

(1992) 09 MAD CK 0060

In the Madras High Court

Case No : Writ Petition No. 16688 of 1990

P.V. Bakthavatchalam

APPELLANT

Vs

The State of Tamil Nadu

RESPONDENT

Date of Decision : 03-09-1992

Acts Referred:

Constitution of India, 1950 — Article 21, 22(2), 226, 32

Evidence Act, 1872 — Section 43

Penal Code, 1860 (IPC) — Section 124A

Citation : (1992) 09 MAD CK 0060

Hon'ble Judges : Raju, J

Bench : Single Bench

Advocate : K. Mohanamurali, for the Appellant; A.S. Venkatachalamoorthy, Special Government Pleader, for the Respondent

Judgement

Raju, J.—The above writ petition has been filed for the issue of a writ of mandamus directing the first respondent to pay a sum of rupees five lakhs as compensation to the petitioner and to frame a scheme to provide adequate and fair compensation in such cases. The petitioner, in the affidavit filed in support of the writ petition, states as follows:

The petitioner is a practising lawyer and the President of the Organisation for Civil and Democratic rights, which fights for the downtrodden in the State of Tamil Nadu. During the Emergency there was an agitation throughout Tamil Nadu to protest against the murder of one Seeralan of Tiruppattur and Appu of Coimbatore by Police, and as a part of the agitation the Organisation referred to, devotedly participated to force the Government to appoint an Enquiry Commission on the Police atrocities and take action against the erring police officers. The agitation ended with an appointment of an Enquiry Commission and the subsequent dismissal and prosecution of several Police Officers. Since the petitioner had taken active part in the above struggle, the entire administration had taken a prejudiced view on the petitioner from that time onwards.

2. The petitioner further states that the Organisation of which he is the President, organised a chain of public meetings in and around Dharmapuri where police terrorism was unleashed over the poor downtrodden, that as part of its programme the petitioner took part in a meeting on 12.8.1979 at Barur police limits in which he condemned the violations of human rights by the police Authorities and that the said meeting ended peacefully and all the speakers including Advocates and doctors returned to their respective places. It is claimed that exactly after six months and twelve days, viz., on 24.2.1980 the petitioner came to know of the registration of a F.I.R., by the Barur Police Station in Crime No. 40 of 1980 against the petitioner alone for an offence under S. 124-A of the Indian Penal Code. This was followed up by filing a case before the then Second Class Judicial Magistrate, Oothangarai in P.R.C. No. 21 of 1981 and the matter was committed to the Assistant Sessions Court, Krishnagiri, on 31.7.1981 in S.C. No. 78 of 1981. At that stage the petitioner approached this Court by way of a criminal miscellaneous petition in CrI.M.P. No. 5023 of 1986 to quash and slay the proceedings. this Court at the stage of admission stayed all further proceedings and subsequently dismissed the same with a direction to the petitioner to file a petition for discharge, while directing the trial court to dispose of the case according to law. It is claimed that the trial court continued the proceedings and after full trial, the Assistant Sessions Judge by his judgment, dated 3.4.1990 acquitted the petitioner of the charge under S.124-A, I.P.C. It is stated that the case was dismissed on the ground of belated sanction for prosecution and that there was no independent witness to corroborate the charge. After noticing certain infirmities and lapses, the criminal court, in paragraph 27 of its judgment has observed that the petitioner/accused in the case before the criminal court was entitled to the benefit of doubt and consequently he was not guilty of the charge.

3. On the basis of the above facts, it is contended that the petitioner had to suffer mental agony, physical torture and mercifully heavy financial losses in contesting the case at every stage and had to wait for nearly ten years, besides the loss of professional income due to the ordeals. It is also claimed that the petitioner was made to face social hatredness due to the prosecution, to immeasurable mental torture not only to the petitioner but also to the members of his family throughout the decade since the launching of the prosecution and that the criminal prosecution was a clear case of violation of the fundamental rights enshrined in the Constitution of India. It is further contended that the F.I.R. was filed after nearly 200 days and the lethargy on the part of the Police in this regard not only in initiating but till the completion of the case would reveal that it was more born out of frustration, prejudice and with an idea of victimisation. Reliance was placed both in the affidavit as well as at the time of hearing by the Learned Counsel for the petitioner on the decisions reported in Rudul Sah Vs. State of Bihar and Another, and Bhim Singh, MLA Vs. State of Jammu & Kashmir and Others, , and it is prayed that the petitioner is entitled to adequate and fair compensation for the ordeal which he had to suffer due to the

alleged malicious prosecution. It is also stated that the petitioner was arrested and detained in judicial custody for more than 40 days and was ordered to be released on bail by the Supreme Court of India and that treating the petitioner as a dangerous "Naxalite" while in Central Prison and during the transit to several Courts for production, for extension of remand period, the petitioner was handcuffed and taken to court with leading chain inside the van and in the streets and also kept in solitary confinement without any basis or materials. The petitioner also claimed that it was written in his warrant in red ink as "Dangerous Naxalite", though no such allegations were made in the charge-sheet or the case papers furnished to the petitioner. The petitioner claims to have been denied even normal facilities in jail and kept in ordinary Third Class, causing inconvenience and preventing friends and relatives from visiting the petitioner while he was in Central Jail at Salem. Reference is also made to a house search in his absence and the posting of 100 Police Officers, Constables and C.I.Ds., around his house. These facts have been referred to by the petitioner as instances of untold hardship and inhuman sufferings resulting in irreparable loss and damage on account of the physical pain and suffering, mental torture and agony all along. It is stated that though the petitioner would be entitled to more, he is restricting his claim to a sum of rupees five lakhs by way of compensation for the wilful action of the Authorities against the established principles of law and also constitutional safeguards.

4. Notice of motion was ordered by this Court on 5.11.1990. The respondents have been served. A counter-affidavit has been filed on behalf of the respondents by the Joint Secretary, Public (Law and Order) Department, Madras-9. An objection is taken by the respondents that the writ petition for compensation of the nature claimed is not maintainable that though the judgment of the criminal court acquitting the petitioner may be admissible for establishing the termination of a criminal proceeding instituted against the petitioner in his favour, the conclusions of the criminal court are inadmissible for basing any finding of malicious prosecution or abuse of process of law. It is also stated by the respondents that at the time of the meeting conducted on 12.8.1979 the petitioner made speeches with the intention to bring or attempt to bring into hatred, contempt" or to excite or attempt to excite disaffection towards the State Government and the Government of India established in law in India. The meeting was also said to have inspired to create feeling of enmity and disaffection towards the Governments.

6. So far as the grounds urged in the affidavit filed in support of the writ petition are concerned, the respondents contend and that the respondents deny that the criminal case was born out of frustration and prejudice and with an idea of victimisation or with any such motive and also contend that the two decisions of the apex court relied upon are not applicable to the facts of the case. The respondents also stated that they have not committed any unlawful acts and the facts alleged do not warrant payment of compensation and that there was no violation of any fundamental rights and that the petitioner had to prove the

factum of malicious prosecution alleged before being declared entitled to any compensation as claimed on the basis of necessary materials and evidence, and such factual investigations cannot be undertaken in proceedings under Article 226 of the Constitution of India. The respondents contend that the contents of the complaint filed before the criminal court would show the existence of a prima facie case against the petitioner. The claim about the handcuffing of the petitioner and other factual averments made in paragraph 7(IV) have been denied as without any proof or justification. Finally, it is contended that it is only the civil court, which can go into the question as to whether the plea of malicious prosecution was established or not or to assess the quantum of compensation payable, and this Court may not be pleased to interfere in the matter.

6. The Learned Counsel appearing for the petitioner while referring to the averments made in the affidavit, relied upon the two decisions referred to in the affidavit itself as noticed supra and contended that the facts on record will prove the plea of malicious prosecution, justifying recourse to this Court, invoking proceedings under Article 226 of the Constitution of India and that no exception could be taken to the claim for compensation made in the case.

7. Per contra, Mr. A.S. Venkatachalamoorthy, learned Special Government Pleader, while reiterating the stands taken in the counter-affidavit referred to in detail supra relied upon the decisions reported in Venkatapathi v. Balappa ILR 56 Madras 641:1933 M.W.N. 1304:37 L.W. 623 S.T. Sahib Vs. N. Hasan Ghani Sahib and Others, Braja Sunder Deb v. Bamderb Das 1944 PC 1 and Haji Sk. Subhan Vs. Madhoroa, . Learned Counsel also invited my attention to the decision of a learned single Judge of this Court reported in Meera Nireshwalia v. The State of Tamil Nadu, etc. 1990 W.L.R. 313. While dealing with the two decisions of the apex court relied upon by the petitioner, Learned Counsel for the respondents contended that all these cases relate to detention of the individuals concerned against their will and unlawfully depriving the right and liberty of the particular individuals concerned and that there can be no comparison of these cases with the case on hand to justify recourse to this proceedings under Article 226 of the Constitution of India, by passing the normal rights available in civil law before ordinary civil courts.

8. I have carefully considered the submissions of the Learned Counsel appearing on either side. The first of the two decisions relied upon by the petitioner is the one in Rudul Sah Vs. State of Bihar and Another, concerning the illegal detention in jail of the person for over fourteen years. While dealing with such a case, no doubt the apex court held that although Article 32 of the Constitution of India cannot be used as a substitute for the enforcement of rights and obligations, which can be enforced efficaciously through the ordinary processes of courts, such as money claims, the Supreme Court in exercise of its jurisdiction under Article 32 can pass an order for the payment of money if such an order is in the nature of compensation consequential upon the deprivation of a fundamental right and that the petitioner can be relegated to the ordinary remedy of a suit if

his claim to compensation was factually controversial, in the sense that a civil court may or may not have upheld his claim. That apart the apex court proceeded to grant relief in that case on the peculiar facts noticed that the prolonged detention of the petitioner before the Supreme Court in prison even after his acquittal was wholly unjustified and illegal and if the petitioner filed a suit to recover damages for his illegal detention a decree would have to be passed in that suit though it is not possible to predicate, in the absence of evidence the precise amount which would be decreed in his favour. The apex court also found gross violation of Article 21 in that case as justifying the award of compensation in the petition filed under Article 32 of the Constitution of India.

9. The other judgment in *Bhim Singh, MLA Vs. State of Jammu & Kashmir and Others*, relied upon by the petitioner was the one made by the apex court in the case of a Member of the Legislative Assembly of Jammu and Kashmir. The apex court, while dealing with the case of unlawful arrest and detention against the will of the legislator, found that the Authorities were bent upon preventing the petitioner from attending the session of the Legislative Assembly and therefore the action of the authorities in that case constituted violation of Articles 21 and 22(2) of the Constitution of India. Compensation was awarded in that case suitably and adequately compensating the petitioner therein for the unlawful detention made.

10. I shall now make reference to the decisions relied upon by the Learned Counsel for the respondents in AIR 1944 1 (Privy Council) is a case which went from the High Court of Patna and arose out of a suit filed for compensation on the ground of malicious prosecution. The Judicial Committee of the Privy Council laid down the necessary ingredients to be established before an action for malicious prosecution could succeed in the following term:

In order to succeed in an action for malicious prosecution the plaintiff must in the first instance prove two things: (i) that defendant was malicious and (ii) that he acted without reasonable and probable cause. Malice has been said to mean any wrong or indirect motive, but a prosecution is not malicious merely because it is inspired by anger. However wrong headed a prosecutor may be, if he honestly thinks that the accused has been guilty of a criminal offence he cannot be the initiator of a malicious prosecution. But malice alone is not enough; there must also be shown to be absence of reasonable and probable cause. If, in the present case, the respondents honestly believed a criminal offence to have been committed and had reasonable cause for so doing, they are not liable in this action, and even though they were malicious they still would not be liable if they had reasonable and probable cause for believing in the appellants' guilt

To the same effect are two judgments referred to for the respondents and reported in *Ramados v. Sanhasi Chettiar* 1958 (1) MIJ 79 and *Chinnamuthu Ambalam Vs. S. Jagannatha Chariar*, .

11. The Learned Counsel for the respondents also relied upon a Division Bench

judgment of this Court reported in Venkatapatlii v. Balappa 1933 MWN 1304 to substantiate the plea regarding the efficacy of the findings, in a criminal court judgment, in a suit for malicious prosecution before the civil forum. The learned Judges of the Division Bench, after analysing the case law on the subject came to the conclusion that in a suit for malicious prosecution plaintiff has to show besides the fact of the prosecution and of its termination in his favour that the prosecution was instituted against him, without any reasonable and probable cause and that it was due to a malicious intention and the mere fact that the plaintiff has been acquitted by the criminal court will not raise such a presumption. It was also held therein that the civil court had to entertain an entirely independent enquiry before satisfying itself of the absence of reasonable and probable cause and the judgment of the criminal court can be used at best only to establish the factum of acquittal in view of S. 43 of the Evidence Act.

12. The next decision relied upon is that of a learned single Judge of this Court reported in State of Madras Vs. His Holiness Srila Sri Subramania Pandara Sannadhi Avergal Adhina Karthar, Thiruvaduthurai Adhinam, Thiruvaduthurai, . While analysing the origin of an action for damages in England and in this country, the learned Judge held the remedy to be by a distinctive action ex delicto for the recovery of damages to person, property or reputation shown to have proximately resulted from previous civil or criminal proceeding which was commenced or continued without probable cause, but with malice and which has terminated unsuccessfully. Reasonable and probable cause was held to mean a genuine belief based on reasonable grounds that the proceedings were justified and that it is invariably a conclusion to be drawn from the facts and circumstances of a case and that the burden is very heavy on the claimant. In *Burmah Construction Co. Vs. The State of Orissa and Others*, a Constitution Bench of the apex court opined that the High Court normally does not entertain a petition under Article 226 of the Constitution of India to enforce a civil liability arising out of a breach of contract or a tort to pay an amount of money due to the claimant and leave it to the aggrieved party to agitate the question in a civil suit filed for that purpose. But an order for payment of money may some times be made in a petition under Article 226 of the Constitution of India against the State or against an officer of the State to enforce a statutory obligation in the nature of a refund of tax unlawfully recovered or a, similar circumstances. The principles referred to as well as the decision of a learned single Judge reported in *Meera Hiresewalia v. The State of Tamil Nadu* 1990 Writ I.R. 313 would go to show that wherever the life and liberty of a citizen is deprived or meddled with, the jurisdiction of this Court to entertain a claim under Article 226 of the Constitution of India and adjudicate upon the legality and propriety of such action, involving deprivation of life and liberty or any fundamental right secured to the citizen, cannot be denied. But on the other hand it is any other illegality complained of or as in this case a plea of malicious prosecution in that a claim of having maliciously initiated the machinery of criminal law against a citizen is complained of certain essential ingredients to justify the claim for compensation

have to be substantiated by oral and documentary evidence. The obligation on the part of a claimant to substantiate such legal ingredients necessary to succeed in a claim for compensation on account of alleged malicious prosecution cannot be dispensed with merely because a particular citizen has chosen to move this Court invoking the extraordinary jurisdiction under Article 226 of the Constitution of India or availing of the extraordinary remedy. In such cases it would be necessary for this Court to consider as to whether there was a justification for bypassing the normal remedies available under the ordinary civil law or that the claim made in the proceedings under Article 226 of the Constitution of India could be effectively and appropriately decided or should be undertaken for determination. In my view, unless in extraordinary situations or for special or compelling reasons or cases of admitted defaults or cases of absence of any controversy or existence of the vital and essential facts, required to be established in this regard this Court would hesitate to entertain an enquiry and embark upon an adjudication of such a claim in exercise of the extraordinary jurisdiction under Article 226 of the Constitution of India.

13. Coming to the facts of the case, it could be seen that though the petitioner has been acquitted on account of certain lapses noticed, the criminal court has chosen to give the benefit of doubt also to the petitioner in ultimately acquitting the petitioner of the charge. Though the Criminal Court Judgment may prove the factum of acquittal or the termination of the criminal proceedings initiated against the petitioner in his favour, in my view it does not invariably and necessarily lead to the only inevitable conclusion that the prosecution initiated is malicious so as to justify the grant of compensation, straightway. That in my view would require the petitioner to substantiate the necessary ingredients as laid down in the various judicial pronouncements to which reference has been made earlier. Though de hors the acquittal relied upon, certain factual averments have been made in paragraph 7 (vi) about the arrest, ill-treatment etc., not only there is absence of any specific or precise details furnished with dates etc., to connect those claims to the criminal case initiated, which ultimately ended in acquittal of the petitioner or to substantiate them independently though separate and not connected with the criminal case, but there are no sufficient details or materials for this Court also to straightway accept them to the facts proved, particularly in the context of a specific denial by the respondents of those facts in the counter-affidavit filed before this Court. Absence of reasonable and probable cause or even genuine belief or justification for the initiation of prosecution, complained of to be malicious had to be proved de hors the factum of acquittal made out from the judgment of the Criminal Court and those are factors to be proved independently on the basis of sufficient and relevant materials, and at any rate cannot be readily inferred from the acquittal alone. In the above facts and circumstances of the case, I am of the view that the only course or proper and appropriate remedy for the petitioner would be to agitate for his rights before a competent civil court in a properly laid action for compensation for the alleged malicious prosecution. These proceedings at any rate, on the facts and

circumstances of the case, in my view, are inappropriate and this Court cannot effectively undertake an enquiry and enter into an adjudication of such factual issues involving also an appreciation of the state of mind of those concerned with the initiation of the prosecution by setting in motion the process of criminal law which would again depend upon sufficient oral or documentary evidence to be placed by the parties, to substantiate their respective stands. For the same reasons, I am of the opinion that no hard and fast rules of invariable and general application for all cases or contingencies could also be formulated in the form of a scheme in respect of cases to arise in future and such issues have to be and could be adjudicated upon only on the individual facts presented before court in a particular case. For all the reasons stated above, I am unable to countenance the claim of the petitioner for compensation in this proceeding under Article 226 of the Constitution of India. The rejection of the claim shall not be construed as an expression of any opinion on the merits of the claim itself made on the basis of the alleged malicious prosecution or the entitlement of the petitioner to secure appropriate compensation for the same, if the claim is properly proved. The petitioner shall be at liberty to work out his rights, if any, in accordance with law and as and when such move is made before any competent court or forum, the order in the present writ petition shall not preclude a fair and independent adjudication, in accordance with law, of such claims, uninfluenced by any of the observations made in this writ petition. The writ petition shall stand dismissed with the above observation and liberties of the petitioner. There will be no order as to costs.