IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal under and in terms of Section 5C of the High Court of the Provinces (Special Provisions) (Amendment) Act No.54 of 2006

SC Appeal No : 159/2010

SC/HC/CALA No : 95/2010

NWP/HCCA/KUR No : 05/2009 (Revision)

DC Kurunegala Case No : 6228/M

Anuradhapura Nandawimala Thero,

Viharadhipathi, Dolukanda

Rankothhena Aranya Senasasanaya,

Wedeniya, Hunupola,

Nikadalupotha

Defendant-Petitioner–Appellant

-Vs-

R M Dharamatissa Herath

Hunupola, Nikadalupotha

Plaintiff-Respondent-Respondent

Before : Hon. Priyasath Dep PC, CJ

Hon. S.E. Wanasundera PC, J and

Hon. Prasanna Jayawardena PC, J

Counsel : H. Withanachchi for Defendant – Appellant – Petitioner

G. Alagaratnam, PC with B. lleperuma for Plaintiff – Respondent- Respondent

Argued on : 01.02.2017

Decided on : 08.10.2018

Priyasath Dep PC, CJ

The Plaintiff – Respondent - Respondent (hereinafter referred to as the "Plaintiff-Respondent") instituted action on 05.11.1999 in the District Court of Kurunegala against the Defendant – Petitioner – Appellant (hereinafter referred to as the "Defendant-Appellant") seeking damages in a sum of Rs. 2.5 million for instigating the police to institute criminal proceedings against him in the Magistrate's Court (malicious prosecution) without any reasonable or probable cause whatsoever.

The Police instituted criminal proceedings in the Magistrate Court of Kurunegala in Case No. 26018/87 pursuant to a complaint made by Herath Mudiyanselage Wimalasiri, the Secretary of the 'Dayaka Sabha' of the Defendant-Appellant's hermitage in Dolukanda at the instance of the Defendant-Appellant. The Complaint was to the effect that the Plaintiff-Respondent, his wife and five others introduced items of ladies garments to a chamber in Defendant-Appellant's hermitage with the objective of bringing the Appellant to disrepute. The Plaintiff-Respondent was charged with offences punishable under Sections 440 of the Penal Code for lurking house trespass or housebreaking in order to commit an offence and under section 291B of the Penal Code for deliberately and maliciously outraging the religious feelings of any class by insulting its religion or religious beliefs. The Respondent was thereafter arrested and later released on bail on 08.11.1997.

When the case was first taken up for trial in the Magistrate's Court, the Defendant-Appellant who was the 1st witness in the case was not present in Court and has tendered a medical certificate. The trial was thereafter postponed to 15.02.1998 and the Defendant-Appellant failed to appear even on that day and has not furnished any plausible reason for his absence. The case was postponed to 15.02.1999 and when the case was taken up on that day another medical certificate was produced on behalf of the Defendant- Appellant. The learned Magistrate refused to accept the same and proceeded to acquit the Plaintiff-Respondent

observing that the Appellant is intentionally evading Court and that the other prosecution witnesses were not interested in the case.

The Plaintiff-Respondent after the acquittal instituted action against the Defendant-Appellant in the District Court of Kurunegala in Case No.6228/M claiming damages in a sum of rupees 2.5 million for malicious prosecution. The Defendant-Appellant in his answer stated that the said Magistrate Court case was instituted by the police and not on a complaint made by him and that he was only a witness for the prosecution. The Defendant- Appellant set up a claim in reconvention claiming damages in a sum of Rs. 2.5 million for the vexatious conduct of the Plaintiff- Respondent in filing this action which resulted in tarnishing his reputation and the good name.

The trial in the District Court was fixed for 22.09.2000 and on that date the Defendant-Appellant failed to appear and the learned judge allowed the application for postponement subject to cost and the case was re fixed for 15.12.2000. The Defendant-Appellant failed to appear on that day also and his Attorney – at – Law informed the Court that he had no instructions to appear. Thereafter the learned judge proceeded to hear the case ex-parte allowing the Plaintiff-Respondent to lead evidence. Thereupon having evaluated the evidence led, the learned judge entered an ex-parte judgment in favour of the Plaintiff-Respondent as prayed for in the plaint .The decree was duly served on the Appellant on 27.06.2001.

The Defendant- Appellant filed an application on 03.07.2001 under Section 86(2) of the Civil Procedure Code seeking to set aside the ex-parte judgment stating that the judgment had been entered without a proper adjudication. It should be noted that the Defendant-Appellant did not seek to purge his default through the said application by furnishing a plausible explanation for the default but merely canvassed the merits of the said ex-parte judgment. The inquiry into the said application was disposed of by way of written submissions and the learned District Judge made order dated 30.05.2002 dismissing the Defendant-Appellant's application as the Defendant -Appellant failed to purged his default. The Defendant-Appellant filed a Petition of Appeal bearing No. NWP/HCCA/51/2002 in the High Court (Civil Appellate) of the North Western Province against this order seeking to set aside the same. However this action was abandoned by the Defendant-Appellant having caused substantial expenses to the Plaintiff-Respondent.

After a lapse of eight years, Defendant- Appellant filed a revision application bearing No. NWP/HCCA/ KUR/05/2009 (Revision) before the same court stating that he has received

fresh legal advice that he would not be able to canvass propriety/validity of the ex-parte judgment in the earlier appeal. The High Court delivered its judgment on 25.02.2010 dismissing the appeal and holding that inordinate delay in filing the application, absence of a reasonable excuse and his culpable conduct in the proceedings disentitles him for a relief in revision. The Court also noted that even though the District Judge has not specifically evaluated the evidence, the evidence adduced by the Respondent in the ex-parte trial is sufficient to prove his case.

Questions of Law

The Defendant-Appellant being aggrieved by the said order sought Leave to Appeal from this Court against the said order of the High Court and obtained leave on following questions of law;

a) Has the High Court erred in law in its reasoning that the evidence adduced at the ex-parte trial was sufficient to establish the Respondent's case?
b) Did the Civil Appellate High court err in law by its failure to consider that what was in issue was not sufficiency of evidence alone but whether the Respondent has made out the constituent elements in an action for malicious prosecution?

The first question of law

It is pertinent to refer to the submissions made by both parties regarding the sufficiency of evidence adduced at the ex-parte trial to establish the case of the Plaintiff –Respondent.

The Defendant- Appellant submitted that the learned District Judge proceeded to grant reliefs prayed for in the Plaintiff-Respondent's plaint on the basis that the evidence of the Plaintiff-Respondent has not been controverted. There should be proper evaluation of facts and the law even in an ex-parte trial.

Unlike in an inter parte trial, the trial judge will not have the benefit of the cross examination which will test the credibility of the witnesses and the admissibility of the documents. This is due to conduct of the defaulting party. In any civil case whether trial is an ex- parte or inte-parte judgement should be in accordance with section 187 of the Civil Procedure Code.

Section 187 reads thus:
'The judgement shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision; and the opinions of

the assessors(if any) shall be prefixed to the judgement and signed by such assessors respectively'.

In the case of *Sirimavo Bandaranaike Vs Times of Ceylon Ltd* (1995)1 Sri L.R pp 22-44 Justice Mark Fernando held that:

> "Even an E*x parte* trial , the judge must act according to law and ensure that the relief claimed is due in fact and in law, and must dismiss the plaintiff's claim if he is not entitled to it. An *Ex parte* judgement cannot be entered without a hearing and an adjudication."

> "Section 85(1) requires that the trial judge should be "satisfied" that the Plaintiff is entitled to the relief claimed. He must reach findings on the relevant points after a process of hearing and adjudication. This is necessary where less than the relief claimed can be awarded if the judge's opinion is that the entirety of the relief claimed cannot be granted. Further, sections 84,86 and 87 all refer to the judge being "satisfied" on a variety of matters in every instance ; such satisfaction is after adjudication upon evidence".

> "There are two distinct issues. The first is whether the ex parte default judgment was procedurally proper and this depends on whether a condition precedent had been satisfied, namely whether a proper order for ex parte trial had been made and whether the defendant had failed to purge his default. The second is whether , apart from the default, the ex parte default judgment was, on the merits i.e.in respect of its substance, vitiated by lack of jurisdiction, error and the like".

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Submissions of the Parties

Defendant-Appellant submitted that it is manifest from the ex-parte judgment that the learned trial judge has failed to observe the requirements under Section 85(1) an 85(2) of the Civil Procedure Code. Defendant- Appellant submitted that the learned judges of the High Court, even after observing such deficiency in evidence has held that such deficiency has not resulted in a miscarriage of justice. Defendant-Appellant has further submitted that although

the learned judges of the High Court had come to a conclusion that the evidence led on behalf of the Plaintiff-Respondent was sufficient to establish his claim, Plaintiff-Respondent has not proved the elements required for an action in malicious prosecution.

The Plaintiff- Respondent on the other hand had submitted that there is no basis for interfering with the judgment of the District Judge as the ingredients for malicious prosecution and the basis for the award of damages are sufficiently evidenced by the material on record notwithstanding that the learned District Judge has not gone into details in analyzing evidence.

In support of his position the Plaintiff- Respondent has cited several cases including two Court of Appeal Judgments. In the case of *Rev. Minuwangoda Dhammika Thero vs Rev Galle Saradha Thero 2003(3) SLR* 247 it was held that *Though there is no evaluation of the evidence led, on an examination of the evidence led at the ex-parte trial, it appears that the trial judge was correct*."

In *Victor and Another Vs Cyril De Silva 1998 (1) SLR.* where court held that where there was sufficient material on record the appellate court will not interfere.

These judgments have considered whether mere absence of reasons or failure to evaluate evidence in ex-parte judgement would vitiate the judgment or not, where there was sufficient material on record

These judgments have also considered the requirements set out in Section 187 of the Civil Procedure Code (requisites of a judgment) together with Article 138 (1) of the Constitution including the proviso which reads as follows; "*Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity which has not prejudiced the substantial rights of the parties or occasioned a failure of justice*"

The Plaintiff-Respondent has also emphasized the fact that the learned High Court judges have affirmatively held that there is sufficient evidence on record. It was submitted that failure to evaluate evidence or give reasons should not affect the validity of the judgment if there is sufficient evidence to satisfy the Judge.

Second Question of Law

The Second question of law in this appeal is whether the Plaintiff-Respondent has proved the constituent elements in an action for malicious prosecution or not.

The action of the Plaintiff -Respondent is an action for recovery of damages for malicious prosecution which is governed by the principles of Roman Dutch law. It is the submission of the Defendant-Appellant that the Plaintiff-Respondent had failed to prove necessary elements required in an action for malicious prosecution.

R.G.Mckerron (Law of Delict -6th Platinum Re-Print 2009 at page at 259) stated :

> "Every person has a right to set the law in motion, but a person who institutes legal proceedings against another maliciously and without reasonable and probable cause abuses that right and commits an actionable wrong. Although the rule is directly traceable to the influence of English Law it has its origin in principles which are common to our law and the law of England"

('Our law' referred to the judgment is South African Civil law which is based on Roman Dutch Law').

In the case of *Karunaratne Vs Karunaratne 63 NLR 365*, in which Basnayake J has observed as follows;

> "*To succeed in an action of this nature, the Plaintiff must establish that the charge was false and false to the knowledge of the person giving the information that it was made with a view to prosecution, that it was made 'animo injuriandi' and not with a view to vindicate pubic justice and that it was made without probable cause…*"

The substantive requirements of the action for malicious prosecution can be described as follows;

a) The institution of proceedings
b) The absence of reasonable and probable cause
c) Malice
d) The termination of proceedings in Plaintiff's favour.
e) Damages.

I. Institution of proceedings

The Defendant-Appellant's contention is that the said proceedings in the Magistrate's Courts were instituted by the police based on investigations conducted by the police and that the Defendant- Appellant merely made a statement in the course of the investigations. The Defendant- Appellant submitted that the report filed by the police in the Magistrate's Court in Case No. 26018/91 discloses that the complaint has been made by one Herath MudiyanselageWimalasiri and based on that complaint the Officer- in –Charge conducted investigations and that the investigations revealed that ladies' garments have been introduced to one of the rooms in the Defendant-Appellant's hermitage. According to the Defendant-Appellant this investigation provided sufficient material to charge the suspects in the Magistrate's Court. Defendant- Appellant has further submitted that other than getting the said Wimalasiri to report the incident to the Police, he has not instigated and/or set in motion the prosecution and that the police was justified in instituting the action on the material which was revealed in the course of the investigations.

The Defendant- Appellant has cited the case of *Saravanamuttu Vs Kanagasabai 43 NLR 357* where Howard CJ expressed the view that:

"*In an action for malicious prosecution in order to establish that the defendant set the criminal law in motion against the plaintiff that there must be something more than a mere giving of information to the police or other authority who institutes the prosecution. There must be the formulation of a charge or something in the way of solicitation, request or incitement of proceedings*."

The Privy Council judgment in *Tewari Vs Bhagat Singh 24 TLR 884* which has been quoted with approval in *Hendriack Appuhamy Vs Matto Singho 44 NL459* is relevant to the facts of the present case. It states thus:

> "If a complainant did not go beyond giving what he believed to be correct information to the Police and the Police, without further interference on his part (except giving such honest assistance as they might require) thought fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge was false to the knowledge of the

complainant, if he misled the Police by bringing suborned witnesses to support it, if he influenced the Police to assist him in sending an innocent man for trial before the Magistrate, it would be equally improper to allow him to escape liability because the prosecution had not technically been conducted by him. The question in all cases of this kind must be – Who was the prosecutor ? And the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion was not the criterion, the conduct of the complainant, before and after making the charge, must also be taken into consideration."

The Plaintiff- Respondent maintains the position that it was Defendant- Appellant who instigated the police to institute proceedings in the Magistrate's Court. Plaintiff-Respondent states that there are contradictions between the statements made by the Appellant and Wimalasiri who gave the first information to the police, He further submitted that it was at the instance of the Appellant, Wimalasiri made the first complaint to the police. Further the Plaintiff-Respondent has submitted that the complaint was a false complaint made to tarnish his reputation and image.

Plaintiff-Respondent submitted that he was falsely implicated in the case because of campaign he led to protect the Dolukanda forest reserve from the illegal constructions of the Appellant and consequently the ill will that the Appellant bore towards the Respondent. It is abundantly clear that the Defendant -Appellant instigated the police to institute proceedings. Having instituted proceedings the Defendant -Appellant kept away from Courts and his conduct is reprehensible.

II. Failure of Prosecution

In the Magistrate's Court proceedings, the Plaintiff-Respondent was discharged under section 188(1) of the Code of Criminal Procedure Act as the Defendant-Appellant and other witnesses repeatedly failed to appear on the given dates. However the Appellant attributes the failure of the prosecution to the Police and not to him and maintains the view that he was merely a witness in the said proceedings. Therefore it is the contention of the Defendant-Appellant that the failure of the prosecution in the said case was attributable to the lethargic conduct of the Police for not securing the presence of the complainant Wimalasiri and witness Karunaratna.

It is the failure on the part of the Defendant- Appellant and his witnesses to attend Courts that led to the discharge of the Plaintiff-Respondent. (the Magistrate in his order referred to it as an acquittal). Police did not reopened the case within one year and under section 188(2) of the Code of Criminal Procedure Act an order of discharge operates as an acquittal. The proceedings have terminated in favour of the Plaintiff-Respondents.

III. Malice and the absence of reasonable and probable cause.

The Defendant-Appellant has submitted that the Police after conducting investigations had a probable and reasonable cause to institute action. In relation to the element of malice, Defendant -Appellant's position is that when he made the statement to the police on 07.11.1997, the police had already commenced their investigations. He came to know of the involvement of the Plaintiff-Respondent in the course of the investigations.

The Plaintiff-Respondent submitted that his evidence and the documents marked and produced as P1, P2, P3, P4, P11, P13, P14, P15, P16, P17, P18, P19,P20 shows the motive to falsely implicate him due to the fact that he has played an active role in protesting and canvassing public authorities and officers against the Appellant's illegal destruction of valuable forest reserve as well as causing environmental degradation.

R.G. Mckeron, Law of Delict (supra) at pages 263-264 states that

> "*The Plaintiff must prove that the defendant actuated by malice. By malice it is to be understood not necessarily personal spite and ill will, but any improper or indirect motive some motive other than a desire to bring to public a person who one honestly believes to be guilty*" He goes on to explain that "*the existence of malice can be established either by showing what the motive was and that it was wrong or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor. Malice may be inferred from want of reasonable and probable cause, but it is not a necessary inference….."*

The Plaintiff- Respondent by giving evidence and producing documents proved that he campaigned against the activities of the Defendant -Appellant that resulted in ill will and personal animosity towards the Plaintiff- Respondent.

With regard to reasonable and probable cause, Respondent has cited the definition provided by *Hawkins J in Hicks Vs Faulkner (1878) 8 QBD 167* pg 171 "to be *an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds of the existence of a state of circumstances which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.*"

Plaintiff-Respondent submits that these ingredients are lacking in Defendant. Appellant who had acted with malice without reasonable and probable cause.

Damages

The next question is whether the Plaintiff is entitled to the damages claimed for or to the part of the claim. Malicious prosecutions belong to class of actions falling under Actio Injuriarum. In such an action the Plaintiff can claim damages for pain of mind, injury to feelings and reputation and also for patrimonial loss. Plaintiff- Respondent has testified that he was getting a monthly profit of Rs. 150,000/- to 200,000/- and since the criminal case was instituted he was prevented from properly conducting his business causing him a loss of Rs. 2.5 million to Rs.3 million. However Defendant-Appellant submitted that no documentary proof of accounts of the business have been produced apart from the evidence of the Plaintiff-Respondent who had given evidence of his business, its earnings and the losses .

Plaintiff-Respondent on the other hand has submitted that considering the unchallenged evidence produced in court, the judgment for a sum of Rs. 2.5 million cannot be alleged as arbitrary or excessive. Citing Gatley-Libel and Slander (11th Edition) pp 265-270 stated that Malicious prosecution involves hurt to reputation and feelings and this is not something that can be technically or arithmetically calculated/quantifiable but is based on policy considerations depending on the status, position of the person affected and the nature of the prosecution. Compensation unlike in other cases is not merely to repair damages but punitive and deterrent.

Plaintiff-Respondent is a long standing resident of the area, a businessman involved in social work and politics , Member of the Pradeshiya Sabha .Due to the institution of the Criminal proceedings he was arrested and remanded and was subjected to much humiliation and pain of mind. The proceedings before the Magistrate's Court has taken more than 15 months.

Conclusions

In order to succeed in his action, the Plaintiff- Respondent is required to prove that in fact and in law he is entitled to the relief claimed for. The Plaintiff -Respondent gave evidence and produced documents marked P1-P20 and satisfied the Court that he is entitled to judgment in his favour. His evidence alone and document he produced are sufficient to prove his case. It was alleged that the District Judge failed to evaluate the evidence and thereby failed to comply with section 183 of the Civil Procedure Code.

The learned Judges of the High Court observed that even though the District Judge has not specifically evaluated the evidence, the evidence adduced by the Respondent in the ex-parte trial is sufficient to prove his case. The High Court in its judgment dismissing the appeal held that the inordinate delay in filing the revision application, absence of a reasonable excuse and the Plaintiff -Respondents culpable conduct in the proceedings disentitles him for a relief in revision.

I hold that failure to give reasons or to evaluate evidence in ex parte trial will not affect the validity of the judgment if there is sufficient evidence on record to satisfy the judge that the Plaintiff -Respondent is entitled to the relief claimed for. Proviso to Article138(1) of the Constitution could be applied to section 183 of the Civil Procedure Code. Therefore the Appellate Court should not interfere with the Judgment if the evidence placed before the Court is sufficient to satisfy the Judge and the judgment is correct and "*has not prejudiced the substantial rights of the parties or occasioned a failure of justice*"

I hold that the High Court (Civil Appeals) did not err in law in its reasoning that the evidence adduced at the ex-parte trial was sufficient to establish the Respondent's case.

The next question is whether the Plaintiff -Respondent established the necessary elements of malicious prosecution. In the Magistrate's Court, Police instituted criminal proceeding under section 136(1) B of the Code of Criminal Procedure Act. The virtual Complaint is Wimalasiri, the secretary of the Dolukanda Hermitage. He was instigated by the Defendant -Appellant to make the complaint and thereby the Defendant -Appellant became the accuser in this case. The proceeding instituted in this case ended in an acquittal and the proceedings terminated in favour of the Plaintiff- Respondent. The Plaintiff -Respondent established that the Defendant -Appellant acted maliciously and without reasonable and a probable cause.

Plaintiff -Respondent had proved the necessary elements of malicious prosecution. The damages awarded is not excessive.

High Court (Civil Appellate) did not err in law when it held that the Plaintiff -Respondent has made out the constituent elements in an action for malicious prosecution.

The next question is whether Plaintiff -Respondent is entitled to the damages claimed for and if so the amount (quantum) of damages to be awarded.

Due to the institution of criminal proceeding, the plaintiff suffered damages. His reputation as a politician, social worker and businessman was tarnished. He was humiliated and insulted . His business was affected. The Plaintiff's evidence and the documents produced is sufficient to prove damages. The conduct of the Defendant - Appellant is deplorable and damages should be punitive and deterrent. I am of the view that the damages awarded is reasonable and not arbitrary or excessive.

I affirm the judgment of the District Court and the Judgment of the High Court of Civil Appellate.

The Appeal dismissed. The Defendant-Appellant is ordered to pay Rs. 100,000/= (one hundred thousand) to the Plaintiff-Respondent as Costs. Further the Plaintiff-Respondent is entitled to cost in the District Court and in the High Court (Civil Appellate).

Chief Justice

S.E.Wanasundera P.C., J.

I agree.

Judge of the Supreme Court

Prasanna Jayawardena P.C., J.

I agree

Judge of the Supreme Court