

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.**

Second Appeal No. 0110 of 2018

District : Beed

Rajjak s/o. Dulhekhan
(Yusufoddin) Pathan,
Age : 52 years,
Occupation : Service,
R/o. Islampura, Beed,
Taluka & Dist. Beed.

.. Appellant
(Original
plaintiff)

versus

Shaikh Sheru s/o. Shaikh Munir,
Age : 58 years,
Occupation : Labour,
R/o. Islampura, Beed,
Taluka & Dist. Beed.

.. Respondent
(Original
defendant)

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*Mr. Sayyed Tauseef Yaseen, Advocate, for the
appellant.*

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 22ND APRIL 2019

ORAL ORDER :

Heard learned Advocate appearing for the
appellant.

02. Appellant is the original plaintiff who had
instituted Special Civil Suit No. 83 of 2008 before
Joint Civil Judge (Senior Division), Beed, for
recovery of amount of Rs. 1,30,000/- with interest by

way of damages for malicious prosecution.

03. What is not in dispute, that the defendant had instituted Regular Civil Suit No. 153 of 2006 against Municipal Council, Beed, plaintiff and his brothers, for permanent injunction. That suit came to be dismissed. It is also not in dispute, that defendant no.01 had filed private complaint bearing S.C.C. No.2975 of 2006 in the Court of Chief Judicial Magistrate, Beed. According to the plaintiff, the said criminal case was filed with malicious intention. Process was issued against the plaintiff. He was required to appear before bail and furnish bail and, therefore, his image in the society has been damaged. It is stated that the plaintiff being government servant, has been unnecessarily dragged into the litigation and several more civil suits have been instituted. The said criminal case resulted in acquittal and, therefore, the plaintiff had prayed for damages. (Parties are referred as per their nomenclature before the trial Court.)

04. The suit was resisted. As regards criminal case is concerned, it is denied that it was a false case. It is stated that on the day of evidence, he could not remain present and, therefore, the case was dismissed under Section 249 of the Code of Criminal Procedure.

05. Taking into consideration the rival contentions, issues came to be framed. Parties have led oral as well as documentary evidence. Taking into consideration the evidence as well as hearing both sides, learned trial Court has dismissed the suit on 22-02-2010. Present appellant had challenged the judgment and decree passed by the trial Court, by filing Regular Civil Appeal No. 37 of 2010. The said appeal was heard by the learned District Judge-4, Beed and it has been dismissed on 14-09-2017. Hence, this second appeal.

06. Learned Advocate appearing for the appellant submitted that though the defendant's complaint was dismissed, in fact, it was on the basis that he did not lead the evidence. On the day of the alleged incident, which was stated to be in the criminal case, plaintiff was very much present in his office and evidence to that effect was adduced by the plaintiff in the suit which has not been considered by both the Courts below. The criminal case that was filed was with malicious intention as the defendant could not get interim protection, he intended to seek.

07. It is well settled that in a case for recovery of damages and compensation for malicious prosecution, the plaintiff is required to prove that he was prosecuted by the defendant, such prosecution

had terminated in his favour, the prosecution was without reasonable and probable cause and that the prosecution was actuated by malice. In the Law of Torts by Salmond, Fourteenth Edition (1965) at page 588, it has been stated as follows:-

"In order an action shall lie for malicious prosecution or the other forms of abusive process which have been referred to, the following conditions must be fulfilled:-

(1) The proceedings must have been instituted or continued by the defendant;

(2) He must have acted without reasonable and probable cause;

(3) He must have acted maliciously;

(4) In certain classes of cases the proceedings must have been unsuccessful - that is to say, must have terminated in favour of the plaintiff now suing."

08. In *Major Gian Singh v/s. S. P. Batra [A.I.R. 1973 Punjab and Haryana 400]* the Division Bench concluded as under:-

"In a suit for malicious prosecution, the burden of proving that the proceedings were initiated without any reasonable and probable cause lies on the plaintiff who seeks damages. It is no doubt true that the acquittal of the plaintiff in the earlier proceedings may some times give rise to a presumption that there was no reasonable and probable cause for his prosecution, but this presumption is rebuttable. The defendant in such a suit has merely to prove that the facts and circumstances did exist which gave rise to a belief

in his mind that the other party was guilty. These facts and circumstances do not have to be viewed or weighed as would be done by a Court of law, for otherwise in all those cases in which the prosecution fails, the complainant or the prosecutor would become liable for damages”.

Therefore, mere filing of complaint and his disposal in favour of accused, may not give rise to conclusion that he was maliciously prosecuted. The first and the foremost fact that is required to be considered as per the record, that the criminal case in the present matter was dismissed under Section 249 of the Code of Criminal Procedure and it was not a decision on merits. It also appears from the contention of the plaintiff, that he wanted to take the plea of alibi before the concerned Court in the criminal proceedings. However, since the complaint itself was dismissed in default, there was no question for plaintiff to adduce any evidence regarding plea of alibi. He cannot get that thing proved in civil suit. The competent Court i.e. criminal Court had not come to a conclusion that the said criminal proceeding was filed with malicious prosecution. The question of malicious prosecution will not arise when the dismissal of the complaint is for want of prosecution under Section 249 of Cr.P.C. Sec. 249 of Code of Criminal Procedure deals with Absence of complainant and provides that, “ *When the proceedings have been instituted upon complaint, and on any day fixed for the hearing of the case, the complainant is absent, and the offence may be lawfully compounded or*

is not a cognizable offence, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused". Thus, it can be seen that dismissal of complaint filed by present defendant has resulted in 'discharge' not 'acquittal'. A criminal complaint on the same cause of action may lie, when accused is discharged. Therefore, the findings given by both the Courts below are correct on the basis of facts as well as law. No substantial question of law has been pointed out in this appeal.

09. Hence, the second appeal is disposed of as **'not admitted'**.

(Smt. Vibha Kankanwadi)
JUDGE

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