

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

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Date of decision: 6th October, 2015

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RFA No. 303/2009

SHRI O.P. GOEL

..... Appellant

Through: Ms. K.A. Nagamani, Advs.

Versus

SHRI TAPAN KUMAR DAS

..... Respondent

Through: Mr. K. Sunil & Mr. Aviral Mittal &
Mr. Navdeep Jain, Advs.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree dated 16th September, 2008 of the Court of Mrs. Sarita Birbal, Additional District Judge (ADJ) of dismissal of Suit No.15/2008 (instituted on 31st May, 1997) of the appellant for recovery of Rs.6,40,000/- by way of damages for malicious prosecution from the five defendants viz. State of Bihar, Tapan Kumar Dass, Vijay Kumar Jha, Vijay Nandan Dubey and Director General, All India Radio (AIR).
2. The memorandum of parties of this appeal shows only one respondent viz. Tapan Kumar Das.

3. On enquiry, the counsel for the appellant informs, (i) that the suit was earlier decreed on 6th April, 2004 awarding damages / compensation of Rs.3,00,000/- along with interest at 9% per annum from the date of filing of the suit and till realization; (ii) 75% of the said decretal amount was directed to be paid by the defendant No.3 Vijay Kumar Jha and the rest of the decretal amount was ordered to be shared by the other defendants equally; (iii) the said decree in so far as against the sole respondent herein viz. Tapan Kumar Das was an *ex parte* decree; ;(vi) the respondent filed an application under Order IX Rule 13 of the CPC for setting aside of the said judgment and decree and which application was allowed vide order dated 21st April, 2006 and the *ex parte* judgment and decree was set aside only against the respondent Tapan Kumar Das. It is thereafter that the impugned judgment and decree was passed. It is on this basis that in this appeal, there is a sole respondent as the impugned judgment is confined to the respondent only.

4. On enquiry, the counsel for the appellant informs that execution of the judgment dated 6th April, 2004 against Vijay Kumar Jha from whom 75% of the decretal amount is to be recovered is pending and the State of Bihar and the Director General AIR, each of whom were to pay 1/4th of the balance 25% of the decretal amount, have paid their respective share.

5. The counsel for the appellant has argued that the order dated 21st April, 2006 of the ADJ setting aside the *ex parte* judgment and decree dated 6th April, 2004 qua the respondent is bad and was obtained by the respondent by fraud.

6. The counsel for the respondent intervenes that the appellant had preferred a Civil Revision Petition before this Court against the order dated 21st April, 2006 setting aside *ex parte* against the respondent and the same was dismissed vide order dated 15th May, 2006.

7. The counsel for the appellant also agrees but contends that since the order dated 21st April, 2006 of the ADJ setting aside *ex parte* decree was a nullity, the appellant is entitled to challenge the same now also. On enquiry, whether at the time of dismissal of the Revision Petition preferred thereagainst, on 15th May, 2006, the said right was reserved or not, the counsel for the appellant states that the appellant did not have proper legal assistance at that time.

8. The counsel for the respondent again intervenes to state that the appellant is learnt to have gone to the Supreme Court also against the order dated 15th May, 2006 of this Court.

9. The counsel for the appellant states that though a Special Leave Petition was preferred but was never listed for hearing and thus the question of dismissal of the same did not arise.

10. In my view, once this Court in exercise of powers under Section 115 of the CPC has examined the order dated 21st April, 2006 of the learned ADJ, it is not open to me at this stage to again entertain a challenge thereto in this Regular First Appeal. I am in this jurisdiction not sitting in appeal over the order dated 15th May, 2006 of this Court of dismissal of the Revision Petition preferred by the appellant against the order dated 21st April, 2006.

11. Notwithstanding the counsel for the appellant having been informed of the same, she insists on arguing on that line only and on no other. She has also handed over a three page synopsis which is taken on record but the same also, save for citing three judgments on the aspect of malicious prosecution viz. i) ***Dau Dayal Vs. The State of Uttar Pradesh*** 1959 AIR SC 433, ii) ***West Bengal State Electricity Board Vs. Dilip Kumar Ray*** AIR 2007 SC 97, and, iii) ***Ravinder Singh Vs. Sukhbir Singh*** 2013 (9) SCC 245, is entirely on this aspect only.

12. In the circumstances the hearing was closed with order to be dictated in Chamber after going through the appeal file as well as Trial Court record requisitioned in this Court.

13. The counsel for the respondent handed over copy of the judgment of the Supreme Court in ***West Bengal State Electricity Board Vs. Dilip Kumar Ray*** AIR 2007 SC 976.

14. However the order could not be dictated on the same day and the counsel for the appellant since then has filed another written submissions also dated 5th October, 2015 along with a fresh *Vakalatnama* dated 3rd October, 2015.

15. I have gone through the records aforesaid as well as the written submissions of the appellant.

16. The learned Additional District Judge (ADJ), in the impugned judgment dated 16th September, 2008, has recorded of having been informed that appeals against the judgment/decrees dated 6th April, 2004 filed by some of the other defendants were pending before this Court and has further recorded that the appellant / plaintiff filed the suit pleading:-

- A. that the appellant/plaintiff was employed in AIR and was transferred to AIR Station at Darbhanga on 8th August, 1989 as its Station Engineer;
- B. that he was acting as Head of Office of AIR Station Darbhanga w.e.f. 1st April, 1990;
- C. that the respondent herein was also posted at AIR, Darbhanga and was working as Station Director at the relevant time, till 31st March, 1990;
- D. that due to wrongful activities of the respondent, he was transferred from Darbhanga and his transfer order was received by the appellant/plaintiff in the first week of April, 1990;
- E. accordingly, the appellant/plaintiff as Head of Office at Darbhanga Station of AIR issued relieving order to the respondent but the respondent avoided receiving the same and consequently the appellant/plaintiff had to himself go to deliver the same to the respondent at his residence in the presence of other officials posted at AIR, Darbhanga;

- F. that the respondent on 10th April, 1990, in a *mala fide* and malicious manner, made false police complaint against the appellant/plaintiff and nine other officials posted at AIR, Darbhanga;
- G. no prosecution was initiated by the Police on the basis of the complaint as the Police did not find any substance in the same;
- H. on 12th April, 1990, the respondent made another complaint on the same very facts and sent the same to the Police through the defendants no.3 & 4 namely Shri Vijay Kumar Jha and Shri Vijay Nandan Dubey for lodging First Information Report (FIR);
- I. as a consequence of this criminal conspiracy between the respondent and the defendant no.3 Shri Vijay Kumar Jha and defendant no.4 Shri Vijay Nandan Dubey and the then Superintendent of Police, Darbhanga, criminal case bearing FIR No.57/90 at Nagarthana Darbhanga under Sections 143, 342, 427, 448, 504 and 506 read with Section 34 IPC was registered

on 14th April, 1990 against the appellant/plaintiff and eight other officials then working at AIR, Darbhanga;

- J. the matter was reported to the defendant no.5 Director General, AIR who gave his go-ahead to the prosecution of the appellant/plaintiff and eight other officials;
- K. that malicious prosecution on these allegations was lodged against the appellant/plaintiff at the behest of the respondent and the said Vijay Kumar Jha and Vijay Nandan Dubey;
- L. that the appellant/plaintiff, due to harassment and threat of his physical elimination and finding no protection from the concerned quarters, had to take premature voluntary retirement from his service on 21st October, 1990 and shifted to Delhi;
- M. that charge sheet was filed in the aforesaid FIR on 21st June, 1990 and charge framed on 1st June, 1992 against the appellant/plaintiff and other eight persons;
- N. ultimately, after trial the appellant/plaintiff and other accused persons were acquitted on 12th July, 1996.

The appellant / plaintiff filed suit from which this appeal arises claiming, (i) damages in the sum of Rs.2 lacs for harassment, loss of reputation, mental torture and agony; (ii) expenses incurred in contesting the prosecution in the sum of Rs.3,10,000/-, (ii) loss of emoluments of Rs.1 lac, and (iii) loss of earnings of Rs.30,000/- i.e. total Rs.6,40,000/-.

17. The following issues were framed on 18th October, 2006:-

- “1. Whether this court has no territorial jurisdiction to try this case? OPD2*
- 2. Whether the suit is not maintainable and barred by principles of resjudicata? OPD*
- 3. Whether the plaintiff is entitled to claim damages against defendant no.2 as prayed? OPP*
- 4. Relief.”*

18. The appellant/plaintiff examined himself only; the respondent, besides himself, examined one Shri Rajender Kumar as his witness.

19. The learned ADJ decided the Issues No.1 & 2 aforesaid in favour of the appellant/plaintiff.

20. However the learned ADJ decided Issue No.3 against the appellant/plaintiff and in favour of the respondent, reasoning:-

- (a) mere acquittal of a plaintiff in a prosecution initiated by the defendant is not sufficient to hold that there was malicious prosecution of the plaintiff; if the defendant has reasonable or probable cause of launching the criminal prosecution, no amount of malice will make him liable for damages;
- (b) reasonable and probable cause has to be such as would operate in the mind of a reasonable man; ‘malice’ and ‘want of reasonable and probable cause’ have reference to the state of the defendant’s mind at the time of initiation of criminal proceedings and the onus rests on the plaintiff to prove the same;
- (c) reliance was placed on *West Bengal State Electricity Board Vs. Dilip Kumar Ray* AIR 2007 SC 976, *Ravinder Kumar Sharma Vs. State of Assam* AIR 1999 SC 3571, *Surat Singh Vs. Delhi Municipal Corporation* AIR 1989 Delhi 51, *Major Gian Singh Vs. S.P. Batra* AIR 1973 Punj. & Har. 400 and *C.B. Aggarwal Vs. P. Krishna Kapoor* AIR 1995 Delhi 154;

- (d) that though the respondent had filed complaints dated 10th April, 1990 and 12th April, 1990 which gave rise to the prosecution but cognizance of the alleged offence was taken by the Judicial Magistrate and the charge sheet filed by the Police at Darbhanga; whether the Police was justified in recording the FIR and filing the charge sheet was the subject matter of the appeals pending before the High Court filed by the State of Bihar and some other defendants. (Though the outcome thereof is not known);
- (e) that the appellant/plaintiff, to succeed was thus required to show that at the time of making of the complaint the respondent had no reasonable or probable cause for making the complaint;
- (f) that at the relevant time while the appellant/plaintiff was posted at Darbhanga Station as its Station Engineer, the respondent was working as Station Director; there was a policy at the relevant time by which both the appellant/plaintiff and the respondents were required to act as the Head of the Station in rotation for one year each; the respondent acted as Head up to

31st March, 1990 and thereafter the appellant/plaintiff was acting as Head w.e.f. 1st April, 1990;

- (g) on 30th March, 1990 the Director General, AIR, Darbhanga issued a transfer order transferring the respondent from the post of Station Director, AIR Darbhanga to the post of Station Director, AIR Kurseong;
- (h) that as per the transfer order, the respondent was required to relinquish his charge at Darbhanga on being relieved by one Shri V.S. Srivastava; there was some delay in reporting by Shri V.S. Srivastava at Darbhanga and the respondent continued to discharge his duties;
- (i) on 10th April, 1990 the appellant/plaintiff passed an order relieving the respondent from Darbhanga and the relieving order was sought to be served by the appellant/plaintiff on the respondent on 10th April, 1990 at about 9.30 P.M. at the residence of the respondent;

- (j) the case of the appellant/plaintiff was that he had to go to the residence of the respondent in the night to serve the order as the respondent was avoiding to receive the order;
- (k) per contra, the case of the respondent was that the appellant/plaintiff came to his residence along with large number of other persons in between 9.00 p.m. and 9.30 P.M. and *gheraoed* his house and forcibly tried to open the door and disconnected the telephone line to the house of the respondent and this led to the filing of the complaint to the Police which gave rise to the FIR;
- (l) that the Chief Judicial Magistrate vide his judgment dated 12th July, 1996 held that the prosecution had not been able to prove allegations against the accused persons beyond reasonable doubt and accordingly acquitted the appellant/plaintiff and other accused; it is noted in the judgment that the wife and son of the respondents were material witnesses but were not examined during the trial; it has further been held in the judgment that in the facts and circumstances, the purpose of the

assembly of which the plaintiff was a party could not be said to be unlawful within the meaning of Section 141 IPC; it is also observed that there was some delay in recording of FIR;

- (m) in the aforesaid facts, it could not be said that the respondent had no reasonable or probable cause for making the complaint;
- (n) it was not disputed that the appellant/plaintiff along with others went to the house of the respondent at 9.30 p.m.; even if the respondent was avoiding to receive the relieving order, the appellant/plaintiff had been unable to show any reasonable cause for going to the residence of the respondent at night along with others and to make an attempt to forcibly serve the same;
- (o) it was not the case of the appellant/plaintiff that he was ordered by the administrative superiors to serve the relieving order in such a manner;
- (p) the language of the relieving order showed that the decision was unilaterally taken by the appellant/plaintiff and appeared to be contrary to the direction of Director General, AIR who had

ordered that the respondent shall continue to work till Shri V.S. Srivastava reports at Darbhanga;

- (q) that the appellant/plaintiff had also locked the office of the respondent, as is apparent from the relieving order;
- (r) the relieving order could have been served by sending it through the registered post or by affixation outside the office of the respondent;
- (s) admitted attempt by the appellant/plaintiff to compel the respondent, by going to the residence of the respondent along with number of other persons, to receive the order at 9:00 P.M. could have given a probable cause for filing of complaint by the respondent;
- (t) that the respondent had proved that the administrative superiors, upon being informed of the incident, ordered re-opening of the office of the respondent which the appellant/plaintiff had forcibly shut down and further that the respondent had continued to work at AIR, Darbhanga till 21st April, 1990 when

in the afternoon he relinquished charge as Shri V.S. Srivastava joined on 22nd April, 1990;

- (u) that the appellant/plaintiff had not been able to establish that he took voluntary retirement in October, 1990 due to the complaint aforesaid; and,
- (v) rather letter dated 14th May, 1990 of the appellant/plaintiff proved as Ex.DW2W1/6 showed that the appellant/plaintiff who was attaining the age of 55 years on 19th May, 1990 had sought either his transfer to Delhi or voluntary retirement to be able to settle down in Delhi to fulfill his social obligation in and around Delhi where he intended to ultimately settle down; no mention was made in the said letter of the complaint made by the respondent or the FIR.

Accordingly, it was held that the appellant/plaintiff was not entitled to any damages against the respondent.

21. I have minutely perused the memorandum of appeal and do not find the appellant/plaintiff to have therein controverted the reasoning aforesaid in the impugned judgment or the premise thereof. Rather, the emphasis of the

appellant/plaintiff therein also is on the illegality of the order dated 21st April, 2006 setting aside the *ex parte* judgment and decree dated 6th April, 2004 against the respondent and on the impugned judgment being contrary to the findings in the *ex parte* judgment and decree dated 6th April, 2004 against the respondent.

22. As aforesaid, the order dated 21st April, 2006 of the learned ADJ setting aside the *ex parte* judgment and decree was subject matter of Revision Petition which was dismissed by this Court. It is now not open to challenge.

23. Similarly, once the *ex parte* judgment and decree was set aside, no reliance can be placed on the *ex parte* judgment and decree to find fault with the judgment and decree rendered after a contested trial.

24. Besides the same, the appellant/plaintiff has contended, (i) that he had, in performance of his official duty, gone to the house of the respondent to deliver the relieving order as the respondent was avoiding to receive the same; (ii) that no complaint dated 10th April, 1990 had been proved and hence the first complaint of the incident of 10th April, 1990 was after two days on 12th April, 1990 and was as an afterthought; (iii) that in fact the

complaint dated 12th April, 1990 also had been submitted to the Police only on 14th April, 1990; (iv) that the delay in filing the complaint shows the malicious intention of the respondent; (v) that the respondent had failed to produce his wife and child who were material witnesses in the witness box in the Suit also; and, (vi) that if there had been an incident as was complained by the respondent, it is unbelievable that there would have been no witnesses to it.

25. I have perused the Trial Court record, particularly the evidence led, to gauge whether the findings of the learned ADJ in the impugned judgment even though not contended to be not borne out therefrom, can be said to be so. I do not find anything therein from which it can be said that the reasoning of the learned ADJ of, (i) the respondent being required to be relieved from the AIR Darbhanga only upon Shri V.S. Srivastava joining the same; (ii) the relieving order which the appellant/plaintiff sought to serve on the respondent being contrary thereto and being the unilateral act of the appellant/plaintiff; (iii) that there being no occasion for the appellant/plaintiff to serve the relieving order dated 10th April, 1990 on the respondent in the night of 10th April, 1990 itself at the residence of the respondent no.2 and going with a large number of other persons to the house

of the respondent; and, (iv) the respondent feeling threatened from the actions aforesaid of the appellant/plaintiff and making a complaint thereof, being erroneous. In fact the appellant/plaintiff in his affidavit by way of examination-in-chief did not even state that the relieving order dated 10th April, 1990 was tendered to the respondent in the daytime of 10th April, 1990 for it to be said that the respondent had failed to receive the same. It cannot also be forgotten that the order dated 30th March, 1990 of transfer of the respondent was not of the appellant/plaintiff but of the Director General AIR and there is nothing on record to show that the appellant/plaintiff working as the Head of AIR Darbhanga was required to issue the relieving order dated 10th April, 1990 or to serve the same. Rather the appellant/plaintiff in his cross examination could not even answer whether he had sent copy of the relieving order dated 10th April, 1990 to the office of the Director General, AIR or to any other senior official. In fact the cross examination of the appellant/plaintiff is replete with “I do not remember”.

26. I also find the respondent to have proved, (i) that his house was in the AIR residential colony; (ii) that in the night of 10th April, 1990 his house was *gheraoed* by 20-25 persons with a view to threaten and attack him and his family members; (iii) that the Police was informed of the incident

immediately and intervened to defuse the situation; (iv) that due to the said incident and fearing for himself and for his family, he requested to be permitted to relinquish his charge even before the arrival of Sh. V.S. Srivastava and was permitted to hand over his charge to the Station Director, Darbhanga and which he did on 21st April, 1990, before the arrival of Shri V.S. Srivastava on 22nd April, 1990; and, (v) that on his complaints disciplinary proceedings were contemplated against the appellant/plaintiff and to avoid which the appellant/plaintiff sought voluntary retirement.

27. I find no reason to disagree or to find error in the reasoning given by the learned ADJ of the circumstances aforesaid giving rise to a reasonable apprehension in the mind of the respondent of threat to him and his family members. It is not in dispute that the appellant/plaintiff, without any reasonable cause, along with others went to the house of the respondent in the night of 10th April, 1990. Such uncalled for visiting by a person who obviously was acting adversely to the respondent, along with a number of other persons can give rise to an apprehension in the mind of the respondent leading to the complaint. Moreover, it is not as if the respondent had pursued any private complaint against the appellant/plaintiff. On the basis of a complaint of the respondent the Police was expected to investigate and if

found any offence to have been made out, to only then prosecute. No error can thus be found in the reasoning of the learned ADJ.

28. The counsel for the appellant/plaintiff in the written submissions filed subsequently also has not contended anything to the contrary. As far as the judgments aforesaid relied upon by the appellant/plaintiff are concerned, they also do not lay down any different proposition than has been adopted by the learned ADJ in the impugned judgment.

29. Before parting with this judgment, I may record that the Trial Court record perused by me is found to contain copies of orders in RFA No.375/2004 preferred by Shri Vijay Kumar Jha and others against the judgment and decree dated 6th April, 2004 as well as of order in RFA No.641/2004 preferred by State of Bihar. A perusal of the website of this Court shows RFA No.375/2004 and RFA No.641/2004 to have been disposed of as infructuous vide orders dated 18th February, 2010 in the light of the judgment dated 16th September, 2008 impugned in this appeal.

30. I may also record that the appellant/plaintiff had before the Trial Court also filed an application under Section 340 of the Cr.PC against the respondent averring falsehood on the part of the respondent in seeking

setting aside of the *ex parte* judgment and decree dated 6th April, 2006 and which application was also dismissed by the learned ADJ vide order dated 16th September, 2008. The appellant/plaintiff had preferred Criminal Appeal No.110/2009 against the said dismissal and notice whereof was issued and which was ordered to be listed with this appeal but which was dismissed in default of appearance of the appellant/plaintiff on 8th January, 2015 and no steps for restoration thereof have been taken.

31. There is thus no merit in the appeal.

Dismissed. However no costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

OCTOBER 06, 2015

‘gsr’/ ‘pp’

(corrected & released on 25th December, 2015)