

INDEPENDENT NEWSPAPERS LIMITED
V.
GUNASINGHAM

COURT OF APPEAL
WIJETUNGA, J &
ANANDACOOMARASWAMY, J
C.A. L.A. NO. 22/90
DC COLOMBO NO. 95381/M
MAY 31, 1990

Civil Procedure - Interrogatories - Civil Procedure Code, Section 94 - Defamation - Pleadings

Held:

Where in a defamation case the pleading was that the defendant had "by the exercise of improper influence committed a heinous criminal offence" no further particulars need be pleaded.

Words may be defamatory *per se* or innocent *per se*. They are the former if in their primary sense they are capable of bearing a defamatory meaning while they are the latter if in their primary sense they are not so capable of having a defamatory meaning. As in the case of words which are *prima facie* defamatory, the standard used in determining whether an innuendo is objective and does not depend on the intentions of the defendant, the test is whether the words are capable of conveying to the reasonable person of ordinary intelligence, who has knowledge of the facts set out in the declaration, the meaning assigned to them.

The trial commences with the framing of issues. Particulars could be obtained through interrogatories but a party should do so at any time before the hearing and if a defendant before he tenders his answer.

Cases referred to:

1. *Justinahamy v. Obisappuhamy* 43 NLR 213
2. *Chatoor v. General Assurance Society Ltd.* 566 NLR 56, 570

APPLICATION for leave to appeal from order of the District Judge of Colombo.

L.C. Seneviratne, P.C. with Varuna Basnayake for defendant - petitioner

S. Mahenthiran for plaintiff - respondent.

Cur. adv. vult

June 29, 1990

The plaintiff instituted this action on 28.8.85 claiming a sum of Rs. 5,000,000/- from the defendant as damages, on the basis that two articles published in the 'Sun' of 28.5.85 and 'Thinapathy' of 30.5.85 respectively, of which newspapers the defendant is the proprietor, publisher and printer, were defamatory of the plaintiff (and of his son).

The defendant filed answer denying the averments in the plaint and pleading inter alia that the said articles were written and published *bona fide* and without *animus injuriandi* and were in fact not defamatory of the plaintiff.

The case having been set down for trial, was taken up for hearing on 5.2.90. In the proceedings of that date, it is recorded that written issues had already been tendered and counsel agree that the issues are as stated therein.

The plaintiff had raised seven issues to which counsel for the defendant had not objected. The defendant had raised twelve issues to which counsel for the plaintiff had not objected and the plaintiff had raised a further consequential issue. Thus, there were twenty issues which the learned District Judge had accepted.

At that stage, learned counsel for the defendant had asked for particulars of the facts and circumstances upon which the meaning set out in paragraphs 8 and 11 of the plaint could be drawn from the text of the alleged libel. It is stated in those paragraphs that the said articles meant and were understood to mean that the plaintiff had gone to Singapore to secure the release of his son by the exercise of improper influence and that the plaintiff and the plaintiff's son had both committed a heinous criminal offence.

After hearing submissions of counsel on both sides, the learned District Judge made order disallowing the defendant's application for particulars of the alleged defamation pleaded in paragraphs 8 and 11 of the plaint. It is from this order that the defendant-petitioner has sought leave to appeal to this Court.

Having considered the submissions of counsel in regard to this application, we refused to grant leave to appeal. We now give our reasons for the order made by us on 4.6.90.

It is relevant to note that the application for particulars had been made by learned counsel for the defendant after the issues had been accepted by Court and evidence was due to be led. Issue No. 12 raised by the defendant is in these terms:

"Did the said articles mean and were they understood to mean -

- (a) That the plaintiff had gone to Singapore to secure the release of his son by the exercise of improper influence?
- (b) That the plaintiff had committed a heinous criminal offence."

Learned counsel for the defendant had not objected to any of the issues including this issue and the Court had accepted the same.

The article appearing in the 'Sun' of 28.5.85 under the heading "Explosive 'waste paper' Arms cargo was worth Rs. 54 m." states inter alia as follows:-

"Singapore authorities launched a full investigation and arrested 40 people including the son of a former Sri Lankan diplomat. 'Sun' learns the ex-diplomat had visited Singapore after his son's arrest to ascertain the possibility of securing his release".

It is these words and those of a similar article in the 'Thinapathy' of 30.5.85 which, according to the plaintiff, meant and were understood to mean that the plaintiff had gone to Singapore to secure the release of his son by the exercise of improper influence and that the plaintiff and the plaintiff's son had both committed a heinous criminal offence.

The learned District Judge states in his order that in an action where statements are per se non-defamatory, the case cannot proceed unless particulars are pleaded in the plaint, but in the instant case, the text referred to is per se defamatory. He rules that the plaintiff is entitled to show that the words, in addition to what they may bear on the face of the libel, could also be construed in an additional sense in the manner referred to in paragraph 8, which is a matter of evidence.

Although the defendant-petitioner sought to submit that the learned trial judge had predetermined the questions raised in issues 3 and 6 and had in effect already answered them in the plaintiff's favour, it should be noted that nowhere in the order complained of has he stated that those words are defamatory of the plaintiff. As we understand that part of his order, the distinction that he was drawing was between words which are defamatory per se and those which are not. That is a well recognised distinction.

"Words may be defamatory per se or innocent per se. They are the former if in their primary sense they are capable of bearing a defamatory meaning, while they are the latter if in their primary sense they are not so capable of having a defamatory meaning" - C.F. Amerasinghe: *Defamation and other Aspects of the Actio Injuriarum in Roman-Dutch Law* at page 30.

The author further stated at page 35 that: "As in the case of words which are prima facie defamatory, the standard used in determining whether an innuendo is defamatory is objective and does not depend on the intentions of the defendant. The test is whether the words are capable of conveying to the reasonable person of ordinary intelligence, who has knowledge of the facts set out in the declaration, the meaning assigned to them in the innuendo."

Nathan, in *The Law of Defamation in South Africa*, dealing with defamation with an innuendo states at page 39 that "it will be necessary for the plaintiff to allege that the words of which he complains were published with the intent that they should be understood, and that they were understood, with the meaning conveyed by the innuendo. If there are special circumstances attending the use of the words, such circumstances must be alleged and proved."

The very circumstance that the defendant had framed issue No. 12 dealing with this aspect of the matter in the terms stated above is itself indicative of the fact that the words 'by the exercise of improper influence' and 'committed a heinous criminal offence' required no further particulars to be pleaded by the plaintiff.

In any event, we see no provision in the Civil Procedure Code for the defendant to have obtained particulars at this stage after the trial had commenced. The trial commences with the framing of issues. The next step in the procedure is for the party having the right to begin to state his case and produce his evidence. If the defendant did require further particulars, the defendant could have had recourse to the provisions of Section 94 of the Code and obtained such particulars through interrogatories. But, as the section itself indicates, a party should do so at any time before hearing and in the case of a defendant, after he has previously tendered his answer and such answer has been received and placed on record.

In *Justinahamy v. Obisappuhamy*, (1) where the plaintiff sued the defendant for damages for loss of her husband whose death was caused by the negligent driving of the defendant's servant and the defendant denied liability and set up contributory negligence, it was held that the defendant was entitled to interrogate the plaintiff as to the acts and omissions constituting the alleged negligence on his part.

But, it was held in *Chatoor v. General Assurance Society Ltd.*, (2) that once the trial has begun, interrogatories cannot under our procedure be permitted.

There was thus no basis for the defendant in the instant case to have moved to obtain particulars of the alleged libel, at that stage of the action.

The learned District Judge was, therefore, right when he disallowed the defendant's application and made the order complained of.

For the foregoing reasons, we refused the defendant-petitioner's application for leave to appeal from the said order.

The plaintiff-respondent will be entitled to the costs of this application, which we fix at Rs. 525/-, from the defendant-petitioner.

WIJETUNGA, J.

ANANDACOOMARASWAMY, J.

Application for leave to appeal refused.