(1969) 03 KL CK 0014

High Court Of Kerala

Case No: A.S. No. 1 of 1964

Govindji J. Khona		APPELLANT
	Vs	
K. Damodaran and Others		RESPONDENT

Date of Decision: March 20, 1969

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 417
- Essential Commodities Act, 1955 - Section 3, 3(g)
- Penal Code, 1860 (IPC) - Section 109, 34, 420

Citation: (1969) KLJ 641

Hon'ble Judges: T.S. Krishnamoorthy Iyer, J; P. Narayana Pillai, J

Bench: Division Bench

Advocate: T.M. Krishnan Nambiar, T.V. Ramakrishnan, K.R. Kurup and K. Raghavan Nair, for the Appellant; T.N. Subramania Iyer, K.V. Narayanaswamy and K.N.V. Ramani for Respondent 2 and K. Bhaskaran and T.L. Viswanatha Iyer for Respondents 3, 4 and 5, for the Respondent

Final Decision: Dismissed

Judgement

P. Narayana Pillai, J.

The appellant, Govindji J. Khona, Partner in Messrs. Govindji Jevat & Co., Bombay, sued the Respondents, the 1st Respondent being K. Damodaran, an industrialist at Cannanore and the 2nd Respondent, The Cannanore Spinning & Weaving Mills Ltd. in the Subordinate Judge''s Court, Ernakulam, for that the 1st Respondent acting as the Managing agent of the 2nd Respondent falsely and maliciously and without any reasonable or probable cause prosecuted the appellant and 2 other persons. Sippy and Krishna Shetty, upon a charge of having conspired together and cheated him of large sums of money. The learned Subordinate Judge dismissed with costs the suit which was for recovery of Rs. 1,50,000. The complex facts of which this story is made up are as follows: The Appellant is a dealer in cotton, doing business at Bombay. Krishna Chetty and Sippy, describing themselves as commission agents at

Coimbatore, offered to sell to the Respondents certain varieties of cotton in which the appellant was dealing. On 24-5-1956. Chetty sent the letter, Ex. D2, to the Respondents inviting orders for cotton. Three types of cotton were offered for sale in that letter. One of them was Hubli Jaidar, equal to sample T. 3729, 356 bales of cotton of that variety at Rs. 875/- per candy, were stated in the letter to be available for sale. It was added in Ex. D2, at the foot note, that Hubli Jaidar was "an attractive quality in comparison to westerners". On 27-5-1956, the Respondents sent a telegram to Chetty offering to purchase 356 bales of Hubli Jaidar equal to sample T. 3729. On receipt of it Chetty on 27-5-1956 itself sent the letter, Ex. D4, to the Respondents accepting the offer. He stated in it that he was contacting his principal at Bombay about the sale.

2. On 30-5-1956 Chetty sent the telegram, Ex. D5, informing the Respondents that on contacting his principal at Bombay, it was understood that the price per candy had to be raised from Rs. 875/- to Rs. 890/-. On receipt of it the Respondents sent the telegram, Ex. D6, to Chetty accepting the revised price contained in Ex. D5 regarding sale of 356 bales of Hubli Jaidar. On 30-5-1956 itself on receipt of Ex. D5-telegram, Sippy wrote the letter, Ex. D7, to the Respondents confirming on behalf of his Principal, the appellant, the sale of 356 bales of Jayadhar at Rs. 890/-, per candy. That letter was sent by Chetty on 31-5-1956 with his forwarding letter, Ex. D8, to the Respondents. It was stated in both Exs. D 7 and D8 that the usual contract of the sellers would follow.

3. In due course the Respondents received through Sippy the triplicate forms, Exs. D9 to D11, of the memorandum of the contract duly signed on 4-6-1956 by the appellant. They had to be signed by the Respondents also. Thereafter, one of them was to be retained by the Respondents and the remaining two were to be sent to Sippy, one for being retained by him and the other for being sent by him to the appellant. In Exs. D 9 to D 11 the quality of the cotton was described as only ''Indian raw cotton'' and not ''Hubli Jaidar''. On suspicion being roused that the supply may not be of Hubli Jaidar the Respondents inserted the words ''Hubli Jaidar'' before the words ''Indian raw cotton'' in the description of the cotton covered by the contract and after duly signing Exs. D 10 and D 11, sent them to Sippy with the covering letter, Exs. D 13, dated 12-6-1956. In Exs. D 9 to D 11 the initial payment to be made was mentioned as 90 per cent. That was also altered by the Respondents as 80 per cent before they sent Exs. D 10 and D 11 to Sippy.

4. On receipt of Exs. D 10, D 11 and D 13 Sippy sent the letter Ex. D 14, on 14-6-1956 to the Respondents. In it he found fault with the Respondents for having made alterations in the contract and said that the contract was for sale by the sample, 3729, and not by description. According to him, his principal at Bombay always entered into transactions for sale only by sample and not by description. He requested the Respondents to confirm that the purchase was by sample and communicate it direct to the appellant. Copy of Ex. D 14 was sent by Sippy to the

appellant. On 18-6-1956, the Respondents sent the reply, Ex. D 15, to Sippy informing him that they entered into the contract on the representation that the cotton to be supplied was Hubli Jaidar, that they wanted only Hubli Jaidar and that they were not prepared to make any alteration in the contract.

5. On 24-6-1956, Sippy sent the letter, Ex. P12, to the Respondents to persuade them to accept the contract for sale by sample and contact the principal at Bombay direct. That letter reads as follows:

We are in receipt of your Regd. letter dt. 18-6-1956 & in reply we have to say that you are aware that both Krishna Chetty & ourselves are brokers & as such we propose & introduce business between Principal to Principal and what is finally agreed is embodied in the terms of the contract & a transaction stands confirmed only when both the contracting parties viz: The Seller & The Buyer sign the same. You say, that in all your dealings ''description'' & ''station'' have found a prominent place, whereas our information is that with this very Seller you have had several transactions, of course through some other brokers, where simply "Indian Raw Cotton equal to our sample so & so" has been tendered & accepted by you & you have signed contracts embodying the above term.

In this case, you have approved the sample No. 3729 & sealed the same & we say that supply will be strictly equal to this. What is there in the name? We have already clarified this thing in our letter dated 14-6-1956. The Seller has the option of supplying you any variety of cotton so long as the same is equal to the basic sample No. 3729. You know, when the sales are made on ''description & station'', no basic samples are allowed to be sealed & deposited with the buyers. You have approved & made purchase on the basic sample No. 3729 & the supply will have to conform with this sample. In any case, we had suggested to you previously & also do so now that you get in touch with the Sellers & if they are unwilling to sell on "description" & ''station'' the deal may be treated as cancelled.

We are very much pained at the contents of para two of your letter under reply. You know brokers proffer ''solicited'' or ''unsolicited'' advice to their clients. You should have taken the same in the spirit in which it was given & considered the same as ''valuable & enlightening'' & not termed the same as "cheap insinuations". We strongly protest at the choice of your language & the same does not speak highly of you.

It is quite improper that you are simply carrying on pointless correspondence with the brokers, leaving the Principals out when you know full well our limitations. We understand that the cotton is ready for despatch & we advise you to write & thrash this out with the Sellers Messrs. Govindji Jevat &. Co., Bombay immediately, but it you do not refer to them inside a week or ten days, we shall take it that you are agreeable to the supply as "Indian Raw Cotton equal to Sample No. 3729 approved by you & now lying with you" & the Sellers will arrange to despatch the cotton &

your unauthorised corrections in the contract will be ignored.

According to the Respondents this letter was never sent to them.

6. On 25-6-1956, two invoices, Exs. D16 and D17 and on 6-7-1956, three invoices, Exs. D18 to D20, were sent to the Respondents by the appellant. They were followed by the demand drafts, Exs. D 21 to D 23, dated 9-7-1956, amounting in all to Rs. 88,800/-. The 106 bales of cotton covered by Exs. D 16 and D 17 were the first to arrive. The came by one steamer. The remaining 250 bales came by a separate steamer. The contract number given in Exs. D 16 and D 18 to D 20 was C.C.T./124, the same number which Exs. D 9 to D 11 bore. Sample was mentioned in Exs. D 16 to D 20 as 3729 and the description of the goods as Indian Raw Cotton. There was no mention anywhere that the cotton sent was Hubli Jaidar.

7. As the Respondents got suspicious about the type of cotton contained in the bales they sent on 23-7-1956 the telegram. Ex. D 25, to Sippy enquiring whether the bales contained Hubli Jaidar. On 24-7-1956, they also sent the letter, Ex. D 26, to him for confirmation that the bales really contained cotton of the description Hubli Jaidar. They sent a copy of it to the appellant. According to him he did not receive that copy. On 25-7-1956 Sippy sent the reply, Ex. D 27, to the Respondents confirming that all the 356 bales despatched contained Hubli Jaidar equal to the sample.

8. After receipt of Ex. D27--reply the Respondents wrote the letter, Ex. D28, dated 26-7-1956, to Sippy requesting him to send his representative for attending weighment and passing. On 2-8-1956. Sippy sent the letter, Ex. D 29 to the Respondents acknowledging receipt of Ex. D 28--letter and agreeing to send his representative at the time of weighment and passing of all the 356 bales.

9. On weighment and passing of the 106 bales of cotton covered by Exs. D 16 and D 17 it was found that the cotton in them was really of the description Hubli Jaidar, although inferior in quality to the sealed basic sample but on weighment and passing of the remaining 250 bales it was found that they contained cotton of the quality ''Annagiri Laxmi'' and ''Adoni Laxmi'' and not ''Hubli Jaidar''. On the Respondents bringing it to the notice of Sippy and Chetty, who were present at the time they promised to communicate to him as to what should be done, before 30-8-1956. As no communication was received, the Respondents sent the letter, Ex. D 33, on 31-8-1956 direct to the appellant complaining that the supply of cotton was different from that contracted for. In that letter the Respondents also informed the appellant that they were not willing to accept the 356 bales covered by Exs. D 16 to D 20. On 3-9-1956, the appellant sent the reply, Ex. D 34, informing the Respondents that the contract was for the sale by sample and not by description. On the same day Sippy and Chetty also sent the letters, Exs. D 35 and D 36, to the Respondents. In them it was stated that copies of Ex. D 33--letter were endorsed by the appellant to Sippy and Chetty and that they were sending Exs, D 35 and D 36 as replies to that letter. In Exs. D 35 and D 36 Sippy and Chetty said that both in class and quality all

the bales of cotton supplied to the Respondents were superior to the basic sample given to them and that if there was any dispute about the quality the remedy of the Respondents was to avail of the provision in the contract for arbitration.

10. After receipt of Exs. D35 and D36 the Respondents took legal advice from Sri. K.V. Narayanaswamy, Advocate at Coimbatore. Ex. D37 is the opinion recorded by him on 12-9-1956. He stated in it that both civil and criminal proceedings could be started. According to the appellant Ex. D37 is a record made or shaped to order after the launching of the criminal prosecution.

11. On 14-9-1956 the Respondent sent the letter, Ex. D 39, to the appellant stating that if the price of the 250 bales which did not contain Hubli Jaidar was not returned the appellant and Sippy would be prosecuted for cheating. On the same day a copy of it was sent to Sri. K.V. Narayanaswamy with the forwarding letter, Ex. D38. In Ex. D38 the receipt of Ex. D37 was acknowledged and it was mentioned that Ex. D39 was prepared on the basis of the draft prepared by Sri. K.V. Narayanaswamy. For Ex. D39 letter Sippy sent the reply, Ex. P19, dated 25-9-1956 to the Respondents. In that letter he stated that it was the Respondents who had tampered with the contents of the contract by making corrections and alterations in them and that if they were prepared to cancel the contract at par for the 250 bales which did not contain Hubli Jaidar and give up the claims for interest and other charges he would persuade the appellant to take back the 250 bales. On 1-10-1956 the Respondents filed the complaint. Ex. P6, before the the Sub Divisional Magistrate, Tellicherry. The Magistrate forwarded the complaint to the police for investigation and report. For Ex. P19--letter the Respondents sent the reply, Ex. D54, on 7-10-1956 denying the allegations made in Ex. P19 and agreeing to consider the proposal made by Sippy regarding the taking back of the 250 bales of cotton if it came from the appellant.

12. After investigation of Ex. P6--complaint the police laid a charge before the District Magistrate, Tellicherry on 30-3-1957 including in it only Section 420 I.P.C. On 30-7-1957 the Respondents applied for permission to appear and act in the case through an advocate under the control of the Assistant Public Prosecutor. In connection with the case the business premises of the appellant in Bombay were searched and he was arrested but released on bail the same day. On 28-5-1959 the Assistant Public Prosecutor filed the application. Ext. P5, supported by the 1st Respondent''s affidavit, Ext. P4, for amending the charge so as to include in it Sections 34 and 109 of the Indian Penal Code also. The accused in that case were finally acquitted by the judgment, Ex. P18, giving them the benefit of doubt. From that judgment application for leave to appeal as also the appeal memorandum, Ex. P17, were filed in this court under S. 417 Criminal Procedure Code by the Respondents. The application for leave to appeal was granted and the appeal was admitted. The appeal was finally dismissed on 8-3-1960 by the judgment. Ex. P1.

13. On 10-6-1960 the present suit was instituted. In the plaint it was on 5 counts that damages we claimed. Rs 25.000 was claimed as money spent for getting the

appellant enlarged on tail and taking steps to defend himself in the District Magistrate''s Court. Tellicherry. Rs. 10,000 was claimed as expenses incurred in connection with Ex. P--1--appeal. Rs. 25.000 was claimed as compensation for the mental shock, worry and pain consequent on the arrest of the appellant and the levelling of false charges against him. Rs. 15,000 was claimed as compensation for the mental pain connected with the filing of Ex. P1--appeal from Ex. P-18 judgment. Rs. 75,000 was claimed as compensation for loss of reputation.

14. It is convenient to deal first with some of the important facts in dispute between the parties. One important fact in dispute is the sending of Ex. P 12--letter by Sippy to the Respondents. The 1st Respondent who was examined as Dw1 deposed that no such letter was received by the Respondents. Sippy did not go into the box. His outward register has not been produced to show that he really sent a letter like Ext. P22 to the Respondents. It was stated in Ext. P12 that the Respondents had approved sale by sample and that it was unnecessary to attach any importance to the name Hubli Jaidar. Sippy advised the Respondents to get into direct contract with the appellant and found fault with them for making unauthorised corrections in Exs. D 10 and D 11. He also mentioned in the letter that the corrections would be ignored and that if no reply was received in 10 days it would be taken that the Respondents were agreeable to the supply of Indian Raw Cotton equal to sample 3729. The previous correspondence, Exs. D 2 to D 8, and the alterations made in Exs. D 10 and D 11 by the Respondents show that they had not really approved sale by sample alone and that they attached great importance to the description as Hubli Jaidar of the cotton to be purchased by them. In Ex-D15--letter the Respondents had made it clear to Sippy that they wanted only cotton known as Hubli Jaidar and that they were not prepared to make any alteration in the contract. On receipt of the invoices wherein the sample was mentioned as 3729 and the description of the goods as Indian Raw Cotton the Respondents got suspicious and immediately sent Ex. D--25 telegram. For that Sippy sent the reply, Ex. D. 27. In it he clearly stated that all the 356 bales contained Hubli Jaidar. That would not have been the representation if Sippy had sent Ex. P 12--letter stating that no importance need be attached to the name and that the sale was really by sample. Similarly it was not likely that the Respondents who had throughout been insisting on the description of the cotton as Hubli Jaidar would have coolly submitted to the supply of cotton according to sample if they had really received Ex. P12 letter. Ext. P12 shows that a copy of it was sent by Sippy to the appellant. If really a copy had been sent it was not likely that the appellant would have consigned the goods to the Respondents before the expiry of the period of 10 days fixed in it. The 106 bales of cotton covered by Exs. D16 and D 17 were consigned on the next day after the date of Ex. P 12. There is no doubt that Ex. P12--letter was not really sent by Sippy to the Respondents.

15. According to the appellant he did not get a copy of Ex. D 26, the letter sent by the Respondents to Sippy. Ex. D 26 shows that a copy of it was sent by the Respondents to the appellant. In the invoices the description of cotton sent was not

mentioned. It was then that the Respondents sent Ex. P25 enquiring whether the bales really contained Hubli Jaidar. The letter also mentioned a telegram sent by the Respondents to Sippy on the previous day to confirm telegraphically whether the bales despatched were Hubli Jaidar. The appellant who was examined as Pw 1 denied having seen a copy of Ex. D26. According to him in July 1956 he had gone on a pilgrimage. He put forward that version only to show that even if a copy of Ex. P26 had reached his office he could not have seen it as he was away. There is no evidence about the exact day on which he went on pilgrimage and returned after that. There is also no evidence as to where he had gone on pilgrimage. He admitted that during his absence all his correspondence were being attended to by his Manager and that they used to be placed before him as soon as he returned. His version that a copy of Ex. D 26 did not reach him cannot be believed.

16. According to the appellant Ex. D 37, the recorded legal opinion, had really not been obtained by the Respondents before they filed the complaint, and it was really procured only after the launching of the prosecution to justify the action that had been taken. The best evidence in this connection would have been that of Sri. K.V. Narayanaswamy himself. In fact, the appellant included him in his witness schedule. But during the trial of the case the appellant gave up the idea of examining him. He was appearing in the present suit for the Respondents. He knew that Ex. D 37 was being used by the Respondents to resist the appellant''s claim for damages. It was not likely that he would have continued to appear in the case for the Respondents if really Ex. D37 was a record which was not prepared on the date it bore. The entry, D49 (a), in the Inward Register, Ex. D49, of the Respondents shows that really on 14-9-1956 a communication dated 12-9-1950 was received by the Respondents from Sri. K.V. Narayanaswamy and that it related to the contract for 356 bales of Hubli Jaidar. Ex. D 37 had really been received by the Respondents before they filed the complaint, Ex. P6.

17. Suits for malicious prosecution are by now on a well-trodden path. It is a tort maliciously and without reasonable and probable cause to initiate against another criminal proceedings which terminate in his favour and which result in damage to his reputation, person, freedom or property. In Black''s Law Dictionary Malicious prosecution is stated to be

A judicial proceeding instituted against a person out of the prosecutor''s malice and ill will, with the intention of injuring him, without probable cause to sustain it, the process and proceedings being regular and formal, but not justified by the facts. For this injury an action on the case lies, called the ''action of malicious prosecution''.

It is a remedy for misuse of legal procedure. In other words, the basis for the action is the abuse of the process of court by wrongfully setting the law in motion. It is intended to discourage the use of the machinery of justice for improper purposes. The law relating to it has evolved from a compromise of 2 rules of law both of which are equally important. One is that all men have the freedom to bring criminals to

justice. In that is involved the liberty of the citizen. The other is that in public good it is necessary that false accusations against innocent persons have to be prevented. In the harmonious blending of these 2 principles some restrictions have been made in making a successful claim for malicious prosecution. In Abrath v. The North Eastern Railway Company (1882-3) 11 Q.B. 440 at 455 Bowen, L.J. said as follows:--

This action is for malicious prosecution, and in an action for malicious prosecution the plaintiff has to prove, first, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the prosecution, or, as it may be otherwise stated, that the circumstances of the case were such as to be in the eyes of the judge inconsistent with the existence of reasonable and probable cause; and, lastly, that the proceedings of which he complains were initiated in a malicious spirit, that is, from an indirect and improper motive, and not in furtherance of justice. All those three propositions the plaintiff has to make out, and if any step is necessary to make out any one of those three propositions, the burden of making good that step rests upon the plaintiff.

It is now well established that the plaintiff in such a suit can succeed only on proof of the following points:

1) that be was prosecuted by the defendant;

2) that the prosecution ended in the plaintiff''s favour;

3) that the defendant acted without reasonable and probable cause and

4) that the defendant was actuated by the malice.

All the above 4 requirements have to concur or unite. If any of them is found lacking the suit must fail. That is clear from the decisions in Bhalbaddar Singh v. Badri Sah AIR 1926 P.C. 46; AIR 1944 1 (Privy Council); Shubrati and Another Vs. Shamsuddin ; Nagendra Nath Ray Vs. Basanta Das Bairagya, ; Dhanjishaw Rattanji Karani Vs. Bombay Municipality, ; Ram Nath Vs. Bashir-ud-Din, ; Yerram Seshi Reddi and Another Vs. Badduri Chandra Ucddi and Another ; Chinnamuthu Ambalam Vs. S. Jagannatha Chariar, ; and Poulose Vs. Pappipilla Amma,

18. As regards the first 2 requirements it is not necessary that the defendant himself should be a party to the criminal proceedings. It is sufficient if he actively instigated them. As regards the liability of such a person Street says as follows in his book on the Law of Torts (1955 Edition) at pages 411 and 412;

The defendant must have been ''actively instrumental'' in instigating the proceedings. If he merely states the facts as he believes them to a policeman or a magistrate, he is not responsible for any proceedings which might ensue as a result of action taken on his own initiative by such policeman or magistrate. Nor is he necessarily responsible even though he actually prosecutes--for instance, he will not

be so responsible where a judge has bound him over to prosecute, unless it was the perjured evidence of the defendant before the judge which caused the latter to require him to prosecute. It is not enough if the defendant has done no more than complain to the proper authorities for the purpose of setting a prosecution in motion; the legal proceedings must have commenced. Charging the plaintiff will no doubt constitute setting the prosecution in motion. The legal adviser of a litigant may be deemed to be responsible for the prosecution where he does more than merely advise the litigant in good faith.

19. With regard to the 3rd essential, as in the case of the other essentials the burden of proving the absence of reasonable and probable cause is cast on the plaintiff although it is a difficult task of proving a negative. The reason for it is given thus by Bowen, L.J. in Abrath v. The North Eastern Railway Company (1882-3) 11 Q.B. 440 at 455:--

In one sense that is the assertion of a negative, and we have been pressed with the proposition that when a negative is to be made out the onus of proof shifts. That is not so. If the assertion of a negative is an essential part of the plaintiff''s case, the proof of the assertion still rests upon the plaintiff. The terms ''negative'' and ''affirmative'' are after all relative and not absolute. In dealing with a question of negligence, that term may be considered either as negative or affirmative according to the definition adopted in measuring the duty which is neglected. Wherever a person asserts affirmatively as part of his case that a certain stated fact is present or is absent, or that a particular thing is insufficient for a Particular purpose, that is an averment which he is bound to prove positively.

20. The civil court can go behind the findings of the criminal court and conduct an independent inquiry to ascertain whether there was reasonable and probable cause for launching the prosecution. Courts decide whether there was a reasonable and probable cause for launching the prosecution after ascertaining the facts upon which the defendant started the prosecution. The elaborate and all-embracing definition of absence of reasonable and probable cause was given as follows by Hawkins, J. in Hicks v. Faulkner (1881-82) VIII Q.B.D. 167 at 171 & 172:--

Now I should define reasonable and probable cause 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 any ordinarily 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. There must be: first an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; thirdly, such secondly-mentioned belief must be based upon reasonable grounds; by this I mean such grounds as would lead any fairly cautious man in the defendant''s situation believe; fourthly, the circumstances so believed and relied on

by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused.

This definition received the unanimous approval of the House of Lords in Herniman v. Smith 1938 Appeal Cases 305. If the facts prove that the defendant did not honestly believe in the guilt of the accused he cannot be said to have had reasonable and probable cause for launching the prosecution. In order to ascertain the state of the mind of the defendant about the 3rd essential namely absence of reasonable and probable cause the following questions were formulated by Cave, J. as the trial judge in Abrath v. The North Eastern Railway Company (1882-3) 11 Q.B. 440 at 455

(1) Did the defendants in prosecuting the plaintiff take reasonable care to inform themselves of the true state of the case?

(2) Did they honestly believe in the case which they laid before the magistrates?

and the following questions by Talbot, J as the trial judge in Herniman v. Smith 1938 Appeal Cases 305.

(1) Has it been proved that the defendant commenced and proceeded with the prosecution without any honest belief that the plaintiff was guilty of fraud?

(2) Has it been proved that the defendant failed or neglected to take reasonable care to inform himself of the true facts before commencing or proceeding with the prosecution?

Cave, J formulated the following question:

Were the defendants actuated by any indirect motive in preferring the charge against the plaintiff?

and Talbot, J the following question:--

Has it been proved that the defendant, in commencing or proceeding with the prosecution was actuated by other motives than a desire to bring to justice one whom he honestly believed to be guilty ?

also, but they partain to 4th essential namely malice and the necessity for answering it would arise only if the answer to the previous 2 questions are in the affirmative. The questions formulated by Cave, J were approved and his, decision was confirmed in Abrath v. The North Eastern Railway Company (1882-3) 11 Q.B. 440 at 455. The House of Lords took the view that the first two questions should not have been left to the jury by Talbot J., but all the 3 questions taken by him from the questions formulated by Cave, J., were approved. The defendant before he launches the prosecution need not test the full strength of the defence. There need only be an honest belief on his part that there is a fit case to be tried and that a charge against the accused is warranted even though it turns out to be a mistaken belief. In

Dallison v. Caffery 1965-I-Q.B. 348 at 371 Diplock, L.J. said:

The test whether there was reasonable and probable cause for the arrest or prosecution is an objective one, namely, whether a reasonable man, assumed to know the law and possessed of the information which in fact was possessed by the defendant, would believe that there was reasonable and probable cause. Where that test is satisfied, the onus lies on the person who has been arrested or prosecuted to establish that his arrestor or prosecutor did not in fact believe what ex hypothesi he would have believed had he been reasonable.

The following propositions were laid down by the House of Lords in Glinski v. Melver (1962) 1 All E.R. 696.

(a) The question whether to defendant honestly believed in the guilt of the accused does not necessarily arise in every action; it should not be put to the jury unless there is affirmative evidence of the want of such belief, or some contested evidence bearing directly on that belief:

(b) the duty of the defendant prosecutor, before bringing the criminal charge, which is the subject of the action, was to have found out whether there was reasonable and probable cause for the prosecution, rather than whether there was a possible defence or whether the proposed accused was guilty.

The defendant must have honestly believed before he launched a prosecution that the proceedings were justified. If he launches a prosecution recklessly without any evidence at all it has to be taken that he had no reasonable and probable cause.

21. In Abbott v. Refuge Assurance Co. Ltd. 1961 III Weekly Law Reports 1240 Upjohn, L.J. said that a reasonable man would usually take the following steps before he launches a prosecution.

(1) he or his advisers would take reasonable slops to inform himself of the true state of the case. Abrath v. North Eastern Railway Company 11 Q.B.D. (440); (2) he or his advisers would finally consider the matter upon admissible evidence only, Meering v. Grahame-White Aviation Co. Ltd., (122 L.T. 44. C.A.); (3) in all but the plainest cases, he would lay the facts fully and fairly before counsel of standing and experience in the relevant branch of the law and receive the advice that a prosecution is justified..... In addition, of course, the defendant must bona fide accept and act on the advice and, though that is part of a subjective test, it cannot be wholly removed from consideration at this stage.

22. As regards taking legal advice Bayley, J., said in Kavenga v. Mackintosh 2 B. & C. 693; 107 E.R. 5141.

I accede to the proportion, that if a party lays all the facts of his case fully before counsel, and acts bona fide upon the opinion given by that counsel (however erroneous that opinion may be) he is not liable to an action of this description.

That much importance cannot be given to legal advice taken before launching the prosecution is clear from the following observations of Upjohn, L.J. in Abbott v. Refuge Assurance Co, Ltd. 1961 III Weekly Law Reports 1240.

In so many cases counsel may disagree. A bold counsel might advise a prosecution; a more cautious one might take a contrary view; a third might advise making further inquiries before deciding upon a prosecution. Again counsel may have to advise on a difficult question of law; it would be hard if a prosecutor acting on his advice was held to have acted without reasonable and probable cause, because after much conflict of judicial opinion, the advisee of counsel is held to be wrong. Then there may be cases where a wise solicitor would take a second opinion, and so on.

Nevertheless Upjohn, L.J. said as follows at p. 1258 in Abbott v. Refuge Assurance Co. Ltd. 1961 III Weekly Law Reports 1240:--

However, ultimately, one has to reach a conclusion upon two matters; first, did the defendants or their advisers make a proper inquiry as to the true state of affairs, and, secondly, if they did, then did counsel reach a reasonable opinion upon the whole matter; thirdly (though part of the subjective test) did they bona fide act on the advice.

The factors which art ordinarily considered in deciding whether there was reasonable and probable cause for launching the prosecution are whether the defendant had taken reasonable care to post himself with the true facts and whether he had acted in good faith on the advice of counsel. If advice of competent counsel has been taken before launching the prosecution it is difficult to establish lack of reasonable and probable cause. It is stated as follows at page 582 of the Eighth Edition of Winfield on Tort:

In practice, however, if the prosecutor believes in the facts of the case and is advised by competent counsel before whom the facts are fairly laid that a prosecution is justified, it will be exceedingly difficult to establish lack of reasonable and probable cause. An opinion of counsel favourable to the prosecutor is not conclusive, but it is a potent factor to be taken into account when deciding whether to prosecute.

23. At the commencement a prosecution may not be malicious. But it may become malicious at a later stage when the defendant had no reasonable and probable cause for continuing the prosecution. Thus if during the pendency of a criminal prosecution the defendant gets positive knowledge of the innocence of the accused from that moment onwards the continuance of the prosecution is malicious. Street says as follows at page 412 of his book on Law of Torts (1955 Edition):--

Although the defendant has properly commenced proceedings, if, during their continuance, he learns of facts which do not justify him in carrying on with them, he is liable if he proceeds with the suit.

Anything which is an improper or on oblique motive for launching the prosecution is treated as malice. About malice Street in his book on the Law of Torts says as follows at page 415:--

The question is not whether the defendant was angry or inspired by hatred, but whether the defendant has a purpose other than bringing an offender to justice--there is malice, for instance, if he uses the prosecution as a means of blackmail or any other form of coercion. Where the motives of the defendant were mixed, the plaintiff will fail unless he establishes that the dominant purpose was something other than the vindication of the law.

24. Malice has been kept separate from lack of reasonable and probable cause ''however spiteful an accusation may be the personal feelings of the accuser are really irrelevant to its probable truth'' and ''malicious motives may coexist with a genuine belief in the guilt of the accused.'' A person actuated by malice may nevertheless have a justifiable cause for launching the prosecution.

25. Want of reasonable and probable cause is an item to be taken into account in considering malice but from the presence of malice want of reasonable and probable cause cannot be inferred. It was observed as follows in Glinski v. Melver (1962) 1 All E.R. 696

though from want of probable cause malice may be and often is inferred, even from the most express malice, want of probable cause, of which honest belief is an ingredient, is not to to be inferred.

26. Some of the items of evidence usually relied upon for proving malice are haste, recklessness, omission to make due and proper inquiries, spirit of retaliation and longstanding enmity.

27. Of the 4 essentials to a successful action for malicious prosecution the first two namely that the appellant was prosecuted by the respondents and was acquitted are not in debate. It is upon the third and fourth essentials that the controversy has arisen. As regards the 4th essential, malice, the argument of the learned counsel appearing for the appellant was that the prosecution was launched by the Respondents with the indirect motive of hoping to be in a better position to negotiate with the appellant with a criminal charge hanging over his head than he would be in negotiating as between persons on equal terms. The necessity for investigating the question of malice arises only if there is proof of lack of reasonable and probable cause.

28. We now return to the facts to find out the 3rd essential that is whether the prosecution lacked reasonable and probable cause. The first subordinate point to be considered in that connection is whether the appellant Sippy and Chetty made the Respondents believe that Sippy and Chetty were acting as the appellant''s agents in the transaction. In Ex. D4 Chetty informed the Respondents that for despatch of the

356 bales of Hubli Jaidar for which they had placed an order with him he was contacting his principal at Bombay. Sippy''s letter dated 30-5-1956 to the 2nd defendant, Ex. D7, shows that Sippy sent a copy of it to the appellant. In Ex. D8 Chetty informed the Respondents that he would send the contract form as soon as it was received from the principal. In Exs. D9 to D11 it was specifically stated that the sale by the appellant to the Respondents of the 356 bales was through Sippy. In Ex. D13 the Respondents informed Sippy that they had received the triplicate contract forms of Sippy''s principal at Bombay. In Ex. D14 Sippy informed the Respondents that his principal at Bombay was selling cotton only by sample and requested them to contact him direct. The principal at Bombay was described in that letter as the appellant. The Respondents in their letter, Ex. D15, to Sippy treated the appellant as Sippy''s principal. In the letter, Ex. D33, sent by the appellant to the Respondents both Sippy and Chetty were described as the appellant''s representatives, In these circumstances the Respondents must bonafide have believed that both Sippy and Chetty were the agents of the appellant.

29. The appellant Sippy and Chetty were acting in concert. Exs. D 2 to D 6 show that from the beginning till the date of Ex. D6 the Respondents'' communications were all with Chetty. Thereafter Sippy emerged at the scene. It was he who wrote Ex. D7 letter to the Respondents confirming on behalf of the appellant sale through Chetty of 356 bales of Jaidar. It was through Sippy that the appellant sent Exs. D 9 to D 11 to the Respondents. Exs. D 34 to D 36 also show that the appellant Sippy and Chetty acted in concert in the matter.

30. Exs. D2, D7, D 9 to D14 and D 24 to D27 deal with the negotiations connected with the contract, the clarifications made during the formation of the contract and the affirmation of the description of the cotton in the 356 bales being Hubli Jaidar. At every stage the Respondents were cautious and insistent on the sale being according to description and not merely sample. In Ex. P12, Sippy is alleged to have asked the Respondent "What is there in the name". In Exs. D 14 Sippy told the Respondents that they need only satisfy themselves about the spinning performance of the cotton and not unnecessarily trouble themselves with the name. The description by name of the cotton is not so unimportant as that.

31. Section 15(1) of the Cotton Control Order of 1955 passed by the Central Government u/s 3 of the Essential Commodities Act (10 of 1955) provides that all persons who held either A or B class licence should submit to the appropriate authority an accurate return in form ''C'' in respect of the stocks, receipts and sales of each description of cotton. Form ''C'' referred to there mentions 36 varieties of cotton. Of them 1 to 26 are Indian cotton and the remainder foreign. The 16th variety mentioned there is Jaidar. Ex. D1 is the notification published by the Central Government fixing the maximum and minimum prices of cotton for the season 1955-56. In Section 3(g) of it Jaidar is described as follows:-

''Jayadhar'' means cotton recognized as such and grown in the Dharwar, Belgaum, Bijapur, North and South Satara and Kolhapur districts of Bombay State and the Mysore State, provided the areas in which the cotton has been grown have been protected under the Cotton Transport Act, 1923 (Act III of 1923), or any corresponding Act.

In schedule ''A'' of that notification the maximum and minimum prices of Jaidar are mentioned. The sample given by the appellant''s agents to the respondents was only about the fitness of the cotton. Each spinning factory has its own mixing formula and spinning programme. According to the mixing formula cotton of specified description and quality has to be mixed in certain specific proportions. One variety of cotton may be superior to another in quality and costlier in price. Nevertheless it may not be of any use to a factory if in its mixing formula and spinning programme it has no place. Therefore from the mere fact that the cotton supplied was of quality superior to that contracted for it cannot be taken that the factory to which it was supplied stood to gain by the supply.

32. In the present case the evidence adduced shows that the Respondents agreed to purchase cotton from the appellant on the representation made that it would be Hubli Jayadhar equal to sample T 3729. The first letter sent to the Respondents is Ex. D2. Therein both description by name and sample were given. Description by name was also given in Exs. D4, D6, D7 and D8. Ex. D7 shows that when Sippy sent it to the Respondents he sent a copy of it to the appellant also. Therein it was specifically mentioned that the 356 bales to be supplied were Jayadhar. The appellant has no case that he did not receive a copy of that letter. At least when that was received he should have been aware that the representation made by his agent to the Respondents was to supply 356 bales of Jayadhar.

33. The appellant sent through Sippy the triplicate forms, Exts. D9 to D11, to the defendants duly signed by him. The quality of the cotton to be supplied was mentioned in them as only Indian Raw Cotton equal to sample No. 3729 although the representation made to the Respondents till then was that it would be of the particular variety Hubli Jayadhar. The Respondents sent back Exs. D10 and D11 duly signed by them. They were not satisfied with the description of the name of the cotton as only Indian Raw Cotton in Exs. D9 to D11. So they inserted the words "Hubli Jayadhar" before the words "Indian Raw Cotton" in Exs. D10 and D11 before they sent them to Sippy duly signed. Sippy on receipt of Exs. D10 and D11 from the Respondents sent Ex. D10 to the appellant and retained Ex. D11 with him. Exs. D10 and D11 were recovered by the police after search of the premises of the appellant and Sippy. In Ex. D10 the words Hubli Jayadhar are seen to have been scored off but not in Ex. D11. The scoring off of those words may have been done either by Sippy or by the appellant. Anyway the Respondents were not aware of the striking off of those words and so they continued to be under the impression that the description of the cotton as Hubli Jayadhar was a term of the contract.

34. On receipt of Exs. D10 and D11 Sippy wrote the letter. Ex. D14, to the Respondents slating that he regretted to note that they had altered in the contract the description of the cotton. In that letter he requested the Respondents to confirm purchase by sample No. 3729 alone. The Respondents then sent the firm reply, Ex. D15, stating that they were insistent on supply of Hubli Jayadhar alone. In spite of that 250 bales despatched were not Hubli Jayadhar. Ex. D14 shows that when Sippy sent that letter to the Respondents he sent a copy of it to the appellant also. The appellant must at least on receiving copy of Ex. D14 have become aware that the correction in Ex. D10 was made by the Respondents and that they were insistent on sale by description by name. He must also have known that until then the corrections made by the Respondents had not been scored off by anybody.

35. Before taking delivery of the goods the Respondents informed Sippy by Ex. D26-letter that the contract was to supply Hubli Jayadhar and requested him to confirm telegraphically whether the bales which had arrived were really Hubli Jayadhar. The reply received from Sippy was that all the 356 bales despatched contained Hubli Jayadhar.

36. After the Respondents took delivery of the first consignment of 106 bales Chetty sent the letter, Ex. D30, to the appellant requesting him to send the remaining 250 bales without delay. In that letter it was specifically stated that the sale of all the 356 bales to the Respondents was Hubli Jayadhar. Ex. D31 is the appellant''s reply to it. He did not dispute in it that the sale to the Respondents was really Hubli Jayadhar. After parting with large sums of money when the Respondents opened the bales they found that the cotton supplied was not of the description covered by the contract. When they wrote to the appellant claiming return of the money his reply, Ex. D34, was that the sale was only of Indian raw cotton equal to sample 3729. In the circumstances of the case it cannot be taken that the contract was for sale of cotton by sample alone. The contract was for sale of cotton by description as well as by sample. In such a case the bulk of the goods should correspond not only with the sample but also with the description. The Respondents had every reason to believe that the appellant and his agents had acted in concert and cheated him. They did not act in haste. As prudent and cautious persons they took legal advice also before filing the complaint. They placed all the facts before their legal adviser, got his recorded opinion, Ex. D37, and acted bonafide upon his opinion, which was not wrong. It cannot be said that the Respondents, when they filed the complaint acted without reasonable and probable cause. After the acquittal of the appellant by Ex. P18-judgment the Respondents filed Ex. P1 appeal before this court. That appeal was accepted after hearing and notice was issued to the Respondents. The acquittal of an accused by the trial court is only subject to the result of appeal, if any. There is nothing wrong in testing the correctness of the decision of the trial court by appealing against it. In the circumstances of this case it cannot be said that the appeal was filed on unjustifiable grounds and without reasonable and probable cause. The learned Subordinate Judge rightly found that the Respondents were not

liable for damages for malicious prosecution.

Hence this appeal is dismissed with costs.