
(1980) 04 BOM CK 0044
In the Bombay High Court
Case No : First Appeal No. 708 of 1971

Genu Ganapati Shivale

APPELLANT

Vs

Bhalchand Jivraj Raison and Another

RESPONDENT

Date of Decision : 02-04-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 95

Citation : AIR 1981 Bom 170 : (1981) CALLT 1 : (1980) MhLj 879

Hon'ble Judges : Sujata Manohar, J; R.A. Jahagirdar, J

Bench : Division Bench

Advocate : H.C. Advani and S.G. Mandrekar, for the Appellant; K.M. Kanade and D.S. Marathe, for the Respondent

Judgement

Sujata Manohar, J.—The original defendant No. 1, Shri Narayanrao Raghunathrao Tulshibagwale, is the Managing Trustee of Shri Ramji Sansthan, Tulshibag, Pune. The above trust has a right to take sand from the bed of the river Bhima in the limits of village Wadav Khurd which belongs to the Trust. On or about 25th August, 1962, the trustees of the above trust passed a resolution, which is at Ext. 106, under which they decided to give to defendant No. 2, Shivale, a contract from year to year for the removal of sand from the bed of the Bhima river at a minimum contract price of Rs. 3,501/-. The first defendant, who was the Managing Trustee, was authorised to enter into contracts with defendant No. 2 pursuant to this resolution. It is the case of defendant No. 1 that for the period 1st August, 1965 to 31st July, 1966, defendant No. 2, Shivale, agreed to pay Rs. 12,000/- as a consideration for the right to remove sand from the bed of the Bhima river. In the month of April, 1965, defendant No. 2 paid to defendant No. 1 Rupees 1,000 /- as and by way of earnest. According to defendant No. 1, however, defendant No. 2 did not pay the balance amount of Rs. 11,000/- by May, 1965 as was agreed upon between the parties. On or about 17th July, 1965, defendant No. 1 gave a notice to defendant No. 2 terminating the contract and sent to him a cheque for Rs. 1,000 /-. Thereafter, on or about 24th July, 1965, defendant No. 1 entered into an agreement with the plaintiff whereby for a

consideration of Rs. 8,000/- paid by the plaintiff to defendant No. 1, the plaintiff was given the right to remove sand from the bed of the Bhima river from 1st Aug., 1965 to 31st July, 1966. On 25th of July, 1965, defendant No. 2 gave a public notice and on 29th July, 1965 he filed Regular Civil Suit No. 594 of 1965 in the Civil Court, Pune, against defendant No. 1 for an injunction restraining defendant No. 1 from obstructing defendant No. 2 in removing the sand from the bed of the Bhima river during the period 1st August, 1965 to 31st July, 1966. The plaintiff was subsequently joined as a party to this suit by defendant No. 2. In this suit, an ex parte ad interim injunction was granted by the Court on or about 30th July, 1965, whereby the plaintiff was prohibited from obstructing defendant No. 2 in removing sand from the bed of the Bhima river. This injunction order was served on the plaintiff on the next day, that is to say, on 31st July, 1965. This ad interim injunction was vacated by the Court on 26th March, 1966 after hearing both the parties. Defendant No. 2 filed an appeal from this order, being Appeal No. 27 of 1966. On 28th March, 1966, an ad interim injunction was obtained by defendant No. 2 against the plaintiff in terms similar to the injunction obtained from the trial Court. However, the ad interim injunction was vacated on 10th June, 1966 after hearing the parties and the appeal was dismissed. On or about 19th Sep., 1966, defendant No. 2 withdrew the suit because the contract period in respect of which there was a dispute between the parties had come to an end.

2. It is the case of the plaintiff in the present suit that as a result of the injunctions obtained by defendant No. 2 in Civil Suit No. 594 of 1965 and in Appeal No. 27 of 1966, the plaintiff could not reap the benefit of the contract which he had entered into with defendant No. 1 on 24th July, 1965. He has claimed from the defendant damages which he has valued at Rs. 11,000/- made up of Rs. 8,000 /- paid by the plaintiff to defendant No. 1 as the consideration under the contract and Rs. 3,000/- as and by way of loss of profit. Although the injunction against the plaintiff was vacated on 10th June, 1966, it is the case of the plaintiff that he could not remove any sand from the bed of the Bhima river from 10th June, 1966 to 31st July, 1966 because of the intervening monsoon. Hence it is his case that he has been effectively prevented by defendant No. 2 from exercising his contractual right. He, therefore, claims the above damages.

3. The suit of the plaintiff was decreed by the trial Court which accepted the plaintiff's case. The trial Court came to the conclusion that the agreement between defendant No. 2 and defendant No. 1 had been validly terminated and that there was a valid and subsisting agreement between the plaintiff and defendant No. 1. The plaintiff, however, could not carry out the agreement on account of the injunctions obtained by defendant No. 2. Hence the trial Court awarded to the plaintiff damages of Rs. 11,000/- which the plaintiff is entitled to recover from defendant No. 2. The plaintiff's suit against defendant No. 1 has been dismissed. From this decision, the present appeal has been filed by the original defendant No. 2.

4. It is the case of defendant No. 2 that even assuming as valid all the findings on facts which have been given by the trial Court against him, the plaintiff's claim must be dismissed with costs. Defendant No. 2 has submitted that the plaintiff has no cause of action against him. In order to appreciate this contention of defendant No. 2, it is necessary to examine the nature of the cause of action which the plaintiff has against defendant No. 2. Essentially, the cause of action of the plaintiff is for damages as a result of malicious abuse of civil proceedings. This cause of action is similar to the cause of action for malicious prosecution. Both these actions are in tort. In order to succeed in establishing malicious abuse of civil proceedings, the plaintiff is required to prove a number of ingredients. (1) In the first place, malice must be proved. (2) Secondly, the plaintiff must allege and prove that the defendant acted without reasonable and probable cause and the entire proceedings against him have either terminated in his favour or the process complained of has been superseded or discharged. (3) The plaintiff must also prove that such civil proceedings have interfered with his liberty or property or that such proceedings have affected or are likely to affect his reputation. For example, if the civil proceedings have resulted in the arrest of the plaintiff or if they are in the nature of bankruptcy proceedings or winding-up proceedings, they may adversely affect the plaintiff's reputation. The plaintiff must establish that he has suffered damage. Ordinarily, apart from cases involving interference with liberty, it is difficult to establish legal damage. If the malicious action is tried in public, the name and fame of the defendant will be cleared. If the action is not tried, his name is not assailed. Ordinarily, a civil action involves no damage to person. The only damage is ordinarily the expense of fighting such a litigation. Since the order in such civil proceedings for costs adequately compensates the aggrieved party for this damage, an action for malicious abuse of civil proceedings is not normally maintainable. As stated in para 717 at page 367 of Halsbury's Laws of England, 3rd Edn., Vol. 25:

"The law allows every person to employ its process for the purpose of asserting his rights without subjecting him to any liability other than the liability to pay the costs of the proceedings if unsuccessful."

Hence one seldom comes across an action for malicious abuse of civil proceedings.

5. The first ingredient of the cause of action of malicious abuse of civil proceedings is malice. Malice means an improper or wrong motive other than a desire to vindicate one's own rights or interests. A malicious action is an action undertaken with a desire to injure another person and not to further one's own interests. A Division Bench of our High Court in the case of Chhaganlal Sakarlal v. Municipality of Thana 34 Bom LR 143 : AIR 1932 Bom 259, after discussing all the authorities on this point, has held that it is not in every case that because there is no reasonable and probable cause a Judge is justified in inferring malice. There must be something more of the nature of an indirect or sinister motive for the prosecution than the mere absence of reasonable and probable cause.

6. In addition to malice, it must be established that the action was undertaken without "reasonable and probable" cause, that is to say, there must be an absence of sufficient ground for bringing an action. The action must have, therefore, concluded in the plaintiff's favour or it should have been incapable of so terminating either because it is dropped or superseded or for any other reason. In *Mohini Mohan Misser v. Surendra Narain Singh* AIR 1915 Cal 173, it has been held that an allegation that the defendants were actuated by malice and that their suit for an injunction ultimately proved unsuccessful was not sufficient to show want of reasonable or probable cause. This factor must be independently established. In this connection, a reference may also be made to the decisions in *Haji Nasiruddin Karim Mahomed Vs. Patel Haji Umerji Adam and Co.*, ; *C.M. Agarwalla Vs. Halar Salt and Chemical Works and Others*, ; and *T. Subramanya Bhatta Vs. A. Krishna Bhatta*,

7. Lastly, the civil action must have caused damage to the plaintiff. The damage may be to his liberty, reputation or property or even otherwise. It is true that, ordinarily, it would be difficult to establish such harm unless the proceedings are manifestly such that the scandal affects a man's reputation or credit. If, however, the proceedings are such as would result in damage, there is no reason why an action should not be maintained for malicious abuse of civil proceedings. The present case is one of the unusual cases where as a result of the proceedings which were taken by defendant No. 2, the plaintiff has suffered damage because he has been effectively prevented from reaping the benefit of the contract which he had entered into with defendant No. 1.

8. We must, therefore, examine whether the plaintiff has succeeded in establishing all the ingredients which go to constitute the cause of action for malicious abuse of civil proceedings. The plaintiff in the pre-sent case had alleged that the suit which was filed by defendant No. 2 against him was filed with an improper motive namely, to prevent him from carrying out his contract with defendant No. 1. There is, however, no evidence to show that the action of defendant No. 2 was malicious, as alleged. In fact, at the time when the suit was filed, defendant No. 2 was not aware that defendant No. 1 had entered into any contract with the plaintiff. The plaintiff was not even a party to the suit initially. He was subsequently joined. Defendant No. 2 filed the suit on the basis that he had a contract with defendant No. 1 for the removal of sand. This contract had been wrongfully terminated by defendant No. 1 and hence he claimed an injunction in furtherance of what he alleged to be his contractual rights. It cannot be said that such an action is either malicious or that it is an action undertaken without reasonable or probable cause. In fact, he succeeded in obtaining ad interim injunctions from the Court in his favour. These injunctions were subsequently vacated after hearing both the sides because the Court came to the conclusion that damages would be an adequate remedy for the defendant No. 2. In the present case, therefore, the plaintiff has failed to establish that defendant No. 2 had filed the civil suit against him maliciously and without reasonable or probable cause. What is more, defendant No. 2's action has not caused the

damage complained of. The damage has resulted from the orders of injunction. Assuming for the sake of argument that the orders of injunction were wrong, a party who comes before a Court of law cannot be penalised for any erroneous orders which may be passed by the Court. Unless it can be established that such erroneous orders were obtained by practising fraud upon the Court, a party cannot be made liable for such orders in an action in tort. The plaintiff cannot, therefore, claim any damages from defendant No. 2.

9. It has been urged by Mrs. Kanade who appears for the plaintiff that the cause of action in the present suit is not malicious abuse of civil proceedings but it is the tort of interference with the contract or business of the plaintiff. She has relied upon the observations in *Winfield and Jolowicz on Tort*, 10th Edn., page 445, in this connection. These are as follows:

"A commits a tort if, without lawful justification, he intentionally interferes with a contract between B and C, (a) by persuading B to break his contract with C, or (b) by some other act, perhaps only if tortious in itself, which prevents B from performing his contract."

She has relied upon the second part of this passage and has argued that defendant No. 2, as a result of his action, has prevented the plaintiff from performing his contract. He is, therefore, liable to make good to the plaintiff the damage suffered by the plaintiff as a result of his conduct. We are unable to agree with this reasoning of Mrs. Kanade. The tort of interference with a contract or business requires the defendant, to act in such a manner as would result in the plaintiff being prevented, from performing his contract. Questions pertaining to this tort normally arise in the case of industrial disputes. In the present case, defendant No. 2 has not done anything as a result of which the plaintiff is prevented from performing his contract. In the first place, there is no breach of contract on the part of the plaintiff at all. Under the contract which was entered into between the plaintiff and defendant No. 1, the plaintiff obtained a right to remove sand from the bed of the river Bhima over a certain period of time. The plaintiff has paid the consideration amount under this contract and, as far as the parties are concerned, the contract is complete. It is true that the plaintiff has not been able to reap the benefit of this contract. But this fact cannot be construed to mean that he has been made to commit any breach of the contract or that he is being prevented from performing his contract. He has been prevented, not from performing his contract, but from reaping any benefit under the contractual rights which exist in his favour. What is more important, the plaintiff has not been so prevented on account of any action tortious or otherwise, of defendant No. 2. Defendant No. 2 merely filed a suit for obtaining certain reliefs. In this suit, the Court passed certain orders. It was as a result of the orders, passed by the Court that the plaintiff was prevented from reaping the benefit of his contract. Hence, if anybody is to be blamed for the damage suffered by the plaintiff, it is the Court. It is a pity that the matter could not be speedily disposed of and the injunctions vacated speedily. Nevertheless,

defendant No. 2 cannot be considered guilty of any interference with the contract of the plaintiff with defendant No. 1. As Salmond on the Law of Torts. 117th Edition, has pointed out at page 420:

"The rule is that no action will lie against any person for procuring an erroneous decision of a court of justice. This is so even though the court has no jurisdiction in the matter and although its judgment or order is for that or any other reason invalid. A court of justice is not the agent or servant of the litigant who sets it in motion so as to make that litigant responsible for the errors of law or fact which the court commits. Every party is entitled to rely absolutely on the presumption that the court will observe the limits of its own jurisdiction and decide correctly on the facts and the law. But a party who has actually misled the Tribunal by his fraud or malice may be liable."

There may be cases where a person may attach or transgress upon another's property under the orders of the Court which are wholly invalid or without jurisdiction. In such cases, an action may lie in trespass. But we are not concerned with such a situation. Hence defendant No. 2 cannot be held guilty of preventing the plaintiff from performing his contract.

10. u/s 95 of the Civil P.C. where in any suit in which a temporary injunction has been granted it appears to the Court that such an injunction was applied for on insufficient grounds, or the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting the same, the defendant may apply to the Court, and the Court may award against the plaintiffs an amount not exceeding one thousand rupees as compensation to the defendant for the expense or injury caused to him. Under this provision, a defendant in a suit who has suffered damage as a result of any temporary injunction wrongfully obtained against him by the plaintiff, can obtain compensation up to Rs. 1,000/- without having to establish any malice or lack of reasonable and probable cause on the part of the plaintiff. This seems to be the only provision which protects a defendant against temporary injunctions obtained on insufficient grounds. The plaintiff in the present case could have applied u/s 95 of the Civil P.C. to the Court in Civil Suit No 594 of 1965 which was filed against him by defendant No. 2. He has, however, chosen to file the present suit. Once the plaintiff decides to come by way of a suit, he must establish a cause of action in tort. The plaintiff has failed to establish such a cause of action. Hence the suit of the plaintiff must fail

11. In the result, the appeal of defendant No. 2 is allowed. The order of the trial Court against defendant No. 2 is set aside and the suit against him is dismissed. In the circumstances of the case, the plaintiff and defendant No. 2 will bear their own costs throughout.

12. Appeal allowed.