

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL DIVISION

CIVIL SUIT NO. S3-23-74-2004

BETWEEN

SAEED AFZALIRAD

.....PLAINTIFF

AND

**THE NEW STRAITS TIMES
PRESS (M) BERHAD**

.....DEFENDANT

GROUND OF JUDGMENT

Encl. 10 is the Defendant's application to strike out the Plaintiffs Writ of Summons and Statement of Claim dated 10.11.2004 pursuant to Order 18 r 19(1) (b) and/ or (d) of the Rules of the High Court, 1980 ('RHC') and/ or under the inherent jurisdiction of this Court.

Background

At the material time, the Plaintiff was the coach for the National Tennis Academy for the Lawn Tennis Association of Malaysia (LTAM).

The Plaintiff's claim against the Defendant is premised upon a Sports Letter published in the Defendant's newspaper "The New Straits Times" , on 20.11.1998 under the title "Where have the money from the sponsors gone? (" said Sports Letter"),

The said Sports Letter is the only subject matter of this suit.

The Sports Letter was received by the Defendant from one of its readers by the name of Zaed Afzalirad and was published in the Defendant's newspapers at the material time following a report filed by the Sports Commissioner on the management of LTAM.

Besides the suit herein, there have been other suits filed against the same Defendant but by different Plaintiffs premised upon the sports letter.

Herein below are the cases which have been filed in relation to the same sports letter:

First Suit: The S5 Suit

Kuala Lumpur High Court Suit No. 55-23-35-2000

Saeed Afzalirad v The New Straits Times Press (Malaysia)

The Claim against the Defendant, for defamation over the Sports Letter seeking to recover special damages of up to RM3,000,000.00 together with general damages.

On 17.2.2004, whilst parties were in the course of preparing this matter for trial, the suit was withdrawn with liberty to file afresh. It was agreed that the costs thereof were to be taxed and paid by the Plaintiff to the Defendant.

It is not disputed that to date, the Plaintiff has not paid the Defendant's costs incurred in respect of the first action.

Second Suit :The S6 Suit

Kuala Lumpur High Court Suit No. 56-23-66-2000

Mohammed Akhbar Baba v The New Straits Times Press (M) Bhd

This is the second action filed in respect of the Sports Letter.

- Writ dated 2.11.2000;
- The Plaintiff was the then vice- president of LTAM, Mohammed Akhbar Baba.
- Claim against the Defendant, for defamation over the Sports Letter seeking to recover aggravated and exemplary damages of up to RM 15 ,000,000.00;
- Case proceeded to full trial at the Kuala Lumpur High Court and the Plaintiff's claim was dismissed with costs on 2.8.2004.
- Judge held that the contents of the Sports Letter was:
 - (i) not expressly directed at Mohammed Akhbar Baba; and
 - (ii) the sports letter was not defamatory of the Plaintiff.

The Third Suit: S5 Suit

Kuala Lumpur High Court Suit No. S5-23-5-2003

Lawn Tennis Malaysia Bhd v The New Straits Times Press (M) Bhd

- the Plaintiff was LTAM;
- Claim against the Defendant, for defamation over the Sports Letter seeking to recover damages of up to RM15,000,000.00 as damages, an injunction, together with interest and costs

The Plaintiff subsequently applied to amend their Statement of Claim and the Defendant had at the same time filed an application to strike out the said action filed by LTAM. Both these interlocutory applications were subsequently withdrawn by consent and the Court had on 2.6.2004 struck out the suit, with costs in favour of the Plaintiff.

The Court's Findings

Issue of res Judicata

One of the basis of the Defendant's striking out application is on the Plaintiff's repeated attempts to relitigate a subject matter that has already been fully litigated and adjudged upon by the Court in a previous action.

To determine whether this is a proper action to be struck out under the provisions of Order 18 rule 19(1)(b) and/or (d) of the RHC, the Court has to determine whether the subject matter of the Plaintiff's present action, i.e. the Sports Letter, is now res judicata and whether issue estoppel applies to the Plaintiff's action.

The Defendant submits that this is the fourth attempt made to re-litigate the Sports Letter against the Defendant.

That may be so, however I am of the view that the First Suit is not a basis for saying that this matter is res judicata. Reasons:

- although the parties and the subject matter i.e. the sports letter are the same, but that Suit had been withdrawn with liberty to file afresh.
- That case had not been litigated or adjudged upon.
- The Claim was against the Defendant, for defamation over the Sports Letter, whereas the present case is for a claim for negligence, which is for a different cause of action. (Refer to the case of Kapt (B) Hj Mohamad Ismail v Perwira Affin Bank Bhd [2001] 5 CLJ 184)

As for the Second and Third Suit the Plaintiffs are not the same as our present case, although the Defendant and the subject matter is the same.

However, I need to point out that although the Second Suit involves a different Plaintiff, the issue in that case was whether the sports letter was defamatory of the Plaintiff in that suit i.e. Mohammed Akhbar Baba. Be that as it may, what is pertinent in the Second Suit is that it went on a full trial and the Judge had deliberated at length on the implication of the sports letter as to whether it is defamatory. His conclusion is as found in page 21 and 22 of the reported judgment which in essence states that :

“ [19] ,,giving the words in the letter its plain and ordinary meaning, that letter was not well written, and because of its lack of clarity and substance ought not to have been published.....

[21].....The general public is not privy to the matters within LTAM or the knowledge of the Plaintiff, such as what the role of the plaintiff had been at times other than that which is stated in the letter, as would make the letter to be reasonably read as defamatory of the plaintiff. The issue then is whether a reasonable reader not knowing of the details in the LTAM or knowledge of the plaintiff, believing it, understand the letter as published, to be defamatory of the plaintiff. For all of the reasons above, that conclusion cannot be drawn.

[22] The plaintiff’s claim, was, therefore, dismissed with costs.”

The gist of the Second Suit is that the Judge had decided that the sports letter is not defamatory of Mohammed Akbar Baba.

Coming back to our present case, the Statement of Claim of the Plaintiff in paragraphs 4 (b) , 4 (c) and 4 (d) states:

“ 4.(b) Defendan telah menyatakan dalam terbitan tersebut secara cuai atau palsu atau secara tidak bertanggungjawab bahawa plaintiff adalah pengarang surat tersebut.

- 4.(c) Perkataan-perkataan dalam surat tersebut merujuk, antara yang lain, kepada Mohammed Akbar Baba, Naib Presiden LTAM.*(emphasis mine)*
- 4.(d) Berasaskan makna yang lazim dan biasa yang difahami, perkataan-perkataan tersebut merupakan fitnah terhadap Mohammed Akbar Baba.....*(emphasis mine)*

From these averments of the Plaintiff in the present suit, what the plaintiff is seeking for this court's determination is on the issue of whether the sports letter is defamatory of Mohammed Akbar Baba, before the plaintiff can maintain an action of negligence against the Defendant. This particular issue has been deliberated and adjudged upon by the Judge in the Second Suit.

Therefore to maintain this present suit would, to my mind be asking the court to relitigate on an issue which had been adjudged upon which, draws the principle of the doctrine of estoppels and res judicata. Thus, on this basis alone the present suit can be struck out as it is an abuse of process of court to relitigate on the same issue which had been determined by the court.

Issue of costs not paid by the Plaintiff in the previous Suit

For completeness, I will address the next issue i.e. as to whether the Plaintiff can pursue the present action when he has failed to pay the costs of the first S5 Suit, which is due and owing to the Defendant.

On this, I refer to the provisions of Order 21 rule 5(l) of the RHC clearly provides that the Plaintiff is required to pay the Defendant's costs of the first action, before proceeding with the present suit. Also refer to the case of ***Palaniappan v Ramanathan & Ors*** [1972] 1 MLJ

227, which states that a Plaintiff having failed in one action commences a second action on the same matter, the second action must be stayed until the costs of the first action have been paid. Thus, the Plaintiff cannot pursue the present action just yet until and unless the Plaintiff paid the costs in the first S% Suit to the Defendant. But, it only goes to state that the present action need only to be stayed, not struck off, in the absence of other factors.

Using the claim of negligence as a cloak to bring the same action

The defendant submits that the Plaintiff has attempted to cloak his present action on the Sports Letter under a claim for negligence in order to circumvent the defences available for defamation and also the Doctrine of Res Judicata and Estoppels.

On this issue, I agree with what is stated in the case of Kapt (B) Hj Mohamad Ismail v Perwira Affin Bank Bhd (No 2) [2001] 5 CLJ 184 and Kho Poh Teck v Digi Telecommunications Sdn Bhd 2 CLJ 957 where the court held that one cannot sue for damages arising from injury to reputation in an action for negligence. For damages for injury to reputation can only be recovered by filing a defamation suit.

However, in the present suit, although the cause of action seems to be different, the issue to be determined still hinged on the fact that whether the sports letter is defamatory of Mohammed Akbar Baba, which again, had been adjudged earlier in the Second Suit.

Therefore, the Plaintiff is precluded from filing a different cause of action premised on the same subject matter, based on the reasons stated.

Conclusion

It is clear that the Plaintiffs present action is an abuse of the process of the Court. The Sports Letter has already been brought through the litigation process in the Second Suit. the Court has already made findings on the contents of the Sports letter.

Accordingly, this is a plain and obvious that the Plaintiff's claim ought to be struck out as the subject matter is now res judicata.

The application of the Defendant is allowed with costs .

Y.A Datin Zabariah bt. Mohd Yusof

Tarikh : 12.06.09

Bagi pihak Plaintiff : Puan Farah Mohd Afzal
Tetuan Azzat & Izzat.

Bagi pihak Defendan : Puan Kavita Karuppanan
Tetuan Shearn Delamore & Co.