

(1964) 09 KL CK 0040

High Court Of Kerala

Case No: S.A. No. 736 of 1962

Kuriakose and Another

APPELLANT

Vs

Kuriyan

RESPONDENT

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**Date of Decision:** Sept. 28, 1964**Citation:** (1964) KLJ 1211**Hon'ble Judges:** T. C. Raghavan, J**Bench:** Single Bench**Advocate:** P. Sreedhara Menon, for the Appellant; P. K. Kesavan Nair and K. N. Narayana Pillai, for the Respondent**Final Decision:** Dismissed

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### Judgement

Raghavan J

1. The second appeal arises out of a suit for damages for malicious prosecution, the defendants, husband and wife, being the appellants. The trial court decreed the suit granting Rs. 250/- as general damages, Rs. 100/- as advocate's fee paid by the plaintiff in the criminal case and Rs. 39/- for other expenses he had to meet in connection with the same. Thus a decree for Rs. 389/- was granted by the trial court and that was confirmed in appeal by the lower appellate court. In second appeal the appellants' counsel has pressed only two points: (1) that the 2nd defendant should not have been made liable in damages, because she was not a "prosecutor" and (2) that the quantum of damages awarded is high, especially the special damages of Rs. 100/- paid as advocate's fee, because there was no evidence regarding that.

2. The counsel of the appellants has cited Badduri Chandra Reddy v. Pammi Rami Reddy (A. I. R. 1955 Andhra 218) and has argued that the 2nd defendant the wife, did nothing but merely pass on to her husband, the 1st defendant, the information she got from her four or five year old child about the theft of pepper from their house by the plaintiff and others in their absence. He has also contended that since the complaint in the case was given only by the 1st defendant, the 2nd defendant is

not a "prosecutor". I do not think that the Andhra decision cited has gone so far as laying down that no one other than the formal complainant should be treated as the prosecutor. In fact, there are several decisions including decisions of the Privy Council laying down that the whole conduct of the party should be taken into consideration and the question as to who is the prosecutor must be determined as a question of fact in each case taking into consideration all the circumstances. To give an illustration, if a person who harbours malice against another makes his servant file a complaint against that another and actively helps in the prosecution keeping behind scenes all the while, can it be said that the prosecutor is the servant and not the master? I think the answer must obviously be that the master is the real prosecutor and that he is the person who is liable in damages. I do not propose to multiply illustrations like this. I shall only mention two or three decisions over and above the decision of the Andhra High Court already referred to. These decisions, among themselves, have considered several decisions including decisions of the Privy Council. The decisions are: [\(Goginoni\) Venkatappayya Vs. \(Yerramneni\) Ramakristnamma and Others,](#); Issardas Kishinchand v. Assudomal Remandas ( A. I. R. 1940 Sind 90); and Nishabhkumar v. K.C. Sharma (A. I. R. 1961 Madh. Pra. 329). I do not find any substance in this contention.

3. In the case before me, there is evidence that the 2nd defendant also filed a complaint against the plaintiff that the latter assaulted her and took away a gold chain belonging to her and that ended in acquittal. It was thereafter that the present case of theft of pepper was filed against the plaintiff and others, which also ended in acquittal. In this latter prosecution also, though the husband gave the first information to the police, the wife was actively helping him. It was admittedly she who told the husband that the child told her about the theft by plaintiff and two others. If she stopped there, probably her claim that she was not a "prosecutor" might have some force. But, she accompanied her husband to the police station on the third or fourth day when he lodged the complaint and gave evidence as well. This shows that she was actively associating with the complainant and helping him, nay, even conspiring with or instigating him. In these circumstances, the 2nd defendant is also a "prosecutor". The next point relates to the quantum of the damages. In pursuance of the complaint the plaintiff was arrested and kept in gaol for some time. Thereafter he engaged counsel, who obtained his release; and ultimately after trial he was acquitted. When these facts are taken into consideration, it cannot be said that the sum of Rs. 250/- awarded as general damages is high. In fact, the objection of the counsel of the appellant is directed mostly against the sum of Rs. 100/- paid as advocate's fee and not against the other two items. The objection is that the plaintiff did not produce a voucher or receipt from his advocate who appeared in the criminal case for the payment of Rs. 100/-. I do not think that this is a valid ground for saying that the amount was not paid. It appears that the plaintiff had to attend court on 26 days in connection with the case and that gives an idea as to how much work the lawyer had to do. It also appears

that the lawyer moved for bail and obtained the release of the plaintiff from gaol. Taking into consideration all these facts, the amount of Rs. 100/- claimed as advocate's fee cannot be said to be high. It cannot also be held in second appeal that the concurrent finding of the lower courts that the said amount was paid to the lawyer is erroneous.

The decision of the lower courts is confirmed and the second appeal is dismissed with costs.