



{1}

SA 229.97.odt

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 229 OF 1997

Balaji s/o. Sadnyanrao Kale
Age 50 years, Occ. Service,
R/o. Hirapur, now R/o. Parbhani

.. APPELLANTS

VERSUS

1. Gangadhar Kondiba Kale
Age major, Occ. Agril.
- 2 Shrihari Gangadhar Kale
Aged major, Occ. Agril

Both R/o. Mirzapur,
Tq. And Dist. Parbhani.

.. RESPONDENTS.

...

Mr. Anil H. Kasliwal, Advocate for appellant.
Mr. Vivek Bhavthankar, Advocate for respondents.

CORAM : S.G. CHAPALGAONKAR, J.

DATE : 27th MARCH, 2025.

JUDGMENT :-

1. The appellant impugns the judgment and decree dated 25th March, 1997, passed by District Judge, Parbhani in RCA No. 103 of 1993, thereby upholding the judgment and decree dated 24.9.1993 passed by Joint Civil Judge J.D.) Parbhani in RCS No. 224 of 1992.

2. The respondent/plaintiff instituted suit for grant of decree of damages for malicious prosecution, contending that they are closely

related with defendant. Defendant is nephew of plaintiff No.1. They hold movable and immovable property at Mirzapur. The defendant lodged complaint against them with Police Station (Rural), alleging that plaintiff committed theft of power spray. Later on, filed private complaint RCC No. 271 of 1990 with same allegations and prosecuted them for offence under Section 379, 411 r/w. 34 of IPC. In that case, plaintiffs are acquitted on trial. According to plaintiffs, there is common wall between their houses and it was constructed with understanding that both of them would equally contribute the expenditure. The plaintiff caused construction of the wall at his expenses and asked defendant to contribute his half share, which he declined. Enraged by such demand, lodged false report against them. The police, on inquiry, found no substance in the report. Still, defendant prosecuted them by filing private complaint with false allegation without just cause. According to plaintiffs, defendant had no reasonable and probable cause to lodge complaint against them.

3. The plaintiffs were made to face inquiry by police Sub Inspector, furnish sureties and incur expenditure for that purpose. They engaged advocate, attended 15 dates of trial and undertook travel by ST Bus to Court from their native place. Their work was disturbed and their status was lowered in the esteem of society. Hence, in order to get damages, they filed suit. The defendant filed written statement and resisted their claim. According to him, he had purchased power spray from Padalkar Agency for agricultural purpose. Plaintiffs had stolen the same. He saw it in the house of plaintiffs. Therefore, he lodged complaint to police station believing that plaintiffs have committed theft or they were receivers of stolen property. His complaint/prosecution was based on reasonable cause, which cannot be termed as malicious

prosecution. The acquittal of plaintiffs itself cannot be construed prosecution was malicious. Rest of the averments regarding expenditure incurred by plaintiffs in defending criminal prosecution or loss of reputation were denied.

4. The trial court framed issues, recorded evidence and concluded that plaintiffs are entitled for damages of Rs. 6,000/- for malicious prosecution from defendant. As such, decree came to be passed on 24.9.1993. The Appellate court concurred with the findings recorded by trial court and dismissed the appeal. Defendant filed present second appeal which has been admitted by this court vide order dated 17.7.2000 on following substantial questions of law :-

“1. In the absence of issue of reasonable and probable cause whether the suit for malicious prosecution was maintainable ?

2. Whether in absence of proof of a loss of reputation and issue to that effect, the suit for malicious prosecution can be decreed.”

5. In pursuance to aforesaid substantial question of law framed at the time of admission of appeal, Mr. Kasliwal, learned advocate for appellant submits that trial court failed to frame the issue of reasonable and probable cause, which is essential for deciding the suit as to malicious prosecution. He would further submit the plaintiffs failed to bring on record any sort of evidence, to prove loss of reputation to them on account of alleged malicious prosecution. Even such an issue was not framed by trial court. On this count also the decree passed by the trial court and affirmed by appellate court is liable to be quashed and set aside.

6. In support of his contention, he relies upon the observations of this Court *Dhanjishaw Rattanji Karani vs. Bombay Municipality and others, reported in AIR 1945 Bombay 320.*

7. Having considered submissions advanced by Mr. Kasliwal and on perusal of record, it can be observed that trial court did not frame the issue as to reasonable and probable cause for initiation of prosecution. Similarly, there is no issue as to loss of reputation in deference to the malicious prosecution. However, trial court framed issue as to whether defendant maliciously prosecuted plaintiffs. While disposing of the aforesaid issue, the trial court has rightly discussed the evidence on record and recorded a finding of non availability of reasonable and probable cause for filing suit for malicious prosecution. A specific finding of fact is recorded in para.19 with further elaboration of defendant's wrongful act observing intentional prosecution of plaintiffs without just cause, excuse, lacking reasonable and probable cause. Moreover, the appellate court while dealing with the challenge to the decree passed by trial court, specifically framed the point for consideration covering the aforesaid aspect.

8. So far as the issue on the point of loss of reputation and consequential calculation of damages based on malicious prosecution, both the courts have concurrently held that defendant had no reasonable and probable cause to prosecute plaintiffs. The evidence of defendant is self-contradictory which depict that filing complaint was not on bonafide belief. Both courts have concluded that action of defendant was actuated with malice, on account of dispute over to contribution towards construction of common wall. Apparently, allegations made against

plaintiff in criminal proceeding was false. Undisputedly, initially police complaint was lodged and thereafter, private criminal case was instituted with allegation of theft against plaintiffs.

9. In this background, following observations of the Supreme Court in the matter of **Dhanjishaw (supra)** are relevant :-

“This is an action for " Malicious Prosecution". The law on the subject is perfectly well-settled. As stated in Clerk & Lindsell on Torts, 9th Edn., at p. 662, it is obviously a grievance that an individual should be harassed by legal proceedings improperly instituted against him. If there is no foundation for them no doubt they will not ultimately succeed, but: during their progress they may cause great injury. It is the right of everyone to put the law in motion if he does so with the honest intention of protecting his own or the public interest, or if the circumstances are such, be his motives what they may, as to render it probable *prima facie* that the law is on his side. But it is an abuse of that right to proceed maliciously, and without reasonable and probable cause for anticipating success. Such an abuse may of necessity be injurious, as involving damage to character, or it may in any particular case bring about damage to person or property. There are, says Lord Holt, three sorts of damages any one of which would be sufficient ground to support an action of malicious prosecution. (1) The damage to a man's fame, as if the matter whereof he is accused be scandalous, (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 liberty which has been always allowed a good foundation of such an action, (3) The third sort of damage 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 (*Savile v. Roberts* (1823) 1 Ld. Raym. 374, 378).”

10. If aforesaid principles of law are applied, in present case , when both the courts have arrived at the finding that prosecution againsts plaintiffs was not with honest intention, but it was abuse of process of law, without reasonable and probable cause for anticipating success, the damage to man's fame can be discerned. In the present case, plaintiffs have brought on record sufficient material in support of action for

malicious prosecution, namely, “damage to men’s fame” whereof, he is accused be scandalous.

11. In the light of aforesaid observations, it is evident that non-framing of issue of reasonable and probable cause for institution of malicious prosecution or issue as to loss of reputation, has not resulted into prejudice to the appellant. It is trite that if parties have recorded their evidence on relevant aspect of the matter and the court has dealt with such an issue, which has further received elaborate consideration by the appellate forum, decree would not be rendered invalid for want of specific issue.

12. The provisions of Order 41 Rule 23 of C.P.C. encompass sufficient powers to appellate court to frame and consider the issue, which is omitted by the trial court and render the findings on the basis of evidence recorded by the parties. In the present case, it is not contention of the appellant that omission to frame the issue has resulted into denial of opportunity to establish his case. In that view of the matter, no prejudice is caused to the appellant/defendant. In the result, the substantial questions of law, as framed, are answered in the negative. Second appeal stands dismissed accordingly.

[S.G. CHAPALGAONKAR, J]

grt/-