

**KALU BANDA  
v.  
RAJAKARUNA**

COURT OF APPEAL  
UDALAGAMA, J. AND  
NANAYAKKARA, J.  
CALA NO. 260/2000  
DC KULIYAPITIYA NO. 11875/M  
FEBRUARY 12, 2002

*Damages – Damages for malicious prosecution – Criminal proceedings pending – Is there a cause of action? – Roman Dutch Law – Actio injuriam – Non-applicability of English Law.*

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.

**APPLICATION** for Leave to Appeal from the order of the District Court of Kuliypitiya.

**Cases referred to:**

1. *Rangani v. Kirihamy* – 71 NLR 357.
2. *Somasiri v. Petroleum Corporation* – (1992) 1 Sri LR 39.
3. *Alwis v. Edward Ahangama* – (2000) 3 Sri LR 225.
4. *Wijegunatilake v. John Appu* – 22 NLR 231.
5. *Naide Hangidia v. Abraham Hamy* – SCM – 01. 03. 1898 CR Kandy 289/5852.
6. *Alagakawandi v. Mutumal* – 22 NLR 111.

*Chula Bandara* for petitioner.

*Jacob Joseph with D. Wimalasiri* for respondent.

*Cur. adv. vult.*

May 29, 2002

**NANAYAKKARA, J.**

The plaintiff-respondent (respondent) instituted action in the District Court of Kuliypitiya against the defendant-petitioner (petitioner) seeking damages in a sum of Rs. 10,000,000 and other ancillary reliefs alleging that the petitioner without any reasonable and probable cause maliciously prosecuted him by instituting criminal proceedings in the Magistrate's Court. <sup>01</sup>

The trial in this case had commenced on 26. 01. 2000 with the formulation of issues by both parties.

Of the 19 issues that have been formulated, 8 issues have been formulated by the plaintiff-respondent and the rest by the defendant-petitioner. <sup>10</sup>

It was agreed that the Court should try issues No. 9 and No. 13 as preliminary issues. Thereafter, the Court making an order in regard to the said issues on the basis of the written submissions tendered

by parties had answered the issue No. 9 in favour of the respondent, leaving the issue No. 13 unanswered.

The issues which the parties moved the Court to try preliminarily were to the following effect:

Issue No. 9 – Is the plaint filed against the defendant premature?

Issue No. 13 – Has the plaint been presented in accordance with <sup>20</sup> section 40 (d) of the Civil Procedure Code?

What the learned Counsel for the petitioner contends basically by this application, is that no cause of action had accrued to the respondent to sue him in a civil action for malicious prosecution as the criminal action in which the respondent was being prosecuted had not been terminated at the time the present civil action for malicious prosecution was instituted against him.

Therefore, the pivotal issue that has to be determined in this case is whether the respondent could maintain this action if the criminal proceedings against the respondent in the Magistrate's Court had not <sup>30</sup> reached a finality at the time the present civil proceedings was instituted against the petitioner.

The learned Counsel for the petitioner has submitted that the termination of criminal proceedings in favour of the respondent, at the time when civil proceedings for malicious prosecution was instituted was one of the fundamental requirements, and as the present civil proceedings for malicious prosecution had been filed before the termination of the criminal proceedings, the plaint is premature and not maintainable.

Therefore, the fundamental issue would be whether a cause of <sup>40</sup> action had accrued to the plaintiff to sue the defendant, at the time he did, for malicious prosecution, and the resolution of this issue depends to a certain degree on the definition of the "cause of action".

In this regard the definition of the cause of action given in *Rangani v. Kirihamy*<sup>(1)</sup> would be a useful guidance in resolving the issues. In this case, the cause of action has been defined as an act on the part of the defendant which gives the plaintiff his cause of complaint. This definition has been accepted and adopted in the case of *Somasiri v. Petroleum Corporation*.<sup>(2)</sup>

As far as the present civil action is concerned what is that has caused him to complain? It is the institution of criminal proceedings maliciously without any reasonable and probable cause. It is the very act of malicious criminal prosecution which has made the plaintiff-respondent institute court proceedings. 50

A careful reading of the plaint, particularly averment 28 shows that it is the prosecution or making false accusation that has prompted the respondent to institute civil proceedings against the petitioner. According to the respondent it is the very institution of criminal proceedings on false charges which has prompted the respondent to institute proceedings. 60

Therefore, it is evident, 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 and the requirements envisaged under the English law would have no application.

As the learned counsel for the respondent submitted, the cause of action which is founded on abuse of legal procedure as contemplated by the Roman Dutch Law principle *actio injuriam*, which is of wider concept than the malicious prosecution as understood in the English Law. 70

In this connection, the reasoning adopted in the case of *Alwis v. Edward Ahangama*,<sup>(3)</sup> would be helpful in resolving the question in issue. His Lordship Justice Fernando in this case held that making a defamatory complaint of theft, maliciously without any reasonable

and probable cause against the plaintiff which led to his arrest and his subsequent production in Court shows that there was *aminua injuriandi*, as the defendant had made the complaint of theft not merely recklessly, but knowing it to be false. As this can ground an action for *injuria* committed by the defendant against the plaintiff it is maintainable against the defendant. 80

Schneider, AJ. in *Wijegunathilake v. John Appu*,<sup>(4)</sup> referring to views expressed by Bonser, CJ. in *Naide Hangidia v. Abraham Hamy*<sup>(5)</sup> has observed in the following terms:

“It is clear that an action on this case, for injury lies. It is a form of action free from the technicalities of the English form of action.”

A careful reading of the averments in the plaint clearly demonstrates that the plaintiff has sought relief on the basis of an *injuria* known to the Roman Dutch Law, although the learned District Judge has not given his mind to this aspect of the matter when making his order. 90 He has based his order mainly on the definition contained in the Civil Procedure Code of the term “cause of action” as analysed in the case of *Ranghamy v. Kirihamy (supra)*, and the interpretation given to the expression no action shall be maintainable and no action shall be instituted in the case of *Alagakawandi v. Muthumal*, which though has some relevance to the resolution of the issues, but does not fully address the issue involved.

Therefore, taking into account the relevant case law and legal principles, I am of the view that the action is maintainable against the defendant-petitioner. 100

Therefore, for the foregoing reasons, I reject the application of the petitioner and the respondent is entitled to costs in a sum of Rs. 5,000.

**UDALAGAMA, J.** – I agree.

*Application dismissed.*