JOHN FERNANDO
AND
ATTORNEY-GENERAL
v.
SATARASINGHE

COURT OF APPEAL
WEERASURIYA, J. AND
DISSANAYAKE, J.
CA NO. 28/94 (F)
DC PANADURA NO. 169/M
JULY 24, 2000
AUGUST 02, 2000

Defamation – After institution of action defendant dies – Does the cause of action survive ? – Should the plaint contain the very words complained of to be defamatory ? – Civil Procedure Code s. 392, s. 393, s. 398 – Form 89.

The plaintiff-respondent instituted action against the original 1st defendant and against the Attorney-General as the 2nd defendant. (Original defendant was an employee of the State) seeking a sum of Rs. 100,000 as damages from the 1st defendant allegedly for reasons of defamation. After the death of the 1st defendant, the widow was sought to be substituted. The District Judge, however, proceeded to deliver judgment as prayed for by the plaintiff without making an order on the application for substitution.

On appeal, it was contended that –

(i) Defamation being a cause of action based on a personal nature against the original 1st defendant, the right to sue ceased on the death of the original defendant.

(ii) The plaint was not in conformity with Form 89 CPC in that the plaint does not contain the very words which were complained of to be defamatory.

Held:

(1) The maxim *"Actio Personalis moritor cum persona"* applies to every action for libel or slander and therefore where a libel or slander has been published by any person and such person dies, no cause of action survives either for or against his personal representative.

(2) However, in the case of death of the plaintiff after *litis contestetio* the action would continue in favour of heirs of the plaintiff as part of the plaintiff's property.

(3) The plaint does not include the defamatory words verbatin or words substantially the same, therefore the plaint is defective. The original defendant had been deprived of knowing the defamatory statements alleged to have been published by him to formulate a proper defence.

APPEAL from the judgment of the District Court of Panadura.

Cases referred to:

1. *Deerananda Thero v. Ratnasara Thero* – 60 NLR 7.
2. *Vajiragnana Thero v. Gintota Anomadassi Thero* – 73 NLR 529.
3. *Sirisena v. Ginige* – 1992 – 1 SLR 320.

Ms. M. N. B. Fernando, SSC for defendant-appellant.

Dr. Jayatissa de Costa with *K. Warnasuriya* for plaintiff-respondent.

Cur. adv. vult.

January 17, 2001

DISSANAYAKE, J.

The plaintiff-respondent (who will hereinafter be referred to as the plaintiff) by her plaint dated 14. 03. 87, which was amended subsequently, instituted this action against the original 1st defendant and against the Hon. Attorney-General as the 2nd defendant-appellant, because the original defendant was an employee of the State (who will hereinafter be referred to as the 1st defendant and 2nd defendant, respectively) seeking a sum of Rs. 100,000 as damages from the 1st defendant allegedly for reasons of defamation.

The original 1st defendant and the 2nd defendant, by their respective answers filed, whilst denying the averments in the plaint prayed for the dismissal of the plaintiff's action.

The case proceeded to trial on 13 issues and when the case was due to be called on 24th of March, 1993, for judgment, Court, on being informed of the death of the original 1st defendant postponed the case for steps for substitution and judgment.

An application made by the plaintiff to substitute the widow of the original 1st defendant as the defendant was objected to by the 2nd defendant, on the ground that on the death of the defendant the cause of action in the case being of a personal nature did not survive. While this application was pending before Court, the learned District Judge proceeded to deliver the judgment in the main case, without making an order in the above said application for the substitution made by the plaintiff.

The learned District Judge by her judgment dated 07. 01. 94 entered judgment for the plaintiff as prayed for with costs. The learned District Judge in her judgment further ordered that the damages of Rs. 100,000 be charged on all allowances and gratuity due to the original 1st defendant from the State.

Subsequently, the learned District Judge by her order dated 18. 01. 94 allowed the application of the plaintiff for substitution of the defendant.

The substituted 1st defendant-appellant (who will be hereinafter referred to as the substituted 1st defendant) preferred this appeal from the aforesaid judgment of the learned District Judge.

Learned Counsel who appeared for the defendants in appeal contended that the learned District Judge was in error when she entered judgment for the plaintiff as prayed for on the following grounds :

(1) That defamation being a cause of action based on a personal nature against the original 1st defendant the right to sue ceased

on the death of the original defendant and, therefore, the action should have abated giving effect to the maxim *"Actio personalis Moritur cum persona"*.

(2) That the plaint was not in conformity with Form 89 of the Civil Prodedure Code, in that the plaint does not contain the very words which were complained of, to be defamatory or words substantially the same as those charged, and therefore the plaint was defective and the defendants did not have adequate notice of the alleged defamatory words to prepare his defense.

Learned counsel who appeared for the defendants cited the decisions of the following two cases to buttress her proposition that in an action, which is of a personal nature, the cause of action does not survive after the death of the defendant.

The case of *Deerananda Thero v. Rathnasara Thero*[1] where the plaintiff claiming title to the incumbency of a Buddhist Temple, suing the defendant alleging that the latter was –

(*a*) unlawfully disputing his right to the incumbency;

(*b*) was disobedient and despiteful and obstructing him in the lawful exercise of his rights as incumbent and he prayed that he be declared the incumbent and that the defendant and his agents be ejected from the temple.

While the trial in the action was partly heard, the defendant died. The plaintiff then made application alleging that any rights which the defendant had to incumbency devolved on the present appellant and moved that the appellant be substituted in place of the defendant. The appellant consented to the substitution. It was held that, on the death of original defendant the action abated by virtue of the provisions of section 392 of the Civil Procedure Code. The action being one of a personal nature against the original defendant, the right to sue

ceased on the death of that defendant. Even on the assumption that the appellant was the legal successor of the deceased defendant, it could not be maintained that the appellant was liable to be ejected on the original cause of action. The cause of action did not survive on the death of the original defendant and the maxim *"actio personalis Moritur cum persona"* was applicable.

The *Ratio Decidedi* in the aforesaid authority was subsequently upheld in the case of *Vajiragnana Thero v. Gintota Anomadassi Thero*[2].

It is to be observed that on an examination of section 392 of the Civil Procedure Code, which deals with the "continuation of action" upon the death of the party makes it conditional that if the right to sue on the cause of action survives only, such action can be continued. Similarly, sections 393 and 398 of the Civil Procedure Code provide for the continuation of actions on the death of the defendant, only if the right to sue the defendant survives.

Fraser in his book *"Libel and Slander"* – 7th edition, at page 181, Article 45, under the heading of "Death of Plaintiff or Defendant", has stated as follows : 'the maxim '*actio personalis Moritur cum persona*', applies to every action for libel or slander and therefore, where a libel or slander has been published by any person and such person dies, no cause of action survives either for or against his personal representative; on the other hand, a cause of action for the publication of false and malicious words causing damage to any person survives for the personal representative of such person".

Further, under Note 1 he states as follows : "that even though the action had been commenced before the death of the plaintiff or the defendant, the death of either party puts an end to it".

On the same page he states further as follows : "On the other hand, it is specially provided by order XVII, rule I, that there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such as be entered, notwithstanding the death".

Odgers on *Libel and Slander,* 6th edition, at page 467, dealing with the English Law Principles, under the heading "Executors and Administrators" states as follows : "the maxim *'action personalis moritur cum persona'* applies to all actions of Libel and Slander. If, therefore, either party dies before the verdict, the action is at an end".

Dr. C. F. Amerasinghe, in his book "*Defamation and Other Aspects of the Actio injuriam in Roman Dutch Law* (in Sri Lanka and South Africa) at page 536 commenting on transmissibility has stated that the death of the plaintiff put an end to the action, both the offence and the penalty being extinguished. The death of the defendant also put an end to the action and did not lie against the heirs.

He has further stated that, "however, where the death of the plaintiff occurred after *'litis contestatio'*, the action would continue in favour of heirs", since the action was held to be part of the property of the plaintiff. [emphasis is mine]

Therefore, on the above principles it is clear that in an action for defamation on the death of the defendant the cause of action does not survive. In the case of death of the plaintiff after *litis contetatio,* however, the action would continue in favour of heirs of the plaintiff as part of the plaintiff's property. Therefore, I am of the view that in this case on the death of the defendant the cause of action abated and did not survive.

It is to be observed that Form 89 of the Civil Procedure Code sets out the averments that are required to be included in a plaint in an action for defamation according to which the very words complained of or words substantially the same as those charged has to be included in the plaint.

In Odgers on *Libel and Slander* (6th edition) at page 623, it is set out that in an action for defamation the plaint must set forth the very words complained of.

In E. B. Wickramanayake's book on *Delicts*, chapter VII, page 74, on 'Pleadings in Defamation' it is stated thus : "A plaintiff who brings an action for defamation must set out in his plaint the very words about which his complaint is made. It is not sufficient to give the substance or purport of it".

In the case of *Sirisena v. Ginige*[3] it has been held that in an action for defamation the very words upon which the allegation of defamation is founded or words substantially the same are required to be pleaded in the plaint, to enable the defendant to know exactly the case he has to meet, otherwise it was held that the plaint was defective.

The alleged defamation caused to the plaintiff is set out in paragraph 3 of the plaint which states that the plaintiff was forced to write a false statement stating that she had sexual intercourse with some person and that she was 5 months pregnant.

The plaintiff in her evidence took up the position that the alleged defamatory statements were contained in the letter produced marked P2, which she was forced to write by the original 1st defendant.

What is contained in letter P2, is as follows :

> The plaintiff has a love affair with Sri Lal and had visited the house of Upul at Ratmalana in Sri Lal's motorcyle and that she had sexual intercourse in that house on 2 days and that Sri Lal inserted his male organ into her female organ on both days. It is further stated that she went to the Mt. Lavinia Beach on Sri Lal's motorcycle on the pretext of going to a tuitiorn, class. She was kissed by him. She had been to Wewala and Batakeththara on his motorcycle and in March she went on his motorcycle to the Kalutara *Bo* Tree and she was kissed there.

It is further stated that Sri Lal's mother is aware of the love affair and that she had been to Sri Lal's house on occasions. Sri Lal had

brought chocolates and handkerchiefs as presents. It is stated further that she will marry him even if there is opposition from her family.

But, paragraph 3 of the plaint, which contains the averments with regard to the alleged defamation of the plaintiff, does not contain the abovesaid defamatory material either verbatim or words that are substantially the same as contained in letter P2.

In point of fact, paragraph 3 of the plaint contains material that are contradictory to the contents of the letter P2.

Therefore, it would appear that since the plaint does not include the defamatory words verbatim or words substantially the same, the 170
plaint is defective and thereby the original 1st defendant had been deprived of knowing the defamatory statements alleged to have been published by him to formulate a proper defence.

Therefore, I am of the view that the learned District Judge was in error when she entered judgment for the plaintiff. Therefore, I set aside the judgment of the learned District Judge.

The appeal is allowed with costs.

WEERASURIYA, J. – I agree.

Appeal allowed.