

## COURT OF APPEAL

A.N. Perera

Vs.

D.L.H. Perera and Others

*C.A. Application No. 1202/81 - Rev. D.C. Matala No. 2726/L.**Right of Counsel to frame, withdraw and reframe issues. Expunction of remarks made by Judges. Tests to be applied in ordinary expunction of remarks.*

Petitioner was Counsel for defendant. Issues were pleaded and accepted at commencement of trial by D.J. without objection. Petitioner withdrew the issue of res judicata at the preliminary stages but when the evidence of Plaintiff was led framed the issue once again and the Judge accepted it. In allowing this issue Judge made the following statement.

"Defence Counsel had suggested and then withdrawn this issue. As such it appears that this Counsel is acting without responsibility. His conduct is unbecoming of an Attorney-at-Law of the Supreme Court. At this stage Court decides to report his conduct to the Supreme Court."

Petitioner prayed that this passage be expunged.

- Held*
1. The Judge was certainly not entitled to comment on the course followed by the Petitioner as conduct without responsibility and unbecoming of an Attorney of the Supreme Court as it is within the province of a Counsel to conduct his case as is most advantageous to his client.
  2. There was absolutely no need to animadvert on that conduct especially when the Judge had decided to accept the issue.

As Das, J. said.

"It has also been recognized that judicial pronouncements must be judicial in nature, and should not normally depart from sobriety, moderation and reserve."

**A**pplication for revision of the order of the District Judge of Matala.

**Before:** Abdul Cader, J. & B.E. De Silva, J.  
**Counsel:** D.R.P. Gunatilleke for the Petitioner  
 D.C. Jayasooriya, S.S.C., for the Respondent.

**Argued on:** 10.03.1982

*Cur.adv.vult.*

**Decided on:** 16.03.1982

**ABDUL CADER, J.**

The petitioner in this case is an Attorney-at-Law. His complaint was against the District Judge who had in the course of his order, allowing certain issues raised at the trial, stated as follows:-

**Translation:**

"This issue can be raised on the facts referred to in the answer. However, before the evidence was led in the case, the defence Counsel had suggested and then withdrawn this issue. As such, it appears that this Counsel is acting without responsibility. His conduct is unbecoming for an Attorney-at-Law of the Supreme Court. At this stage, the Court decides to report his conduct to the Supreme Court.

District Judge"

The petitioner prayed that this passage be expunged from the order as "it grieved me very much that the learned District Judge thought it fit to make such comments which I did not in any way merit."

The issues in question are as follows:-

- "(1) Does the decree in case No. 2407 of the District Court of Matale operate as *res judicata* between the parties?
- (2) If so, can the plaintiff have and maintain this action?"

These issues were pleaded and accepted at the commencement of the trial by the District Judge without objection. On Counsel for the plaintiff moving Court to dispose of these issues preliminarily, the petitioner withdrew these issues which was allowed by Court. When the plaintiff was giving evidence, the petitioner framed these issues once again which the Judge once again accepted. It is in the course of the order allowing these issues the Judge made the comments complained against. There is nothing in the record to indicate that anything unpleasant happened or of any other circumstances which warranted these comments by the Judge.

Deputy Solicitor-General appearing as *amicus curiae* at our request wondered whether the Court would wish to call for a report from the Judge as regards the circumstances under which he made these comments. We took the view that the petitioner should not be prejudiced by obtaining additional material, and that he is entitled to an order on the

record as it now stands. The Judge has given a reason for his comments and an order should be made on that reason alone. Besides, a report from the Judge may introduce contentious matters which might even compel an unnecessary inquiry.

Rodrigo, J. states as follows in C.A. (S.C.) Application No. 603/76 (Minutes of 30.06.1980), *Samarakkody vs. A.G. and others*:

"The tests to be applied in considering the expunction of disparaging remarks against persons or authorities whose conduct comes in for consideration before courts of law in cases to be decided by them, were neatly summed up in this Court, speaking through S.K. Das, J. in *State of U.P., v. Muhammed Nain* (1964) 2 SCR 363 at p. 374 - (A.I.R. 1964 S.C. 703 at p. 707 - 1964 - 1 Cri. L.J. 549 at p. 594 thus:

- (i) Whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself?
- (ii) Whether there is evidence on record bearing on that conduct justifying the remarks; and
- (iii) Whether it is necessary for the decision of the case, and as integral part thereof, to animadvert on that conduct. It has also been recognized that judicial pronouncements must be judicial in nature, and should not normally depart from sobriety, moderation and reserve."

With respect, we adopt these tests and we find that the Judge's comments against the petitioner are thoroughly unwarranted and untenable under every one of these tests.

- (1) The Judge accepted the issues without protest and, therefore, gave no opportunity to the petitioner to explain his unusual conduct, which appears to have irked the Judge.
- (2) There is no evidence on record justifying the remarks. The issues were pleaded and framed, withdrawn and reframed. It is within the province of a Counsel to conduct his case as is most advantageous to his client. When the petitioner found that there was an application for these 2 issues to be heard preliminarily, he thought that a preliminary decision would not dispose of the action. When the plaintiff's evidence was placed before Court and objection was taken to his cross examination, he raised these issues once again so that he could question the plaintiff in respect of the case covered by the issues (vide petition...

There can yet be other reasons for a Counsel's conduct. I can imagine a situation where Counsel takes the view that he can succeed on merits without raising a plea of *res judicata* and later decides to frame the issues when he finds that the plaintiff's evidence carried some conviction which might result in the plaintiff succeeding in the action. What motive prompts a Counsel to adopt an unusual procedure. Counsel knows best and that is his exclusive province. Certainly, since it is the Judge who is ultimately responsible for the issues, he may accept or reject the issues. Taking into consideration the facts in this case, even without the reasons given by the petitioner, the Judge was certainly not entitled to comment on the course followed by the petitioner as conduct without responsibility and unbecoming of an Attorney of the Supreme Court.

- (3) There was absolutely no need "to animadvert on that conduct" especially when the Judge had decided to accept the issues. I would repeat the last part of this clause even as Rodrigo, J. did:

"Judicial pronouncements must be judicial in nature and should not normally depart from sobriety, moderation and reserve."

This Court will not interfere with a decision made by the Judge to report any matter to the Supreme Court, but we cannot for that reason leave intact the last line in this passage because that would yet be a reflection on the petitioner. Therefore, we make order that the entire passage be expunged from the record.

We understand from Counsel for the petitioner that the main trial has been concluded in favour of the defendant for whom the petitioner appeared. It is to the credit of the learned District Judge that he did not permit the facts in this petition to influence him in any manner, as regards his decision on the merits of the case.

B.E. de Silva J. – I agree

*Impugned  
passage expunged.*