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

Pathirage Don Abeyratne,
Panadura Road,
Ingiriya..

Plaintiff -Appellant

Vs

C.A.NO.818/97 (F)
D.C.HORANA CASE NO.4918/L

Gamage Don Chandradasa,
Weerananda Mawatha,
Rathmalgoda,
Poruwadanda..

Defendant-Respondent

BEFORE : **SISIRA DE ABREW,J**

K.T.CHITRASIRI,J.

COUNSEL : Shiran Lakthilaka with N.J.P.Silva
Attorney-at-Law for the Plaintiff-Appellant

Defendant- Respondent is absent and unrepresented

ARGUED ON ; 1ST JUNE 2011

DECIDED ON : 23RD JUNE 2011

CHITRASIRI, J.

Plaintiff-Appellant (hereinafter referred to as the plaintiff) filed this appeal seeking to set aside the judgment of the learned District Judge of Horana, dated 11th September 1997 wherein he dismissed the plaintiff's action with costs.

Plaintiff in his plaint had claimed damages in a sum of Rs.400,000/- with interests on the ground that a prosecution had been instituted maliciously against him upon the initiative of the defendant-respondent. (hereinafter referred to as the defendant) In that plaint it is stated that the plaintiff was prosecuted in the Magistrate's Court of Horana in the Case bearing No. 75959 on a charge of contempt of Court pursuant to a complaint made on the 28th November 1986 by the defendant. The Magistrate having recorded part of the evidence of the defendant, being the first and the star witness in that case, acquitted the accused (plaintiff) as there was no sufficient evidence to prove the charge of contempt of court. Relying upon the said acquittal; plaintiff filed this action in the District Court for malicious prosecution stating that the said prosecution was a result of the complaint dated 28th of November 1986 of the defendant.

This appeal being an application to revise a judgment concerning a claim made for malicious prosecution, I will first refer to the law relevant to the claims made for the *injuria* caused by malicious prosecution. In **"THE LAW OF DELICT" by R.G.McKerron (Sixth Edition at page 244)** it is mentioned that:

"It is an actionable wrong to institute criminal proceedings against any person maliciously and without reasonable and probable cause. But to entitle the plaintiff to succeed in an action for malicious prosecution he must show that the institution of the proceedings caused him pecuniary loss, or that the charges were calculated to injure his reputation. [This rule is substantially the same in English Law. Ref.Salmond 717] Thus, a charge which is not of a scandalous nature and which can result in the imposition of a fine only- for example, a prosecution for the breach of a municipal by –law prohibiting the parking of motor-cars in a non-parking area will not ground an action for malicious prosecution, unless it causes pecuniary loss."

Having explained the nature of the delict of malicious prosecution, McKerron goes on to mention the ingredients that are necessary to establish such a delict. At page 246 of the same text book he states;

"In an action for malicious prosecution or other malicious proceedings, the plaintiff must show that;

1) The defendant instituted the proceedings;
2) The defendant acted without reasonable and probable cause;
3) The defendant was actuated by malice; and
4) In the case of certain classes of proceedings, the proceedings terminated in his favour."

These matters have been discussed by Shirani Thilakawardane J. in the case of **Silva V. Silva as well. [2002 (2) S L R 29 at page 31]** In that decision it is stated; "In a case of malicious prosecution whilst the onus of proof is on the plaintiff, he must prove on a preponderance of evidence or on a balance of probabilities that:

- There was a prosecution on a charge that was false;
- Such prosecution was instituted maliciously or with *animo injuriandi* and not with a view to vindicate public justice,
- There was want of reasonable or probable cause for such action,
- The prosecution terminated in favour of the plaintiff as against the complainant."

Having referred to the applicable law, I will now look at the facts of this case to ascertain whether the plaintiff was successful in establishing the aforesaid criteria referred to in the aforementioned authorities.

In the complaint alleged to have been made by the defendant to the police, (P1) he had stated that the plaintiff threatened to kill him and also used obscene language whilst the threat was being made. He also had said that the incident occurred near the accused box in the court-room. At the trial held in the Magistrate's Court too, the defendant has given evidence in the same manner which fell in line with the contents found in the said complaint to the police. However, the contents in the statement to the police and also in the evidence recorded before the learned Magistrate did not reveal that there had been any disturbance for the conduct of the proceedings of the

Magistrate's Court though the charge levelled against the plaintiff was that of a contempt of court based upon the contents of the statement made by the defendant. Subsequently, considering the evidence recorded before him learned Magistrate acquitted the accused (plaintiff in this case) of the charge of contempt for want of sufficient evidence to prove the same.

Therefore, it is beyond doubt that the proceedings in the Magistrate's Court had been terminated in favour of the plaintiff. However, merely because the decision in the lower court was in his favour, damages for malicious prosecution cannot be awarded to the plaintiff, unless the other necessary requirements referred to in the aforesaid authorities are proved on a standard required in a civil suit namely on a balance of probability.

As mentioned by Mckerron, defendant himself should have instituted action in the Magistrate's Court for the plaintiff to succeed in a case to claim damages for malicious prosecution. However, McKerron also state that if the defendant had set the law in motion having made a complaint against the plaintiff then the defendant could have been made liable for the delict of malicious prosecution.

Although the case in the Magistrate's Court was a result of the complaint by the defendant, the learned Magistrate had found that there had not been sufficient evidence to prove the charge of contempt of court filed against the plaintiff. However, such an acquittal based on a specific charge cannot rule out the fact that the plaintiff

could have had the similar result namely an acquittal, in the event the correct charge was filed in accordance with the material available to the police. Contents of the statement of the defendant to the police may have been sufficient to file a different charge that could have been sustained successfully to obtain a conviction. Therefore, I am unable to decide that there had been falsehood in the statement of the defendant which instigated the police to file action in the Magistrate's Court. As no cogent material to establish the falsehood of the complaint of the defendant that led to file action in the Magistrate's Court, it is impossible to conclude that the defendant set the law in motion to prosecute the plaintiff.

Moreover, it is a fact that the filing of charges had been done solely by the police and the defendant had no hand in deciding upon the charges that were to be filed. This proposition is supported by looking at the dates relevant to the incident as well. Charge of contempt of court under the provisions of the Judicature Act was filed only on the 15th of May 1990 whereas the complaint which led to file the same was made on the 28th November 1986, leaving a gap of nearly three and half years. Such a background also shows that the defendant had had no authority to decide upon the charges filed. Hence, it is my view that the contents of the complaint of the defendant had not been properly considered by the police when filing the charge of contempt though it was the starting point to commence police investigations. In the absence of any participation by the defendant in filing the charges, he cannot be held delictually liable for having prosecuted the plaintiff maliciously.

Such a background also shows that the defendant by making the complaint against the plaintiff had not acted maliciously. More importantly, it is clear that the defendant was not at fault as far as the filing of the charge of contempt of court against the plaintiff is concerned. Accordingly, since there was no sufficient evidence to establish wrongful intent (*animus injuriandi*) or *dolus* on the part of the defendant, liability under *actio injuriarum* cannot be imposed on him.

In the circumstances, it is my considered opinion that the plaintiff had not established the necessary ingredients to prove his case for damages. Hence, I hold that the learned District Judge had correctly dismissed the plaint of the plaintiff.

Learned Counsel for the plaintiff also had argued that the defendant had stated falsehood to the police as there had been an animosity between the parties. However, truth of the statement of the defendant which led to prosecute the plaintiff cannot be ascertained since the Magistrate had terminated the proceedings on the basis that the charge was defective even before the defendant finished with his evidence in chief without looking at the facts. Mere presence of animosity between the parties cannot be a deciding factor to determine the correctness of the statement in issue. Hence, I am unable to agree with the said contention of the learned Counsel for the appellant.

Learned Counsel for the plaintiff also submitted that the learned District Judge had answered the issues No.2 and No.8 in the opposite direction although both those issues raise the same question and had contended that such a position cannot co-

exist. Plain reading of the two issues do not seem to contain the same question as suggested when one look at the two issues. The Issue No.2 have been framed to prove that the case in the Magistrate's Court was filed pursuant to the complaint made by the defendant whilst the issue No.8 is directed to establish whether the charge filed in the Magistrate's Court was in accordance with the contents of the complaint made by the defendant. Therefore, it is my view that it is incorrect to argue that the aforesaid two issues raised, pose the same question.

For the aforesaid reasons, I dismiss the appeal with costs.

JUDGE OF THE COURT OF APPEAL

SISIRA DE ABREW, J

I agree.

JUDGE OF THE COURT OF APPEAL