

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 15/2010

[2013] SCSC 68

K. D. PILLAY
Plaintiff

versus

K. DURAISAMY PILLAY
Defendant

Heard: 2012
Counsel: Basil Hoareau for plaintiff
Pesi Pardiwalla for defendant
Delivered: 16 October 2013

JUDGMENT

Dodin J

[1] On the 15th July, 2009, the Plaintiff received a document by post written in the Tamil language which contained the following extract now translated into English:

“.....when there was financial constraints during the tenure of the construction of the new “Rajagopurm” temple a person who has not contributed nothing or given any help towards the construction of the “Rajagopurm”, wants to be the Chairman of the Seychelles Hindu Kovil Sangam. He gathered the members of the Hindu Kovil Sangam and

organised an illegal meeting to appoint members for the ad hoc committee. During the meeting, he made false propaganda against the present management team of the Seychelles Hindu Kovil Sangam. He did this to divide the unity among the members of the Seychelles Hindu Kovil Sangam. His only aim was to become the Chairman of the Hindu Kovil Sangam and to take over the temple keys jewels and to submit the accounts and he insisted the present existing committee to step down from the office bearer post.

A committee which was elected by you members has been declared to be null and void by the above-mentioned person and taken to court for justice. He was also aware that we will conduct the GM on the 22nd February and so in a hurry he has filed another case in the Court on the 16th February seeking permission from the court that there should be no meeting to be held by us and the case stands postponed. The details of the case (notice of motion is attached for you to see)."

[2] The Plaintiff who is a member and was a founder member of the Seychelles Hindu Kovil Sangam (SHKS), brought this action against the Defendant who was at the time the Secretary of the SHKS, maintaining that the content of the document portrayed him as a liar, hypocrite, a dishonest person and a fraudster who intended to rob or defraud the SHKS of its valuables and therefore unfit to be a member of the SHKS. The Plaintiff further maintains that the statements contained in the document were defamatory imputations made out of malice, animosity or personal spite towards him, calculated to degrade or disparage him in his professional, public and private life.

[3] The Plaintiff maintains that by reason of the said publication which he considers to be false, malicious and defamatory, he has been:

- i. Severely prejudiced and injured in his credit, character and reputation especially as a member of the SHKS and in his official functions;
- ii. Lowered in the estimation of right thinking members of the society generally and specially in the estimation of the other members of the SHKS;
- iii. Brought into public scandal, odium, hatred, ridicule and contempt and distress; and
- iv. Hurt in his feeling.

- [4] The Plaintiff maintains that as a result of the defamation the Plaintiff has suffered damages in the sum of Seychelles rupees five hundred thousand (SR500,000/-), which the Plaintiff now claims from the Defendant.
- [5] The Defendant denies that the article in question is defamatory to the Plaintiff maintaining that the translated version of the document is inaccurate and misleading. The Defendant maintains that the letter was written to the members of the SHKS in the course of his duty as the secretary to the SHKS to inform them that the Supreme Court of Seychelles had declared the holding of an ad hoc meeting to elect some persons as committee members to be illegal, null and void and that the letter contained no false, malicious or defamatory statements.
- [6] Mr Chinasamy Jayaraj, an attorney-at-law testified that translation from Tamil to English is very difficult and complicated as Tamil words or phrases may not have exact equivalent in English and consequently different English meanings can be attributed to the same Tamil word or phrase. He testified that in the passage complained of there is stated that a person who during the economic difficulties of the Association without contributing to the welfare, against law spreading false information regarding some members of the association, demands the keys to jewellery and accounts of the temple to be handed over to him, made by letter annexed. Further he has filed a new proceeding in the Court saying or praying that we should not hold meeting on 16th of February.
- [7] The witness testified that the document does not mention any name but says an unknown person and that a person held a meeting not in accordance with law and said that the keys should be handed over but did not say to whom.
- [8] Kannu Deenu Pillay, the Plaintiff testified that he is a businessman, also the Honorary Counsel for Nigeria in Seychelles and chairman of the Diabetic Society. He has been in Seychelles doing business for over 50 years. He is a founder member of the SHKS and was its chairman for 14 years. He testified that about 2 years previously he received a circular document which had been sent to all the members in which there was a paragraph which although did not mention his name referred to 2 letters which had been

written by him which made allegations in Tamil that he wanted to grab the items of the SHKS and take over the accounts.

- [9] He testified that the statements are false and insinuate that he is a liar, a dishonest person and hungry for power, who is fighting for a post and creating division in the community. He testified that the letter which was circulated to all the members of the SHKS was written by the Defendant pretending that it was a letter from the committee and the paragraph complained of is defamatory to him and affected his character and status in society for which he is claiming damage from the Defendant in the sum of Rs 500,000.
- [10] In cross-examination, the Plaintiff admitted that he was unaware if the Defendant wrote the letter in his personal capacity or under instructions from the committee as secretary to the SHKS but maintained that the contents of the letter insinuated that he intended to rob the Temple of its jewels and that he organised an illegal meeting. He maintained that he was only invited to the meeting but he did not organise it. He admitted that he filed an application for an interim injunction and that he sent a letter as ad hoc chairman asking for the replacement of the office bearers but denied that he was suing the Defendant out of malice or that the content of the letter was truthful. He maintained that although his business has not been affected by the incident, his character and personal dignity have been seriously affected hence the damages claimed against the Defendant.
- [11] Velumani K. Sundaran testified that he works as a teacher with the Ministry of education and that he is fluent in both Tamil and English. He is a life member of the SHKS and has lived in Seychelles since 1995. He testified that he had known the Plaintiff since then and that he had found the Plaintiff to be a good businessman and role model for the younger generation. He testified that he received the circular letter in 2009 and he believed the letter was purely written by the Defendant although it contained the SHKS letterhead and that the attachments showed that it was aimed at the Plaintiff.
- [12] He testified that when he read the circular, he felt that the contents were implying that the Plaintiff was greedy for power, wanted all the jewellery and that the letter was aimed at destroying the credibility of the Plaintiff.

- [13] In cross-examination he maintained that there was no division in the association and that the ad hoc meeting was organised by the 56 life members and not by the Plaintiff. He admitted that it was the Plaintiff who signed the letter but only because he was the chairman of the ad hoc committee.
- [14] Kamatchi Vinawagamurthy testified that she is the daughter-in-law of the Plaintiff and she also received a copy of the circular letter complained of. She testified that according to her, the letter was aimed at tarnishing the reputation of the Plaintiff. She testified that the content of the letter was not true as she was aware that the Plaintiff contributed a lot towards the construction of the temple and its renovation.
- [15] Kannan Padayachy testified that he had known the Plaintiff both as a businessman and as the 1st chairman of the SHKS. He also had the opportunity to read the circular letter complained of and became aware that the article was referring to the Plaintiff. He testified that the part of the article referring to the Plaintiff was damaging to the reputation of the Plaintiff as he is aware that the Plaintiff contributed to the SHKS and tried to develop the association.
- [16] The Defendant testified that the circular in question was sent to most of the members of the association because the members were asking what was happening as they had not held an annual general meeting for 2 years. He testified that he was directed by the executive committee to write the letter which he signed as secretary. He testified that every time they advertised for the AGM, the Plaintiff and Doctor Ramados brought a case to Court asking for injunction and so the AGM could not be held.
- [17] He testified that the Plaintiff did not make any contribution towards the renovated temple and that the Plaintiff had written to the committee asking for the keys to the jewellery, ornaments and cash to be handed to him. He testified that the meeting of the ad hoc committee was unlawful and the Court declared so in a ruling delivered by Renaud J. dated 26th February, 2009. He maintained that everything contained in the circular was true and denied that any of it was defamatory to the Plaintiff.

- [18] In cross-examination, the Defendant admitted that everything contained in the circular was written by him and that he signed the same but maintained that he did so under the direction of the executive committee at a meeting. He admitted that when he referred to a person in the circular he was referring to the Plaintiff who was the person who signed the letter sent to the SHKS. He maintained that the Plaintiff exchanged land for the new Rajagopurm but did not give anything and that the Plaintiff wrote to the Planning Authority requesting the Authority not to give permission for the renovated temple.
- [19] The Defendant maintained that he had no intention of hurting anybody and that the circular was sent to some 300 members for information and was not defamatory to the Plaintiff.
- [20] Learned counsel for the Defendant submitted that the Plaintiff has not proved that injury has been caused to his character or credit or that the words used in the letter were in fact defamatory. Learned counsel submitted that when libel or defamation is claimed, especially by using a foreign language, the Plaintiff must prove that the translation of the foreign words is correct. He submitted that in this case, three witnesses testified on the interpretation of the Tamil words and all three gave different meanings to the words, hence there was no satisfactory interpretation before the Court.
- [21] Learned counsel submitted further that the contents of the circular are correct and reflect the truth of what was said. He submitted that the Plaintiff did not contribute towards the new Rajagopurm and that he was a member of an ad hoc committee which the Court declared to be unlawful. He submitted that the Plaintiff also wrote to the executive committee requesting that they hand over the keys and jewellery. He submitted that the Defendant who was the secretary of the SHKS was under a duty to inform the members of the association what was happening and hence wrote the circular in question.
- [22] Learned counsel hence concluded that the content of the circular was not defamatory as claimed by the Plaintiff and that they reflected the truth of what was in fact the case and therefore the Plaintiff's character and credit were not affected in any way. He therefore moved the Court to dismiss the Plaintiff's claim with costs.

[23] Learned counsel for the Plaintiff submitted that in proving defamation, the court should not merely look at the words which he admitted may have different meanings but at the innuendo and the Defendant must show that the words themselves and the meaning that can be attributed to them would not lead a reasonable person to conclude that they were defamatory. Learned counsel submitted that it is not sufficient for a Defendant to simply deny that the words were defamatory but if a reasonable person finds that one of the meanings attributed can be defamatory, then defamation has been proved.

[24] Learned counsel further submitted that the Defendant in this case cannot rely on the defence of justification as that defence was not pleaded and maintained that the Defendant has failed to prove that the words and statement made against the Plaintiff was the truth.

[25] On the issue of damages, learned counsel submitted that the Court must consider the fact that the character of the Plaintiff was untainted until this publication was made to more than 300 persons members of the association. He submitted that the Plaintiff suffered more damage but that the amount claim is merely a token to teach the Defendant a lesson. Learned counsel hence moved the Court to give judgment in favour of the Plaintiff with costs.

[26] The Defendant has raised as part of his defence, the fact that he wrote the letter under directions from the SHKS executive committee, as he was the secretary to the association and therefore he should not be personally liable as he did not write and circulate the document in his personal and private capacity.

[27] In general, everyone involved in the dissemination of the defamation is liable either as having produced or as having published it. It has been held that some forms of distribution are so mechanical that the actor ought not to be held liable unless he or she ought to have realized that there was defamation involved. This defence is known as innocent dissemination or mechanical distributor. I do not find this defence to be available to the Defendant here as the evidence show that he was personally involved in the writing and circulating of the article in question. Secondly, justice would not be served if the writer of articles deemed defamatory were to be protected because they

supposedly acted under instructions of other persons or authority. Thirdly, the Plaintiff has an inherently choice to choose who amongst the several persons or legal persons involved he would be most successful against.

[28] I find that the Defendant is one of the persons responsible for the publication and the fact that he was one of the members of the executive committee of SHKS does not absolve him from facing the possible consequences if the article in question is found to be defamatory.

[29] There are five essential elements that a plaintiff must prove to establish defamation: (1) The accusation is false; (2) it impeaches the subject's character; (3) it is published to a third person; (4) it damages the reputation of the subject; and (5) that the accusation is done intentionally or with fault such as wanton disregard of facts or with malicious intention. Hence, making a negative statement about another person is not defamation unless the statement is false and represents something as a fact rather than a personal opinion of the subject. The difficulty in applying this process is succinctly stated by Michael G. Parkinson and L. Marie Parkinson in their joint publication entitled Law for advertising, broadcasting, journalism, and public relations, Routledge, 2006, p. 273:

"Simplifying a very complicated decision, the court said that because the plaintiff must prove a statement is false in order to win an action in defamation, it is impossible to win an action in defamation if the statement, by its very nature, cannot be proven false."

[30] Allowable defences against defamation are justification which includes the truth of the statement, fair comment which is determined by whether the statement was a view that a reasonable person could have held, absolute privilege when the statements were made in Parliament or in court, or they were fair reports of allegations in the public interest and qualified privilege, where it is determined that the freedom of expression outweighs the protection of reputation, but does not amount to the granting of absolute immunity. A defamatory statement is presumed to be false unless the Defendant can prove its truth.

- [31] In a case for defamation, in order to be granted compensatory damages, the Plaintiff must prove actual malice by establishing that the Defendant knowingly made the false statements or that the Defendant showed reckless disregard for the truth or that there was actual malice on the part of the Defendant. It must be noted that in such cases the Plaintiff has the burden only of proving that the statement was made by the Defendant and that it was defamatory. The Plaintiff is not required to prove that the statement was false although if that is proved it would certainly strengthen his claim. On the other hand, proving the truth of the statement is an affirmative defence available to the Defendant.
- [32] In this case, the Plaintiff maintains that the circular letter sent to the members of the SHKS by the Defendant contained falsities, was malicious and defamatory and consequently the publication has severely prejudiced and injured his credit, character and reputation especially as a member of the SHKS and in his official functions; has lowered him in the estimation of right thinking members of the society generally and specially in the estimation of the other members of the SHKS; has brought him into public scandal, odium, hatred, ridicule and contempt and distress; and has hurt his feelings.
- [33] The Plaintiff maintained that he was until then a well respected businessman, diplomat and member of the community and that the statements contained in the circular were false and insinuated that he is a liar, a dishonest person, hungry for power, who is fighting for a post and creating division in the community. The Plaintiff however admitted that the said article did not mention his name although references were made to letters signed by him which were circulated along with the article.
- [34] In the case of *Morgan v Odhams Press Ltd*[1971] 2AllER 1156 HL a newspaper article in *The Sun* newspaper then owned by Odhams Press, reported on the kidnapping of a young woman by a dog-doping gang. The woman had been staying at the home of a Mr. Morgan, a journalist, at the time of her kidnap. Morgan claimed that even though the article did not mention him in any way, it implied to those who knew that the woman was staying with him that he was a member of the gang. Lord Morris of Borth-y-gest ruled that even though the plaintiff was never referred to by name, nor was he even directly implicated upon strict reading of the defamatory article, he was still sufficiently

identified. This was because a substantial group of people who knew the plaintiff understood that it referred to him. He held that this was sufficient, even though no-one called to give evidence in fact believed the allegations to be true.

[35] In this case I am satisfied that the article in question sufficiently identified that Plaintiff as the person who is the subject of the statements contained in the article and that the article was circulated to a substantial number of the population, mainly the members of the SHKS. I am also satisfied that a simple reading of the translated versions of the statement does appear to impugn the character of the Plaintiff presenting the Plaintiff as a person who was acting in a way not favourable to or in the interest of the SHKS.

[36] Learned counsel for the Defendant has argued that the translations made of the statements cannot be relied upon by this Court because the three persons who attempted to translate the article into English gave different versions and meanings to parts of the article. I agree with learned counsel for the Defendant that there were differences in the wordings of the translation made by the witnesses but I do not agree that the differences were such as to make the English version unreliable and unbelievable. I find that all the witnesses who translated the article into English although they did not use the same words conveyed virtually the same meaning to the articles which still appeared to show that the Plaintiff's actions were not in the interest of the SHKS.

[37] I am therefore satisfied that the Plaintiff has discharged the burden of proof as required by him to establish that the portion of the circular complained of when read by an ordinary person would convey an overall allusion that the Plaintiff was not a person of good character in his dealings with the SHKS at the time. Having so found, the Court must now determine whether the Defendant has established a complete defence against the Plaintiff's claim.

[38] The Defendant's defence is two-fold. Firstly that the translated statement before Court cannot be relied upon as three witnesses gave three different versions of the article, hence without a reliable and acceptable version of the article having been accepted by the Court, the claim of the Plaintiff cannot be maintained. Secondly, that the statements

contained in the article reflected the truth of what was in fact the case and therefore the Plaintiff's character and credit were not affected in any way by the article.

[39] The first limb of the Defendant's defence has already been addressed above and I have found that even if the 3 witnesses gave slightly different interpretations in their translation of the Tamil language document into English, all the versions conveyed almost the same meaning and impression of the Plaintiff as a person who had not been of exactly good character in his dealings regarding the SHKS.

[40] The second limb of the defence is the statements reflected the state of affairs as they existed at the time. In other words the statements were true. A claim of defamation is defeated if the Defendant proves that the statement was true or were fair comments and the Defendant genuinely held the views he expressed to the other members of the association in the circular. To quote Lord Nicholls of Birkenhead in Albert Cheng v Tse Wai Chun (2000) 3 HKCFAR 339 at p 360I to 361D:

“My conclusion on the authorities is that, for the most part, the relevant judicial statements are consistent with the views which I have expressed as a matter of principle. To summarise, in my view a comment which falls within the objective limits of the defence of fair comment can lose its immunity only by proof that the defendant did not genuinely hold the view he expressed. Honesty of belief is the touchstone. Actuation by spite, animosity, intent to injure, intent to arouse controversy or other motivation, whatever it may be, even if it is the dominant or sole motive, does not of itself defeat the defence. However, proof of such motivation may be evidence, sometimes compelling evidence, from which lack of genuine belief in the view expressed may be inferred.”

[41] In the case of Branson v Bower [2002] QB 737, at p 748, para 29, Eady J also said:

“The comment must be upon ‘facts truly stated’. A commentator must not deliberately distort the true situation. That would be relevant on “malice” even according to Lord Nicholls's criterion. It would not be honest. The matter of distortion (whether dishonest or otherwise) may also come into play, however, at the stage of the objective test, because one cannot decide whether a hypothetical commentator could hold an opinion in a vacuum. Even at this point, it is surely necessary to test the matter against some factual assumptions.”

[42] In the case of London Artists Ltd -v- Littler; [1969] 2 QB 375, Lord Denning MR said:

“Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or others; then it is a matter of public interest on which everyone is entitled to make fair comment.’ The comment must be based on facts which are true or protected by privilege.”

[43] The Defendant maintains that he is entitled to the defence of truth and fair comment because firstly, because the Plaintiff actually wrote to the association by letter dated 6th October, 2008 which contained the following passage:

“...As per the powers vested to the Adhoc Committee, we request you to handover the following within seven days from the date of this letter.

1. Temple Keys

2. Ornaments

3. Cash in hand and at bank

4. Other valuables, stock, furniture and fittings etc belonging to the Sangam

As regards the accounts of the Sangam, it has been decided that it will be your responsibility to do the accounts up to 14th October 2008, which shall be audited by M/s Ramani & Co. and submitted to us within one month (ie) on or before 7th November 2008. The Adhoc Committee will be responsible for the accounts as from 15th October 2008 and will submit the same to the AGM, to be called in November 2008 or as per Adhoc Committee’s decision.”

[44] I also find in the ruling of Renaud J the following findings in his ruling dated 26th February 2009;

“As the Defendant did not comply with both the provisions of the Registration of Associations Act and the Rules of the Association regarding the holding of a Special General Meeting, in my view, the Governing Council elected at that Special General Meeting cannot have any standing in law, hence null and void for all intents and purposes.”

[45] The Plaintiff did not produce any evidence to show that he contributed to the renovated Rajagopurm except that there was mention that he exchanged some land for the extension of the temple. It has been accepted by all sides and I do note that the Plaintiff was a founder member of the temple and indeed contributed to the initial construction and development of the temple, but the Defendant maintained that the Plaintiff made no contribution towards the renovation and extension of the temple. In fact the Plaintiff's witnesses all referred to the contributions of the Plaintiff prior to the renovation but none testified that he contributed towards the renovated Rajagopurm.

[46] I find that such matters would indeed be of concern to the members of the association and that they would want to know what was happening. I also find that as the secretary of the association the Defendant would have been the proper person to keep the members informed of the said developments and state of affairs. Whilst I agree that there are different ways to impart information, studying the contents of the article complained of and the state of affairs that existed then, I find that the following existed:

1. There was division in the SHKS by the very fact that an ad hoc committee had been formed to oversee the affairs of the association which was still being governed by the then existing executive committee;
2. The Plaintiff was the presiding person on the ad hoc committee;
3. The Plaintiff had written to the association requesting the handing over of the temple keys, ornaments, cash in hand and at the bank, and other valuables, stock, furniture and fittings etc belonging to the Sangam;
4. The Court had declared the ad hoc committee unlawful, null and void for all intents and purposes.
5. Whilst the Plaintiff had made substantial contributions towards the creation of the association and the initial building and development of the temple, the Plaintiff had not made contributions at the time of the renovation.

[47] The above being the case, I am satisfied that the words used by the Defendant in the article to the members more or less reflected the truth of the situation as it existed at the time. Admittedly the language used could have been more conciliatory and diplomatic but the content of the article were comments based on facts truly stated I do not find that the Defendant deliberately distorted the true situation. I also find that a reasonable person with knowledge of the facts commented on by the Defendant in the article would not find the article to be defamatory to the Plaintiff in the circumstance.

[48] I therefore find that the Defendant has a successful defence to the claim of defamation made against him by the Plaintiff in the circumstances and therefore the Plaintiff's claim for damages cannot succeed. The Plaintiff's claim for compensation is therefore dismissed accordingly.

[49] I award costs to the Defendant.

Signed, dated and delivered at Ile du Port on 16 October 2013

G Dodin
Judge of the Supreme Court