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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment delivered on: 03.01.2012

+ RFA(OS) 77/2010

SCHENKER INDIA PVT LTD

..... Appellant

versus

SIRPUR PAPER MILLS LTD

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr. Sandeep Sethi, Sr. Advocate, Amicus Curiae with Mr. Ashutosh Dubey & Mr. Love K. Sharma, Advocates

For the Respondent : Ms. Saloni Nagoria, Advocate

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J (ORAL)

1. The present appeal is preferred against the judgment dated 02.02.2010 passed by the learned Single Judge whereby the suit has been dismissed. The learned Single Judge by the impugned judgment has dismissed the suit broadly on two grounds : (i). firstly, that the suit is barred by limitation and; (ii). secondly, that the delay in re-filing the suit of nearly 204 days, did not deserve to be condoned, in the facts and circumstances of the case.

2. The broad facts, in the background of which, the present suit was

filed by the appellant, who is the original plaintiff in the suit, are as follows :-

2.1. The appellant in the suit has claimed damages in the sum of Rs.5 Crores and a relief for permanent injunction. The appellant avers that it is carrying on the business of freight transporter, both at the international and domestic level; which inter alia requires it to deal with aspects, such as, air cargo, shipping, chartering, consolidation, forwarding, customs clearing and travel agents, etc.

2.2 It appears that the respondent, who is the original defendant, engaged the services of the appellant for providing logistic services. The respondent alleges that there were delays on the part of the appellant in transporting heavy duty machinery from Germany, for which purpose, the services of the appellant had been sought. There were, it appears, difficulties in the execution of this transaction which resulted in allegations of breach of obligation being hurled by each side against the other.

2.3 The respondent, it appears, filed a suit for injunction against the appellant, as a consequence of which, certain containers holding the machinery which the appellant had to transport were ultimately released.

2.4 It appears that the respondent also filed a criminal complaint with the Additional Chief Metropolitan Magistrate (in short, ACMM). It is not disputed that the complaint was filed on 26.03.2006 (though on the copy of the complaint appended to the appeal, the date adverted to is : 21.08.2006). It is also not in dispute that the matter was investigated, whereupon a preliminary investigation report was filed by the police.

There is no dispute as regards the fact that in the report it was observed that no cognizable offence was made out as against the appellant.

2.5 Upon the investigation report being filed, an opportunity was granted to the respondent to file a protest petition as against the conclusion drawn in the preliminary investigation report filed by the police.

2.6 The respondent, it appears, did not file a protest petition and consequently, when the matter came up before the learned ACMM, on 24.03.2007, the complaint was dismissed.

2.7 The learned Single Judge taking into account the facts adverted to hereinabove, came to the conclusion that the suit was barred by limitation on account of the fact that the suit which had been admittedly filed on 09.10.2007, was beyond the prescribed period of limitation. In coming to this conclusion, the learned Single Judge has adverted to Article 74 of the Limitation Act, 1963 (hereinafter referred to as the Limitation Act). As indicated hereinabove, the learned Single Judge also declined to condone the delay in re-filing the suit.

2.8 We may also note that there is also a reference to Article 79 of the Limitation Act in the impugned judgment.

2.9. In the present appeal, we had requested Mr. Sandeep Sethi, Sr. Advocate to assist us in the matter as we had found that the advocate for the appellant was unable to assist us in the matter. This order was passed by us on 21.12.2011.

3. Thus, in the background of the aforesaid facts, the first question which arises for consideration is whether the provisions of Article 74 of

the Limitation Act, are at all, applicable. Article 74 prescribes for limitation where, an action is filed for malicious prosecution. The said article for the sake of convenience is extracted hereinbelow :-

No.	Description of Suit	Period of Limitation	Time from which period begins to run
74	For compensation for a malicious prosecution	One year	When the plaintiff is acquitted or the prosecution is otherwise terminated

4. In our view, the said Article would apply only if, necessary averments are made in the plaint. With the assistance of the learned Amicus Curiae, we have perused the plaint which, runs into 98 paragraphs. Despite prolixity of the plaint, we find that there is no averment to the effect that the action is founded on malicious prosecution. The only averment to which recourse was sought to be taken by the appellant are contained in paragraphs 90 to 94. For the sake of convenience, the same are extracted hereinbelow :-

“90. That it is pertinent to mention that on 27.03.2006, the defendant herein has even tried to pressurize and blackmail the plaintiff by filing a complaint being CC No.107/1/06 under section 200 of Cr.PC for registration of FIR u/s. 383, 384, 385, 415, 418, 420 u/s. sec. 120-B of IPC against the plaintiff and its Managing Director. The Ld. ACMM had directed the concerned Police Station to investigate the matter and file a report.

Accordingly, an Action taken Report (ATR) was filed before the Ld. ACMM wherein it is revealed that the allegations against the plaintiff was false, without any basis and devoid of substantial material and accordingly the Ld. Judge dismissed the complaint vide order dated 24.03.2007.

91. That the plaintiff herein has a right, title and interest in respect of such payment towards the goods and ought to be paid for services rendered. It is submitted in this regard that in terms of agreement entered into between the parties, the plaintiff is entitled to be paid a sum of Rs.76,03,821/- alongwith interest @ 12% p.a. for which the plaintiff reserves his right to file an appropriate proceedings to recover the same.

92. That the defendants because of their impish and puckish acts of filing false, baseless complaint has caused great disrepute to the plaintiff and has ill-reputed and defamed the image and goodwill of the plaintiff in the market for which the plaintiff is well-known. The defendant has knowingly and purposely harmed the reputation of the plaintiff.

93. That the plaintiff respectfully submits that it had blocked resources, deployed capital for these specific transactions and therefore the inordinate delay on the part of the defendant in getting the product registered unnecessarily delayed the project and the Clearing Agent wrote several emails stating this position and that the demurrage charges are increasing and cumulating day by day.

94. That the plaintiff herein has a right, title and interest in respect of such payment towards the goods and ought to be paid for services rendered. Due to such acts of blackmail and attempts to bring disrepute to the plaintiff, the business of the plaintiff has suffered immensely and therefore, irreparable injury is caused to the plaintiff, for which the plaintiff can only be compensated in terms of money.”

4.1 A perusal of the averments made therein would show that there is only a reference to the termination of the proceedings before the ACMM which, as noticed hereinabove, were terminated vide order dated 24.03.2007. The gravamen of the action is discerned, in actuality, on a perusal of the averments contained in paragraph 92 of the plaint. A perusal of the averments shows that the appellant (i.e., the original plaintiff) was evidently aggrieved on account of the defamatory allegations contained in the complaint filed before the ACMM. As observed hereinabove, there is no averment to the effect that a criminal ***prosecution***, of the plaintiff, was set in motion with malice with a view to cause a damage to the appellant.

4.2. As a matter of fact, the averments made in paragraph 96, which pertain to cause of action, only advert to the date on which the proceedings before the ACMM were terminated. The relevant averments made therein are quoted hereinafter :-

“...The cause of action further arose on 24.03.2007 when the ***false and baseless complaint*** filed by the defendant was

dismissed by the Ld. ACMM....”

4.3. These averments would show that the action is pivoted on the complaint filed before the ACMM once again; though a feeble attempt is made to seek extension of limitation based on the date of its dismissal.

4.4 In view of these averments, according to us, there was, as a matter of fact, no occasion to refer to Article 74 as this is not an action based on malicious prosecution. Similarly, in our view, Article 79 which speaks of an action for compensation vis-à-vis “illegal, irregular or excessive distress”; would also have no application in the absence of relevant pleadings in that regard. What can be said, at the highest, in favour of the appellant, is that, the action is based on defamatory material contained in the complaint, and if that be so, then the relevant article is Article 75, which reads as follows :-

No.	Description of Suit	Period of Limitation	Time from which period begins to run
75	For compensation for libel	One year	When the libel is published

5. The net result of the aforesaid discussion would be that the limitation would have to be calculated from the date on which the complaint was filed. As indicated above, it is not disputed that the complaint was filed on 26.03.2006. Thus, the limitation for filing the present suit would expire on 25.03.2007. The suit admittedly was instituted on a date, way beyond the period of limitation, which is,

09.10.2007.

6. There is another facet of the matter which we would like to refer to, which is, as to whether Article 74 would at all get attracted in the instant case. The order on the basis of which the appellant seeks to sustain the institution of the suit is the order of ACMM dated 24.03.2007, which reads as follows :-

“24.03.2007

Present: AR of the complainant
IO SI N.R. Lamba

I have gone through the preliminary investigation report of the investigating officer. I have also gone through the various documents placed before me including the details regarding civil proceedings and the orders of the Hon'ble Delhi High Court. Despite an opportunity, the counsel for the complainant has not filed any protest to the preliminary report. I am satisfied by the preliminary investigation report and I do not find sufficient material to proceed with the complaint which is hereby dismissed. File be consigned to Record Room.”

6.1. It is not in dispute that in the present case, no summons had been issued to the appellant based on the complaint filed by the respondent under section 156(3) of the Code of Criminal Procedure, 1973. The question therefore would arise as to whether in terms of Article 74 of the Limitation Act, “*prosecution*” if at all got triggered. The test to determine as to whether prosecution gets triggered for maintaining an action for malicious prosecution has been articulated by the Privy Council in the case of *Mohamed Amin Vs. Jogendra Kumar Bannerjee and Ors, 1947 AWR (P.C.) 1754*. The observations of the court being apposite are

extracted hereinbelow :-

“....From the consideration of the nature of an action for damages for malicious prosecution emerges the answer to the problem before the Board. To found an action for damages for malicious prosecution based on criminal proceedings the test is not whether the criminal proceedings have reached a stage at which they may be correctly described as a prosecution; the test is whether such proceedings have reached a stage at which damage to the plaintiff results. The Lordships are not prepared to go as far as some of the courts in India in saying that the mere presentation of a false complaint which first seeks to set the criminal law in motion will per se found an action for damages for malicious prosecution. If the Magistrate dismisses the complaint as disclosing no offence with which he can deal, it may well be that there has been nothing but an unsuccessful attempt to set the criminal law in motion, and no damage to the plaintiff results. But in this case the Magistrate took cognizance of the complaint, examined the complainant on oath, held an inquiry in open court under section 202 which the plaintiff attended, and at which, as the learned judge has found, he incurred costs in defending himself. The plaintiff alleged the institution of criminal proceedings of a character necessarily involving damage to reputation and gave particulars of special damage alleged to have been suffered by the plaintiff. Their Lordships think that the action was well founded, and on the

findings at the trial the plaintiff is entitled to judgment.”

6.2. In other words the test appears to be that: whether in an action for malicious prosecution, the criminal proceedings has reached a stage where it has caused damage to the plaintiff. The learned Judges have quite categorically observed, that they were not inclined to go to the extent of saying that mere dismissal of a false complaint, which sought to set the criminal law on motion, could *per se* be made a foundation for an action for damages, on the ground of malicious prosecution. It is observed, as indicated above, if a Magistrate dismisses the complaint as disclosing no offence, it may well be that it was nothing but an unsuccessful attempt to set the criminal law in motion, and no damage to the plaintiff consequently resulted.

6.3 In our view, in the facts of the present case, since no summons had been issued and cognizance had not been taken of the complaint filed by the respondent, the prosecution in terms of Article 74 had not commenced. It is trite to say that an enquiry ordered by a Magistrate under section 156(3) of the Code is at a pre-cognizance stage (see ***Devarapalli Lakshminarayana Reddy and Others Vs. V. Narayana Reddy and Others, (1976) 3 SCC 252***). Therefore, Article 74 would have no applicability, in the facts of the present case. However, as indicated hereinabove, that since the plaint did not contain any averment qua malicious prosecution, in any event, Article 74 would have no applicability.

7. For the reasons given hereinabove, we are of the opinion that the conclusion of the learned Single Judge is required to be sustained; albeit

for different reasons.

7.1 In view of our discussion above, we are of the opinion that the other aspect of the matter, that is, whether the delay ought to be condoned or not, does not arise for consideration.

7.2 The appeal is accordingly dismissed and the impugned judgment is sustained.

8. We may place on record our appreciation for the assistance rendered by Mr. Sandeep Sethi, the learned Amicus Curiae.

SANJAY KISHAN KAUL,J

RAJIV SHAKDHER, J

JANUARY 03, 2012

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