
(1988) 01 MAD CK 0056
In the Madras High Court

P.A. Jacob and Others

APPELLANT

Vs

Nanda Timber Trading Company

RESPONDENT

Date of Decision : 08-01-1988

Acts Referred:

Penal Code, 1860 (IPC) — Section 376

Citation : (1989) 2 MLJ 361

Hon'ble Judges : Swaikannu, J

Bench : Division Bench

Judgement

Swaikannu, J.—This is an appeal filed by defendants 1 to 9 in O.S.No. 133 of 1974 on the file of the Court of the learned First Additional Subordinate Judge of Tirunelveli, against the judgment and decree dated 2nd August, 1978, decreeing the suit for a sum of Rs. 53,548-22 P. with proportionate costs, finding that the plaintiffs are entitled to recover the said sum from the defendants towards damages.

2. The suit itself was one for damages, and the case of the plaintiffs-respondents herein was shortly as follows: The plaintiffs are carrying on business in timber with their head-office at Pollachi and a branch office at Shencottai. The defendants are carrying on business in Shencottai under the name and style of Poabson and Co. The plaintiffs entered into an agreement with the State Government of Kerala on 19-8-1972 and acquired the right of cutting and removing the entire tree-growth in Achankoil forest in Kerala State, for which they had paid a sum of Rs. 7,400 by way of security deposit to the Government of Kerala. In pursuance of the agreement the plaintiffs cut and collected the trees and stored various timber logs and firewood as described in Schedules 1 to 4 in the plaint, and the Forest Department of Kerala assigned specific numbers to the logs of wood so cut and stored. The Forest Department also issued Pass Nos. 3 to 7 to the said quantity. On 5-1-1973 the plaintiffs were issued permits for removal of the timber available in the coupe, i.e., Coupe No. 5. Pass Nos. 3 and 4 related to the firewood logs while Pass Nos. 5 to 7 related to the logs of timber

schedules 1 to 3 describe the logs of timber, while Schedule and set out the logs of firewood. The logs of timber in schedule 2 are the ones covered by the agreement of sale to different parties, while the logs of timber set out in Schedule 23 are not covered by any agreement./One R.D. Chowda obtained the Passes Nos. 3 to 7 on behalf of the plaintiffs from the office of the District Forest Officer. Themmala and while he was proceeding towards Shencottai on a scooter, he was way laid by defendants 1 and 2, who with the help of their henchmen lifted him and put him in a jeep of their own and took him to their sugarcane field and forcibly removed Pass Nos. 3 to 7 from his possession. Subsequently, on 5.1.1973, the defendants misused the passes and forcibly removed the timber logs in Schedule No. 1 from their place of storage. The logs of timber stored and mentioned in Schedule 1 would be worth Rs. 17,892-33P. The defendants carried away the entire stock of logs in 14 lorries and stored them in their saw mill at Shencottai. The plaintiffs lodged a criminal complaint to the police, who seized the logs on the next day and kept them in their custody and instituted criminal proceedings against the defendants. The logs of timber continued to be in the custody of the police even on the date of the suit. The defendants are liable to pay the value of the logs unlawfully removed by them.

3. One O.P. Nanda, the son of the Managing partner of the plaintiffs, but not connected with the plaintiffs' firm, had some transaction with the defendants and for the breach of contract committed by him, the defendants sued the plaintiffs in C.S.No. 4 of 1973 in the High Court of Madras. This litigation further strained the relationship between the plaintiffs and the defendants.

4. With a view to misappropriate all the logs of timber and make unlawful gain, the defendants further sued the plaintiffs in O.S.No. 5 of 1973 in the Sub Court at Kottarakkara and sought a declaration of their title to the all the timber in Coupe No. 5 in Achankoil forest and obtained an ex-parte injunction in I.A.No. 59 of 1973 against the plaintiffs. The application for injunction was however got dismissed later by the plaintiffs who entered appearance and contested. The defendants appealed to the High Court of Kerala and obtained a temporary injunction and thereby prevented the plaintiffs from removing the timber or firewood. With a view to complying with the terms of the agreement with the Kerala State, the plaintiffs even applied for issue of duplicate passes for removing the timber from coupe No. 5, but were refused passes in view of the injunction issued by the High Court, which was then in force. The plaintiffs believe that the defendants had set fire to the timber and firewood and destroyed the entire quantity. The plaintiffs were under an obligation as per their agreement with the Kerala State to remove all the stock of logs and firewood before 9.7.1973, which they were unable to do because of the unlawful acts of the defendants. This led to the Kerala State imposing a penalty of Rs. 6,161-59 P. on the plaintiffs, which amount was collected from out of the deposit which had been made by the plaintiffs in pursuance of the agreement with the Kerala State. The defendants are bound to reimburse the plaintiffs in that amount also. The plaintiffs estimated the total loss suffered by them as Rs. 96,269-96 P. for

which they prayed for a decree against the defendants.

5. Defendants 1 and 2, in their written statement, admitted the plaintiffs having entered into an agreement with the Kerala State for cutting and removing timber and firewood from Coupr No. 5 of Achankoil. They contended inter alia that the suit in effect was directed against Poabson & Co. of which they were partners. Since no overt act has been alleged against defendants 3 to 10. Those defendants or not necessary parties to the suit, which is bad for misjoinder. The number of trees, timber and firewood set out in Schedule 1 to 4 are incorrect, and are not covered by Passes 3 to 7 as alleged by the plaintiffs. The plaintiffs had not entered into any agreement with any third-parties for sale of timber or firewood, and no such agreement had been pleaded in any prior proceedings. Those agreements are neither true nor supported by any documents, and have not been produced by the plaintiffs along with the plaint.

6. Then, again, the story of defendants 1 and 2 way laying R.D. Chowda and removing the passes from his possession is utrer falsehood. The second defendant is 72 years old and is confined to his village. Othara, in Kerala State. The defendants neither own a jeep nor any sugarcane field as alleged.

7. O.P. Nanda is a partner of the plaintiffs firm. He had business agreements with the defendants under which the defendants supplied Pillaimaruthu" sizes to the Tamil Nadu Housing Board, Madras, in February and March, 1971. Under the said transactions, the plaintiffs firm owed a sum of Rs. 9,146-17 P. to the defendants. Under instructions from the plaintiffs, the defendants' firm, Poabson & Co., entered into a contract with India Leaf Tobacco and Development Co., Amaravathi and supplied firewood, on account of which the plaintiffs owed the defendants a sum of Rs. 10,047-30 P. Another sum of Rs. 6,763 is also due from the plaintiffs to the defendants for supplies of firewood they had made directed to the plaintiffs, as well as another sum of Rs. 1,037-83 P. for Pillaimaruthu sizes supplied by them to the plaintiffs. Thus, in all, the plaintiffs owed a sum of Rs. 36,999-30 P. to the defendants. In spite of demand by the defendants, the plaintiffs failed to pay the same, but however, they agreed to repay the amounts by selling the timber and firewood from Coupe No. 5, for which they had, in the meanwhile, contracted with the State Government of Kerala for removal of timber and firewood from Achankoil forest. It was in pursuance of this agreement, they had delivered Passes Nos. 3 to 7 to Poabson and Co. on 5.1.1973. Poahson & Co. removed 158 logs worth Rs. 12,000. The rest of the logs worth Rs. 24,994-30 P. were retained in the coupe itself. On the next day, i.e. 6.1.1973, the plaintiffs raised dispute with respect to the price and measurement of the logs the defendants had already removed in pursuance of the agreement. The above facts have all been suppressed in the plaint allegations. Poabsons and Co. had only lawfully removed the logs from the coupe. It was the plaintiffs who prevented them from transporting further quantity towards their dues, by unlawful means. This resulted in the defendants instituting O.S.No. 5 of 1973 in the Sub Court, Kattaraccara and obtaining an

injunction against the plaintiffs. Though the plaintiffs got the injunction vacated, the defendants appealed to the High Court of Kerala and got a temporary injunction against the plaintiffs. The High Court directed the Sub Court to appoint a Receiver to sell the logs in public action and deposit the amounts in court. The Receiver inspected the logs which were then in the custody of the plaintiffs though a sale had in fact been effected there of in favour of the defendants. The Receiver collected the remaining logs and sold them in public auction for Rs. 1,500 and deposited the amount in Court, on 17.5.1973. The defendants are therefore not liable to pay any damages to the plaintiffs. For their dues from the plaintiffs, the defendants filed O.S.No. 5 of 1973 in the Sub Court, Kottaraccara and there were no mala fides on their part in obtaining an injunction to safeguard their interests, and the same was done in good faith towards realisation of their dues from the plaintiffs. The plaintiffs' suit is only a counter-blast to their suit, with a view to escape liability.

8. In their additional written statement, defendants 1 and 2 stated that Passes Nos. 3 to 7, having been issued exclusively in the name of H.L. Nanda, and the passes being not transferable in law, the plaintiffs had no right to passes and they had not acquired any right over the logs and firewood in the coupe. Even otherwise, the suit of the plaintiffs is opppsed to public policy.

9. Defendants 3 to 10, in their written statement, stated that no overt act having been alleged against them, they are not necessary parties to the suit. In other respects, they adopted the written statements of defendants 1 and 2.

10. The plaintiffs filed a reply statement refuting the defendants' contentions. They denied any sale of timber by the plaintiffs to the defendants. The plaintiffs reiterated that they held the passes in fact in respect of the logs of timber in coupe No. 5, and this was known even to the defendants. As a matter of fact, the stand of the defendants in their suit in the Sub Court, Kottaraccara, was that the plaintiffs held the passes in respect of the timber in the coupe. Even the application for injunction was filed in the Sub Court on the basis. The original agreement which the plaintiffs had entered into with the Government of Kerala is found covered by the slip of paper at the place where material words, originally, the material words, "Managing Partner, Nanda Trading Co" had been written. There was no question of the plaintiffs firm taking a transfer of the passes in their names as they were owned by the plaintiffs themselves.

11. On the above pleadings, the Court below framed the following issues for trial:

1. Whether the plaintiff firm was illegally prevented by the defendants from removing the timber and firewood described in Schedule 1 to 4 of the plaint ?
2. Whether the defendants are bound to pay the value of the timber and firewood described in Schedules 1 to 4 in the plaint ?
3. Whether the logs covered by Passes 5 to 7 were sold by the plaintiffs to "Poabsons" as alleged by defendants 1 and 2 ?

4. Whether the agreement of sale set up by defendants 1 and 2 is true ?
 5. Whether the suit is bad for misjoinder of parties ?
 6. Whether the suit as framed is maintainable ?
 7. Whether defendants 3 to 10 are necessary or proper parties to the suit ?
 8. Whether the plaintiffs are entitled to recover any and what amount and from which of the defendants ? and
 9. To what reliefs are the plaintiffs entitled ?
11. In proof of their case, the plaintiffs examined three witnesses (P.Ws. 1 to 3) including one of their partners and filed Exhibits A.1 to A.111. The defendants in turn examined three witnesses (D.Ws 1 to 3) including the first defendant in support of their defence, and their documentary evidence consisted of Exhibits B.1 to B.30.
12. On a consideration of the above oral and documentary evidence adduced before him, the learned Subordinate Judge, under Issues 3 and 4, found that the defendants had not been able to show that they had got any claim against the plaintiffs firm, that the agreement alleged by the defendants is not true and export passes 5 to 7 had not been lawfully taken by the defendants, that export passes 3 and 4 related to firewood over which the defendants never had any claim and that they had been actually taken possession of by them obviously behind the back of the plaintiffs. On Issue No. 1, the learned Subordinate Judge held that the plaintiffs were effectively prevented by the defendants from removing the logs and firewood covered by the passes, Exhibits B.13 to B.17 from Coupe No. 5. Under Issue Nos. 2 and 8, he held that it was no defence to the action to state that the plaintiffs had no title to the property, because possession is title against all excepting the true owner and it therefore followed that the defendants were liable to pay the plaintiffs the value of the timber and firewood listed in Schedules 1 to 4 to the plaint. The learned Subordinate Judge found Issues 5 and 7 in favour of the plaintiffs. On Issue No. 6, he found that the firm was the contractor and the subsequent communications in the name of H.L. Nanda were only in his capacity as managing partner and therefore, the suit was maintainable in law. On Issue No. 9, the learned Subordinate Judge held that it was just and proper that the claim in respect of firewood was reduced to one half, i.e. Rs. 4,500 that the Kerala Government had collected a sum of Rs. 6,161-59 P. Obviously towards penalty for the plaintiffs not complying with the conditions of the agreement to clear the coupe within the stipulated time, that the plaintiffs were disabled to comply with the agreement because of the defendants preventing them from doing so by means of the injunction and that, therefore, appeared to be a penalty which the defendants themselves must pay. The learned trial Judge further held that in view of the fact that the plaintiffs had collected substantial amounts from out of the timber covered by the export passes, Exhibits A.40 and A.41, their claim was by far in excess of what they

were legitimately entitled to, and that a sum of Rs. 53, 548-22 P- fixed as damages due to the plaintiffs would meet the ends of justice. In the result, the plaintiffs were granted a decree for the said amount with proportionate costs. Defendants 1 to 9, being aggrieved by the above judgment and decree, are now before us in appeal.

13. It is inter alia contended on behalf of the appellants by Mr. B. Kalayanasundaram, learned Counsel, that the Court below ought to have dismissed the suit on the ground that the plaintiffs firm was not the owner of the licence for Coupe No. 5 issued by the Forest Department and therefore, the suit filed by the plaintiffs was not maintainable. The Court below ought to have dismissed the suit on the further ground that no cause of action as against defendants 3 to 14 was disclosed in the plaint or in the evidence against the defendants at all. It ought to have seen that the licence and the right to fell the trees in Coupe No. 5 vested only with H.L. Nanda as an individual, and not in his capacity as managing partner of the plaintiffs firm. It erred in holding that the plaintiffs have proved the case of the defendants kidnapping Chowda and wrongfully confining him and snatching away the passes from him and carrying away the logs from Coupe No. 5. The Court below ought to have seen force in the contention of the defendants that the first plaintiff H.L. Nanda had voluntarily handed over the passes to Poabsons & Co., of which defendants 1 to 10 were partners in settlement of the debts due to the defendants from his business concern at Madras in charge of his eldest son O.P. Nanda, who has been examined as P.W.3. The Court below further erred in coming to the conclusion that the defendants were fully aware of the difference between the plaintiffs' business and the business carried on by P.W.3. The Court below erred in accepting the plaintiffs' allegation about the employee of the plaintiffs being kidnapped and the passes being snatched away from him and the logs being removed from the coupe by the defendants, in view of the evidence about the criminal proceedings in C.C.Nos. 528 of 1974 and 826 of 1974 having ended in acquittal of the accused there in for want of sufficient evidence, and it ought to have seen that person who alone could have spoken about that case of the plaintiffs had not been examined by them. According to learned Counsel, the Court below grievously erred in valuing the logs at Rs. 17,890-33 P. as stated in the plaint in view of the inconsistent valuation of the defendants according to the Court below. It was pointed out that the defendant themselves had valued the logs in some other proceedings and in their written statement to this suit at Rs. 12,800.

14. Mr. G.M. Nathan, learned Counsel for the respondents on the other hand, submitted that the Court below had carefully met the evidence on record and come to the conclusion that none of the contentions of the appellants defendants can be upheld. He submitted that the Court below had followed the law with reference to the facts of the case disclosed through the evidence. He further submitted that in the cross-objections filed by the plaintiffs, it has been contended that the observation of the trial Court about the claim regarding the value of the firewood destroyed by the fire being Rs. 9,000 is not established by

convincing evidence, cannot be justified since Exhibit A.7 and A.8, the counterparts of Exhibits B.13 and B.14, coupled with Exhibits A.45, A.46 and A.47 clearly establish the worth of the firewood destroyed by fire. In other words, it was submitted by learned Counsel for the cross - objectors that the trial Court erred in not assigning any reason for disallowing a sum of Rs. 25,870 odd in the second schedule. According to learned Counsel, the observation of the trial Court that the plaintiffs -respondents' claim under Item C of the second schedule cannot be sustained, is totally wrong since the same has been proved beyond doubt by Exhibit A.43 and the relevant bills Nos. 2,3 and 11 in Exhibit A.45. The cross-objections have been filed with reference to the sum of Rs. 42,721-74 P. disallowed by the trial Court.

15. Having regard to the contentions of both sides, the points that would arise for our determination in these appeals and the memorandum of cross-objections are:

1. Have the plaintiffs-respondents proved that they were illegally prevented by the defendants from removing the timber and firewood described in Schedules 1 to 4 of the plaint?
2. Are the defendants bound to pay the value of the timber and firewood described in Schedule 1 to 4 in the plaint ?
3. Whether the logs covered by Pass Nos. 5 to 7 were sold by the plaintiffs to Messrs. Poabsons as alleged by defendants 1 and 2?
4. Whether the agreement of sale set up by defendants 1 and 2 is true ? and
5. Are there elements of conversion viz wrongful taking, wrongful detention or wrongful disposal of property, available in the case, as put forward by the plaintiffs-respondents ?

16. Points 1 to 5: It is common ground that the plaintiff-firm, respondent herein, purchased timbers in coupe No. 5 of Achankovil Reserved forest in Kerala on auction and entered into Ex.A.48 agreement with the Government of Kerala dated 19.8.1972 for felling and removing timbers within a prescribed period. Towards security thereof, plaintiff-firm deposited Rs. 7,400 with the Government of Kerala. Defendants 1 and 2, namely, P.A. Jacob and P.O. Abraham, in their additional written statement, no doubt, contended that contract for felling of trees was not taken by the plaintiff-firm, but it was J.L. Nanda individually. In respect of this contention, the learned Counsel for the defendants relies on the evidence of P.W.1 H.L. Nanda, Managing Partner, who states that Ex.A.48 agreement is only a copy and it is not a true copy in as much as signatures of all the persons are not there. The fact that it is the plaintiff-firm Nanda, Timber Trading Co., which is the contractor for sale of coupe No. 5 of Achankovil is supported by Ex.A. 106 communication issued by the Divisional Forest Officer, Thenmala, to H.L. Nanda, Managing Partner, Nanda Timber Trading Company calling upon him to pay balance of instalments of the value of timber purchased

in auction. This document has come into existence soon after the purchase of sale coupe No. 5. Obviously the sale was in favour of the plaintiff-firm, the respondent herein. The learned Counsel for the defendants has pointed out that Ex.A.2 original licence issued by Kerala Forest Department in relation to coupe No. 5 as well as other documents issued from the Department including conditions for the contract do not disclose that the contract was in favour of the plaintiff-firm. It is no doubt true that Ex.A.2 original licence is issued to H.L. Nanda, 1/190, Pirnoor Border, Shencottai. Ex.A.3 does not disclose the name of the contractor. Ex.A.4 to A.8 export licences also have been issued in the name of H.L. Nanda. But it cannot be ignored that he is the Managing Partner. Obviously he is the person who is carrying on all the business activities for the firm. There is, therefore, no surprise that the officials issued all the subsequent documents in the individual name of H.L. Nanda. Nevertheless, the fact remains that the contract was taken by the plaintiff-firm itself. This is confirmed by ExA.106 communication addressed to the Managing Partner of the plaintiff-firm. It cannot also be ignored that only because Forest-Department officials of Kerala for their convenience committed the mistake by merely addressing Managing Partner by name, this will not in any way adversely affect the claim of the plaintiff-firm. We are, therefore, unable to uphold the contention of the learned Counsel for the defendants that the plaintiff-firm has not purchased the sale coupe No. 5. It is also relevant in this connection to note that the defendants as members of the firm Poabsons and Company, sued the plaintiff-firm in O.S.No. 5 of 1973, on the file of the Sub Court, Kottarakkara Ex.A. 26 is the copy of the plaint. It is not shown anywhere in Ex.A.26 that sale coupe No. 5 Achankovil is the exclusive concern of H.L. Nanda. This gives the lie direct to the case of the defendants that the plaintiff-firm has no direct concern with the purchase of timber in Coupe No. 5, Achankovil. The contention put forward in the additional written statement that H.L. Nanda purported to have transferred the right of felling trees to the firm and that transfer being not valid, the plaintiff-firm is incompetent to claim damages on the ground that defendants 1 and 2 of Poabsons and Company have unlawfully robbed export passes from the possession of the plaintiffs servant Chowda and unlawfully claimed the timbers as their own and on the basis of such false claim, the defendants have removed the timbers listed in the First Schedule worth Rs. 17,892-23 P. Defendants have carried away the timber in First Schedule in 18 lorries overnight and thereafter the defendants prevented the plaintiffs from removing the remaining logs by unlawfully and unjustifiably obtaining injunction from Court.

17. P.W.1 H.L. Nanda is the Managing Director of another firm, namely, Nanda Saw Mill and Wood-work Limited. He and O.P. Nanda, (P.W.3), the eldest son of H.L. Nanda are carrying on business jointly and they cumulatively owed Rs. 36,000 to the defendant-firm Poabson and Company. It is the further case of the appellants that when they demanded repayment, the plaintiff-firm was unable to pay and, therefore, the plaintiff-firm sold timbers in coupe No. 5 of Achankovil in favour of the defendant-firm, in discharge of the debt due to them (defendants).

In support of this contention, defendants rely on the evidence of D.W.1 Ramakrishnan Naidu. He, no doubt, claims to have witnessed the transaction whereby P.W.1 H.L. Nanda sold all the timbers in coupe No. 5 in discharge of the debt due to the defendants. In cross-examination, D.W.1 has disclosed that he has no knowledge of English. At the same time, he claims to have heard P.W.1 H.L. Nanda and D.W.3 talking in English. The evidence relating to this aspect clearly shows that if there was any conversation between P.W.1 H.L. Nanda and D.W.3 Jacob, there was no prospect of D.W.1 Ramakrishna Naidu having understood anything out of it. D.W.1 is a person hostile to the plaintiff-firm, for, he has given evidence against the plaintiff in an earlier Suit No. 20 of 1973. It is also relevant to note that he is friendly with the 1st defendant (D.W.3) for, on his own showing, they have jointly taken coffee in a hotel. Though it may look trivial, yet, in the circumstances of the case, the motive for him to depose in favour of the appellants cannot be lost sight of. We are therefore, unable to place any reliance on the version of D.W.1. It is also relevant to note that D.W.2 Sridharan Pillai does not claim to have witnessed any transaction between P.W.1 H.L. Nanda and the 1st defendant. Further, it cannot also be ignored that in Ex.A.26 order in IA.No. 59 of 1973, on the file of Sub Court, Kottarakkara, it is observed that the alleged sale of timber is unworthy of acceptance. There is no better evidence in this case to substantiate the case of the defendants of the sale of timbers in coupe No. 5 of Accankovil in their favour. In support of the case of the defendants that the plaintiff-firm as well as P.W.3 Om Prakash Nanda of Nanda Saw Mill and Wood Works Limited owed money, defendants rely on Ex.B. 19 to B.21 copies of accounts maintained by the defendants in C.S.No. 4 of 1973, on the file of this Court and the genuineness of these accounts has been found against. Ex.A.61 is a copy of judgment in C.S.No. 4 of 1973. Even otherwise, there is no convincing evidence in support of the case of the defendants that the plaintiff-firm and Nanda Saw Mill and Wood Works Limited, another firm in which P.W.1 H.L. Nanda is Managing Partner owed money to defendants. P.W.3 Om Prakash Nanda denied the claim of the defendants that he owed money to them. It is clear from the evidence that the defendants (appellants) supplied "Pillaimaruthu" to the Tamil Nadu Housing Board, Madras. Admittedly, the bills for payment have been addressed to the Housing Board direct. The transaction is, therefore, made between the appellants and the Housing Board. In the absence of any acceptable evidence supporting the claim against P.W.3, we have no other alternative than to hold that the defendant's case that balance is due from P.W. 3 is not correct. Even if P.W.3 owes any money to the appellants, it is not a ground on which the defendants can place their claim against the plaintiff-firm, respondent herein. The appellants are well aware of the fact that the respondent is running entirely a different business from the one run by Om Prakash Nanda. For some time, Poabson and Company and defendants were supplying "Pillaimaruthu" sizes for the plaintiff - firm also. This is supported by Ex.A. 88 to A.92 bills and Ex.A. 93 to A.96 lorry passes. While so, on 5.2.1971, the 1st appellant has written to the plaintiff-firm disclosing the former's inability to continue the supply any longer and asking the

plaintiff-firm to exempt him from further supply. This was in February, 1971. At the same time, the defendants have written ExA.89 letter dated 2.3.1971 to the third party (Om Prakash Nanda) declaring their ability to supply Tillaimaruthu" sizes for the Housing Board. This letter is dated 2.3.1971. This aspect of the evidence available on record clearly shows that the appellants were fully aware of the business run by the respondent - firm and the business run by P.W.3. We are, therefore, unable to accept the copies of accounts. The defendants have not been able to substantiate any balance payable by the plaintiff-firm to them. They have also failed to show that Nanda Woodwork and Saw Mills actually owed any amount to them. We are, therefore, unable to place any reliance on the case of the defendants that the plaintiff-firm or its sister firm and P.W.3 Om Prakash Nanda jointly owed any sum of money like Rs. 36,000. It is also relevant in this connection to note that the appellants sued the plaintiff-firm in O.S.No. 5 of 1973, on the file of Sub Court, Kottarakkara and the same was dismissed. Ex.B. 8 is the judgment dated 30.9.1975. Even before that suit was dismissed for default, O.S.No. 5 of 1973 has been laid. It is represented that O.S.No. 5 of 1973 was stayed on account of the pendency of C.S.No. 4 of 1973, on the file of this Court. It is represented that on the date of Ex.B.8 judgment (30.9.1975), C.S.No. 4 of 1973 was not disposed of. But it is relevant to note that ExA.61 judgment in C.S.No. 4 of 1973 discloses that it was delivered on 28.9.1975. O.S.No. 5 of 1973 was dismissed for default and it was not restored. Therefore, it is clear that the appellants are not able to show that they have got a claim against the respondent/plaintiff firm. It also belies the case of any transaction between the appellants and the respondent-firm. On the other hand, it is on record that between 4.1.1973 and 6.1.1973, P.W.1, the Managing Partner of the respondent-firm was up[held up in Quilon Travellers Bungalow. Ex.B.17 is a cash memo issued to P.W.1 H.L. Nanda for his stay in Travellers" Bungalow between 4.1.1973 and 6.1.1973. This is support by E.A.18 telegram calling upon P.W.1 to meet the Collector on 4.1.1973. In the meanwhile, export, passes have been issued to plaintiff-firm for the transport of timber from coupe No. 5 at Shencottach. Admittedly, they were issued to R.D. Chowda, a servant of the plaintiff firm, Yeshpal Nanda, one of the partners of the plaintiff-firm, sent Ex.A. 19 telegram dated 6.1.1973 to H.L. Nanda asking P.W.1 to return the very evening itself. In they meanwhile, O.P. Nanda sent a telegram to Collector, Tirunelveli, Deputy Superintendent of police, Ambasamudram and Superintendent of Police, Tirunelveli and others complaining of robbery of export passes from Chowda. Ex.A. 10 to A.16 are the telegrams. Ex.A.9 complaint was also preferred to the Inspector of Police, Shencottai, on 6.1.1973. He registered a case u/s 376 of the Indian Penal Code against some of the defendants, appellants herein, and D.W.2 Sridharan Pillai. Ex.A.111 is the copy of the F.I.R. In pursuance thereof, Criminal Case Nos. 528 and 826 of 1974 have been launched against them. But ther defendants and the other accused persons were acquitted by the Magistrate obviously for want of sufficient evidence R.D. Chowda, whohad been kidnapped, turned hostile. Ex.A.22 letter written by H.P. Nanda to P.W.1 Nanda would show that R.D. Chowda was being kidnapped and wrongfully

confined by the defendants. The fact remains that his scooter which had been secreted by the accused in that case, among whom the defendants are also involved, was recovered by the police and produced before the Court. P.W.1, was issued Ex.A.25 memo from the Criminal Court enabling him to take delivery of the scooter. It is also relevant to note that Ex.A.63 to A.65 paper publications have been contemporaneous to the export passes having been robbed from the servants of the plaintiff-firm by the defendants and their henchmen and that with the help of export passes, the defendants have also carried away valuable timbers from the sale coupe No. 5 owned by the plaintiff-firm. The fact that there was some violence in connection with wrongful seizure of export passes from the hands of R.D. Chowda, servant of the plaintiff-firm, therefore, is highly probable. Such of those defendants who were accused in the criminal complaints have been acquitted is not a circumstance to conclude that no such occurrence took place. At any rate, the defendants' case that they have taken possession of the export passes lawfully and that P.W.1 H.L. Nanda entered into a sale transaction with the 1st defendant are quite unacceptable. A careful perusal of Ex.A.22 letter dated 2.2.1973 written by H.D. Chowda, brother of R.D. Chowda, addressed to P.W.1 H.L. Nanda confirms the case of seizure of the export passes from R.D. Chowda by force. The case of the defendants that R.D. Chowda has written the letter Ex.B.18 dated 5.1.1973 to Dow-lath who admittedly was an agent of the plaintiff-firm supervising the coupe at the spot cannot be a circumstance to defeat the claim of the plaintiffs, because, Chowda is no longer friendly with the plaintiff. Further, the genuineness, of Ex.B. 18 is not substantiated by convincing evidence Ex.B. 18 letter, therefore, may be a product of fabrication for the purpose of the case. In the circumstances of the case, the irresistible conclusion that can be arrived at is R.L. Chowda was way laid and taker away from his scooter and as such no letter could have been written by him voluntarily to Dowlath. It is also relevant in this connection to note that P.W.2 Dr. Ramachandran who examined R.D. Chowda for injuries on his person on 10.1.1973 at 11.30 A.M. has made note of the same in the accident Register, the copy of which is marked as Ex.a.67. Ex.A.67 reads as follows:

Accident Register Date and hour 10.1.73 at 11.20 A.M.

Name : Chowda. Age : 39 Sex-Male Caste : Occupation : Address and residence : S/o. Devaram Bhai 1/190, Piranoor Border, Shencottah. Identification marks : 1. Big wound scar over forehead below hair margin. 2. Black mole over right shoulder. By whom brought : H.C. 14/8 Police informed or not : Ref. by S.I. of Police, Shencottach Declaration required or not : Nature of injury and treatment : Said to have sustained (State simple or grievous) abrasions while he tried to escape from some enemies and fell down in a forest between Thehmalai and "Kulathupalai on 7.1.73 at about 5.00 A.M. 1. Abrasion over right knee 2 cm x 2 cm wound is healing

2. Abrasion overback of right foot above big toe 1 cm x 1 cm.

3. Abrasion over back of left elbow 3 cm x 1 cm.

4. Abrasion over right fore-arm above the wrist 1 cm x 1 cm.
5. Abrasion over front of left thigh above knee 2 cm x 2 cm.

All the wounds are healing Ex.1. Inj Tetanus toxoid 1 c.c

2. G.V. paint.

3.Treated as O.P.

4. All the wounds are simple in nature.

Sd. I.S. Ramasubramanian Signature of Medical Officer making examination

Even if it is to be taken that R.D. Chowda did not sustain injuries on 7.1.1973, the fact remains that Ex.B.13 to B.17 export passes were forcibly removed from R.D. Chowda.

18. The respondents case is probablised by ExA.12 letter dt 1.2.1973, purported to have been written by H.D. Chowda, brother of R.D. chowda, who was under the employment of the respondents. The alleged sale is also improbable in view of the fact that the respondents entered into an agreement ExA.47 dt.27.11.72 with Vallaba Vinayaga Lorry Service for the purpose of transport of timber from coupe No. 5 to S. Dhencottai. In the written statement of P.W.1 Ex.A.23 it is disclosed that he entered into an agreement for transport of timber logs with one Subbiah Pillai, but significantly this fact has not been brought to the notice of the P.W.1, Managing Partner of the respondents" firm. So it is quite probable that Subbiah Pillai referred to in Ex.A.23 is the very same person connected with Vallaba Vinayaga Lorry Service. In Ex.A.47 agreement, Subbiah Pillai claims to be the proprietor of the said Lorry Service Ex.A.47 dt 27.11.72 having come into existence long prior to the occurrence, this will be a strong circumstance to show that there was actually an agreement between the plaintiffs/respondents and Vallaba Vinayaga Lorry Service for transport of timber from coupe No. 5, we cannot uphold the case of the appellants that they entered into the sale agreement with respondents" firm. In fact the respondents had already transported huge quantity of timber from coupe No. 5. Export Passes under Exs.B.13 to B.17 were issued only for clearance of timber and firewood, not covered by export passes Exs.A.40 and A.41. The appellants were ignorant about this, aspect. This is yet another circumstances which goes to show that the appellants had no discussion with P.W.1. Managing Partner of the respondents" firm in connection with timber and firewood left in coupe No. 5. Under these circumstances, we find that the agreement of sale alleged by the appellants is not true and export pass Nos. 5 to 7 have not been lawfully taken by appellants. Export Pass Nos. 3 and 4 relate to firewood. The appellants taken them behind the back of the respondents" firm.

19. Now let us discuss the evidence available on record with respect to the question whether the respondents" firm was illegally prevented by the appellants from removing the timber and firewood described in Schedules 1 to 4 in the plant

It is not in dispute that the respondents' firm owned timber and firewood listed in the plaint schedules 1 to 4 and appellants transported timbers listed in the 1st schedule. It is also not in dispute that the timber and firewood listed in Schedule 2 to 4 were left in coupe No. 5, for the removal of which, export passes 3 to 7 were issued by the Forest Department. Ex.A.27 is the order of ad-interim injunction dt.25.1.73 preventing the respondents from removing timbers from Coupe N.Ho. 5. It is also relevant to note at this juncture that export passes 3 and 4 are also covered by Ex.A.27 and interim injunction. Though the said order of and interim injunction was vacated, in C.M.A.No. 34 of 1973 the High Court of Kerala granted injunction on 23.3.1973 under Ex.A.24. By that time a major portion of timber and firewood left in coupe No. 5 were reduced to ashes by fire. The fire accident was duly informed by respondents to the Conservator of Forests, Divisional Forest Officer and Inspector of Police under Exs.A.35 to 35 telegrams. There upon P.W.1, Managing Partner of the respondents firm applied for passes for removal of logs left but it was refused by the Divisional Forest Officer on the ground that the order of injunction was in force. Thus we find that the respondents' firm was effectively prevented from removing the logs and firewood covered by Exs.B.13 to B.17 passes from coupe No. 5.

20. At this juncture it is relevant to note the law relating to Maintenance and Champerty, as found in Law of Torts by Anand & Sastri's at Page 1066. It runs as follows:

24. Maintenance and Champerty: Maintenance is the officious or unlawful assistance by money or otherwise, preferred by a third person to either party to a civil suit, in which he himself has no legal interest to enable the party helped to prosecute or defend it. The essence of the offence is intermeddling with litigation in which the intermeddler has no concern. Champerty is only a species of maintenance, and consists in the "unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute or some profit out of it. Both these torts are crimes. They originated in the early history of the common law when the royal justice had prevent interference from the powerful barons and local squires. Very often the assistance must have taken the form of armed intervention. The Royal Courts adopted rule that it was unlawful and criminal for any person other than the parties to an act in and their legal advisers to interfere in an action without lawful justification.

Maintenance differs from malicious prosecution in that it is confined in its application to interference with civil proceedings. It is not maintenance to interfere officiously in criminal proceedings, although it may possibly amount to malicious prosecution.

The question sometimes arises as to what is interference in order to constitute the tort of maintenance. Giving or lending money or bearing the entire or partial expenses of an action is the most natural form of maintenance. But there may be other forms as well. Thus it has been held that saving a litigant from expenses which he might otherwise incur is equally objectionable and is as such

tortious. A mere promise to maintain a suit will not suffice. Such an agreement may be an unlawful agreement and even may be the tort of conspiracy but it will not amount to the tort of maintenance.

It is of no consequence whether it is the plaintiff or the defendant to whom the help was rendered or whether the action in which the help was given was successful or not. Hence it is no defence to an action for maintenance that the maintained proceedings were successful and therefore justifiable. It may be remarked that it is only when the maintained proceedings are successful that the opposite party can be said to have suffered special damage. When such action has failed the other party cannot be said to have suffered any loss and no suit for maintenance would lie. It is, therefore only in case the maintained action is successful that a suit for maintenance can lie at all.

As just stated maintenance per se is not actionable. The plaintiff in order to succeed must prove special damage suffered by him in consequence of maintenance by the defendant. A well instance where a suit for maintenance failed for failure to prove special damage is afforded by *Neville v. Londaon Express Newspapers Ltd.* 1919) A.C. 368 cited above. In that case the plaintiff contemplated laying out land on the South Coast as a building site and developed it into a seaside resort, and offered a prize for suitable name for the intended resort. He offered also consolation prizes of freehold building plots subject to payment by the winners of these three-guineas for the conveyance of their respective plots to them. A number of persons responded. The defendants in their newspaper published articles to the effect that the competition was not bona fide and that the prizes were really sales of the land at a profit. The defendants offered to rake legal proceedings at their own expense on behalf of consolation prize winners to recover three-guineas fees. Two actions were brought by the defendants' solicitors in this behalf and were successful with the result that the plaintiff had to pay back the money and costs. The plaintiff sued the defendants for maintenance. It was argued on behalf of the plaintiff that the success of the actions maintained was no defence in an action for maintenance. This argument was upheld by the House of Lords. But this suit was dismissed on the ground that he had suffered no special damage. It was true that he was made to return guineas which he had obtained by fraud, but in doing so he could not be said to have suffered any loss. He had, it is equally correct to pay the costs of the action, but these were not special damages as they merely followed the result of the actions. Moreover, he had only to thank himself for losing money by sweating up an unsuccessful defence. An illustration of a case where damage was proved is to be found in the well known case of *Bradlaugh v. Newgate* (1883) 2 Q.B.D.1. In this case Newgate, defendant, had instigated and assisted with finances one Clerk to file a civil suit against Charles Bradlaugh for recovery of the statutory penalty for sitting and voting in Parliament without taking the prescribed oath. That suit was dismissed on the ground that the plaintiff therein was not entitled to sue as common informer. There upon Charles Bradlaugh brought an action for maintenance against the defendant and

recovered the costs incurred by him in the prior suit and not realised by him on account of the poverty of Clarke who was the plaintiff in that case.

21. In Law of Tort by Winfield and Jolowicz, 9th Edition, regarding Malicious prosecution at pages 489 and 490 it is stated thus:

The action for malicious prosecution being an action on the case, it is essential for the plaintiff to prove damage, and in *Savile v. Roberts* (1698) 1 Ld. Ray. 374 : 5 Mod. 394 -Holt, C.J. classified damage for the purpose of this tort as of three heads, any one of which might ground the action, malicious prosecution might damage a man's fame, or the safety of his person, or the security of his property by reason of his expense in repelling "an unjust charge. A moral stigma will inevitably attach where the law visits an offence with imprisonment, but there are today unnumberable offences which are punishable only by fine. In such cases, the plaintiff can only rely upon damage to his fame if the offence with which he is charged is necessarily and naturally defamatory of him, and in effect the question of law which is involved in actions for defamation." It is the statement that the plaintiff was charged with the offence capable of a non-defamatory meaning? Thus a charge of wrongly pulling the communication cord in a railway train does not necessarily affect the fair fame of the accused and will not ground an action for malicious prosecution under Holt, C.J.'s first head, but it is otherwise where, e.g. the plaintiff is charged with deliberately travelling on a train without having paid his fare. On the other hand unless the plaintiff was awarded the equivalent of the taxed costs which he incurred in defending himself, the difference between the costs awarded in the criminal proceedings, if any, and the costs actually incurred is sufficient to ground the action under Holt, C.J.'s third head.

Assuming there is damage as explained above, the plaintiff must prove (a) that the defendant prosecuted him and (b) that the prosecution ended in the plaintiff's favour; and (c) that the prosecution lacked reasonable and probable cause; (d) that the defendant acted maliciously

22. In the Law of Torts" by T.S. Venkatesa Iyer at Chapter XXI, on the topic " Malicious Prosecution, it is stated thus:

Malicious Prosecution:- From the earliest times, a writ of conspiracy was available under the Statute of Conspirators against persons who conspired to indict another for felony. Gradually, this was extended to all misdemeanours. Ultimately, it has assumed its present form of an action for the abuse of legal process, civil or criminal. The leading case which expressly recognised the tort in its present day form is *Savile v. Roberts* (1699) 91 E.R. 1147. Historically, the action for malicious prosecution is, as could be naturally expected, an action on the case. It differs from the tort of false imprisonment in that the latter is an action of trespass.

In such an action, the plaintiff will have to establish five points, namely,

- (i) that the plaintiff was criminally prosecuted;
- (ii) that the proceedings terminated in plaintiff's favour;
- (iii) that the defendant in so prosecuting acted without reasonable and probable cause;
- (iv) that it was malicious;
- (v) that plaintiff has suffered damage as a result thereof.

The burden of proving all the above five points is however on the plaintiff.

As discussed above, we find from the evidence available on record, both oral and documentary, that the defendants/appellants wrongly claimed the timber and firewood covered by Ex.B.13 to B.17 - export passes as their own. They have also filed O.S.No.5 of 1973 on the file of the Sub-Court, Kottarakkara, on this basis. The attitude of the defendants/appellants, according to the plaintiff/respondent, amounts to conversion, and therefore, they are liable to reimburse the value of the timber and firewood covered by Ex.B.13 to B.17, export passes.

Mr. B. Kalayanasundaram, learned Counsel for the appellants, submits that there shall be conversion only if the appellants had misappropriated the property for themselves. In the instant case before us, admittedly, the defendants/appellants have taken possession of the property and they removed a portion of the timber also. In the first schedule to the plaint, the timber logs removed by the appellants have been listed. It is a recognised principle of law that there may be conversion of goods although the appellants have not physically dealt with them or been in physical possession of them, if his acts amount to a denial of plaintiff/respondent's right to possession. In the instant case before us, it is seen that the defendants/appellants have denied the right of the plaintiff/respondent firm and setup title in themselves. It is a well established principle of law that the Tort of conversion consists in an act of wilful interference, without lawful justification with a chattel. In a manner inconsistent with another's right whereby that other is deprived of the use and possession of it. There are three distinct methods in which one may be guilty of conversion:

1. by wrongly taking it;
2. by wrongly detaining it; and
3. by wrongly disposing of it

In the instant case before us, the defendants/appellants have virtually taken possession of all the timbers and firewood and have wrongly misappropriated some portion listed in plaint first schedule and wrongfully prevented the plaintiff/respondent firm from removing the portion of the timber and firewood listed in Schedules 2 to 4. We are, therefore, unable to accept the contention raised on behalf of the appellants that misappropriation is the gist of the tort of conversion. On the other hand, we hold that mere detention is sufficient to constitute the tort

of conversion.

23. Mr. G.M. Nathan, learned Counsel for the respondents, while arguing the points raised in the memorandum of objections, filed a memo of calculation for damages claimed in O.S.No. 113 of 1974, against which A.S.No. 169 of 1981 has been filed. It runs as follows:

Rs. p. I.A. The value of the logs in Schedules I to III in the plaint, at and the firewood in Schedule 81,108.37 IV in the plaint was arrived at by calculating at the rates shown in the

(a) Agreements with Third parties 9,000.00 viz., Ex.A.42, A.43 and 47

(b) Indicated in the counter foils (Ex.A.45 and A.46) relating to the sale of logs and firewood few months subsequent to January, 1973 and prior to January 1973.

B. Penalty paid. 6,161-00 ----- Total 96.269-96 -----

II. Even otherwise, according to the admission of D.W.3. the total value would come-to 82708 9,000.00 as indicated below: D.W.1 admits that the value of 158 logs shown in Sch.I is So the cost of the log will be nearly Rs. 76/- Total No. of logs 67,547.00 is 1008 x 76 Penalty paid. Penalty paid 6,161.00 ----- Total 82,708.00 -----

Even otherwise Plaintiff purchased coups right for a sum of 83,990.00 Penalty paid. 6,161.00 ----- Total 90,151-00 -----

24. We have gone through the evidence of P.Ws. 1, P.W.2 and P.W.3. According to P.W.1, a partner of the plaintiff firm, Nanda Timber Trading Company, his son Yeshpal Nanda sent various telegrams to various officers under Exs.A.10 to A.16 in respect of the matter; that between 4.1.73 and 6.1.1973 he was staying in Quilon Government Tourist Bungalow in connection with an agreement to be signed before the Collector of Quilon; that on receipt of information from his son he sent a reply telegram under Ex.A.19 that he would reach his son very soon; that the defendants (appellants) forcibly removed the original of five export licences from his clerk Chowda; and sent out his people from the coupe and removed all the logs stored therein; that Ex.A.25 is the memo issued from Criminal Court regarding return of the scooter; that during the pendency of the criminal case, the appellants filed O.S.No.5 of 1973 of the file of the Sub Court, Kottarakkara claiming that the logs were sold to the appellants; that Ex.A.27 is the copy of the injunction order; and that Ex.A.28 is the copy of the order vacating injunction already granted under Ex.A.27. It is further stated by P.W.1 that the signature found at the end of Ex.A.48 suit agreement is not his signature and Ex.A.48 is not the original one since the signatures of parties are not there; that the original of Ex.A.48 is with the District Forest Officer, Thenmalai; that Exs.A.4, A.5, A.6 and A.7 and A.8 are the export passes taken from the Department issued in the personal name of P.W.I; that there is no mention of Nanda Trading Company in the export licences; export passes on 1.1.1973, that kidnapping of Chawda took place on 5.1.1973 and he came to

know about it only on 6.1.73; that he not claiming damages for kidnapping; that on 8.1.73 himself and Sub-Inspector of Police, Shencottah went to Thenmalai Police Station; that it is not correct to state that he has given imagined value in his plaint.

25. According to P.W.2, Medical Officer, Government Head Quarters Hospital, Tiruchy, on 10.1.1973 at 11.20 A.M. he examined Chowda for certain injuries on a requisition from the Sub-Inspector of Police, Shencottah and he has entered about this in the Accident Register under Ex.A.67.

26. According to P.W.3, he has nothing to do with the business of his father H.L. Nanda; that he filed, C.S.No. 4 of 1973 against the appellants on the file of the High Court, Madras and obtained a decree; that he has nothing to do with Nanda Trading Company; that it is not correct to say that his father has any interest in O.P. Nanda and Co. that his father went to supervise his interest in Shencottah in the matter of supply of firewood; that he has no interest in Nanda Saw Mills and Works Limited, that his brothers, his father and himself are not joint in all the business; that it is not correct to state that a sum of Rs. 36,000 is due to appellants in the matter of supply of Pillamaruthu timber and firewood and that it is not true to say that his father handed over the export passes to appellants.

27. In this connection, it is relevant to note that the appellants have obtained injunction restraining the respondent from removing the logs within the time prescribed. It is no doubt that it is open to the respondents to claim damages for injury resulting from the wrongful injunction in that suit itself. According to the learned Counsel for the appellants, the plaintiff/respondent who is aggrieved must show that the appellants had no reasonable or probable cause in seeking an order of injunction. In *Imperial Tobacco Co. Vs. Albert Bonnan*, it was held that:

... a suit for damages against the defendant at whose instance plaintiffs goods were detained by authorities... a part from malice or want of probable cause; a plaintiff cannot recover damages in an independent suit upon mere proof that an injunction was granted restraining him from doing what has since been held within his right....

What is significant is that the appellants having fully known that they have no title to the property have claimed absolute title, while to their knowledge they have no title to the timber logs kept in coupe No. 5. It has been well established that although in an enquiry as to damages it is a matter upon which the court exercise its judicial discretion it is not necessary that the party aggrieved by the interlocutory injunction should show that his opponents suppressed material facts or otherwise obtained injunction by improper means.

28. Bearing the above principles in mind let us examine the facts of the present case. In the instant case before us, the defendants/appellants herein were the plaintiffs in O.S.No. 5 of 1973 on the file of the Sub Court, Kottarakkara, and they have fraudulently suppressed the facts that they have no title to property.

In *Kasireddi Chinna Reddi v. Atchipulusu Venkataswami* (1919) 53 I.C. 70, it was held that so far as the Courts in India are concerned, a finding as to want of reasonable and probable cause in an action for malicious prosecution is a finding of fact and not of law. The expressions "reasonable cause" and "probable cause" are synonymous. Any distinction that is sought to be made, that in any particular case there might be probable cause but not reasonable cause and that there should be an absence of both of probable and reasonable cause to sustain an action for malicious prosecution as if the two could be distinguished, is opposed to the rules laid down on this branch of the Law of Torts. Whether it is called "reasonable and probable cause" or "reasonable or probable cause", the meaning is reasonably probable cause, i.e., a cause which an ordinarily reasonable man, having knowledge of facts and the belief arrived at in a reasonable manner as to facts which the defendant then had, would be justified in considering as affording a fair basis for the opinion that a criminal offence has been committed by the plaintiff and hence as being a probable cause for the institution of criminal proceedings against the plaintiff. The fact that a civil suit for damages was a better or more appropriate remedy has little relevancy on the question of "want of reasonable and probable cause". A man is entitled to pursue any of the legal remedies in any order he likes. There is no real distinction between legal malice and malice in fact. If a man has been reckless, whether the change be true or false, that might amount to malice; but not recklessness in coming to the conclusion that there is reasonable and probable cause.

Mr. Kalayanasundaram, learned Counsel for the appellants, refers to the decision in *Gambhir Mal Pandiya Vs. J.K. Jute Mills Co., Ltd., Kanpur and Another*, , for the following proposition:

Held, that G was liable for the decree passed against the firm. A decree passed against a firm may be executed against a partner who was not summoned in the suit, but Order 21, Rule 50(2) of the CPC gives him an opportunity of showing cause if he disputes his liability. In such a case he can prove that he was not a partner or that he was not a partner at the time the cause of action accrued. He can also question the decree on the ground of collusion, fraud or the like, but he cannot have the suit tried over again or arise issues between himself and his other partners.

The decision in *Har Kumar De Vs. Jagat Bandhu De*, , is relied on for the proposition that where a temporary injunction is wrongfully obtained on insufficient grounds a suit for damages is maintainable.

The decision in *Smt. S.R. Venkataraman Vs. Union of India (UOI) and Another*, , is relied on for the following proposition:

Malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause.

If a discretionary power has been exercised for an unauthorised purpose, it is

generally immaterial whether its repository was acting in good faith or in bad faith.

The decision in *Firm of S.P.A. and A.R. Chockalingam Chettiar Vs. National Steamship Co., Bombay*, is relied on for the following proposition:

The tort of "conversion" consists in an act of wilful interference, without lawful justification, with a chattel in a manner inconsistent with another's right, whereby that other is deprived of the use and possession of it. There are three distinct methods in which one may be guilty of a conversion; (1) by wrongly taking it, (2) by wrongly detaining it, and (3) by wrongly disposing of it.

29. In the instant case before us, the defendants/appellants figuring-themselves as plaintiff in O.S.No. 5 of 1973 on the file of the Sub Court, Kottarakara, got order of injunction against the plaintiffs/respondents-firm. It is contended on behalf of the respondents herein that the court had no jurisdiction. According to the learned Counsel for the respondents even on the appellant's own showing, sale took place at Shencottah, which falls within the jurisdiction of the lower court viz. Court of the learned Subordinate Judge, Tirunelveli and not Sub Court, Kottarakara. u/s 20 of the Sale of Goods Act, the property passes upon the agreement of the parties. D.W.3-first defendant/first appellant has stated in his evidence that in lieu of debt due to defendants/appellants-firm, P.W.1 H.L. Nanda, Managing Partner of the plaintiffs/respondents firm has sold timber logs covered by passes 3 to 7 (Ex.B.13 to Ex.B.7) outright. If this be an, this must result in passing of title from the seller to buyer u/s 20 of the Sale of Goods Act. It is on this basis, the learned Counsel for the respondents herein claims that injunction was obtained without jurisdiction. According to the learned Counsel for the appellants, on the date of sale, in the beginning of January, 1973, property to goods did not pass and that Ex.B.13 to B.17 are documents of title to goods and only upon they being delivered to the appellants on 5.1.1973, title must be deemed to have passed. Delivering of Ex.B.13 to B.17, title to goods must be deemed to have passed on 5.1.1973. This having taken place at Thermala within the jurisdiction of Sub Court, Kottarakara, the latter mentioned court has got jurisdiction, according to the learned Counsel for the appellants. But ExA.28, printed copy of order in I ANo.59 of 1973 in O.S.No.5 of 1973 of Sub Court, Kottarakara, dated 7.3.1973 dismissing the application for an injunction, clearly disclose that the plaintiffs therein who are defendants/appellants in that instant case before us have not been able to establish any claim to timbers involved herein. This being so, there was no actual transfer of title to goods. Further Ex.B.13 to Ex.B.17 export passes are not documents of title to goods. On the other hand, they are merely permits for transport. Whoever possesses them can transport the goods irrespective of the fact that the person holding the export pass is the owner or not.". This cannot be claimed as a circumstance to show that the Sub Court, Kottarakara, had jurisdiction to entertain I.A.No. 59 of 1973 in O.S.No. 5 of 1973 for grant of injunction. It is relevant in this connection to note that actually logs were available in Achankovil forest, which is within the

jurisdiction of the Sub Court, Kottarakara. It is also relevant to note that it is the case of the respondents herein that they were obstructed from removing the logs. Therefore, it cannot be said that Sub Court, Kottarakara, had no jurisdiction to entertain O.S.No. 5 of 1973 nor it can be said that the order in I.A.No. 59 of 1973 was passed without jurisdiction. Nevertheless the fact remains that the act of the appellants amounts to trespass. It is well established principle of law that any person when he unlawfully interferes with the exercise of the property rights of another commits an act in the nature of trespass to the property, is liable in an action for trespass. It is not necessary for the respondents to prove malice or want of reasonable or probable cause. In the instant case before us, the appellants herein have unlawfully interfered with the exercise of property rights of the respondents herein. This is a clear circumstance to infer that injunction has been improperly obtained; in other words, the appellants herein have unlawfully interfered with the exercise of property rights of the respondents herein. Any person unlawfully interfering with the exercise of the property right of another person commits an act in the nature of trespass to the property, is liable for damages in an action for trespass without proof of malice or want of reasonable or probable cause. It is necessary to prove malice or want of probable cause even though judicial order might have been improperly obtained. In the instant case before us, it is very clear that the respondents-firm had no liability towards the appellants herein. Knowing fully well, the respondent-firm is not liable for any amount, the appellants have maliciously sued the respondents herein in O.S.No. 5 of 1973 on the file of the Sub Court, Kottarakara and got an injunction against the respondents-firm. There is no reasonable probable cause for seeking injunction against the respondents-firm. At the same time, it is in evidence that before the appellants sued the respondents firm in O.S.No. 5 of 1973 on the file of the Sub Court, Kottarakara, Omprakash Nanda filed C.S.No. 4 of 1973 on the file of the Sub Court, Kottarakara, Omprakash Nanda filed C.S.No. 4 of 1973 before this Court for money against the appellants firm and got a decree therefore Aggrieved by this, the appellants unlawfully sued the respondents firm. This is a clear circumstance to show the case of malice. We are, therefore, satisfied that the appellants firm had not only no probable or reasonable cause to get injunction against the respondents, but also they are actuated by malice. We are, therefore, of the opinion that the respondents firm are entitled to damages.

30. It is also contended on behalf of the defendant/appellants that the plaintiff/respondents having sold away logs to different persons covered by Ex.A.42 and Ex.A.43 agreement as well as agreement with Sivasankara Timber Depot, Tuticorin, the plaintiff/respondents herein are not entitled to claim any damages. It is relevant to note that Sivasankara Timber Depot was not given the timber under the agreement. Sivasankar Timber Depot filed O.S.No. 236 of 1975 on the file of the learned District Munsif, Tenkasi, and recovered an amount of Rs. 4,746-05. D.W.1 Ramakrishna Naidu deposed as a witness in that suit, P.W.1 on behalf of the plaintiff/respondent firm in the written statement in O.S.No. 236 of

1975 has stated that he had timbers ready at Prianoor Border. P.W.1 H.L. Nanda has given evidence relating to the contents of Ex.B.9 written statement and also acknowledged the same to be true. It is, therefore, contended on behalf of the appellants that the timbers purported to have been sold to Sivasankara Timber Depot, Tuti-corin, was not within coupe No. 5. Even admitting that the timbers covered by the agreement of the plaintiff/respondent firm with Sivasankara Timber Depot was not kept within the Coupe No. 5, it cannot be lost sight of that the plaintiff/respondent firm had agreements with Senthil Timber Traders and Ashok Timber Dept, Tenkasi. The plaintiff/respondents have not stated anywhere that the timbers covered by Ex.A.42 and Ex.A.43 were actually sold. On the other hand, they are timbers covered by 2nd Schedule item (A) and 2nd schedule item (C) It is contended on behalf of the defendants/appellants that in Ex.A.59 written statement of the plaintiff/respondent firm in O.S.No. 5 of 1973, the respondents herein claimed to have sold the logs to various merchants; and the same is not correct. According to the plaintiff/respondents, it was only an agreement of sale with them. Even on the appellant's own showing, there were timber logs worth Rs. 24,999-30 besides firewood logs available in coupe No. 5. The actual loss incurred by the plaintiff is reimbursable by the defendant. It is seen that even granting that the plaintiff got part payment by way of agreement with Senthil Traders and Ashok Timbers, this does not give rise to any right to the defendants to defeat the claim of the plaintiff. An action in conversion would lie if there is invasion of the right of possession and on such an action, the plaintiff is entitled to succeed against all excepting the true owner. It is no defence to the action that the plaintiff had no title to the property because possession is title against all excepting the true owner. Therefore, we find that the defendants/appellants herein are liable to pay the value of timber and firewood listed in schedules 1 to 4. The finding of the lower court in this regard is correct and the same is hereby confirmed.

31. It is contended on behalf of the defendants/appellants that the main allegation is only against defendants/appellants 1 and 2, and that defendants/appellants 3 and 10 have been wrongly impleaded. During the pendency of the suit, 10th defendant. It is clear that they can be sued as members of the firm or individually. They can be sued in the name of the firm also. In the instant case before us, the plaintiff/respondents herein have chosen to implead all the members of the firm. This will not in any way give advantage to the defendants/appellants. A plaintiff bringing a suit against a firm may implead all the members of a firm and likewise members of a firm may sue jointly in the individual names; and such a suit is none the less be a suit against the firm or by the firm. Therefore, there is no question of misjoinder. There is no case of non-joinder in the instant case before us.

32. Another contention raised on behalf of the appellants is that the contract in respect of coupe No. 5 of Achankovil was taken by P.W.1 H.L. Nanda alone in his individual capacity and as such it is not open to the firm to come forward with the instant suit before us. It is also contended on behalf of the appellants that

P.W.1 H.L. Nanda must necessarily have transferred his title to goods in favour of the firm. Transport pass being non-transferable, property cannot be deemed to have passed title to the plaintiffs/respondents. Therefore, the plaintiffs/respondents are not entitled to institute the suit. We have already discussed about this aspect. It is the partnership firm which bid the action and it is in the name of the firm, Coupe No. 5 was taken on contract. This is clear from E.A.106 official letter dated 1.9.1972 written by District Forest Officer, Thenmalai to the respondents firm. It is also relevant to note that this document is the earliest record. Therefore, the irresistible conclusion that can be arrived at is that the partnership firm was the contractor, and the subsequent communications in the name of H.L. Nanda were only in his capacity as Managing Partner of the firm. Therefore, the suit instituted by the plaintiffs/respondents is sustainable in law.

33. We have already extracted the memo of calculations submitted in Court by Mr. G.M. Nathan, learned Counsel for the respondents. The respondents herein claim damages to the tune of Rs. 96,269-96. The appellants have admittedly removed timber logs listed in the first schedule. The respondents claimed Rs. 17,890-33 to wads this item. The appellants herein in the proceedings connected with O.S.No. 5 of 1973 had at one stage valued the timbers they admittedly removed as worth Rs. 12,800. Subsequently in the written statement in the instant suit before us, they claim the value as Rs. 12,000. Thus, we see that there is inconsistent valuation on the part of the appellants. We are unable to accept the appellants' valuation. Therefore, we are inclined to accept the plaintiff/respondents' valuation of Rs. 17,892-33 as true in respect of 1st schedule item. The evidence on record is not succinct and clear so far as the second schedule is concerned. There are three items in the second schedule. Second schedule B item of logs are those purported to have been sold to Sivasankar Timber Depot, Tenkasi, as already pointed out P.W.1 H.L. Nanda, Managing partner of the plaintiff/respondent firm has conceded in Ex.A.44, that he had already removed the timbers involved in the agreement with Sivasankar Timber depot and were stored in Piranoor border at Shencottai. Therefore, the claim of the respondents under C item of 2nd schedule cannot be sustained. So far as items A to C, the respondents claim Rs. 393-81. The appellants also contended in their written statement that the timbers left in coupe No. 5 was worth Rs. 24,994-30; and A & C items in 2nd Schedule put together approximately comes to Rs. 25,000. The value of timber left by the respondent firm in the second schedule therefore can be calculated to be Rs. 24,994-30. Under the III schedule the respondents claim timbers worth Rs. 15,134-94. In respect of this claim, there is no adequate evidence available on record. At the same time, it is relevant to note that the case of the appellants that the total value of timber left in the coupe is worth Rs. 24,994-30 is not displaced by acceptable evidence. On the other hand, with respect to the firewoods, they are covered by Ex.B.13 and Ex.B.14 export pass Nos. 3 and 4/73. The respondents' claim that the firewoods destroyed by fire was worth Rs. 9,000 is not established by acceptable evidence. Firewoods admittedly have been destroyed by fire. The evidence adduced on behalf of the

plaintiffs/respondents does not disclose the exact value thereof. The appellants have attacked the entire claim of the respondents as exorbitant. Admittedly, the appellants have not carried away any part of the firewood. In the absence of convincing and acceptable evidence regarding the claim of the plaintiffs/respondents with regard to the firewood, it has to be concluded that the claim is excessive. At the same time it cannot also be ignored that the appellants have not removed the firewood. Therefore, we are of the opinion that it is just and proper that the claim in respect of firewood is reduced to one-half (1/2) i.e., Rs. 4,500. The Government of Kerala collected Rs. 6,161-59. This is obviously a collection by the Government towards penalty for not complying with the conditions of agreement to clear the coupe within the stipulated time. The plaintiffs/respondents herein were disabled because of the injunction obtained by the appellants herein. This therefore appears to be a penalty which the appellants themselves must pay. So we are of the opinion that the total amount has to be arrived at Rs. 53,548-22.

34. It is also relevant in this connection to note that the respondents have claimed Rs. 92,269-96 before the lower court. We have to ascertain the actual loss sustained by the respondents. It is also material that the appellants have not gained anything more than Rs. 17,892-33 even on the respondents' own showing Ex.B.24 report of the Range Officer dated 15.2.1973 to the District Forest Officer, Thenmali, regarding the fire accident to export licence No. 3 to 7/73 in coupe No. 5/71 of Achankovil forest shows that the timbers and firewood were destroyed by natural fire only. The allegation of the respondents that the appellants destroyed them, therefore, cannot be accepted. Further the allegation of the appellants that the respondents destroyed the logs and firewood also is not substantiated by evidence. On the other hand, the respondents, on their own showing, transported already huge quantities of firewood covered by Ex.A.49 export pass No. 685 and Ex.A.41 export pass No. 686. The case of the respondents that they spent Rs. 8,300 for coupe No. 5 might be true in view of the fact that one-third of the amount covered by the contract is approximately Rs. 23,000 as seen from Ex.A.106 letter written by the District Forest Officer, Thenmalai, to the respondents firm. In view of the fact that the respondents have collected substantial amount relating to the timbers covered by Ex.A.40 and Ex.A.41 export passes, we are bound to hold that the respondents' claim is by far in excess of what they are legitimately entitled to. Therefore, we are unable to uphold the claim made on behalf of the plaintiffs/respondents in the memo of calculations filed during the hearing of this appeal. We are definitely of the view that damages of Rs. 53,548-22 would certainly meet the ends of justice. We accordingly hold that the respondents are entitled to recover damages to the tune of Rs. 53,548-22 with proportionate costs. Under the circumstances, we find that there is no merit both in the appeal as well as in the cross-objections. We confirm the judgment and decree of the lower court.

35. In the result, both the appeal as well as the cross-objections are hereby dismissed. Under the circumstances, there is no order as to costs.