

(1940) 12 BOM CK 0005
In the Bombay High Court
Case No : O.C.J. Suit No. 524 of 1939

Haji Nasiruddin Karim Mahomed

APPELLANT

Vs

Patel Haji Umerji Adam and Co.

RESPONDENT

Date of Decision : 09-12-1940

Acts Referred:

Presidency Small Cause Courts Act, 1882 — Section 53

Citation : AIR 1941 Bom 286 : (1941) 43 BOMLR 546

Hon'ble Judges : B.J. Wadia, J

Bench : Single Bench

Judgement

B.J. Wadia, J.—The plaintiffs carry on business as milk merchants in the firm name and style of Haji Nasiruddin Karim Mahomed & Co. at Jogeshwari outside the Fort of Bombay, and own a large number of buffaloes which were housed in the stables belonging to Sir Mahomed Yusuf, situate at Lamington Road. The defendants are the rent fanning contractors of the stables, and the plaintiffs had attorned tenants to them as from December 1, 1938. There were really five different tenancies taken in the names of the five plaintiffs separately. This suit is to recover a sum of Rs. 30,000 as damages from the defendants for having executed certain distress warrants obtained from the Small Cause Court, Bombay, on an application made on behalf of the defendants on February 15, 1939, for the rent due to them from the plaintiffs for the month of January, 1939. The distress warrants were executed on February 16 and the buffaloes were attached, but the plaintiffs paid the amount of the rent due to the defendants on February 18, and the distraint was removed and the attachment raised. Plaintiffs say that the distress warrants were obtained falsely and maliciously and without any reasonable and probable cause and that in executing the same the defendants were guilty of the abuse of the process of the Court. The defendants contend that the plaint does not disclose any cause of action. They deny that they acted maliciously and without reasonable and probable cause and also deny all liability for damages.

2. Several issues were raised in the suit on behalf of the defendants. The first issue is whether the plaint discloses any cause of action, and that issue has been taken up first before proceeding with the others. The onus is on the defendants to show that the plaint discloses no cause of action. Their contention is two-fold, viz., (1) assuming that the facts in the plaint are true for the sake of argument, the distress levied by the defendants was neither illegal nor wrong and therefore the plaintiffs have no cause of action; (2) even assuming for the sake of argument that the distress was illegal and wrongful, the distress proceedings not having terminated in the plaintiffs' favour, the plaintiffs have no cause of action. I will take these two separately.

3. It is not in dispute that the rent for January, 1939, was due at the date of the applications for the distress warrants. The tenancy of the stables was monthly, and the rent for January became due at the end of that month, i.e. on February 1, 1939. u/s 108(I) of the Transfer of Property Act a lessee is bound, in the absence of a contract or local usage to the contrary, to tender the rent to the lessor or his agent in that behalf at the proper time and place. There is nothing in that section to require the lessor to make a demand for the rent. The rent was not paid on February 1 and thereafter, and defendants applied on February 15 on the affidavits of one of their partners for levying distress warrants for the rent of the month of January. In England distress is a very ancient right which landlords exercised without legal process in order to recover their dues from defaulting tenants. It was once a purely private form of self-help, but it has still survived as a part of the customary law of real property in England, though considerably modified by statute. In India the rights of landholders to attach the holdings and moveables of ryots for arrears of rent are governed by statute law in various Provinces, and the right of distress depends upon the observance of the statutory formalities, the right being only conferred by statute and on the conditions mentioned in it. Before the Presidency Small Cause Courts Act of 1882 was passed, the law relating to distress in the Presidency-towns was governed by the Distress Act (I of 1875). That Act was repealed, and the provisions in it relating to distress have been almost verbatim embodied in Chapter VIII of the Act of 1882. That chapter contains the law now prevalent relating to distress in the three Presidency Towns therein mentioned which include Bombay. It contains rules both of the substantive law of distress and the rules of procedure for those towns, "and it appears on all important points to be exhaustive, as it is provided by Section 68 that no distress shall be levied for arrears of rent except under the provisions of Chapter VIII. Under the Act "any person claiming to be entitled to arrears of rent of any house or premises" can only set the machinery of the Court in motion by an application for a distress warrant u/s 53 which has to be supported by an affidavit, and the affidavit has to be to the effect of Form A contained in sch. III of the Act, according to which the landlord or his duly constituted attorney on his behalf has to swear or affirm before the Judge or Registrar of the Small Cause Court that a particular tenant is "justly indebted" in a particular sum for the arrears of rent specified. u/s 54 the distress warrant is

issued by the Judge or Registrar under his hand and seal according to the Form B in the same schedule. The section further provides that the Judge or Registrar may at his discretion decline to issue the distress warrant. In accordance with the procedure thus laid down in the Act the defendants through their partner made an application to the Small Cause Court which was supported by five different affidavits in the same form in respect of the five tenancies of the five plaintiffs on February 15, 1939. It was argued that defendants who were the plaintiffs in those applications to the Small Cause Court were not entitled to apply for a distress warrant in respect of one month's rent only, and that a distraint for the rent of the month of January, 1939, only was wrongful and illegal. There is however no averment to that effect in the plaint. Five other affidavits were made, in the same form, on the same day by the same partner of the defendants, alleging that the defendants to those applications who are plaintiffs in this suit might remove the buffaloes to Jogeshwari in a few days which is without the jurisdiction of this Court and that it would therefore be well-nigh impossible for the plaintiffs to recover their just dues. Why the second affidavit was made is not clear. Plaintiffs allege in paragraphs 7 and 8 of the plaint that these allegations were false to the knowledge of the defendants, that the plaintiffs were landed proprietors, and that the defendants have in applying for and obtaining and executing the distress warrants acted falsely, maliciously, without any reasonable and probable cause, and abused the process of the Court. Plaintiff's counsel relies on the word "months" used in Form A which "s in the plural. It is not quite clear whether the word "month" in Form C is used in the plural or in the singular. Counsel argued that the word used in the plural in Form A shows that the rent for which distress can be levied must be in arrears at least for two months, as Form A is referred to in the section itself. In the first place the words in the section are that the application shall be supported by an affidavit or affirmation "to the effect of the Form marked A", meaning that the affidavit or affirmation shall be substantially in that form. Secondly, the words used in the beginning of the section "are" arrears of rent of any house on premises". No particular period of arrears is there referred to. It would, in my opinion, be very strange for the Legislature to leave the minimum period, if any, for levying distress to be inferred from the Form in the Schedule attached to the Act, if its intention was to make "any minimum period part of the substantive law. Plaintiffs' counsel at the close of his address applied to the Court to call the Registrar of the Small Cause Court to prove that the practice of the Small Cause Court at the time, i.e. in or about February, 1939, was not to levy distress for arrears of rent for less than two months unless special cause was shown. Any such practice that may have been followed cannot in my opinion render illegal that which is not clearly made illegal by the provisions of the statute itself. It is quite possible that, distraint for rent being a drastic remedy, the landlord does not apply for a distress warrant unless more than a month's rent at least is due, but that in itself cannot make the distress for a month's rent illegal. The alleged practice is in my opinion irrelevant to the issue I have to determine.

4. Defendants secondly contend that it is an essential part of the cause of action in a suit for damages for the abuse of civil proceedings that the proceedings in which the process complained of is taken out shall have terminated in favour of the plaintiffs or that the particular process complained of has been superseded or discharged, unless the proceedings are incapable of so terminating or of being superseded or discharged". As pointed out by Halsbury, Vol. XXII, Hailsham's Edn., paragraph 42, page 27, the plaintiff in an action for the abuse of civil proceedings has to allege and prove a case similar, *mutatis mutandis*, to that of a plaintiff in an action for malicious prosecution. In an action for malicious prosecution it is well-known that the plaintiff in order to sustain his action for damages must first prove that the prosecution has terminated in his favour. It is an actionable wrong to institute certain kinds of proceedings against some one's person or against his property; but in order to succeed the plaintiff has to prove that the proceedings were instituted by the defendant, that the defendant acted without reasonable and probable cause, that the defendant also acted maliciously, and that in certain classes of cases the proceedings have come to a proper or legal end, i.e. terminated, in the plaintiff's favour. No action lies for instance for maliciously procuring the plaintiff to be adjudicated a bankrupt, unless and until the adjudication order is set aside or annulled: see *Metropolitan Bank v. Pooley* (1885) 10 A. C. 210. It is pointed out at p. 217 by the Earl of Selborne L.C. that the rule is founded upon public policy. Otherwise, as he observed, the most solemn proceedings of all our Courts of justice, civil and criminal, when they have come to a final determination settling the rights and liabilities of the parties, might be made themselves the subject of an independent controversy, and their propriety might be challenged by actions of this kind. He further stated that the fact of the adjudication standing would be a sufficient answer to the alleged cause of action. In *Raj Chunder Roy v. Shama Soondari Debi* (1879) ILR 4 Cal. 583 it was not disputed that an action for damages for arrest in execution of an *ex parte* decree will not lie until after the decree is set aside. As a matter of fact the *ex parte* decree in that case was set aside, but it was held that the plaintiff was not entitled to damages, because it was not found that the defendant had acted without reasonable and probable cause. In *Kedarnath Tulsidas v. Beharimal Jagarmal* (1924) ILR 49 Bom. 629 Taraporewala J., as he then was, held that it was an essential part of the cause of action in a suit for damages for wrongful attachment before judgment that the proceedings in which the process complained of was taken out should have terminated in favour of the plaintiff or that the particular process complained of had been superseded or discharged. The order of the Court is valid until it is set aside, and ordinarily there can be no cause of action for damages on the allegation that the order of the Court was wrongfully obtained so long as the order of that Court stands. An arrest of a judgment-debtor or attachment of his property in execution of a decree of a civil Court is the act of the Court executing the decree; so also is an order for arrest or attachment before judgment. In *Less v. Patterson* (1878) 7 Ch. D. 866 the writ of *ne exeat regno* issued by the defendant was not set aside, and it was held that as the defendant had not

moved to discharge the writ, it must be taken to have been properly issued and defendant could not set-off any claim for damages in that behalf against a plaintiff in a partnership action. At p. 870 Fry J. observes as follows:--

The writs of ne exeat were granted upon affidavits which satisfied the Court of the propriety of granting them, and Patterson has submitted to them instead of moving to discharge them. I must, therefore, take it now that the writs were properly issued.

5. It is provided by Section 60 of the Presidency Small Cause Courts Act of 1882 that the debtor or any other person alleging himself to be the owner of any property seized under this chapter, i.e. Chapter VIII, or the duly constituted attorney of such debtor or other person, may, at any time within five days from such seizure, apply to any Judge of the said Court to discharge or suspend the warrant, or to release a distrained article, and such Judge may discharge or suspend such warrant or release such article accordingly, upon such terms as he thinks just. It is not in dispute that no such application was made by the plaintiffs to the Small Cause Court Judge. There is also no averment in the plaint that the proceedings had terminated in the plaintiffs' favour. Plaintiffs' counsel argued that their cause of action was for damages on the ground that the distress warrants were obtained and executed maliciously and without reasonable and probable cause, that the plaintiffs could not have applied u/s 60 to set aside the distress warrants on those grounds, and that therefore any proceedings which could have or might have been taken by the plaintiffs were incapable of terminating in their favour. Applications u/s 60 are generally made: on the ground that the debtor is not justly indebted for the rent claimed from him, or that the rent claimed is excessive, or that it has not become due and payable, or that it was not payable for the period for which it was claimed. u/s 62 it is provided inter alia that in any case u/s 60 the Judge may award such compensation by way of damages to the applicant as the Judge thinks fit, and the Judge must for that purpose make any enquiry that he thinks necessary; if the Judge awards or refuses such compensation, his order shall bar any suit for the recovery or compensation or damages caused by the distress. The plaintiffs, however, cannot be heard to say that in respect of the execution of a distress warrant under an order of the Court, which is binding until it is set aside, they have a cause of action for damages on the ground that the defendants acted maliciously and without reasonable and probable cause as alleged. Any exercise of malice or improper motive not in itself illegal will not convert a legal act done with such motive into a civil wrong for which reparation is due: see *Allen v. Flood*. [1898] A.C. 1. In England no jury is at liberty to find a verdict for a plaintiff because the defendant in doing; an otherwise lawful act was inspired by an improper motive. If a person has done what he was justified in doing according to the law, the law will not permit an enquiry into his motive. No action can therefore lie if an execution creditor acting under an order of the Court or a creditor executing a distress warrant under an order of the Court acts with malice or improper motive, unless the order of the Court is first vacated. There is no

cause of action in respect of the doing of a legal act, even if it is done with malice and without reasonable and probable cause.

6. It was next argued by plaintiffs' counsel, with some ingenuity, that the proceedings must be deemed to have terminated in the plaintiffs' favour; because in terms of Section 60 the distrained articles, viz., the buffaloes, were released on February 18. It is, however, necessary" that the proceedings must not have merely terminated, but terminated in favour of the party claiming damages. The buffaloes were released on payment, and not without payment. So that if at all the proceedings terminated, they terminated in favour of the defendants when they got payment of the rent for which the distress warrants were levied.

7. It is true that in some cases of action for damages for abuse of civil proceedings it is not necessary that the proceedings should have terminated in the plaintiff's favour, if from their nature they are incapable of so terminating, e.g. if the defendants cause further proceedings to be dropped as in *Nicholas, v. Sivarama Ayyar* (1922) ILR 45 Mad. 527. The creditor may abandon the proceedings in consequence of any payment made by the debtor to obtain release as in *Gilding, v. Eyre* (1861) 10 C.B. (N.S.) 592. Where the arrest of other proceeding complained of is an abuse of the process of the law to effect an object which is not within the scope of the process, it is not necessary that the proceedings should have terminated in plaintiff's favour: see *Grainger v. Hill* (1838) 4 Bing. (N.C.) 212. In such a case the process of the Court is employed to oppress or injure the debtor, and to compel him to do something which he is not bound to do under the process. The remedy of the aggrieved party is for the unfair user of the process,, which user is not within its scope. That is not the case before me. The distress proceedings were capable of terminating in the plaintiffs' favour, if an application u/s 53 could be sustained. The plaintiffs have not moved the Court under the section, and one essential requirement to give them their cause of action is wanting. If an application cannot be sustained u/s 53, then the order of the Court stands, and the distress having been levied according to the law, the plaintiffs have no cause of action on the grounds merely of alleged malice and want of reasonable and probable cause.

8. I would therefore answer issue No. 1 in the negative. In view of my finding on issue No. 1, it is not necessary for me to determine the other issues that have been raised on behalf of the defendants. The suit must, therefore, be dismissed with costs.