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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
Date :21.04.2021
CORAM :
THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN
S.A.(MD)No.122 of 2013
and
M.P.(MD)No.1 of 2013

1.M.Abubaker
2.Mohammed Ali
3.Nagoor Gani
4.A.Mustafa
5.Hassan Hussein
6.Abdul Razack ... Appellants/Respondents/Defendants

-Vs-

Abdul Kareem ...Respondent/Appellant/Plaintiff

PRAYER: To allow the Second Appeal filed under Section 100 of Civil Procedure Code by setting aside the decree and Judgment dated 17.09.2012 in A.S.No.114 of 2011 passed by the Principal District Court, Trichirapalli reversing the decree and judgment dated 13.07.2010 in O.S.No.172/2003 passed by the Principal Sub Court, Trichirapalli.

For Appellants : Mr.S.Suresh Kumar
For Respondent : Mr.R.Devaraj

JUDGMENT

The defendants in O.S.No.172 of 2003 on the file of the Principal Sub-ordinate Judge, Trichirapalli are the appellants herein. The respondent herein, namely, Abdul Kareem filed the said suit seeking compensation of a sum of Rs.1,50,000/- from the appellants for having maliciously prosecuted him. The suit was dismissed by the trial Court vide Judgment and decree dated 13.07.2010. Challenging the same, the respondent herein filed A.S.No.114 of 2011. The first Appellate Court by the impugned Judgment and Decree allowed the appeal. Questioning the same, this second appeal was filed. It was admitted on 21.02.2013 on the following substantial questions of law :

> "1.Whether the First Appellate Court has erroneously altered the judgment and decree of the trial Court and partly allowed the claim of the plaintiff without considering the non-jointer of necessary parties ie., also marked in Ex.A5 is a valid one ?
>
> 2.Whether the First Appellate Court is ignoring the five elements required to prove for the suit for malicious prosecution is correct, when it leads to self-contrary in nature ?
>
> 3.Whether the first Appellate Court fails to consider the 161 statement in Cr.P.C, when negligence is existed on the part of the Investigation Officer is

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proper ?”

It is obvious that the aforesaid formulation conveys no meaning. It does not make any sense at all. The reason is obvious. Though Section 100 (4) of CPC states that where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question, what mostly happens in practice is not in strict consonance with the statutory mandate. Since Section 100(3) of CPC states that the appeal memorandum shall precisely state the substantial question of law involved in the appeal, once the Judge is satisfied that a case has been made out for admitting the second appeal, instead of independently formulating the substantial question of law arising in the appeal, instruction is given to the stenographer to copy down certain particular grounds from the appeal memorandum. If the counsel's formulation is flawed and defective, the Court record also carries the same vice. Though it is somewhat embarrassing, I have chosen to be frank more with an eye on future. Since the judicial workload is staggering, it is not fair to expect the judges to expend too much time and energy in proof-reading. The counsel must assume greater responsibility. They must deeply study the case record. Their grasp of the legal principles must be thorough and accurate. The distilled understanding must be reflected in the appeal grounds. They must be properly drafted. There should not be grammatical and spelling errors. The role of stenographers and typists is equally significant. Only if all the stakeholders discharge their commitments sincerely, howlers like what we saw now can be avoided.

2.In the place of what was formulated earlier, the following substantial questions of law were framed :

> “1.Whether the first Appellate Court ought to have seen that there was no cause of action against the defendants 2 to 6 as they figured only as witnesses in the criminal case ?
>
> 2.Whether the first Appellate Court failed to note that the necessary ingredients for proving the claim of malicious prosecution are not present in this case ?
>
> 3.Whether the first Appellate Court ought to have seen that the plaintiff failed to discharge the burden of proof cast on him ?.”

The learned counsel on either side addressed the court on the aforesaid substantial questions of law.

3.The plaintiff was a permanent resident of Pettavaithalai Village. He was employed in TWAD Board. He questioned the manner in which the local mosque was being administered. The president of the Jamath which managed the mosque was the brother-in-law of the first defendant M.Abubacker. The first defendant implicated the plaintiff and his son in Crime No.399 of 2000 under Sections 452 and 506(2) of IPC on the file of the Jeeyapuram Police Station. The plaintiff was arrested on 06.12.2000 and detained in custody for more than 24 hours. He was also suspended from service. The case

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was charge-sheeted and taken on file in C.C No.165 of 2001 on the file of the Judicial Magistrate No.III, Trichy. Following his acquittal on 01.02.2003, the plaintiff issued notice dated 25.05.2002 demanding compensation for malicious prosecution from the defendants. The first defendant sent a reply dated 19.11.2000 denying the claim. Thereafter, the present suit came to be filed. The defendants filed written statement controverting the plaint averments.

4.The plaintiff examined himself as P.W.1 and marked Exs.A1 to A6. The first defendant examined himself as D.W.1 and the sixth defendant Abdul Razack examined himself as D.W.2. On the side of the defendants, Exs.B1 to B3 were marked. The learned trial Judge, after consideration of the evidence on record, vide Judgment dated 13.07.2010 dismissed the suit. However, the decision of the trial Court was reversed by the first Appellate Court. By the impugned Judgment and decree, a sum of Rs.1.00 lakh was awarded as compensation to the plaintiff.

5.The learned counsel for the appellants submitted that the acquittal of the plaintiff by the Criminal Court by itself will not furnish cause of action for maintaining the instant suit for malicious prosecution. The plaintiff had the legal burden to establish that the prosecution was vitiated by malice and that the defendants did not have any reasonable or probable cause for making the complaint. The plaintiff was obliged to show that he was innocent and that the complaint made against him was false. The first defendant was the defacto complainant but the other defendants were only witnesses. It was a police case and if due to negligence on the part of the investigation officer, the case had ended in acquittal, the appellants cannot subsequently be vexed with a claim for damages. The learned counsel took me through the pleadings as well as evidence and submitted that the substantial questions of law deserve to be answered in favour of the appellants. He wanted the impugned judgment and decree passed by the first appellate court to be set aside and the decision of the trial court restored.

6.Per contra, the learned counsel appearing for the respondent submitted that the trial Court went completely wrong in holding that there was no malice in the matter of filing the criminal complaint. He would point out that even according to the defendants, the relationship between the parties was already bitter. According to him, the element of malice is apparent and therefore, the first appellate Court rightly reversed the decision of the trial Court. He submitted that no substantial question of law has really arisen for determination and called upon this Court to dismiss the second appeal.

7.I carefully considered the rival contentions and went through the evidence on record. The respondent/plaintiff was prosecuted in C.C No.165 of 2001 on the file of the Judicial Magistrate No.III, Trichirappalli. It ended in acquittal. But, acquittal by itself is

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not sufficient. The plaintiff was obliged to prove that the prosecution was without any reasonable and probable cause and that it was instituted with a malicious intention and that he suffered damage.

8.A suit for malicious prosecution will lie only against that person at whose instigation the proceedings commenced. The question is who was the prosecutor. In the case on hand, it was only the first defendant who gave the complaint against the plaintiff and his son. The other defendants no doubt supported the prosecution but they merely figured as witnesses. D2 to D6 did not set the law in motion. By no stretch of imagination, they can be said to have prosecuted the plaintiff. If according to the plaintiff they had committed perjury, the course of action to be taken against them will have to be different. I hold that the plaintiff did not have any cause of action against defendants 2 to 6. The first substantial question of law is answered in favour of the appellants.

9.Of course, the first defendant cannot take the same plea. Even though C.C No.165 of 2001 is based on police report, it is anchored on the complaint given by the first defendant. Having been the defacto complainant and having played a prominent part in the prosecution, the first defendant cannot be heard to contend that the suit is not maintainable against him [vide *Balbhaddar Singh vs. Badri Sah (AIR 1926 PC 46*)].

10.The case of the prosecution in C.C.No.165 of 2001 was that on 01.12.2000, the plaintiff and his son entered the shop run by the first defendant at around 09.00 p.m. They brandished a knife and threatened that if the first defendant did not withdraw the earlier complaint given by him before the Pettavaithalai Police Station, he would face dire consequences. On the strength of this complaint given by the first defendant, Crime No.399 of 2000 was registered for the offences under Section 452 and 506(2) of IPC. As already noted, the prosecution ended in acquittal. But, the civil court must undertake an independent enquiry. It cannot merely borrow the grounds of the acquittal and grant decree in favour of the plaintiff. The burden of proof lies on the plaintiff to show that he was maliciously prosecuted. The ingredients of malicious prosecution have already been set out. To discharge the burden cast on him, the plaintiff examined himself as P.W.1. He deposed that the complaint leveled against him was false. According to him, the first defendant was nurturing animosity against the plaintiff for more than one reason. The plaintiff had demanded accountability in the administration of the mosque. Hence, he was victimised.

11.There is no doubt that the burden of proof lay only on the plaintiff. This burden can never shift. However, the plaintiff cannot be called upon to prove the negative. As regards the non-existence of reasonable and probable cause, the onus will shift to

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the defendant after the plaintiff asserts in the witness box that the complaint against him was false and after he adduces evidence demonstrating the existence of malice on the part of the defendant. Of course, in *Sudhir Chandra Pal vs. Rajeswar Datta (AIR 1972 (Gau) 119*), it was held that although it involves a notoriously difficult task of proving a negative, the burden of proving absence of reasonable and probable cause is nevertheless on the plaintiff. However, it was added that onus may at different stages of the proceeding shift from one party to the other.

12.In *Bharat Commerce and Industries Ltd. vs. Surendra Nath Shukla and Ors. (AIR 1966 Cal 388)*, the principles were accurately laid down in the following terms :

> "7.....In a suit for malicious prosecution, the plaintiff must prove (1) that the defendant prosecuted him, and (2) that the prosecution ended in the plaintiff's favour, and (3) that the prosecution lacked reasonable and probable cause, and (4) that the defendant acted maliciously. .....In the past, "malice" was identified with "lack of reasonable and probable cause" and often malice was inferred from lack of reasonable and probable cause and vice versa. But the present state of law seems to be that the concept of malice is to be kept distinct from the concept of lack of reasonable and probable cause. Ordinarily, malice denotes spite or hatred against an individual but it is often difficult to infer spite or hatred from the conduct of a person. It is said that the devil does not know the mind of man. Therefore, the ordinary meaning of malice cannot be determined by any subjective standard. Clarke and Lindsell have rightly said in their book on Law of Tort, 11th Edition. Article 1444 at page 870:
>
> "The term 'malice in this form of action is not to be considered in the sense of spite or hatred against an individual, but of malice animus and as denoting that the party is actuated by an improper motive. The proper motive for prosecution is of course a desire to secure an end to justice."
>
> Professor Winfield has also made similar observations in his book on the Law of Torts (3rd Edition) at page 604:
>
> *"Judicial attempts to define malice have not been completely successful. 'Some other motive than a desire to bring to justice a person whom he (the accuser) honestly believes to be guilty", seems to overlook the fact that motives are often mixed. Moreover anger is not malice; indeed, it is one of the motives on which the law relies in order to secure the prosecution of criminals, and yet anger is much more akin to revenge*

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than to any desire to uphold the law, perhaps we are nearer the mark if we suggest that malice exists unless the pre-dominant wish of the accuser is to vindicate law."

Thus, in order to give an objective meaning to the term, 'malice', it should be found out whether the accuser has commenced prosecution for vindication of justice e.g., for redress of a public wrong. If he is actuated by these considerations, he cannot be said to have any malice. But if his object to prosecute is to be vindictive or to malign him before the public or is guided by purely personal considerations he should be held to have malice in the matter. Similarly, the lack of reasonable and probable cause should be also understood objectively. Reasonable and probable cause does not connote the subjective attitude of the accuser. If the accuser thinks that it is reasonable to prosecute, that fact by itself cannot lead to the conclusion that judicially speaking, he has reasonable and probable cause for the prosecution. The term 'reasonable' shows that the causes must conform to the standards of a reasonable and prudent man and the term 'probable' shows that the causes may result in the proof of the guilt. Therefore, a reasonable and probable cause can only mean that the grounds for the plaintiffs guilt are reasonable according to a reasonable and prudent man and that there are materials which might result in the conviction of the accused. It can never be said that the reasonable and probable causes are grounds which must inevitably result in conviction. If acquittal means that the prosecution has been commenced without any reasonable and probable ground, then it would not have been necessary to say that apart from or in addition to the acquittal the plaintiff, in a suit for malicious prosecution, must prove that the defendant lacks reasonable and probable cause in prosecuting the plaintiff. A man may be acquitted and yet there may be a reasonable and probable cause for prosecution. This analysis of the legal position shows that the probative value of the evidence or the legal conclusions on the evidence cannot be very relevant in determining whether the accuser has a reasonable and probable cause in prosecuting the plaintiff. It is not necessary that in order to come to the conclusion that the accuser has a reasonable and probable cause, the evidence adduced must be commensurate with the conviction of the accused. In a criminal trial, benefit of doubt often plays an important part. If some part of the evidence

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leans to a conclusion that a man is guilty and if another part of the evidence in the same case indicates that the man may not be guilty, or if two possible views of a conflicting nature can be spelt out from the entire facts of the case, the accused gets benefit of doubt. Therefore, the only relevant and material time when a reasonable and probable cause for prosecution has to be found out is the time when the criminal proceeding is commenced or set in motion. It is only from this point of view that the evaluation of the evidence in a suit for malicious prosecution should be made....."

13.In *Satdeo Prasad vs. Ram Narayan, AIR 1969 Pat 102*, an interesting proposition has been laid down. Where the accusation against the plaintiff was in respect of an offence which the defendant claimed to have seen him commit and the trial ends in an acquittal on merits, the presumption will be that there was no reasonable and probable cause for the accusation. Of course, as consistently held by all the courts, the civil court will have to undertake an independent enquiry in the matter.

14.The law of torts talks independently of an action for false imprisonment and action for malicious prosecution. In Limitation Act also, Article 73 relates to false imprisonment and Article 74 pertains to malicious prosecution. For both, the period of limitation has been prescribed as one year. For the former, time begins to run when the imprisonment ends and for the latter, it begins to run when the plaintiff is acquitted or the prosecution is otherwise terminated. The application of the rules relating to burden of proof would also be different. In *Narayan Govind Gavate v. State of Maharastra (1977) 1 SCC 133*, the Supreme Court approvingly quoted Phipson that in actions of malicious prosecution, it is upon the plaintiff to show not only that the defendant prosecuted him unsuccessfully, but also the absence of reasonable and probable cause; while in actions for false imprisonment, proof of the existence of reasonable cause is upon the defendant, since arrest, unlike prosecution, is prima facie a tort and demands justification. It has been noted in Ratanlal & Dhirajlal's "The Law of Torts" that if a person gets another arrested by police on a false complaint, he is liable for damages for false imprisonment. Where the prosecution also included arrest, in a suit for malicious prosecution, the burden of proof rests rather lightly on the plaintiff and when the onus shifts, the defendant has a heavy task to discharge.

15.The allegation of the first defendant is that he had given an earlier complaint against the plaintiff and to force him to withdraw the same, the plaintiff and his son entered his shop on 01.12.2000 at 09.00 PM. But the earlier complaint was not marked.

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Since the occurrence spot is a shop, it would have definitely attracted notice and a complaint would have been lodged before the local police immediately thereafter. But, the first defendant approached the District Superintendent of Police only on the next day and the written complaint given by the first defendant was sent through post to Jeeyapuram Police Station and the FIR itself was registered only on 06.12.2000. The first defendant claimed that the occurrence was witnessed by the other defendants. But, only the 6th defendant was examined as DW.2. But DW.2 did not utter a word about the occurrence in question. He deposed only regarding the strain between the parties caused by the matrimonial dispute between the plaintiff's son and daughter-in-law. In other words, in support of the criminal charge, except the testimony of the first defendant, there was no corroboration forthcoming. The police officials have not been examined by the defendant. It is also impossible to believe that at 09.00 P.M, the other defendants came to the shop of the first defendant for the purpose of accompanying to the mosque for offering namaz and incidentally happened to witness the occurrence. As already observed, the plaintiff can only state that neither he nor his son went to the shop of the first defendant or threatened him. He can only depose that the allegation against him was false. A plaintiff in a suit for malicious prosecution need not demonstrate that he was innocent of the charge upon which he was tried. The Privy Council in *Balbhaddar Sing vs. Badri Sah (AIR 1926 PC 46)* categorically held so. The plaintiff need not undergo a second agnipariksha. On the other hand, it is the defendant who must discharge the onus once it is shifted to him. In this case, the first defendant had miserably failed to discharge the onus cast on him.

16.The existence of malice has been amply established by the plaintiff. Ex.B1 dated 02.11.2000 is a copy of the notice sent by the plaintiff to the President and Secretary of the mosque. The President was none other than the brother-in-law of the first defendant. A reading of the evidence adduced on either side would show that there were two issues, one concerning the mosque administration and the other concerning the matrimonial dispute of the plaintiff's son. In the written statement itself, it is admitted that the plaintiff's daughter-in-law left the matrimonial home and lodged the complaint before the police (Ex.B3). Her Jamath took up the matter with the President of the Pettavaithalai Jamath (Ex.B2). The first defendant approached the plaintiff in this regard but the plaintiff is said to have rebuffed the efforts at mediation. It is also admitted that the plaintiff asked for accounts and the relationship between the mosque management and the plaintiff was under strain. In this background, the criminal case was registered and the plaintiff was arrested. It is obvious that the mosque management wanted to teach the plaintiff a hard lesson. There was no cause at all for giving the complaint, let alone

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reasonable and probable cause. The twin reasons mentioned above culminated into a false complaint. The first appellate court rightly found that the plaintiff had proved all the ingredients of malicious prosecution. In a larger sense, this is more a question of fact and less of law and I answer the second and third substantial questions of law against the appellants.

17.Next comes the question of damages. The plaintiff was arrested and was in detention for more than twenty four hours. He had to seek bail and furnish sureties. He had to undergo the agony of trial. He was suspended from service. The plaintiff obviously incurred expenditure for engaging counsel and attending the court hearings. As a result of the case, his family was also excommunicated. Thus, the plaintiff had established that he suffered damage and injury. His reputation was tarnished and he also suffered loss of liberty. He had clearly made out a case for award of damages. However, considering the facts and circumstances, the compensation payable to the plaintiff is quantified at Rs.50,000/-. The first respondent is directed to pay a sum of Rs.50,000/- as compensation to the plaintiff with interest at the rate of 6% per annum from the date of plaint till the date of payment. The Judgment and Decree passed by the first Appellate Court is set aside as regards the defendants 2 to 6. The Second Appeal is partly allowed. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS III)

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Sub Assistant Registrar(CS)

skm

To

1.The Principal Sub Judge, Trichirapalli.

2.The Principal District Judge, Trichirapalli.

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The Record Keeper, V.R.Section,

Madurai Bench of Madras High Court, Madurai. (2C)

+1 CC to M/s.R.DEVARAJ, Advocate (SR-17033[F] dated 22/04/2021)

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