

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

SC Appeal 162/15

Application No: SC HC (CA) LA 464/2014

NWP/HCCA/KUR/134/2010(F)

DC Kurunegala Case No: 9540/M

In the matter of an Application for leave to Appeal from the judgement dated 4th August 2014 of the High Court (Civil Appeal) of North Western Province made under and in terms of the Section 5(c) of High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 Of 2006

Sadayan Kanapathi Sandrakala

Kadithalamulla, Polgahawela

Plaintiff

Vs.

Mohammed Saththas Issathul Sareena,

No.10, Kurunegala Road,

Bandawa, Polgahawela

Defendant

AND

Sadayan Kanapathi Sandrakala

Kadithalamulla, Polgahawela

Plaintiff-Appellant

Vs.

Mohammed Saththas Issathul Sareena,

No.10, Kurunegala Road,

Bandawa, Polgahawela

Defendent-Respondent

AND NOW

Mohammed Saththas Issathul Sareena,
No.10, Kurunegala Road,
Bandawa, Polgahawela

Defendent-Respondent- Petitioner

Vs.

Sadayan Kanapathi Sandrakala
Kadithalamulla, Polgahawela

Plaintiff-Appellant-Respondent

Before: B.P Aluwihare, PC, J.

L.T.B Dehideniya, J.

Murdu N.B Fernando, PC, J.

Counsels: Keshan Thalagahagoda with Ms. Rashmi Dias for the Defendant-Respondent-Appellant

Kamal Nissanka for Plaintiff- Appellant – Respondent instructed by Lakshman Herath

Argued on: 04.09.2020

Decided on: 01.12.2021

L.T.B. Dehideniya, J.

Plaintiff-Appellant- Respondent (hereinafter sometime referred to as the Respondent) instituted an action by plaint dated 30.05.2006 seeking damages from the Defendant – Respondent –Petitioner (hereinafter sometime referred to as the Appellant). In her plaint, the Respondent had alleged that the Appellant had made a false complaint to the Polgahawela Police Station accusing the Respondent of Theft. Upon the said complaint, the Respondent had been arrested, produced in Court, remanded for 10 days and thereafter released on bail. The Magistrate Court of Polgahawela

had discharged the Respondent on or about 06.12.2005, on the basis that the witnesses had not presented themselves in Court. Consequent to the filing of the action in the District Court, the proceedings against the Respondent before the Magistrate Court (Case bearing No.13028) had been reopened. The matter had been taken up for trial and the Respondent was acquitted and discharged on or around 16.03.2010. The Respondent's cause of action of the District Court action arose when the Respondent was discharged by the Magistrate's Court on the account of the fact that the witnesses had not presented in Court, before the case was reopened.

The Respondent contested that the Appellant's act of false allegation of theft, constituted an aggression upon her person, her dignity or her reputation, and that the act was intentional. The Respondent has further stated that, in consequence of the complaint made by the Appellant, the Respondent had been arrested, assaulted by Police and thus suffered physical and mental trauma, the Respondent had to relocate with her family due to extreme social stigma and resulted in losing her small business and the education of the Respondent's child had got affected. The Respondent had denied the charges of theft and further contends that the Appellant had no reasonable or probable cause to make the said complaint and the Appellant has committed an *injuria* with the intention of impairing Respondent's dignity, reputation and personality. Accordingly, the Respondent claimed a sum of Rs.400, 000/- as damages

The District Court of Polgahawela delivered the judgement dated 01.09.2010 in favour of the Appellant holding that no sufficient evidence was led that would establish that the Appellant acted maliciously or that she made a false complaint. District Court further held that the Respondent's claim was not explicit enough to consider whether the Respondent's action was based on *actio injuriarum* or malicious prosecution. Being aggrieved by the said judgement the Respondent tendered an appeal there from to the High Court of Civil Appeal of the North Western Province. Upon hearing the parties, the High Court of Civil Appeal delivered the judgement dated 04.08.2014 in favour of the Respondent, set aside the Judgement of District Court of Polgahawela holding that the Respondent's action comes under the *actio injuriarum* and not malicious prosecution. The Learned High Court Judges further affirmed that the Appellant has failed to establish a reasonable and probable cause in making the allegations of theft. It is from the aforesaid judgement that this appeal is preferred.

This Court granted leave to appeal on the following questions of law;

- 1) Did the High Court err in law by failing to appreciate that the rights of parties are determined as of the date of the institution of the action and that consequently the Judgement of the Magistrate's Court could not have formed the foundation of the judgement in favour of the Plaintiff?
- 2) Did the High Court err in law by failing to consider that the action before the District Court could not be maintained while proceedings were still pending before the Magistrate's Court and that no cause of action would accrue until a finality had been reached in respect of such proceedings in terms of the law?
- 3) Did the High Court misdirect itself in law applying the judgement of *Alwis v. Ahangama*?

The Appellant's case is based on the ground that the judgement of the High Court of Civil Appeal of the North Western Province, is wrong, contrary to law and against weight of the evidence led before the Court. When carefully considering the evidence tendered before the Magistrate Court in the initial action, it appears that the Appellant had made the said complaint only upon a 'suspicion' against the Respondent (Appellant's Statement to the Police Station of Polgahawela marked as 37.1 in the original action). Examining all the evidence presented, it appears that the series of events in which the Appellant lined up the theft that allegedly took place at her place of business was based on the conclusions drawn from the suspicion of the Respondent. Among the factual evidence submitted in the said police complaint and the evidence presented at the proceedings, multiple contradictory evidence has been detected. Although it is recorded in 37.1 the police complaint, that the Appellant went home having closed the shop at about 5.00 p.m., it seems to be an inaccurate fact since the evidence of the Appellant in Case bearing No.13028 in Magistrate's Court as well as in the District Court of Kurunegala (Case bearing No.9540/M) was that her daughter closed the shop in that evening (at p.61 of the proceedings). However, when the learned counsel had shown the Appellant what was recorded in the Police Records, the Appellant was unable to provide a justifiable reasoning for the contradictions of the evidence.

Further, the Appellant has clearly stated in her Police Complaint that there was no eyewitness evidence of the theft suspected to have been committed by the Respondent; except the evidence that the missing clothing items were there for sale with few cloth merchants, namely; Rajapakse

Siril Anandathilake and Nisantha Bandara, at the fair of Polgahawela. However, the police statements obtained from the said merchants were not submitted and they had not been produced before the Court as witnesses. When carefully considering the Police Records, it appears that the said merchants had failed to recognize the clothing items as the exact same missing clothing items belongs to the Appellant. Further, when the learned counsel cross-examined, the Appellant had failed to even recognize the identities of the two merchants.

As per the aforesaid context;

- i. The Appellant has failed to substantiate the allegation of theft against the Respondent by clear evidence.
- ii. Contradictions identified in the Appellant's evidence throughout the court proceedings has damaged the credibility of the Appellant's allegations against the Respondent.

Accordingly, with the perusal of the factual evidence pertaining to the present application, it is clear that there was no reasonable or probable cause for the Appellant to suspect the Respondent of theft.

The learned District Judge in the judgement dated 01.09.2010 held that the Respondent's claim was not explicit enough to consider whether the Respondent's action was based on *actio injuriarum* or malicious prosecution. The District Court further held that, the action must be dismissed since the Respondent had failed to establish direct evidence on malice or *injuria* with regard to the complaint of theft of the Appellant against the Respondent. The law has introduced a set of essential factors in establishing an action of *actio injuriarum* and malicious prosecution. **R.G Mckerron** (The Law of Delict, Reprinted Edition, 2009 at p.53) describes *actio injuriarum* as an act committed with *dolus* (wrongful intent) or as it is usually termed in this connection, *animus injuriandi* which consisting an impairment of the Plaintiff's personality.

“The interests of personality protected by the actio injuriarum are those interests ‘which every man has, as a matter of natural right, in possession of an unimpaired person, dignity and reputation’. The plaintiff therefore, show that the act complained of constituted an impairment of his person, dignity and his reputation.

Examples such acts are;

- *Assaults of all kind*
- *The unjustifiable infliction of any restraint upon the liberty of another*
- *The use of defamatory or insulting words concerning another*
- *The malicious and unwarranted institution of criminal proceedings against another* [emphasis added]

The legal principle of "ABUSE OF LEGAL PROCEDURE" under *actio injuriarum* action has been discussed and accepted in case law jurisprudence. In *Alwis v. Ahangama* [2000] 3 Sri L.R 225 Justice Fernando referring to **R.G Mckerron** (The Law of Delict, Reprinted Edition, 2009 at p.259), held that in both injuria and malicious prosecution has a general requirement to be fulfilled, which is to "*set the law in motion*".

"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...

The chief classes of proceedings to which the rule applies are: 1) Malicious criminal prosecutions 2) Malicious imprisonment or arrest 3) Malicious execution of property 4) Malicious insolvency 5) Malicious civil actions"

In light of the well-established legal principles discussed above, it is clear to this court that in the present application, the Appellant has 'set the law in motion' by making the police complaint against the Respondent. Furthermore, it is undeniable that, being arrested upon the said complaint, the Respondent was produced in Court and remanded for 10 days, itself constructs an *injuria* since the said complaint of the Appellant has led to an impairment of personality, dignity and reputation of the Respondent.

It is a question with great importance before this Court that, whether the Appellant has acted maliciously when making the alleged complaint of theft against the Respondent. The necessary ingredients forming a charge of malicious criminal arrest are discussed in *Chitty Vs. Peries* (41 N.L.R 145 at page 147), Howard CJ stated that the Plaintiff must show (i) *that his arrest on a criminal charge was instigated, authorized or effected by the Defendant* (ii) *that the Defendant acted maliciously* and (iii) *that the Defendant acted without reasonable and probable cause.*

The Respondent has stated that the Appellant lodged the Police complaint purely on malicious intent. Upon the process of adducing evidence before the Court, the Respondent has stated that the Appellant had a quarrel with the Respondent over a personal dispute, and consequently made the said Police complaint, wilfully or intentionally to cause harm, without legal justification against the Respondent. When carefully observing the evidence led before this court, it appears that the Appellant has failed to rebut the Respondent's evidence on the aforesaid personal dispute (at p.2-3 of the proceedings) and had no other reasonable or probable cause for the allegations of theft against the Respondent, except the said personal dispute. Further, it is clear to this court that it was the Appellant's Police complaint that led to the arrest of the Respondent. Therefore it is evident that, the necessary ingredients forming malice have been satisfied by the Respondent. Therefore, it is conspicuous that, the respondent's claim in this case is not based on malicious prosecution as understood in the English Law, but founded on principles of *actio injuriam* known to the Roman Dutch law.

It is a pivotal issue, whether the respondent could maintain this action if the criminal proceedings against the respondent in the Magistrate's Court had not reached a finality at the time the present civil proceedings was instituted against the Petitioner. The Appellant submits that, one of the essential requirements to be fulfilled to maintain such a case is termination of criminal proceedings in the Magistrate's Court in favour of the Respondent, at the time when civil proceedings for damages was instituted. The key to this issue depends on the degree of the definition of the "cause of action". In this regard the definition of the cause of action given in ***Ranghami v. Kirihamy*** (1904) 7 NLR 357 would be a useful guidance in resolving the issues. Layard C.J at p.359 stated as follows;

"Brett, J., had previously in Jackson v. Spittal (5 C. P. 552) laid down that a cause of action was the act on the part of the defendant which gives the plaintiff his cause of complaint. Taking that as the true definition of 'cause of action'.."

This definition has been accepted and adopted in the case of ***Somasiri v. Ceylon Petroleum Corporation*** [1992] 1 Sri. LR 39 at p.43. As far as the present application is concerned what caused the Respondent to institute a civil action? It is the malicious initiation of a criminal proceeding against the Respondent without any reasonable and probable cause. It is the very act

of maliciously making a Police complaint without a probable cause, that led the Police to arrest the Respondent, which has made the Respondent institute the civil action upon the *injuria*. Further, when carefully observing the factual evidence, it is obvious that the Respondent instituted the civil action for damages after she was discharged by the Magistrate's Court, on or about 6th December 2005 by reason of the witnesses had not presented themselves in Court. Therefore, even the proceedings against the Respondent before the Magistrate Court (Case bearing No.13028) had been reopened after the filing of the action in the District Court, The Respondent's cause of action for the civil action arose when the Respondent was discharged by the Magistrate's Court on the account of the fact that the witnesses had not presented in Court, before the case was reopened. Moreover, according to the proceedings, leading evidence of the District Court commenced only on 24.03.2010, after the Respondent was acquitted and discharged on or around 16.03.2010 by the Magistrate's Court (Case bearing No. 13028). And the said judgement was marked and produced at the trial of the District Court.

Looking at the decided cases, where similar legal issues were discussed, it also appears that there is no legal impediment to the Respondent to maintain a civil action against the Appellant, when the Respondent has tendered convincing evidence of 'cause of action' against the Appellant.

In *Kalu Banda vs. Rajakaruna* [2002] 3 Sri L.R 44 at p.44,

The plaintiff-respondent instituted action seeking damages alleging that the defendant petitioner without any reasonable and probable cause maliciously prosecuted him by instituting criminal proceedings in the Magistrate's Court. The criminal action in which the plaintiff-respondent was being prosecuted had not been terminated. The defendant-petitioner contended that, no cause of action had accrued to the plaintiff-respondent to sue him in a civil action for malicious prosecution as the criminal action had not been terminated at the time the present civil action for malicious prosecution was instituted against him. The District Court held that the action is maintainable.

Held:

(1) As far as the present civil action is concerned, it is the institution of criminal proceedings maliciously without any reasonable and probable cause that had caused the plaintiff to institute Court proceedings.

(2) The plaintiff-respondent's claim is not based on malicious prosecution as understood in the English Law but founded on principles of actio injuriam known to the Roman Dutch Law.

The reasoning adopted In *Alwis vs. Ahangama* [2000] 3 Sri. L.R by Fernando J., at p. 238, provides legal guidance in determining whether a civil action is maintainable in an application where similar legal issues arise as discussed in the present application.

“I therefore hold that the Plaintiff’s action was maintainable. Being an action in respect of an injuria allegedly committed by the Defendant, by (a) maliciously, and (b) without reasonable and probable cause (c) making a defamatory complaint (of theft) against the Plaintiff (d) which resulted in legal proceedings against the Plaintiff (namely his arrest and production in the Magistrate’s Court)”

Therefore, taking into account the relevant case law and legal principles, I am of the view that the Respondent’s civil action seeking damages for injuries occurred as a result of the false Police complaint is maintainable against the Appellant.

The harm or loss which gives rise to the *actio unjuriarum* is a violation of a personality interest, usually classified as *corpus*, or bodily integrity, *dignitas*, or dignity; and *fama*, or reputation. as per the averments of the plaint dated 30.05.2006, the Respondent had sought damages for the patrimonial loss and the injuries done to her personality, dignity and reputation. However, when carefully observing the evidence led before the Court, it appears that the Respondent has not tendered evidence on patrimonial loss she suffered due to the false complaint made by the Appellant against the Respondent. Therefore, when assessing damages in respect of non-patrimonial loss, which does not have an economic or pecuniary value, the court exercises its own judgement in the matter and strives to determine awards which will be fair to the Respondent as well the Appellant.

The allegation of theft made by the Appellant without a reasonable and probable cause had led the Police to arrest the Respondent, detained at a remand prison for ten days. The Respondent had to endure many hardships including humiliation of being labelled as thief, her child being insulted at school as a child of a thief which had effected the child’s education and his mental health, and she and her family had to change the locality and relocate to Colombo in order to avoid `the extreme social stigma. Furthermore, the Respondent had to give up her small business when relocating to

Colombo, causing her severe financial hardship. In respect to all the evidence tendered by both parties, it is clear to this court that the Respondent has been able to successfully establish her evidence on the *injuria* caused by the Appellant's Police complaint of theft against the Respondent. However it is important to point out that, the Appellant has failed to rebut the aforesaid evidence in the Court.

I answer the questions of law as follows,

- 1) No
- 2) No
- 3) No

By considering above circumstances, I am in the view that, this Court will not interfere with the judgement of the High Court of Civil Appeal of the North western Province.

Appeal dismissed with costs.

Judge of the Supreme Court

B.P Aluwihare, PC, J.

I agree

Judge of the Supreme Court

Murdu N.B Fernando, PC, J.

I agree

Judge of the Supreme Court