

## APPELLATE CIVIL

*Before Man Mohan Singh Gujral, J.*PARKASH CHAND SETH,—*Appellant**versus*SANT SINGH,—*Respondent***Regular Second Appeal No. 1075 of 1961.**

September 24, 1971

*Law of Torts—Malicious civil prosecution—Suit of damages for—When lies—Code of Civil Procedure (Act V of 1908)—Section 35-A—Whether permits the filing of such a suit in all cases of malicious civil action.*

*Held*, that no doubt it is a tort, maliciously and without reasonable cause, to initiate against another judicial proceedings which terminate in favour of the other party. But an action will not lie for malicious civil proceedings unless there is damage to credit or reputation or there is arrest of person or loss or seizure of property or where damage resulting from a civil action cannot be compensated by an order of costs.

(Paras 5 and 8)

*Held*, that section 35-A of Code of Civil Procedure, 1908 is a provision only for the grant of compensatory costs in respect of false or vexatious claims or defences and is not a substantive provision creating any right in a party to claim damages for malicious civil prosecution. According to this provision, the amount of compensation awarded under this sub-section will be taken into account in a subsequent suit for damages or compensation in respect of such claim or defence, but from this it does not necessarily follow that in every case where false or vexatious claim has been made or defence taken a suit for malicious prosecution would lie. The reasonable construction of the section is that in those cases where damages can be awarded for malicious civil prosecution the amount awarded under section 35-A will have to be taken into account.

(Para 4)

*Regular Second Appeal from the decree of the Court of Shri Charan Singh Tiwana, Senior Sub-Judge with Enhanced Appellate Powers, Amritsar, dated the 13th day of March, 1961, reversing that of Shri Sudarshan Aggarwal, Sub-Judge, 1st Class, Amritsar, dated the 23rd July, 1960, and dismissing the plaintiff's suit in toto with no order as to costs. The appeal No. 245 of 1960 filed by the plaintiff was dismissed with costs.*

S. L. Puri and Munishwar Puri, Advocates, for the appellant.

I. S. Vimal, Advocate, for the respondent.

## JUDGMENT

GUJRAL, J.—(1) Parkash Chand Seth appellant filed an application against Sant Singh under section 13 of the East Punjab Rent Restriction Act claiming eviction of the respondent from the house which the respondent had taken on rent from one Nihal Chand as Parkash Chand Seth had subsequently purchased this house from Nihal Chand. The eviction was claimed on the ground that the respondent had failed to pay the rent and had also caused damage to the property. During the hearing of the application it was agreed that the case be decided on a special oath being taken by the respondent and as the respondent took the oath the application for eviction was dismissed. Respondent Sant Singh then filed a suit against Parkash Chand Seth for a declaration that the property in dispute was owned by him and that he was not the tenant of Parkash Chand Seth. It was further alleged in the suit that Parkash Chand Seth was only a benamidar and was not the owner of the property. Sant Singh did not appear on the date when the evidence was to be recorded with the result that his suit was dismissed for default with costs. Parkash Chand Seth then brought the present suit for the recovery of Rs. 500 as damages for malicious civil prosecution and damage to the property. The suit was contested by respondent Sant Singh and on the pleadings of the parties the following issues were framed :—

- (1) Has this Court no jurisdiction to try the present suit?
- (2) Is the suit for compensation on account of allegations in para 12 of the plaint competent?
- (3) Is the suit barred as *res judicata* ?
- (4) Was a civil suit filed by the defendant against the plaintiff false, frivolous and vexatious to the knowledge of the defendant and was it filed maliciously?
- (5) If so, can the plaintiff claim any damages for the same? If so, how much?
- (6) Has the defendant caused any damage to the property of the plaintiff?
- (7) If so, to what compensation is the plaintiff entitled for the damage caused?
- (8) Which of the parties is entitled to compensatory costs under section 35-A C.P.C.?

The learned trial Court decided issues Nos. 1 and 3 against the defendant and issue No. 2 against the plaintiff. No decision was given on issues Nos. 4 and 5 while issues Nos. 6 and 7 were decided in favour of the plaintiff and issue No. 8 was decided against both the parties. In view of these findings, the plaintiff was granted a decree for Rs. 100 for damage which had been caused to the building of the plaintiff but no compensation was allowed for prosecution on the basis that no damages could be awarded for civil malicious prosecution. Both the parties being dissatisfied with this judgment filed two separate appeals before the Senior Subordinate Judge. These appeals were disposed of by order dated 13th March 1961. The learned Senior Subordinate Judge dismissed the plaintiff's appeal but accepted the appeal filed by the defendant, with the result that the suit of the plaintiff was dismissed *in toto*. Being aggrieved the plaintiff has come up in second appeal to this Court.

(2) In appeal before me the decision on issues Nos. 2, 6 and 8 has been challenged. The first appellate Court had found that the earlier suit filed by the defendant was malicious. This finding was based on the consideration that in the earlier eviction proceedings before the Rent Controller the defendant had not taken the plea that the plaintiff was not the owner of the property in dispute or that he was benamidar for him. It was further found that the suit filed by the defendant claiming the plaintiff to be benamidar was filed merely to harass the plaintiff. In spite of these findings, it was held that it was not actionable wrong to institute civil proceedings without reasonable and probable cause even if malice was proved. Support for this view was sought from the decision of Punjab Court in *Abdul Samad Khan v. Rahmatullah Khan, etc.*, wherein it was held that a suit for damages arising out of a civil action, brought maliciously and without reasonable or probable cause does not lie.

(3) The argument on behalf of the appellant before the first appellate Court and again before me is that the rule laid down in the above case was no longer good law because of the introduction of section 35-A in the Civil Procedure Code after the above judgment. By referring to sub-section (4) of section 35-A it was contended that suit for damages in case of civil malicious prosecution was envisaged in this provision.

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(1) 1889 P.R. 568.

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(4) Section 35-A relates to the award of compensatory costs in respect of false and vexatious claim or defence. Sub-section (4) provides as under:—

“(4) The amount of any compensation awarded under this section in respect of a false or vexatious claim or defence shall be taken into account in any subsequent suit for damages or compensation in respect of such claim or defence.”

No doubt, according to the above provision, the amount of compensation awarded under this sub-section will be taken into account in a subsequent suit for damages or compensation in respect of such claim or defence, but from this it does not necessarily follow that in every case where false or vexatious claim has been made or defence taken a suit for malicious prosecution would lie. A more reasonable construction of this provision would be that in those cases where damages can be awarded for malicious civil prosecution the amount awarded under section 35-A will have to be taken into account. Section 35-A is a provision only for the grant of compensatory costs in respect of false or vexatious claims or defences and is not a substantive provision creating any right in a party to claim damages for malicious civil prosecution. In order to adequately compensate the defendant in a case of civil proceedings the legislature enacted section 35-A of the Civil Procedure Code providing for compensatory costs in respect of false or vexatious claims. Section 95 of the Code also provides a speedy remedy for claiming compensation in respect of obtaining arrest, attachment or injunction on insufficient grounds. An order obtained under this section, however, is a bar to any suit for compensation in respect of such arrest, attachment or injunction.

(5) It is a tort, maliciously and without reasonable and probable cause to initiate against another judicial proceedings which terminate in favour of that other and which result in damage to his reputation, person, freedom or property. It was pointed out by Winfield in his book “Winfield on Tort (Seventh Edition)” that historically there was no reason why the old action upon the case for conspiracy should not be extended to malicious civil proceeding as well as to malicious criminal proceedings, but it was stated that in modern times it has been laid down that it is available whenever the civil proceedings attack a man’s credit in scandalous fashion, for example, malicious bankruptcy proceedings against him, or malicious

winding-up proceedings against a company. While further considering whether the law makes the malicious institution of any civil proceedings actionable, Winfield pointed out that there was no historical reason why it should not, because it seemed curious that a man could have an action for taking malicious bankruptcy proceedings against him but not for maliciously suing him for some scandalous tort like seduction or deceit. Two main reasons have generally been advanced against the general proposition that malicious institution of civil proceedings is not actionable but both these reasons have not been accepted by Winfield in his book mentioned above who at page 716 stated as under :—

“Apart from this case, it has been urged against the general proposition, first, that the person maliciously sued is adequately compensated by successfully defending the action — which is patently false — and, secondly, that litigation must end somewhere — which is true as a fact but unconvincing as an argument, for litigation should end only where common justice has been done or at least attempted.”

No reported decision, however, in favour of the view taken by Winfield could be found. Harry Street in his book ‘Law of Torts’ (Third Edition at page 402) accepted the situation and pointed out “it might have been expected that the “damage” requirement of this tort would be satisfied whenever the plaintiff proved that he suffered harm to his person or his reputation or suffered pecuniary loss as a non-remote consequence of the wrong”, but found that that was not so. In *Savile v. Roberts* (2), Holt, C.J., in 1698 enumerated the kinds of damages the existence of any one of which was essential before an action for civil malicious prosecution could be supported. The doctrine laid down by Holt, C.J., was considered and approved in *The Quartz Hill Consolidation Gold Mining Company v. Eyer* (3) and it was observed as follows :—

“The reason why, to mind, the bringing of an action under our present rules of procedure and under our present law, even if it is brought without reasonable or probable cause and with malice, gives rise to no ground of complaint, appears to me easily to be seen upon referring to the

(2) (1698) 1 Ld. Raym. 374.

(3) 11 Q.B.D. 674.

doctrine laid down by Holt, C.J., in *Savile v. Roberts*. He there said that there were three sorts of damages, any one of which would be sufficient to support an action for malicious prosecution. "(1) The damage to a man's fame, as if the matter whereof he is accused be scandalous. And this was the ground of the case between Sir Andrew Henley and Dr. Burstall : Raym. 180 ..... (2) The second sort of damages, which would support such an action, are such as are done to the person; as where a man is put in danger to lose his life, or limb, or liability, which has been always allowed a good foundation of such an action ..... (3). The third sort of damages, which will support such an action, is damage to a man's property, as where he is forced to expend his money in necessary charges, to acquit himself of the crime of which he is accused, which is the present charge. That a man in such case is put to expenses, is without doubt, which is an injury to his property, and if that injury is done to him maliciously, it is reasonable that he shall have an action to repair himself." It is clear that Holt, C.J., considered one of those three heads of damage necessary to support an action for malicious prosecution. To apply this test to any action that can be conceived under our present mode of procedure and under our present law, it seems to me that no mere bringing of an action, although it is brought maliciously and without reasonable or probable cause, will give rise to an action for malicious prosecution. In no action, at all events in none of the ordinary kind, not even in those based upon fraud where there are scandalous allegations in the pleadings, is damage to a man's fair fame the necessary and natural consequence of bringing the action."

Considering this aspect from various angles it was then observed in the above case as follows :—

"Therefore the broad canon is true that in the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution."

(6) With regard to the costs incurred by the party who has unnecessarily been dragged into the Court, it is pointed out that if the Judge refuses to give him costs, it is because he does not deserve them, that if he deserves them he will get them in the original action and if he does not deserve them he ought not to get them in a subsequent action.

(7) The observations in the above case were cited with approval in *Dhanjishaw Rattanji Karanji v. Bombay Municipality and others* (4). It may be stated at this stage that in *Ah Fong v. Nam Ke* (5) to which reference was specifically made by the learned counsel for the appellant, no different rule was adopted and it was held that ordinarily a civil action, though false and malicious in its institution, would not give rise to an action for damages. The test to be applied was stated to be whether the civil action complained of necessarily or naturally involved damage which could not be recompensed by an order for costs. It does appear that the rule was stated rather too broadly. It was pointed out by Harry Street in the *Law of Torts* (Third Edition) that since 1698 when Holt, C.J., delivered the judgment in *Savile v. Roberts*, the Courts have regarded this judgment as marking the outer limit of this sort of tort. Probably, what was meant by Leach, J., in *Ah Fong's case* (5) (supra) was that no damage was caused by the mere institution of a false and malicious suit but had resulted from the interim decision given in the proceedings. In that case, the plaintiff was granted a license in respect of the municipal pawnshops in Pegu. On the application of the defendant, Ministry of Education stayed the issue of license pending inquiry into the action of the municipal committee. Eventually the stay order was vacated but the plaintiff was not able to open his shop for a considerable time thereafter. On the allegations that the stay order had been obtained on averments which were false and malicious the plaintiff filed a suit for compensation for the loss which he had suffered as a result of not being able to commence business for the period for which the stay order had operated. In that case the damage had been caused not by mere filing of the suit or proceeding which had been instituted maliciously or falsely but by the grant of the stay order resulting in loss of business. In fact,

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(4) A.I.R. 1945 Bom. 320.

(5) A.I.R. 1934 Rangoon 75.

Leach, J., also quoted with approval the view taken in *Quartz Hill Consolidated Gold Mining Co. v. Eyer*, by Bowen, J.

(8) From the above discussion, it would emerge that an action will not lie for malicious civil proceedings unless there is damage to credit or reputation or there is arrest of person or loss or seizure of property or where damage resulting from a civil action cannot be compensated by an order of costs.

(9) In the present case, the damage claimed does not fall any of the three categories mentioned by Holt, C.J., in *Savile's case* (supra). The first appellate Court was, therefore, right in coming to the conclusion that the plaintiff was not entitled to damages for instituting malicious civil prosecution in this case.

(10) As regards the claim of the plaintiff in regard to the damage to the roof of the verandah, the finding of the learned first appellate Court is that there was not sufficient evidence to show that the damage had resulted from any mischievous act committed by the defendant. This finding was mainly assailed on the ground that the defendant having denied the existence of the verandah and it having been found as a fact that the verandah had existed and had been damaged, it should be inferred that the damage to the verandah was caused by the act of the defendant. This argument is also without force. The learned first appellate Court was right in holding that the defendant's plea that there was no verandah in existence would not necessarily imply that it was the defendant who had caused damage to the verandah. The learned first appellate Court also considered the evidence on this point and came to the conclusion that the story put forward by the plaintiff was unnatural. It was felt that there was no occasion for the defendant to carry heavy logs of wood to the roof of the building as he had more than sufficient space for storing the logs on the ground floor. It was also observed that the plaintiff had not given sufficient particulars about his claim in this respect.

(11) For the reasons stated above, I find no merit in this appeal and dismiss the same. The parties will be left to bear their own costs.

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