

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 534 of 2006

BETWEEN : **VIJAY SHARMA** of 2nd Floor Prouds Building, Renwick Road, Suva in Fiji, Architect.

1ST PLAINTIFF

AND : **SHARMA DESIGN GROUP LIMITED** a duly incorporated company located at 14 Denison Road, Suva.

2ND PLAINTIFF

AND : **MARK HALABE** of Deoji Street, Princess Road, Tamavua, Suva in Fiji
Businessman

1ST DEFENDANT

AND : **SUN (FIJI) NEWS LIMITED**, a limited liability company having its registered office at Lot 1 Wailekutu Subdivision, Lami, Suva in Fiji

2ND DEFENDANT

AND : **RUSSEL DOUGLAS HUNTER** of Suva, Acting Publisher and Editor in Chief of **SUN (FIJI) NEWS LIMITED**

3RD DEFENDANT

BEFORE : **Justice Deepthi Amaratunga**

COUNSELS : **Mr. D. Prasad** for the Plaintiff
Mr. P. Sharma for the Defendant

Date of Decision : **25th June, 2013**

DECISION

A. INTRODUCTION

1. The 1st Defendants filed a notice of motion seeking strike out of the 'pleading in the amended statement of claim' against the 1st Defendant. The Plaintiff has filed the present action for defamation based on an article in a daily news

paper, against three defendants. 2nd and 3rd Defendants were the Publishing Company and the editor in chief at that time and the 1st Defendant was the alleged person whose name was quoted as the source of information, in the article that was published in the news paper. The Plaintiffs in the amended statement of claim had not disclosed a cause of action against the 1st Defendant but he had, allegedly provided such information to the 2nd and 3rd Defendants and the source of the information is quoted in the article.

B. ANALYSIS

2. The notice of motion dated 19th August, 2010 seeking strike out stats as follows

‘The Pleading in the Amended Statement of claim of the First and Second Plaintiff filed on 8th October, 2010 against the First Defendant be struck out’

3. The said application is allegedly made in pursuant to Order 18 rule 18 (1)(a) and (c). There is no affidavit in support for the said application. Order 18 rule 18 of the High Court Rules of 1988 deals with the striking out pleadings and endorsements and states as follows:

‘18-(1) The court may at any stage of the proceeding order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground date-

- (a) **It discloses no reasonable cause of action or defence, as the case may be; or**
- (b) It is scandalous, frivolous or vexatious; or
- (c) **It may prejudice, embarrass or delay the fair trial of the action; or**

- (d) It is otherwise an abuse of the process of the court; and may order the action to be stayed or dismissed or judgement to be entered accordingly, as the case may be.
- (2) No evidence shall be admissible on an application under paragraph (1) (a).
- (3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summon or petition, as the case may be, were a pleading.’ (emphasis added)

4. The paragraph 7 of the amended statement of claim dated 10th October, 2010 states as follows

‘7. On 20 October 2006, on page 3 of the edition of the Fiji sun for that day, the **Second and Third Defendants published or caused to be published** the following words defamatory of the First and Second Plaintiffs as follows....’
(emphasis added)

5. The full news article was verbatim reproduced as allegedly published in the newspaper and the said statement clearly indicate its source of information as the 1st Defendant, and presumably that may be the reason for joining 1st Defendant, but strangely the reference of the 1st Defendant was left over for speculation and this is the reason behind the present application for strike out of the 1st Defendant from this action.

6. The alleged defamatory statement and its publication was not denied by the publishers of the news paper, who were the 2nd and 3rd Defendants as well as the 1st Defendant who sought ‘strict proof’ of the said article. There was no definition of ‘strict proof’ in any recognized text on evidence and it is a meaningless word, and perhaps used to avoid the admission of an obvious fact

that was already admitted by the publishers of the news paper and an admitted fact.

7. The name of the 1st Defendant appeared in the said article as the source of the information and more importantly the said news item had verbatim quoted statements made by the 1st Defendant. The Plaintiffs allege that the entire news article as defamatory against the 1st and 2nd Plaintiffs, but failed to make any reference as to the 1st Defendant's alleged cause of action against the Plaintiffs. This was made difficult for the 1st Defendant to plead and to know the cause of action against the Plaintiffs and more specifically there was no reference to 2nd Plaintiff at all, in the said article.
8. The 1st Defendant also points out that there is no reference to the 2nd Plaintiff, in the said article in the news paper. That is correct but whether that statement is defamatory or not and whether it was made innuendo cannot be decided at this juncture. Whether it can be defamatory to 1st and or 2nd Plaintiff is not a matter that can be decided summarily, but again there is reference to the 2nd Plaintiff other than the initial reference in introduction of the parties and their status at the beginning of the statement of claim, in paragraphs 7, 8 and also in paragraph 9 of the amended statement of claim filed on 8th October, 2008. So, the argument that there is no reference to the 2nd Plaintiff hence, no disclosure of cause of action against the 2nd Plaintiff cannot be accepted, but since there is no reference against the 1st Defendant and he had not allegedly referred to 2nd Plaintiff in the said newspaper article, the pleadings are not clear as to allegations against 1st Defendant and also the case against 1st Defendant had not been revealed.
9. The news item quoted in full in the statement of claim indicate that the actions of the Plaintiff and more specifically the construction of the building was the bone of contention, between the Plaintiffs and the 1st Defendant and had also been subject matter of previous litigation between the Plaintiffs and the 1st Defendant. The 1st Defendant had allegedly stated that issue of alleged illegal acts of 1st Plaintiff, would spark illegal constructions among the architects, and there is reference to the 1st Plaintiff and not to the 2nd Plaintiff which was also involved in the incident. The said article also quote the 1st Defendant pointing to the certain officials of the authority that granted license for construction and

allegedly complained that said illegal constructions by the 1st Plaintiff was condoned by the authority. The 1st Plaintiff is an architect by profession and it is left for the Plaintiffs to prove how they were defamed as alleged in paragraphs 8 and 9 of the amended statement of claim filed on 8th October, 2008, but a clear reference of cause of action against 2nd Plaintiff against 1st Defendant is found wanting in the pleadings, since there was no reference of 2nd Plaintiff in the newspaper.

10. In Bruce v Odhams Press Limited (1936) 1 KBD 287 at p 291 Slesser L.J held

‘In such case as the present, the plaintiff, not being actually named in the libel, will have to prove an innuendo identifying her in the minds of some people reasonably reading the libel with the person defamed, for there is no cause of action unless the plaintiff can prove a publication of and concerning her of the libelous matter.....

.....

Though evidence be no longer pleaded the need for assigning a special meaning by innuendo with sufficient particularity remains.

In Clement v Fisher ([1827] 7 B & C 459; 32 Digest 15, 55, on a count that the defendant published of the plaintiff libelous matter without alleging that it was matter of and concerning the plaintiff. Lord Tenterden, C.J, said at page 462;

‘Such an allegation would not have been necessary if there had been in the libel set out anything which clearly applied to the plaintiff-it seems to me quite impossible to say that it has any relation to the plaintiff. There is no averment that the particular matter is of and concerning the plaintiff or any innuendo shewing that it related to the plaintiff.’

11. The Plaintiff in paragraph 7, 8 and 9 in the statement of claim stated that the alleged statement was defamatory to the 1st and 2nd Plaintiffs and stated in paragraph 9 as follows

‘9.The Publication of the words complained of has gravely injured the reputation of the First and Second Plaintiffs and has exposed them to public scandal and contempt and caused them embarrassment and distress and in respect of the Second Plaintiff, affected its goodwill in a detrimental fashion.’

12. In my judgment the description and alleged cause of action against the 2nd Plaintiff against the 1st Defendant needs to be pleaded and if not 1st Defendant should be removed from this action.
13. There is no reference of cause of action against the 1st Defendant in amended statement of claim, filed on 8th October, 2008; though clearly such reference was made against the 1st Defendant in the statement of claim filed on 4th December, 2006. It may be an omission or inadvertence, but this could have prevented if such an omission was admitted and a request for further amendment was made promptly by the Plaintiffs, they did not do so and unnecessary costs incurred to the 1st Defendant. The court is reluctant to strike out unless in an obvious matter where the pleadings would doom to fail.
14. The Fiji Court of Appeal has applied similar principles in National MBF Finance (Fiji) Ltd v Buli, Fiji Court of Appeal Civil Appeal No. ABU 0057 of 1998S (6 July 2000) at page 2 of 4, second paragraph, where it stated as follows:-

“The law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved. If a legal issue can be raised on the facts as pleaded then the courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot

be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention. It follows that an application of this kind must be determined on the pleadings as they appear before the court. In this case the Judge's task was made more difficult because a considerable amount of factual material was placed before him. We wish to point out that this is inappropriate and undesirable. The Judge's task was also made more difficult by the wording of both statements of claim and defence which do not raise the questions at issue with clarity."

15. Considering the facts of the case I am not inclined to grant the order sought by the 1st Defendant to strike of the 1st Defendant from the pleadings. What is left to strike out against 1st Defendant is the 1st Defendant's name from the caption and the introduction of the 1st Defendant in the pleading, as no reference was made against the 1st Defendant in the amended statement of claim. The amended statement of claim had not disclosed a cause of action against the 1st Defendant and there was no reference to the 1st Defendant other than the initial introduction and reference in the alleged defamatory statement reproduced verbatim in paragraph 7 of the amended statement of claim. The alleged news item had quoted the statements allegedly made by the 1st Defendant and the reference to the 1st Defendant in the alleged defamatory statement cannot be considered as a proper disclosure of cause of action against 1st Defendant. It should also be noted that no reference was made against the 2nd Plaintiff and nexus between the 1st Defendant and the 2nd Plaintiff needs to be pleaded properly. In the statement of claim filed on 4th December, 2006 the cause of action against 1st Defendant was revealed, but when it was amended in the amended statement of claim the reference to the 1st Defendant and alleged cause of action against 1st Defendant was omitted. Considering the circumstances of the case I am not inclined to strike out the 1st Defendant at this moment. I will allow the Plaintiff to file summons seeking to amended statement of claim including any claim against the 1st Defendant and the manner in which the 2nd Plaintiff, who was not referred to in the said statement, was defamed, within 21 days from today and if not the 1st Defendant will be struck off from this action. The Plaintiffs were negligent in its drafting which

resulted this application for which the Plaintiffs should pay the costs applying principles in Calderbank v Calderbank (1975) 2 All ER 333 which I assess summarily at \$500. Delay is regretted.

C. FINAL ORDERS

- a. The Notice of Motion dated 27th November, 2008 is struck off.
- b. The Plaintiff is ordered to pay a cost of \$500 to the 1st Defendant as costs for this application within 21 days from today.
- c. The Plaintiff is directed to file summons to further amend the amended statement of claim to include the cause of action(including how 2nd Plaintiff is affected by the statement) against 1st Defendant within 21 days from today and if not the claim against the 1st Defendant will be struck off.
- d. Normal Cause

Dated at **Suva** this **25th day** of **June, 2013**.

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Justice Deepthi Amaratunga
High Court, Suva