K. G. N. FERNANDO
v.
FAWZI MOHAMED

SUPREME COURT
ATUKORALE, J., FERNANDO, J. AND KULATUNGA, J.
S. C. APPEAL No. 32/86 – C. A. APPEAL No. 8/76 (F)–
D. C. KALUTARA CASE No. 1821/MR.
JUNE 12, 1989.

Defamation – Privileged occasion – Assessment of evidence.– Circumstances justifying disturbing of findings on facts.

To an allegation in the plaint that certain words defamatory of the Appellant (namely that the Appellant had a "terrible reputation for being a terrible womaniser" and that "several female patients had told him" that he examined them in places that are not necessary") had been uttered by the Respondent in the hearing of Kingsley Wickremasinghe a leading lawyer of Kalutara, the Respondent responded with a denial and gave as his own version of his conversation with the said lawyer that Wickremasinghe (a friend of the Appellant) had asked him why he does not join the Appellant and run a Nursing Home and the Respondent had said he was not interested. When Wickremasinghe persisted the Respondent told him that the Appellant was tactless with his patients and there was a rumour (of which he knew nothing personally and which he did not believe) that he examined patients in unwanted places.

The District Judge held for the Appellant accepting Wickremasihghe's evidence.

It was argued that the Court of Appeal should not disturb findings of fact but that Court held that the learned District Judge had misdirected himself on the facts and the law in regard to privilege. The District Judge had attached undue weight and importance to the position of Wickremasinghe in the community and at the Bar.

Held on appeal to the Supreme Court :

(1) There was no critical analysis of the evidence by the District Judge. The Judge had failed to consider the impact (or even understand the significance) of the evidence of another attorney-at-law Mohamed Hanaffi on Wickremasinghe's version of the

circumstances in which the conversation between him and the Respondent began. For according to Wickremasinghe the Respondent uttered the words complained of without any provocation constituting more or less, a sudden and gratuitous attack on the moral character of the Appellant. The most glaring error in the District Judge's assessment of evidence was his failure to consider the testimony of Mohamed Hanaffi that 2 days after the incident the Respondent had met Wickremasinghe in his company and asked him whether he called the Appellant a womaniser and Wickremasinghe replied "that is the meaning of what you said".

(2) The defence of privilege was available to the Respondent.

Case referred to :

Colletts Ltd. v. Bank of Ceylon (1984) 2 Sri L. R. 253.

APPEAL from judgment of the Court of Appeal.

D. R. P. Goonetilleke with *Shiranthi de Saram* for the Plaintiff-Appellant.
H. L. de Silva, P. C. with *Faiz Mustapha, P. C., M. D. Mohamed* and *Mizam Razzaq* for Defendant –Respondent.

Cur. adv. vult.

July 6, 1989.

ATUKORALE, J.

At the conclusion of the hearing into this appeal we made order dismissing the same with costs. We now set down our reasons for doing so.

Both parties to this appeal are medical practitioners who, at the relevant times, were practising their profession in or around Kalutara. The Appellant filed this action, which has given rise to the present appeal, against the Respondent to recover damages in a sum of Rs. 50,000 for certain defamatory statements alleged to have been uttered regarding him by the Respondent in the verandah of the Magistrate's Court. Kalutara, in the presence of Kingsley Wickremasinghe, an Attorney-at-law, practising at Kalutara Court. The precise words allegedly uttered by the Respondent and forming the basis of the appellants's claim are set out in paragraph B of the plaint. They are an follows:–

"Dr. George Fernando has a terrible reputation of being a terrible womaniser."

"Several female patients have told me that he examined them in places that are not necessary."

"I have been asked to join him several times. I will lose the little practice I have if I join him."

Dr. George Fernando referred to above is the Appellant.

In his answer the Respondent denied that he uttered the words set out above. He averred that ever since he commenced practice at Kalutara the Appellant had suggested to him that he should join him in running a Nursing Home or a dispensary in partnership. He, however, did not give the Appellant a definite reply although he had, in his own mind, decided no to join the appellant in practice. On the day in question when he went to Kalutara Courts on business Kingsley Wickremasinghe (who he knew was a friend of the Appellant) came up to him and asked him why he does not join the Appellant and start a Nursing Home in Kalutara or Beruwela. He told Wickremasinghe that he was not interested in joining the Appellant. Wickremasinghe then advised him to do so. When he persisted in his refusal Wickremasinghe asked him for the reasons why he was not willing to join the Appellant. He then told Wickremasinghe that the Appellant was tactless with his patients and that there was a rumour that the Appellant examined patients in unwanted places though he himself knew nothing about it personally and did not believe it. The Respondent further averred that the conversation that took place between him and Wickremasinghe on the day in question was in consequence of the iatter's insistence on knowing the reasons for his refusal to join the Appellant in practice and that the communication so made by him to Wickremasinghe was a privileged communication made on a privileged occasion and as such was not actionable. The plea of privilege set up by the Respondent in his answer was put in issue at the trial. It is not denied that the material words (whether they be those set out in the plaint or those set out in the answer as having been said in response to Wickremasinghe's query) were spoken by the Respondent in the presence of and within the hearing of Wickremasinghe only and of no one else.

The learned District Judge after hearing the evidence held that the Respondent uttered the defamatory words attributed to him in the plaint. He also held that the occasion on which they were uttered was not privileged and that they were not privileged communications. He awarded the appellant a sum of Rs. 25,000/– as damages. The Respondent went in appeal to the Court of Appeal which reversed the judgment of the trial judge and dismissed the Appellant's action. The present appeal is from this judgment of the Court of Appeal.

At the hearing before us learned Counsel for the Appellant contended that the question that arose for decision is this case was whether the

Respondent uttered the defamatory words set out in the plaint or not, that it was essentially a question of fact, that the trial judge was the best judge on questions of fact, that having seen and heard the witnesses on both sides he accepted the version of the Appellant's witness Wickremasinghe, and rejected that of the Respondent, that it was not open to the Court of Appeal to have substituted its own view to that of the trial judge and that the Court of Appeal should not have, in the circumstances of this case, interfered with the trial judge's findings of fact. In view of learned Counsel's submission it is necessary for us to examine closely the reasons which induced the Court of Appeal to disturb the findings of fact of the Trial Judge.

A perusal of the judgment of the Court of Appeal discloses that the main thrust of the submissions advanced in that court on behalf of the Respondent (who was the appellant therein) was that the trial judge's approach to the assessment of evidence in the case, particularly that of Wickremasinghe, caused grave prejudice to the Respondent; that the Trial Judge had seriously misdirected himself on certain vital items of evidence resulting in an erroneous evaluation of the totality of the evidence in the case and that he had misdirected himself both on the facts and the law in regard to the plea of privilege raised by the Respondent. Upon a consideration of all the matters urged before us at the hearing we formed the view that there was ample material to substantiate each of the aforesaid submissions, the first two of which, by themselves, would suffice to refute the arguments of learned Counsel for the Appellant. We were in entire agreement with the view of the Court of Appeal, which, though not expressly stated so, was implicit in its reasoning, that but for the wrong approach adopted and grave misdirections committed by the Trial Judge he would not have failed to uphold the Respondent's version of what took place on the day in question upon which was founded his plea of privilege.

One of the opening paragraph of the judgment of the trial judge makes it abundantly clear that he has attached undue importance and weight to the position and standing enjoyed by the Appellant's witness, Wickremasinghe, in the community and at the Kalutare Bar. He states therein that generally it must be held that a person of the standing of Wickremasinghe would not, by using such indecent words as are set out in the plaint, affirm to something which did not actually happen. He further states that on a consideration of the evidence of Wickremasinghe and of

the Respondent it is necessary to decide whether Wickremasinghe's evidence can be accepted or not. He then proceeds to narrate briefly Wickremasinghe's evidence but there is no critical analysis of the evidence of either of them. In regard to the evidence of Mohamed Hanaffi, Attorney - at -law, called by the Respondent, the learned judge observes that there is a discrepency between his evidence and that of Wickremasinghe as to whether the Respondent was introduced or not to Wickremasinghe by Mohamed Hanaffi (Wickremasinghe maintaining that he was and the latter denying the same) but that this discrepency was of no significance and concludes that on a consideration of their evidence it is not possible to hold that Wickremasinghe is a person who would testify to words which were not uttered by the Respondent. But, as pointed out by learned President's Counsel, he has totally failed to consider the impact or even understand the significance of Mohamed Hanaffi's evidence on Wickremasinghe's version of the circumstances in which the conversation between himself and the Respondent began. According to the evidence of Wickremasinghe the Respondent uttered the words complained of without any provocation constituting, more or less, a sudden and gratuitous attack on the moral charactor of the Appellant. But according to Mohamed Hanaffi, Wickremasinghe came up to the spot where he and the Respondent were talking and asked the respondent why he came there. When the Respondent said that he wanted to get Mohamed Hanaffi's brother's building to start a dispensary at Beruwela, Wickremasinghe asked him why he did not start a dispensary with the Appellant, at which stage Mohamed Hanaffi stated he left the place to attend to his work.

This evidence of Mohamed Hanaffi (which does not appear to have been seriously challenged in cross-examination) materially corroborates the Respondent's version of what transpired in conversation between him and Wickremasinghe.But the learned judge has not even adverted to the same in his judgment. Nor has the learned judge made any reference to that passage in the evidence of Mohamed Hanaffi to the effect that when he, at the request of the Respondent, accompanied the Respondent to meet Wickremasinghe about 2 days after the incident and when on that occasion the Respondent asked Wickremasinghe whether he had called the Appellant a womaniser, Wickremasinghe replied " that is the meaning of what you said. " This evidence of Mohamed Hanaffi, if true, negatives Wickremasinghe's accusation that the Respondent called the Appellant a womaniser on the day in question. But, in my view, the most glaring error

of fact committed by the learned judge which led him to outright rejection of the Respondent's evidence is his finding that the Respondent's testimony that during his conversation with Wickremasinghe he was only referring to a prevalent rumour (which he himself did not believe) that the appellant examined patients in unwanted places was a mere afterthought on the part of the respondent trotted out by him for the first time whilst in the witness box with no reference to it even in his answer. This finding of the learned judge is in the teeth of what had been stated by the Respondent not only in his answer but also in his reply (D3) to the Appellant's letter of demand, in both of which the Respondent has specifically set out that he told Wickremasinghe that there was a rumour that the Appellant examined patients in unwanted places, though he knew nothing about it nor believed it. Thus the rejection of the Respondent's evidence was based on a wholly untenable and manifestly erroneous finding of the trial judge. Quite apart from the above matters, the trial judge's uncritical acceptance of Wickremasinghe's evidence is also borne out by the fact that he has not paused to consider Wickremasinghe's conduct at or about the time that the defamatory words were allegedly uttered by the Respondent. Wickremasinghe says he was annoyed when the Respondent made the defamatory statements concerning the Appellant, who was his close friend. But he did not venture to contradict nor even to express his disbelief of the same but remained silent. It is inconceivable that Wickremasinghe would have just remained silent if, as alleged, the Respondent made a sudden and unprovoked attack of such magnitude on the character of his good friend in his very presence. Wickremasinghe's silence lends support to the Respondent's version that he did not volunteer to make the disparaging words complained of or take responsibility for the same as alleged but referred, only when pressed by Wickremasinghe, to such a rumour as the reason for not wishing to join the Appellant. There was also the clear evidence of Wickremasinghe himself that at one stage he thought the matter should have been settled by an apology from the Respondent. This statement is consistent more with a reference to a rumour concerning the Appellant rather than a virulent attack made directly on the Appellant's character. There was further evidence that the Appellant was Wickremasinghe's election agent and trusted friend with whom there were business transactions. It was, therefore, the duty of the trial judge to approach Wickramasinghe's evidence with a certain amount of caution for there was the possibility of, perhaps, even an unintended exaggeration out of his loyalty

towards a trusted friend. It was further urged by learned President's Counsel that Wickremasinghe's lack of candour was evident by the fact that he repeatedly denied any knowledge of the contents of the Respondent's reply to the letter of demand and of the position taken up by him in the answer *vis-a-vis* the defamatory words allegedly uttered by him despite having attended on two occasions the chambers of counsel who appeared for the Appellant in the lower court for consultations. It appears to me that the learned judge from the very outset of his judgment proceeded on the hypothesis that Wickremasinghe, by virtue of his calibre and standing in life, could not but have been a truthful witness on whose testimony he could safely act. As a result he has failed to address his mind to the infirmities in the evidence of Wickremasinghe or to embark on a fair and impartial evaluation of the evidence as a whole. This approach undoubtedly has caused serious prejudice to the Respondent's case. In the circumstances it was incumbent on the Court of Appeal to review the evidence afresh and to arrive at its own findings of fact.

Article 138 (1) of our Constitution mandates, *inter alia,* that the Court of Appeal shall have and exercise an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any Court of First Instance. The Court of Appeal has thus the power and, indeed, is under a duty to correct all errors of fact committed by an original court. Nowhere has it been laid down that the Court of Appeal is powerless to interfere on questions of fact. The submission of learned Counsel for the appellant that it was not open to the Court of Appeal to disturb the findings of fact of the original court and substitute therefor its own view of the facts is a preposition which is not warranted. In an appropriate case it would be the duty of the Court of Appeal to do so. The principles of law upon which an appellate court will interfere with the findings of fact of a Court of First Instance have been laid down in several decisions of the Supreme Court, both past and present. One of the more recent judgments of the present Supreme Court on this point is the case of *Collettes Ltd. v. Bank of Ceylon* (1) . Learned Counsel did not seek to challenge the validity or applicability of these principles to the facts of the instant case. Nor did he make any endeavour to explain the errors and misdirections in the judgment of the learned trial judge enumerated above except to repeat that the findings of fact, particularly the finding that the Respondent uttered the defamatory words set out in the plaint arrived at

by the trial judge should accrue to the Appellant's benefit and should not be disturbed. I think the following passage from the judgment of Sharvananda J. (as he then was) in the above case applies with equal force to the judgment of the trial judge in the instant case :

> " The trial judge has everlooked relevant considerations in the assessment of the evidence. He had not directed his mind to relevant questions and had failed to apply correct principles of law to the facts. The deficiencies in the judgment are such that I am convinced that an Appeal Court will be failing in its primary duty if it inhibits itself by regarding the findings of fact arrived at by the District Judge as unreviewable and final just because credibility of witnesses is involved. It was significant that Counsel for the plaintiff when asked to substantiate certain findings of fact could fall back only on the mere fact of the Judge's finding in his favour and not on any other supporting material. I have no doubt , in fact I am convinced, that the District Judge has grievously gone wrong in his opinion. It is a judgment which by its manifest errors of law and fact would have resulted in a miscarriage of justice had the Court of Appeal affirmed it."

I am of the view that the finding of the learned trial judge in the instant case that the Respondent uttered the defamatory words testified to by Wickramasinghe in his evidence is, as argued by learned President's Counsel demonstrably unreasonable and the Court of Appeal was fully justified in reversing the same. In fact in the Court of Appeal learned Counsel appearing for the Appellant appears to have presented his arguments on the basis that the Respondent had uttered only the words admitted by him and in the circumstances set out by him. To say that there was a rumour that the Appellant examined female patients in unwanted places would be defamatory of him. Hence the issue that appears to have been substantially in dispute in the Court of Appeal was whether the Respondent's defence of privilege was entitled to succeed. The Court of Appeal held that it was. The Appellant, neither in the application for special leave to appeal nor at the hearing before us has sought to canvass this finding of the Court of Appeal.

FERNANDO, J. - I agree.

KULATUNGA, J. - I agree.
Appeal dismissed