the learned Author states thus: *“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 allegations does affect the question whether or not they are defamatory. Where the words complained of are defamatory in their natural and ordinary meaning the Plaintiff need prove nothing more than that and their publication by the Defendant”*.

In this case, the publication is admitted. The article describes that the small groups of people including the group led by the plaintiff have got involved in collecting funds and pocketing the same. Further the article indicates that the Plaintiff has been misappropriating the donations made to the Campaign for Democracy and Human Rights in Sri Lanka. When I consider the article published in the news paper and the evidence of Fernandopulle, I am of the opinion that the article has the effect of lowering the Plaintiff in the estimation of society.

For the above reasons I hold that the article is per se defamatory of the Plaintiff. Thus the judgment of the Court of Appeal is correct to this extent.

The next question that must be considered is whether awarding Rs. 5,000,000/- (5 Million) is excessive or not. In deciding this matter it is important to note that the plaintiff did not give evidence. According to the judgment of the Court of Appeal, the plaintiff is permanently residing in England. There is no dispute on this matter. Even learned President's Counsel for the Plaintiff, at the hearing of this appeal, did not dispute this matter. There is no evidence to suggest that the plaintiff would come and settle down in Sri Lanka. Then how does the article affect his life in Sri Lanka. The plaintiff must, by way of evidence, say as to how the article affects his reputation both in Sri Lanka and London. This evidence is necessary in order decide whether the quantum sought could be granted. But his evidence is not necessary to decide whether the article is defamatory of him. Mr. Fernandopulle who was called by the Plaintiff has stated, in his evidence, that the plaintiff has a very high reputation in London. He had met the Plaintiff in London only on two occasions. In order to decide whether the court can grant the quantum that the plaintiff has asked for, there must be evidence as to how the article affected his reputation in London and Sri Lanka or there must be positive evidence on this matter. Is there any evidence to suggest that the people in Sri Lanka and or London made inquiries from the Plaintiff about the truth or falsity of this article? The answer is no. When I consider all these matters, granting of Rs.5,000,000/- (5 Million) is, in my view, excessive. I therefore set aside the part of the judgment of the Court of Appeal awarding Rs.5,000,000/- However Mr. Fernandopulle says that the plaintiff was a leading Criminal lawyer in Sri Lanka. This shows that he was a leading figure in Sri Lanka. Therefore, in my view, he is entitled to some kind of compensation. I also note that the plaintiff does not live in Sri Lanka.

Considering all these matters I grant a sum of Rs.2,000,000 (Rs.Two Million)/- as compensation. However I have earlier decided that the judgment of the Court of Appeal was correct when it decided that the article was defamatory of the plaintiff. I affirm the judgment of the Court of Appeal to the said extent. But I set aside part of the judgment of the Court of Appeal which awarded Rs.5,000,000/- (Rs.5 Million) to the plaintiff and award only Rs.2,000,000/- (Rs.Two Million).

In view of the above conclusion reached by me, I answer the 1st question of law in the affirmative but answer the 2nd question of law in the negative.

Judgment of the Court of Appeal varied.

Judge of the Supreme Court.