

DR. DE ZYLVA & OTHERS
v.
DR. RANJAN FERNANDO

COURT OF APPEAL
UDALAGAMA, J., AND
NANAYAKKARA, J.
CALA NO. 212/2001
DC COLOMBO NO. 23349/MR
AUGUST 24, 2001

Defamation – Are issues limited to pleadings? – Cause of action not disclosed in pleadings – Raised through issues – Prejudice – Malicious Prosecution – Civil Procedure Code s. 146, and s. 65 (d).

Plaintiff-respondents sued the defendant-petitioners on an alleged basis of a false statement the defendant-respondent purported to have made and published with the intention of causing loss and damage to the plaintiff's standing in society. The plaintiff-respondents objected to certain issues raised by the defendant-petitioner which objection was upheld by the District Court. The District Court was of the view that the Court could not grant to the petitioner an opportunity to raise a cause of action not disclosed, due to prejudice caused thereby to the plaintiff.

On leave being sought –

Held:

- (1) It is not necessary to limit the issues to pleadings.
- (2) It is apparent from the contention and the answer in particular to the claim in reconvention by which they counter claim for quantified damages from the plaintiff on the basis, as stated therein of malicious prosecution. Malicious prosecution alleged is the very action of the plaintiff which is yet to be concluded.
- (3) All particulars of avoiding liability or as in the instant case particulars of liability of the plaintiff for adjudication of the claim in reconvention and for the Judge to ascertain for himself the proposition of fact or of law upon which the parties are at variance is clearly not set out as required by s. 65 (d).

- (4) Hence, Court has to decide on the conduct of plaintiff as to whether such conduct was false, malicious or with intention to injure. These are matters to be decided after the evidence is concluded.

APPLICATION for leave to appeal.

1. *Mariam Umma v. The Oriental Govt. Security & Life Insurance Co., Ltd.* – 37 NLR 145.
2. *Abeysekara v. Livera* – 71 NLR 465.
3. *Cooray v. Fernando* – 42 NLR 329.
4. *Pure Beverages Ltd v. Shamil Fernando* – 1997 - 3 SLR 202.

Avindra Rodrigo with *M. Marzook* for petitioners.

Wijedasa Rajapaksha, PC with *Kapila Liyanagamage* for respondent.

Cur. adv. vult.

September 07, 2001

UDALAGAMA, J.

The facts briefly in the instant case appear to be as follows: The plaintiff-respondent who was the President of the Wildlife and the Nature Protection Society sued the 1st to 3rd defendants on an alleged basis of a false and defamatory report purported to have been made and published with the intention of causing loss and damage to the plaintiff's standing in the society as morefully described in paragraphs 30, 31 and 32 of the plaint.

On 24. 04. 2001 when this case was taken up for trial before the learned District Judge and admissions and issues were recorded. Counsel for the plaintiff-respondent objected to issues 27 to 32 raised on behalf of the 1st defendant, issues 49 to 54 raised on behalf of the 2nd defendant and issues 71 to 76 raised on behalf of the 2nd defendant and issues 71 to 76 raised on behalf of the 3rd defendant.

Issues 27, 49 and 71 appear to be the basic issues in dispute. In fact, issue 27 which reads as follows: "Is the plaintiff's action filed against the 1st defendant false and malicious with an intention to cause injury to the 1st defendant" is similar to issues 49 and 71. Issue 27 is raised by the 1st defendant and issues 49 and 71 by the 2nd defendant and the 3rd defendant, respectively.

Perusing the submissions of the petitioner it is observed that the learned Counsel has dealt with this application to set aside the impugned order refusing to accept the issues under two headings, namely, (1) should the issue be limited to pleadings, and (2) does the claim in reconvention disclose a cause of action.

It is apparent from the learned District Judge's order that he had categorically come to a finding that "it is not necessary to limit the issues to pleadings". In view of that definite finding, I see no reason to pursue dwelling on the relevant submissions as made by learned Counsel for the petitioner on that matter.

As for the second, it is also the finding of the learned District Judge that the Court could not grant to the petitioners an opportunity to raise a cause of action not disclosed in the pleadings through the issues due to the prejudice caused thereby to the plaintiff.

It is apparent to this Court from the contention and the answer of the 1st to 3rd defendants in particular to the claim in reconvention by which they counter claim for quantified damages from the plaintiff on the basis, as stated therein, of malicious prosecution. Furthermore, the malicious prosecution alleged is in the very action of the plaintiff, the subject-matter of DC Colombo case No. 23349/MR, which is yet to be concluded.

The details of computation of the damages so quantified are not set out as envisaged by the provisions of section 65 (d) of the Civil Procedure Code. I would agree with the view expressed by Mc Karon,

in his treatise on "The principles of liability for civil wrongs in the law of South Africa", which is also relevant to Sri Lanka that "no one shall be allowed to allege on a still pending suit that it is unjust. This can only be decided by a judicial determination or other final event of the suit in the regular course of it. Consequently, no action will lie for the malicious institution of proceedings unless the proceedings are terminated.

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A similar view appears to have been taken in V. Mittars "*Laws of Defamation and Malicious Prosecution*" revised by K. Shamukaham, 10th edition of 1966, page 333.

In *Mariam Umma v. The Oriental Govt. Security and Life Insurance Co., Ltd.*,⁽¹⁾ at 149, Gratiaen, J. held, *inter alia*, that: "section 146 imposes a special duty on the Judge himself to eliminate the element of surprise which will arise when the precise nature of the dispute is not clarified before the evidence is recorded".

All particulars for avoiding liability or as in the instant case, particulars of liability of the plaintiff for adjudication of the claim in reconvention and for the Judge to ascertain for himself the propositions of facts or of law upon which the parties are at variance is clearly not set out as required by section 65 (d) of the Civil Procedure Code as referred to above. The decision in *Mariam Umma (supra)* was cited with approval by Alles, J. in *Abeysekera v. Livera*.⁽²⁾

It is also clear from the order of the learned District Judge that severe prejudice could be caused to the plaintiff if the said issues are accepted. I am of the view that this finding stands to reason as stated above, in that the particulars necessary to meet the issues are clearly lacking.

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Counsel for the petitioner has cited *Cooray v. Fernando*⁽³⁾ in support of his contention that the issues raised by the petitioners need to be accepted. However, the facts of this case refers to the false prosecution for maintenance in another action.

Learned Counsel also refers to Bullen and Leake on the subject of Abuse of Civil Proceedings. The issues in this case are different from the subject of the Abuse of Civil Proceedings. Here the Judge has to decide on the conduct of the plaintiff as to whether such conduct was false, malicious or with the intention to injure. These are matters to be decided after the evidence is concluded. 80

I will also in view of the submissions made by the learned Counsel for the petitioners refer with approval to the judgment by Gunawardana, J. in *Pure Beverages Ltd. v. Shamil Fernando* wherein His Lordship, *inter alia*, held: "the question as to how or in what manner issues have to be dealt with or tried is primarily a matter best left to the discretion of the trial Judge and the Court exercising the appellate or revisionary jurisdiction ought to be slow to interfere with this discretion except in a case where it is patent or obvious that the discretion had been exercised not according to reason, but according to caprice". 90

I am unable to find any lack of reasoning or that the learned District Judge's order was made with no obvious causes.

For the reasons stated above, leave to appeal from the order of the learned District Judge dated 30. 05. 2001 is refused with costs fixed at Rs. 10,000.

NANAYAKKARA, J. – I agree.

Application dismissed.