SIRISENA
v.
GINIGE

COURT OF APPEAL
GUNAWARDANA, J. AND
WIJEYARATNE, J.
D.C. ANURADHAPURA NO. 10225/M
C.A. APPEAL NO. 240/84 (F)
06 JUNE, 1992.
(Written submissions: 24 July and 12 October, 1992)

Defamation – Rule of pleading requiring that the very words upon which the allegation of defamation is founded, should be set out in the plaint – Plea of qualified privilege – Burden of proof – Meaning of malice.

The plaintiff, who was the Principal of a school filed action claiming damages for defaming her, by reading out an anonymous petition containing allegations about her character, at a departmental inquiry, to the members of the staff and the committee members of the School Development Society. The defendant, who was an Education Officer, who conducted the inquiry on the orders given by his superior officer, took up a plea of qualified privilege.

The defendant also pleaded that the plaint is defective in that the plaint did not set out the very words upon which the allegation of defamation was founded.

Held:

(i) that the averment in the plaint substantially differed from the allegations in the petition. Hence the right of the defendant to know exactly the case he has to meet is violated. It is to protect this right that it is insisted in a defamation action, that the very words or words substantially the same, are required to be pleaded in the plaint. Therefore, the plaint is defective.

(ii) that the contents of the petition were disclosed by the defendant in the discharge of his duty, to persons who had an interest to receive it and therefore the said communication was made on a qualified privileged occasion.

(iii) that the burden is on the plaintiff to prove affirmatively that the defendant acted with malice, in order to destroy the plea of qualified privilege.

(iv) that the term "malice" in the case of defamation means not necessarily any actual ill-will borne by the defendant to the plaintiff, but merely the doing of a wrongful act without just cause or excuse.

Cases referred to:

1. *Bell v. Cohen and Cohen* (1910) W.L.D. 112.
2. *Wright v. Clements* (1820) 3 D & A 503, 506.

APPEAL from judgment of the District Court of Anuradhapura.

D. R. P. Goonetilleke for defendant-appellant.

Anil Obeysekera for plaintiff-respondent.

Cur adv vult.

17th November, 1992

GUNAWARDANA, J.

The plaintiff filed this action against the defendant in the District Court of Anuradhapura, claiming Rs. 10,000/- as damages, for allegedly defaming the plaintiff by reading out an anonymous petition at a departmental inquiry, first to the members of the staff of the school where plaintiff was the Principal, and thereafter to the Committee members of the School Development Society. The said petition which was produced marked P2, contained allegations that the plaintiff had collected money amounting to about Rs. 2000/- from the students, on the pretext of attending to the various needs of the school, and also to buy desks and chairs. It contained a further specific allegation in the form of a query, as to whether there was no other person in Anuradhapura, fit enough to be the Principal of the said school, other than the plaintiff, who had lived as a prostitute, a few years ago? The petition was unsigned, but contained the words "School Development Society". It was sent to the District Minister, Anuradhapura, who referred it to the Regional Director of Education, for necessary action. The Regional Director of Education forwarded it

to the Circuit Education Officer calling for a report. In consequence of that order the defendant who was the Education Officer, wrote the letter P1, to the plaintiff requesting her to summon the staff of the school and the committee members of the School Development Society, to a meeting, on 27 March, 1981, at the school, to investigate into an allegation of misappropriation of funds belonging to the School Development Society, by the plaintiff. On the day of the meeting, the defendant had first got the staff together, and read the said petition to them. He had then called for written observations on the content of the petition, to be noted on the sheets of paper given to them, by him. Thereafter, the defendant had summoned the five members of the said Committee, who had come there that day, and read the petition to them. He then called upon them to note their written observations on the sheets of paper provided by the defendant. Both, the teachers who are members of the staff, and the members of the said Committee, submitted their written observations, to the defendant. Thereafter, the defendant had forwarded his report to the Education Department. According to the plaintiff's evidence, the defendant had read the whole petition twice. Once before the teachers, and thereafter to the members of the said Committee, in spite of her protest, not to read it for the second time. However, the defendant in his evidence has taken up the position that he read only that part of the petition which dealt with allegations of misappropriation of funds. He has denied having read the allegations about the character of the plaintiff to the teachers or to the members of the said Committee.

The learned District Judge has held that although the publication was done on an occasion of qualified privilege, the malice shown by the defendant has destroyed that privilege. Accordingly, the plaintiff was awarded the full sum of Rs. 10,000/-, which she claimed as damages. This appeal is from the said Order of the learned District Judge.

The learned Counsel for the defendant submitted that, a plaintiff who brings an action for defamation must set out in the plaint the very words upon which the allegation of defamation is founded. It is seen on an examination of paragraph 6 of the plaint, where the defamatory allegations are set out, that the said paragraph begins by stating that,

following is a summary of facts which are defamatory of the character of the plaintiff. Then the said paragraph goes on to state under three sub-paragraphs, the following allegations.

(i) Misappropriation of about Rs. 1500/- by the plaintiff of the monies collected.

(ii) Convening a meeting of the School Development Association, without the teachers.

(iii) Identifying the plaintiff-respondent, as a person who had lived as a prostitute for about one year.

On a perusal of the petition produced marked P2, it is seen that the allegation of misappropriation is more specific and all details of the date of the meeting of the School Development Association, and the procedure adopted to collect the money, and the amounts actually collected from the children are set out in the petition, in 3 paragraphs. The allegation about the character of the plaintiff is also specifically stated. It is to be noted that unlike what is stated in the plaint, the question raised is in the form of a public interest issue; as to whether there is no other person in Anuradhapura, fit enough to be the principal of that school, other than the plaintiff, who is alleged to have such a bad character. Thus the allegations in the petition and the averment in the plaint substantially differ. The resulting position is that the right of the defendant to know exactly the case he has to meet, is violated. It is to protect this right that it is insisted on in a defamatory action, that the very words or the words substantially the same are required to be pleaded in the plaint.

The learned Counsel for the plaintiff conceded that there is a slight variation in the words in the plaint. He however argued that, that would not have prejudiced or misled the defendant, as the petition was in the custody of the defendant. In this context it must be stated, and as pointed out earlier, the averment in the plaint itself says that it is a summary of the facts which are defamatory of the character of the plaintiff. In addition the summary given in the plaint is substantially different to the allegations in the said petition.

In this regard it would be pertinent to refer to the Form 89 (page 315) of the Civil Procedure Code, wherein the averments that are required to be included in a plaint in a defamatory action are given. The suggested form is as follows:–

> "1. – That on the – day of – 19 –, at – the defendant published in a newspaper, called the – (or in a letter addressed to E.P.) the following words concerning the plaintiff:–
>
> (Set forth the words used.)
>
> (Note – If the libel was in a language not the language of the Court, set out the libel verbatim in the foreign language in which it was published, and then proceed thus: "which said words being translated into the – language, have the meaning and effect following, and were so understood by the persons to whom they were so published; that is to say. (here set out a literal translation of the libel in the language of the Court.)"

In E. B. Wickramanayake on Delicts at page 74 it is stated that, "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." The underlying principle is that the defendant should be given adequate notice of the alleged defamatory words in order to prepare his defense.

Mason, J. observed in the South African Case of *Bell v. Cohen & Cohen*[1] that,

> "It is true that a plaintiff will not lose his remedy if he proves the publication of the words substantially the same as those charged, but that is not the same thing as words to the same effect. It was argued that the plaintiff ought not to be debarred from bringing this action because they cannot produce the defamatory letters in the possession of other people and that they might know of their existence and would be entitled to guess as their contents; but this argument seems to me to overlook the right of the defendant to know exactly the case he

has to meet and to be protected as far as possible from an action for what is apparently a hypothetical libel."

Thus it is seen that in South Africa too the plaint has to set out the very words complained of, or "words substantially the same as those charged," so that the right of the defendant to know exactly the case he has to meet, is not mitigated.

Under English law where the *ipsissima verba* rule is more strictly applied, Abbott, C.J., in *Wright v. Clements*[2] 503 at 506 stated as follows:–

> "I am of opinion, that in this case the objection must prevail, and that the judgment must be arrested. In actions for libel, the law requires that very words of the libel to be set out in the declaration, in order that the Court may judge whether they constitute a ground of action; and unless a plaintiff professes so to set them out, he does not comply with the rules of pleading. The ordinary mode of doing this, is to state, that defendant published, of and concerning the plaintiff, the libellous matters, to the tenor and effect following. In that case the word 'tenor' governs the word 'effect', and binds the party to set out the very words of the libel."

In Odgers on Libel and Slander (5th Edition) at page 623 it is stated that, "An action for defamation cannot be maintained without setting forth in the plaint the words complained of."

Thus it is seen that this is a rule of pleading which is common to English, South African and Sri Lankan law. Although the degree of adherence may vary, it is based on the sound principle that, the defendant has a right to know exactly the case he has to meet.

Having regard to analysis of the averments of the plaint, in the instant case, which I have done earlier on, I am of the view that the said averments do not comply with the requirements of the said rule of pleading. Therefore, I hold that the plaint is defective and that the plaintiff cannot have and maintain this action as presently constituted.

The defendant has raised a plea of qualified privilege, on the basis that, the said petition was read to the teachers and the members of the said Committee, in the discharge of his duties, at a departmental inquiry, which was a qualified privileged occasion. As stated earlier, it is seen that the defendant was directed by the Regional Director of Education to forward a report to him regarding the contents of the said petition. According to the evidence of the Administrative Officer of the Education Department Office in Anuradhapura, there is a minute in the file directing the defendant to hold an inquiry. He produced marked V19 the report submitted by the defendant after the inquiry. He has stated that the procedure to be followed in holding the inquiry is at the discretion of the officer holding the inquiry and that the Regional Director has not given directions regarding that. The written observations made by the teachers and the members of the said Committee and the statement made by the plaintiff were produced by this witness marked V1 to V18. Thus it appears that the procedure adopted was a very formal one, where all the evidence had been obtained in writing and a written report submitted, at the conclusion of the inquiry.

It may be noted here that the learned trial Judge has held that the occasion on which the said petition was published was a qualified privileged occasion. However he has gone on to hold that because of the express malice on the part of the defendant, such privilege had been forfeited.

Therefore, it is appropriate to consider the evidence to ascertain whether the plaintiff has adduced sufficient evidence to prove that the defendant acted with malice, when he read the said petition, to the teacher and the members of the said Committee. The learned trial Judge has arrived at the conclusion that the defendant acted with malice for two reasons. Firstly he has pointed out that he accepts the position that the said petition was read out fully, twice, and that the plaintiff would have invariably objected to the second reading. He has held that the personal life of the plaintiff cannot be the subject of such an inquiry. Since the defendant has knowingly published a fact not relevant to the inquiry twice, he has held that it is reasonable to infer that the defendant has acted maliciously.

In this regard it is pertinent to note that it became necessary for the defendant to read the said petition twice, not for effect. It was because he had to bring to the notice the contents of the said petition to two sets of people viz. the teachers and the members of the said Committee, who were really the people concerned about the said allegation. Of course, he could have gathered both parties together and read the petition once. Even then the effect would be much the same. In the *Law of Delict* by McKerron at page 178 it is stated as follows:–

> "A communication made in the discharge of a duty is provisionally protected, provided the person to whom it is made has a duty or interest to receive it. It is not necessary that the defendant should be under a legal duty to make the communication; it is sufficient that he is under a moral or social duty to make it."

When the said criteria are applied to the facts of the instant case it is clear that the teachers and the members of the said Committee had an interest in the welfare of the said school, and therefore, had a right to know about the allegations in the said petition. Furthermore they were the persons who would have been knowledgeable about the truth or falsity of the allegations contained in the said petition. Although according to what was stated by McKerron, it is sufficient if the defendant had a moral or social duty, in the instant case, the defendant had a better right, because he was under a legal duty, to disclose the said allegations to the said persons, in order to facilitate the inquiry that he was ordered to hold. Therefore, it would be improper to infer malice on the basis of the mere reading of the petition twice, because both sets of persons, viz. the teachers and the members of the said Committee had an interest to receive the contents of the said petition, and the defendant acted under a legal duty.

Secondly the learned trial Judge has held that the false denial by the defendant that he read the allegation relating to the character of the plaintiff, is proof of his malicious intention. It is apparent from all the circumstances of this case, that the defendant has denied reading the allegation relating to the character of the plaintiff with a view of putting up a defence, by negativing the proof of publication,

of that allegation. Therefore, the said denial in my view is not necessarily evidence of malice.

It is also to be seen that there is no evidence to show that the defendant had any animosity, ill-will or prejudice against the plaintiff. The defendant had set about the holding of the inquiry by officially writing to the plaintiff herself, to summon a meeting of the teachers and the members of the said Committee. He had distributed sheets of paper and invited written responses, obviously to have a written record of whatever they have to say. Thus, the procedure he had adopted seems to show that he wanted to submit a true and accurate report, rather than that he had an intention to defame the plaintiff.

It is appropriate at this stage to consider what is meant by the expression "malice". Massdorp in *Institutes of South African Law*, Volume 3 at page 133 states as follows:-

> "By the term "malice" in the case of defamation is meant not necessarily any actual ill-will borne by the defendant to the plaintiff but merely the doing of a wrongful act without just cause or excuse."

Taking all these matters into consideration it is clear that the plaintiff has failed to prove malice on the part of the defendant, when he read the said allegations relating to the character of the plaintiff to the teachers and the members of the said Committee.

It has to be understood clearly that the burden is on the plaintiff to prove that the defendant acted maliciously as pointed out by McKerron at page 164. "If, therefore, the plaintiff relies upon malice to destroy the effect of a plea of qualified privilege he must affirmatively establish it." Therefore I hold that the plea of qualified privilege raised by the defendant is entitled to succeed.

Accordingly, I would allow the appeal and dismiss the plaintiff's action with costs here and in the Court below.

WIJEYARATNE, J. – *I agree.*

Appeal allowed.