
(1962) 02 KL CK 0033
In the High Court Of Kerala
Case No : S.A. No. 537 of 1957

Punnoose

APPELLANT

Vs

Mammi Amma and Another

RESPONDENT

Date of Decision : 02-02-1962

Acts Referred:

Citation : (1962) KLJ 273

Hon'ble Judges : M. Madhavan Nair, J

Bench : Single Bench

Advocate : P.K. Krishnankutty Menon, for the Appellant; C.K. Sivasankara Panicker, for the Respondent

Final Decision : Allowed

Judgement

M. Madhavan Nair, J.—The appellant herein is the 1st defendant; and the suit is for recovery of the profits of property lost to the plaintiff within three years preceding the institution of the suit, on account of the defendants' procuring several orders from court and thereby delaying the plaintiff's getting possession of the property in execution of the decree in O. S. No. 409 of 1105 on the file of the Munsiff, Kanjirapally, wherein the present 1st defendant was the 3rd defendant. The several applications moved by the defendants were ultimately dismissed by the court. The dismissal of the last of such obstructive motions was on 25-1-1952 so that the plaintiff got delivery of possession through court on 29-1-1952 only. In this suit, instituted on 29-5-1952, the plaintiff is claiming Rs. 1,200/- being the profits for three years thus lost to him by the acts of the defendants. The 1st defendant contended that he had only been seeking reliefs under law, that the execution in O.S. No. 409 was really within the prohibition of Act VIII of 1950 (T-C.) (the decree being for eviction of a lessee) and that the plaintiff was not entitled to any relief in this suit. The Munsiff decreed the suit awarding mesne profits to the plaintiff at Rs. 286-12-6 per annum for the period from 29-5-1949 to 12-1-1952 which latter date was found to be the date of delivery of the property to him; and the lower appellate court upheld it. Hence

this second appeal.

2. Mr. Sivasankara Panicker, appeared on behalf of the plaintiffs, but was not heard on this second appeal for the following reason:

The trial court decreed the suit on November 21, 1955. Soon after that, on January 2, 1956, Exts. A to B1, being all the documentary evidence on the side of the plaintiffs, were taken away from court by the plaintiffs, even before the first appeal was filed before the District Court, Kottayam. After the institution of this second appeal this Court wrote for the above or--said exhibits; and on receipt of the communication, the Munsiff, Kanjirapally, called upon the plaintiffs' counsel to bring back the aforesaid exhibits to be forwarded to this Court for purposes of this second appeal. Counsel stated that, on intimation of the above call, the plaintiff had informed him that the concerned documents had been entrusted to their counsel in the High Court, that they were unaware whether the records had been actually produced in the High Court or not, and that he had instructed them to see that the exhibits, if not already produced, were produced in the High Court without fail. The statement of counsel has been forwarded to this Court along with the Munsiff's letter which reads thus:

No. R. 72/61

Kanjirapally, 27-9-1961.

From

M.K. Krishnan, B. Sc., B.L.,

Munsiff, Kanjirapally.

To

The Registrar, High Court,
Ernakulam.

Sub : Exts. A to 111 in O.S. 159/52 of this Court.

Ref: High Court letter No. CRSA 721/61

14-9-1961.

Sir,

With reference to the above, I have the honour to inform you that Exts. A to 111 in O.S. 159/52 of this Court were returned to the plaintiff's counsel on 2-1-1956. Notice has been issued to the plaintiffs counsel to produce them before this Court, but he has filed a statement on 26-9-1961 stating that the plaintiff has entrusted those records with his advocate in the High Court. The statement is herewith forwarded.

Yours faithfully (Sd.) Munsiff.

Mr. Sivasankara Panicker stated that he had not been entrusted with any of those exhibits.

3. As observed in Oswald's "Contempt of Court",

An order must be implicitly observed every diligence must be exercised to obey it to the letter, and any proceedings resulting in a breach are tantamount to an actual breach.

In *Hadkinson v. Hadkinson* (1952 Probate 285), Romer L.J. (with the concurrence of Somervell L.J.) has held :

It is the plain and unqualified obligation of every person against or in respect of, whom an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged.....Disregard of an order of the court is a matter of sufficient gravity, whatever the order may be.

Denning L.J. also concurred and, after holding that a party who disobeyed an order of the court was in contempt, observed "that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."

4. As the entire documentary evidence on the side of the plaintiffs, on which their claim has necessarily to rest, been removed from court while the trial of the case through its appellate stages was awaited, and not been put back thereafter, even after express notice for their return for purposes of hearing the second appeal in this Court, the plaintiffs are guilty of disobedience of an order of the court, and such disobedience impedes the course of justice by making it more difficult for the court to ascertain the truth of facts in the cause and is therefore an act of grave contempt on the part of the plaintiffs-respondents. No motion has been made for purging their contempt. In the circumstances I am constrained to decline to hear them in this second appeal. Counsel for the appellant, 1st defendant, contends that a defence to a motion, even if it be without reasonable and probable cause would not constitute an actionable wrong, and that a suit for damages the claim for reimbursement of "loss of profits" is only a camouflage for a claim in damages--caused by such a defence is not maintainable without proof of malice. Counsel adverted to the reasonableness of the contentions raised by his client in the prior proceedings and relied on *Krishnan v. Govinda Prabhu* (1952 KLT 224) to show that the identical contentions came to be subsequently accepted by a Full Bench; but that need not be considered here. Both the courts below have viewed the present suit as one for mesne profits for a period subsequent to that covered by the decree in the prior case and therefore allowed the suit as mentioned above. Such a case does not find any mention in the plaint in this case; nor even in the replication filed as a rejoinder to the written

statements of the defendants. The only case set up by the plaintiffs is that the plaintiff (referring to the 1st plaintiff, the others having come in only after his death as his legal representatives) had been obstructed in taking possession of the property by various motions made by the defendants in court and securing orders of stay, injunction etc. in the mailer, as the result of which the plaintiff had suffered loss of profits for three years which the defendants are bound to make good in this suit.

The Supreme Court has pointed out in *Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar*, "the decision of a case cannot be based on grounds outside the pleadings of the parties, and it is the case pleaded that has to be found. Without an amendment of the plaint, the court was not entitled to grant the relief not asked for and no prayer was ever made to amend the plaint so as to incorporate in it an alternative case." These observations apply on all fours to the facts of this case. It is not the function of the court to construct a case not pleaded by the parties, as such a procedure would very often amount to a denial of proper opportunity to the opposite party to meet the same straight.

The case set up in the pleadings of the plaintiff is only of abuse of judicial proceedings. It is then essential that the plaintiff should prove malice on the part of the defendants before he can succeed in his claim for damages. As observed by Varadaraja Iyengar J. with the concurrence of Joseph J. in *Rama Iyer v. D.S. Iyer* (A.I.R. 1956 T-C. 222): "k.....by merely avoiding the word "damages" and using the words "loss of profits" the plaintiff cannot make his position any better."

"The foundation of the action" held B.K. Mukherjea J. with concurrence of Sharpe J. in *Bhupendra Nath Chatterjee and Others Vs. Sm. Trinayani Devi*, , "is the malicious procuring of the order of the court by representation of facts which the defendant knew to be false or of which there was no reasonable and proper basis.....As the essence of such action is the malicious abuse of the processes of the court it is not sufficient to show that the injunction was obtained on insufficient grounds; it must be proved also that the defendant knew them to be insufficient and acted from an improper motive." See also *Ramanathan Chetty v. Mira Saibo Marikar* (A. I. R. 1931 P. C. 28) and *Janaki Ammal v. Sarada Ammal* (1956 K. L. T. 510).

Excepting the fact that the defendants have procured injunctions and stay orders from courts, which orders were ultimately cancelled by the court, no malice as such on the part of the defendants has been made out. Resorting to reliefs in a court of law cannot by itself be an actionable wrong, and if proceedings were taken on a wrong basis, apart from malice, it cannot afford a cause of action for a fresh suit for damages. It then follows that on the pleadings no cause of action has been made out in this case, nor has anything been made out at the trial either.

The suit therefore fails against the 1st defendant. It is accordingly dismissed and this second appeal allowed with costs throughout.