SANDESA LTD. & ANOTHER v. SIRIMAVO RATWATTE DIAS BANDARANAIKE

COURT OF APPEAL
WIMALARATNE, J. (PRESIDENT C.A.) & VICTOR PERERA, J.
C.A. (S.C.) 359/72 D.C. COLOMBO 72789/M
JUNE 16, 1980

Civil Procedure Code – Affidavit tendered after closure of cases of the parties – Civil Procedure Code, sections 134, 166 & 184 – Principles of natural justice – Interruptions by court during counsel's addresses.

Plaintiff-respondent instituted action against the defendant-appellants alleging that an article published in a newspaper of which the first defendant-appellant was the proprietor and the second defendant-appellant was the editor, was defamatory of her. The article made a special reference to a statement alleged to have been made to the news editor of the paper by one P.B.W. a Member of Parliament endorsing the contents of the article. The defendant-appellants denied that the article was defamatory and also pleaded the defences of justification, fair comment on matters of public interest made in good faith and qualified privilege. The news editor testified for the defendant-appellants that P.B.W. came to the newspaper office and made that statement and this was challenged by counsel for the plaintiff-respondent. P.B.W. was not called as a witness for the defendant-appellants. After submissions of counsel were concluded and the judgment reserved, an affidavit was filed by P.B.W. with no notice to the defendant-appellants denying that he ever made any statement to the news editor. The trial judge in his judgment stated that neither did he take the averments of that affidavit into consideration nor was he influenced by it. Defendant-appellants contended that there was a violation of the principles of natural justice in that the document found its way into the record in a manner other than the usual manner in which evidence gets into the record and that its contents would have undoubtedly influenced the judge's findings regarding the veracity of the news editor's evidence. Complaint was also made of the fact that there were no less than 55 interruptions by court when counsel for the defendant-appellants was addressing the trial judge as opposed to 4 interruptions during the address of the plaintiff-respondent's counsel.

Held:

The test to be applied is an objective one, and therefore the question is not whether the judge has not been influenced, but whether a reasonable man would come to the conclusion that the judge may have been influenced by the affidavit. Had there not been so many interruptions there may perhaps have been more comprehensive submissions by counsel for the defendants which would undoubtedly have assisted court. The case was remitted for a fresh trial.

Cases referred to:

(1) *R. v. Sussex Justices Ex. P. McCarthy* (1924) 1 K.B. 259.
(2) *R. v. Camborne Justices Ex. P. Pearce* (1954) 2 AER 850 at 852.

APPEAL *from the Order of the District Court of Colombo.*

H. W. Jayewardene, Q.C. with *Mark Fernando* and *Lakshman Perera* for the defendant-appellants.

C. Thiagalingam, Q.C. with *H. L. de Silva* for the plaintiff-respondent.

Cur adv vult.

16th JULY, 1980.

WIMALARATNE, J. (President of the Court of Appeal)

The plaintiff-respondent instituted this action on 23rd May 1970 alleging that an article in the "Udaya" newspaper of 18th February 1970, of which the 1st defendant-appellant was the proprietor and the 2nd defendant-appellant was the editor, was defamatory of her. The article bore the headline "Coalition mouths are sealed. A fraud more gigantic than the four lakh highway robbery". The allegation itself related to a distress fund collected by the then opposition parties (constituting the S.L.F.P., the L.S.S.P. and the C.P.) during the government of the late Mr. Dudley Senanayake; a distress fund for assisting government and corporation employees who were in distress as a result of interdiction and termination of services consequent to a general strike called by these three opposition parties on 8th January 1966 in furtherance of certain objectives.

In an earlier issue of the same newspaper published on 4th February 1970 an allegation had been made that several tens of thousands of rupees collected by the three parties had been misappropriated by the trade union leaders of the coalition, and that the fund had still not been divided amongst the victimised employees. That issue threw out a challenge to the leaders of the coalition to disclose to the public as to whom they have paid, the sum paid and when it was paid. The alleged defamatory article in the issue of 18th February was accompanied by an "inset" which made reference to the article of 4th February. The alleged defamatory article after stating that, unable to answer the challenge made by the "Udaya" (of 4th February) the mouths of the three party coalition were sealed, made a special reference to a statement made by the then M.P. for Kiriella, Mr. P. B. Wijesundera, that those who respect the truth are indebted to the "Udaya" for this revelation. The article attributed to Wijesundera the following further statement –

> "Although I have worked in the Left movement and in the Lanka Samasamaja Party for over twenty years there has not been in that period a fraud as utterly disgraceful and despicable as that of hitting the January 8th Distress Fund. The fund that was

collected avowedly for the maintenance of the families of the distressed workers has gone into the pockets of the collectors themselves. This is an act as caddish as that of stealing from the begging bowl of the beggar. It is the prime duty of the three big leaders Sirima Bandaranaike, N. M. Perera and Dr. S. A. Wickremasinghe to remain silent no longer but to make a public statement on this shameless fraud perpetrated by some leaders of the three party coalition".

The plaintiff averred that she was the President of the S.L.F.P. and the Leaders of the United Front of the three parties and therefore the above publication was by itself, and by reason of the insinuations, imputations and innuendos set out in the plaint, defamatory of her.

The defendants in their answer denied, *inter alia,* that the article was defamatory, and also pleaded the defences of justification, fair comment on matters of public interest made in good faith, and qualified privilege. At the trial the following issues were framed –

1. Does the publication complained of in Annexure "A", attached to the plaint, defame the plaintiff ?

2. If so, what damages is the plaintiff entitled to ?

3. Are the statements of facts contained in the said article,

   (a) true in substance and in fact ?

   (b) published for the public benefit ?

4. Do the statements of opinion contained in the said article consist of fair comment upon a matter of public interest made in good faith and for a lawful purpose ?

5. (a) Is the said article a correct report of a statement made by Mr. P. B. Wijesundera, the Member of Parliament for Kiriella, upon a matter of public interest ?

   (b) Was the said article published in pursuance of a duty to do so and/or interest in so doing ?

   (c) Did the public have an interest in receiving or obtaining the information therein contained ?

6. If issues 5(a), 5(b) and 5(c) are answered in the affirmative,

   (a) is the said article privileged ? or

   (b) published on a privileged occasion ?

7. Was the article published without any *animus injuriandi ?*

At the trial learned Counsel for the plaintiff confined his case to the question whether the article was *per se* defamatory of the plaintiff, and did not rely on any of the innuendos pleaded in the plaint.

After two witnesses had given evidence pertaining to the correctness of the translation of the article in question from Sinhala to English, Mr. Felix Dias Bandaranaike was called on behalf of the plaintiff and he testified to the fact that after necessary inquiries he was quite satisfied that there was no truth whatsoever in the allegation that the monies collected for the distress fund had been embezzled or misappropriated. His investigations revealed that approximately Rs. 17,000/- was collected, and after making allowances for initial expenses a sum of Rs. 16,000/- was divided proportionately among the persons belonging to the three parties who were to be the recipients of the distress assistance. In cross-examination the witness stated that the money was handed out by the plaintiff, who wrote out three cheques, countersigned by the treasurer of the S.L.F.P. and gave them to three representatives of the three parties.

The defendants called as their witness Richard Wijesiri, News Editor of the "Udaya" newspaper to testify to the fact that Wijesundera came to the newspaper office and made the statement which had been correctly reproduced in the paper of 18th February. It may be mentioned here that when he was cross-examined by Counsel for the plaintiff he stated that he could not vouch for the correctness of the article, and that the manuscript of the report taken down by a reporter was not available. The purpose of this line of cross-examination was undoubtedly to establish that Wijesundera did not make the statement reproduced in the paper; for in his submissions learned Counsel for the plaintiff, according to the record, challenged the defendants "to establish that Wijesundera ever said such a thing at all. At that date he was an L.S.S.P. member. He could have said this with impunity in Parliament. Are they fathering their own libel on that poor man Wijesundera ? There is no evidence that Wijesundera made this statement to the paper at all. The least they could have done was to have called Wijesundera into the witness box, but they have not called him".

The submissions of Counsel were concluded on 7.10.71 and judgment was reserved for 8.11.71. Thereafter appears the following journal entry under dated 15.10.71:

"Mr. Adv. Wijesuriya along with affirmant P. B. Wijesundera tenders affidavit dated 14.10.71 and document marked "A".

Tender deficiency of stamps on affidavit and document and move.

Sgd.

D.J. 15.10.71"

No steps were taken thereafter either by the affirmant to tender the deficiency of stamps or by Court to notice the parties regarding any affidavit which had found its way into the record.

The learned District Judge delivered judgment on 8.11.71, answering issue 1 in the affirmative and awarding Rs. 100,000/- as damages to the plaintiff. Issues 3 to 7 which arose on the several defences pleaded in the answer were answered against the defendants.

The learned Judge referred to this affidavit in his judgment in a passage which reads as follows:–

> "I think it would be pertinent here to refer to a strange development that took place in this case after the addresses were over and the judgment reserved. An affidavit, purported to be sworn by Mr. Wijesundera on 14.10.71, was tendered by Mr. Adv. Wijesooriya on his behalf. In the affidavit Mr. P. B. Wijesundera denies the evidence of Mr. Wijesiri called by the defendants, and reported in the "Dinamina" that he made the statement attributed to him in the article P1 and denounced it as false. Neither have I taken this affidavit into consideration, nor have I been influenced by it in this judgment of mine. All I can say in passing is that Mr. P. B. Wijesundera does not deserve praise for the purported chivalry but censure for his supineness in not contracting the article P1 immediately or soon after it appeared on 18th February, 1970, and before the General Elections of May 1970".

One of the grounds urged in the Petition of Appeal is that the learned Judge erred in law and acted contrary to the principles of natural justice and the rules of evidence and civil procedure in admitting the affidavit purporting to be sworn by Mr. P. B. Wijesundera after the addresses were over and without notice to the defendant-appellants. It has been contended by Mr. Jayawardena for the appellants that the affidavit should have been forthwith rejected and returned, and in any event not included in the record. No notice was given or ordered to be given to the defendants in respect of the

proceedings of that day. In this affidavit Wijesundera has contradicted the evidence of the News Editor Wijesiri that Wijesundera made that statement to him. Mr. Jayawardena submits further that although the learned Judge states in his judgment that he has neither taken the affidavit into consideration nor been influenced by it, there has been a violation of the principles of natural justice in that a document has found its way into the record in a manner other than the usual manner in which evidence gets into the record. The averment of Wijesundera as contained in the affidavit that he did not make the statement to Wijesiri, made just eight days after learned Counsel appearing for the plaintiff had challenged the defendants "to establish that Wijesundera ever said such a thing at all", would have undoubtedly influenced the Judge's finding regarding the veracity of Wijesiri's evidence. Mr. Jayawardena, in support of his contention, cited a well known passage from the judgment of Lord Hewart, C.J. in *R. v. Sussex Justices, Ex. P. McCarthy*[1] – "a long line on cases shows that it is not merely of some importance, but is of fundamental importance that justice should not only be done . . . . . Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice".

Mr. Thiagalingam, on the other hand, contended that the only issues relevant to the determination of this action are issues 1 to 2 and that if the Court held that the words contained in the article are defamatory of the plaintiff, the defendant was obliged to prove the truth of the contents of the article, namely, that a degrading fraud had been committed by certain leaders of the three party combine which was even more heinous than the four lakh robbery and the C.W.E. robbery, and that the plaintiff who was the leader of the main party remained silent about it. The question as to whether Wijesundera made the statement to the "Udaya" paper or not is by no means relevant to the determination of this case. You cannot repeat what another person says and claim immunity from liability if what that other person has said is defamatory. It is elementary in the law of defamation that a newspaper cannot repeat defamatory matter and seek shelter under the fact that so and so said it. If a newspaper is allowed to do so no one would be safe, contended Mr. Thiagalingam.

Mr. Thiagalingam was thus echoing the following observation of Slade, J. in *R. v. Camborne Justices Ex. P. Pearce,*[2]: "while endorsing and fully maintaining the integrity of the principle reasserted by Hewart, C.J., this Court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done that it should in fact be done".

When the parties to a civil action have placed before the Court all the evidence which they are in a position to place and which they think desirable, and have closed their cases and addressed the Court, the ordinary course is for judgment to be delivered in accordance with section 184 of the Civil Procedure Code. There are special circumstances under which the Court may reopen the case and call for fresh or further evidence. Sections 134 and 166 stipulate the circumstances under which there may be a departure from the ordinary course. These rules of procedure are the measures authorised by the law so as to keep the streams of justice pure and to see that trials and inquiries are fairly conducted. A radical departure from these rules may lead to the deprivation of a fair trial which the parties to the litigation are entitled to. It is no doubt correct to say that the Judge did not reopen the case and record fresh evidence after the case had been closed. But the acceptance of this affidavit after the close of the case was a departure from the normal procedure, no less damaging than the receipt of evidence without notice to the parties.

When the affidavit of Wijesundera was tendered by his Counsel on 14.10.71 (which was not a calling date) the learned District Judge should, if he considered it not relevant to the issues he had to answer, have rejected it outright; or if he considered the averments in it as relevant, should have issued notice on the parties and heard them before incorporating the affidavit in the record.

One fact is clear, and that is that the defendants in their answer pleaded that the publication was a correct report of a statement made by a Member of Parliament upon a matter of public interest, and that the public had an interest in obtaining the information contained therein; in short, that the statement was made on a privileged occasion. Based upon the pleadings the defendants Counsel raised, *inter alia,* issues 5 and 6. Although learned counsel for the plaintiff stated at the conclusion of the recording of the issues that quite a number of the issues raised by the defendant were not relevant as far as this case was concerned, no objection was taken to these issues. The defendants had therefore a right to an answer to these issues, upon the evidence recorded at the trial. In the course of his submission learned Counsel for defendant addressed thus: "The person who wrote this article has been called. He said that his statement was made by a Member of Parliament. He said that he published a statement made by a Member of Parliament.

Court: Can a Member of Parliament come and say something to a reporter and can the reporter accept all what he says and publish it ?

Mr. Navaratnarajah: (for the defendants) It is on that the issue of qualified privilege has been raised.

Court: Where is the qualified privilege ?

Mr. Navaratnarajah: The people will be interested to know as to what a Member of Parliament has to say about a matter of public interest.

In view of the order we propose making I do not wish to say anything than to observe that when the defence of qualified privilege is raised, the answer to the question "was the occasion privileged ?" can only be answered upon a consideration of all the circumstances of the case, and that it is impossible to catalogue or classify the circumstances which create a moral or social duty to speak. But the defence of qualified privilege could not have availed the defendants in the absence of proof that Wijesundera did in fact make the statement to Wijesiri. That is where the incorporation of Wijesundera's affidavit into the record becomes relevant.

The learned Judge says that he has not taken the affidavit into consideration, and that he has not been influenced by it. With all respect to the learned Judge, I would say that the test to be applied is an objective one, and therefore the question is not whether the Judge has not been influenced, but whether a reasonable man would come to the conclusion that the Judge **may** have been influenced by the affidavit. In order to prove that Wijesudera made the statement the defendant relied upon the evidence of Wijesiri. There was no evidence on that point other than that of Wijesiri when the case for the defendant was closed. Under these circumstances the only answer the Judge could have given to the question "did Wijesundera make this statement to the "Udaya" newspaper ?" was "yes". But when Wijesundera's affidavit made its unauthorised entry into the record, the answer may well be "no"; when looked at objectively a reasonable man, would have believed that there was a real likelihood that the Judge, on reading the affidavit would have had a doubt regarding Wijesiri's evidence. An application of an objective test leads me to the conclusion that the acceptance of Wijesundera's affidavit and the reference to its contents in the judgment has violated the principles of natural justice, and that there should therefore be a fresh trial.

The problem has also to be viewed in the background of the second complaint made by learned Counsel for the appellants, and that is that when Counsel for the defendant was addressing Court at the conclusion of the evidence, there were no less than 55 interruptions by the Court; whereas Counsel for the plaintiff was interrupted only on 4 occasions. The law does not prohibit a Judge from asking questions from Counsel in order to elucidate some point on which he had a doubt. The Civil Procedure Code makes no provision for the recording of the submissions of Counsel, as it does in the case of the recording of issues of the evidence of witnesses. But a practice has grown of recording such submissions as well, and we would not be wrong in treating the record of the submissions of Counsel as a true record. I think the Judge ought not to have interrupted Counsel for the defendant to the extent he did, especially when Counsel was dealing with the defences raised in issues 3 to 7. Had there not been so many interruptions there may perhaps have been more comprehensive submissions by Counsel for the defendant, which would undoubtedly have assisted the Court.

For these reasons I am of the opinion that the Judgment and decree ought to be set aside. I would therefore set aside the judgment and decree and remit the case for fresh trial to be held at an early date. I would also direct the Registrar of this Court to expunge from the record the affidavit of Punchi Bandara Wijesundera dated 14th October 1971 before it is remitted to the District Court of Colombo. As the plaintiff is not to be blamed for the situation that has arisen, there will be no costs of this appeal.

VICTOR PERERA, J. – I agree.

Case remitted for fresh trial.