
(1990) 05 GAU CK 0004
In the Gauhati High Court
Case No : First Appeal No. 89 of 1984

Ravindra Kumar Sharma

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 22-05-1990

Acts Referred:

Penal Code, 1860 — Section 52
Penal Code, 1860 (IPC) — Section 52

Citation : (1990) 1 GLJ 485

Hon'ble Judges : S.N.Phukan, J and H.K.Sema, J

Bench : Division Bench

Advocate : R.C.Sancheti, J.N.Sharma, B.Banerjee, Advocates appearing for Parties

Judgement

H. K. Sarma, J.—This appeal is directed against the judgment and order dated 16. 7. 84 passed by the Assistant District Judge, Jorhat in M.S. No. 40/78 dismissing the plaintiff's suit.

2. The material facts giving rise to this appeal are as under:

On 1. 10, 77 the defendant No. 2 Shri Liladhar Hazarifca Dy. Superintendent of Police (B) Jorhat town and the defendant No. 3 Shri Narendra Nath Deka, S. I. of Police, the then Second Officer, Tit a bar Police Station went into the mill belonging to the plaintiff at Madhapur at dusk. Thereafter, the defendant No. 2 immediately on arrival asked Shri Sitya Nirayaa Sharroa (P. W. 8) an employee of the plaintiff to give him a bag of Jaha rice, P. W. 8 however, in absence of Munib declined the demand of defendant No. 1. Enraged by this decline the defendant No. 2 and 3 went inside the mill and granary of the plaintiff and seized paddy and rice. According to the plaintiff the paddy in the mill premises belonged to different permit holders which were brought for milling but due to failure of power line had to wait for hours together for milling. The vehement protest by permit holders and request for releasing their seized paddy was of no help. All these commotion had taken place in the absence of plaintiff.

3. That thereafter, the plaintiff had arrived at the mill premises when the defendants were still there. After the arrival, the plaintiff pleaded with the defendants not to seize the paddy and rice as the Govt. of India had already withdrawn the Assam Food Grains (Licensing and Control) Order, 196f. The plaintiff also pleaded with the defendants to look in to the milling permits and the declarations which were valid up to 30.9.78. On the contrary, the plaintiff had been placed under arrest and also the Munib Shri Prem Raj Mali who had then come back to the mill premises was placed under arrest.

4. Thereafter, at about 9.30 P.M. the plaintiff's father arrived at the mill premises and pleaded with the defendants to release the plaintiff and his Munib on bail. At this the plaintiff father was asked to go to Dangdhara O. P. which is about half mile away from mill premises. After awaiting for a considerable period of time the defendant No, 3 retorted "bail can not be granted on a verbal request." The plaintiff and his Miraib were then taken to Titabar Police Station and put into lockup. On 2. 10. 77 the plaintiff was forwarded to the Court "by defendant No. 3 for detention in jail with a prayer not to release the plaintiff on bail. Accordingly, the Chief Judicial Magistrate, Jorhat sent the plaintiff to the judicial custody. The plaintiff could obtain bail order on 4. 10. 77 and he was released on 5. 10. 77.

That acting on the ejahar lodged by defendant No. 3 Shri N. N. Deka Police Case No, 3 (10,)/77 and 4 (10)/77 under section 7 (1) (a)(i) & (ii) of the Essential Commodities Act, 1955 corresponding to G. R. Case Nos. 1664/77 and 1665/77 were registered against the plaintiff/accused.

5. Curiously enough while the plaintiff was still in jail, on 3. 10. 77 the defendant No. 2 & 3 managed to obtain an order from the Chief Judicial Magistrate, Jorhat to sell the entire seized paddy and rice on the ground that the commodities are perishable goods.

6. Against the order of sale dated 3.10. 77 the plaintiff moved Criminal Motion No. 8 (4)/77 and 9 (4)/77 respectively before the Sessions Judge, Jorhat. After hearing the parties the Sessions Judge set aside the order dated 3. 10. 77 passed by the Chief Judicial Magistrate, Jorhat and ordered the paddy and rice to keep in the jimma of the plaintiff on furnishing sufficient security etc. This order however, had lost its force as the order dated 3. 10. 77 of the Chief Judicial Magistrate, Jorhat for selling seized paddy and rice was duly executed on 15.11.77 before the order of Sessions Judge could be obtained.

7. With regard to the charge under section 7 (1) (a) (i) & (ii) of the E.G. Act corresponding to G. R. Case No. 1664/77 and 1665/77 the plaintiff/ accused was discharged by the learned Magistrate on 12. 4.78. After considering the police report and the documents the Magistrate considered the charge against the plaintiff/accused was groundless and discharged.

8. The plaintiff having aggrieved at the initiating of the prosecution against the plaintiff by the defendant No. 2 and 3 filed suit before the Assistant District Judge, Jorhat being M. S. No. 40/78 claiming damages for Rs. 2,98,377.00 for

malicious prosecution. The suit was dismissed by the Assistant District Judge by an order dated 16. 7. 84. Hence this appeal.

9. The dominion question which has arisen in the case at hand for our consideration is that 1) whether the action of defendant No. 2 and 3 in entering the mill premises, seizing paddy and rice from the mill premises, arresting and detention of the plaintiff in jail custody, disposing of paddy and rice by auction sale by obtaining an order dated. 3. 10. 77 would amount to malicious prosecution.

10. The learned trial Court after considering the plaint and written statement framed as many as 6 (six) issues:

1. Whether in view of abrogation of Assam Food Grains (Licensing and Control) Order with effect from 1. 10. 77 as notified in the Gazette of India Extra Ordinary dated 30. 9. 77 and various news to that effect already circulated in paper including the "Statement" dated 29. 9. 77, defendants' action in seizing the stock of rice etc. And taking the plaintiff into custody are justified in law?

2. Whether the defendants No. 2 and 3 as responsible officers of defendant No. 1 acted malafide with ulterior motive?

3. Whether the plaintiff's arrest, his detention in jail and his prosecution with the sanction of the Deputy Commissioner are extremely uncalled for, unwarranted and motivated harassment to the plaintiff?

4. Whether the entire process of action against the plaintiff is malicious and illegal ?

5. Whether the plaintiff is entitled to his claim of Rs. 2,98,377.00 and further interest and cost against the defendant jointly and severally ?

6. To what relief or reliefs the parties are entitled ?

11. It is submitted at the bar by the learned counsel for the plaintiff that the trial Court did not at all consider the documents exhibited by the plaintiff numbering 23 in all in arriving at impugned finding which if considered in proper perspective, would have supported the plaintiff's case. He further submits that the findings of the learned trial Court is perverse and contrary to the evidence on record.

12. As against this, the learned Govt. Advocate, Assam submits that the plaintiff has not been able to establish its case with regard to one of the essential ingredients of malicious prosecution namely the absence of reasonable and probable cause for the prosecution of the plaintiff. He further submits that at any rate the plaintiff is not entitled to any relief as the plaintiff did not adduce evidence with regard to the damage suffered by the plaintiff. He also submits that the defendant Nos. 2 and 3 acted in good faith in lawful discharge of their duties.

13. It is in this context now let us see

1. What is malicious prosecution ? and

2. Whether action of defendant Nos. 2 and 3 in launching the prosecution case against the plaintiff amounts to malicious prosecution? and

3. Whether defendant Nos. 2 and 3 acted with malice ?

14. Different authors have defined malicious prosecution. But the definition given in Halbury's Laws of England 3rd Edition 25 Vol. at page 348 has been commonly accepted as correct meaning of malicious prosecution. Malicious prosecution has been defined as "abuse of the process of the Court by wrongfully setting the law in motion:

a) on a criminal charge

b) to be actionable as a tort,

c) the process must have been without reasonable and probable cause,

d) must have been instituted or carried on maliciously and

e) the plaintiff must prove damage, except where the charge endangers his fame or person, in which cases the damage is implied.

15. It is in this legal context let us now see whether the action of the defendants in launching prosecution case against the plaintiff amounts to malicious prosecution.

16. Admittedly, on the day of occurrence i.e. on 1. 10.77 the Assam Food Grains (Licensing and Control) Order, 1961 in short the Order was rescinded by the Government of India Ministry of Agricultural and Irrigation (Deptt of Food) by Notification No. S. O. 696 (E) dated 30. 9. 77 published in the Gazette of India, Extra Part II, section 3 (ii), dated 30. 9. 77 p. p. 263940 which is as follows :

"In exercise of powers conferred by section 3 of the E. C. Act, 1955 (10 of 1955), the Central Government hereby rescinded the Assam Food Grains (Licensing and Control) Order, 1961 w.e.f. 1.10.77."

The said notification appeared in Current Central Legislation Vol. 3, 1977 at page 335. In Schedule B of the said notification at page 336 the Assam Food Grains (Licensing and Control) Order, 1961 is shown in serial No. 1 of the Schedule. This being the position in law, the defendant Nos. 2 and 13 had no authority to go to the Mill of the plaintiff at Madhapur on 1. 10. 77 at dusk. Before the Court below an attempt was made that the defendants had performed their lawful duties as they had no knowledge of rescinding the Act. It was also urged on behalf of the defendants that the defendants had received instructions from the Government of Assam to carry on their duties in accordance with the Assam Act. This message was purportedly received by the defendants on

3,10.77. This contention of the defendants was erroneously accepted by the learned trial Court. The material question of which remains to be considered is that on 1.10.77 when the defendants went to the Mill of the plaintiff at dusk under the pretext of performing duties, the Assam Control Order was not at all in force on that day. The learned Court below failed to consider this aspect of matter and erroneously accepted the contention of the defendants which has resulted in miscarriage of justice. There was no occasion for the defendants to go into the Mill of the plaintiff in purported exercise of their power under the law. There was also no material before the defendants at the relevant time to form an opinion believing that there was reasonable and probable cause for the defendants to launch a prosecution case against the plaintiff. In the F. I. R. it has been alleged by the prosecution that the plaintiff stocked rice and paddy illegally by violating the provision of the Act. However it has been averred by the plaintiff that the paddy in the Mill premises belonged to different permit holders who brought the same ; for milling but had to away: for a period of considerable hours due to failure of power line. It has been also averred by the plaintiff that the plaintiff requested the defendants to look into the milling permit and the declarations which was valid upto 30. 9. 78. Apart from this the plaintiff examined Shri Dilip Kumar Saikia, P. W. 2 who was the Deputy Inspector of Supply, Jorhat at the relevant time. P.W.2 had stated that the Mill in question was within his jurisdiction and he has not seen any irregularity during that period. He has also stated that the Mill used to submit fortnightly statement of stock regularly. This statement of P. W. 2 remained unimpeached by the prosecution. Unfortunately this fact was not at all considered by the Court below.

17. Apart from this, it is now necessary to go into the various subsequent activities of the defendants immediately preceding checking of the Mill, These are the plaintiff was immediately placed under arrest along with his Munib, the plaintiff was taken to Titabar P. S and the bail was refused, stating "Bail cannot be granted on a verbal request¹, the plaintiff was forwarded to the Court on 2. 10. 77 with a prayer not to release the plaintiff on bail and plaintiff could secure the bail order on 4. 10. 77 and release on bail only on 5. 10.77, the defendants managed to obtain an order dated 3. 10. 77 to sale the paddy and rice on the ground that the commodities are perishable goods, the paddy and rice were sold at auction safe on 15. 11.77 at nominal price. Taking all these conspectus of facts into consideration we are convinced that the defendants abuse the process of the Court by wrongfully setting the law in motion.

18. Before we proceed into the question of law it would be pertinent to mention that in spite of specific allegations made in the plaint against the defendant Nos. 2 and 3 curiously enough, the defendant Nos. 2 and 3 did not file any written statement. Instead, the written statement was filed on behalf of the defendants by one Shri D. K. Barthakur, Additional Deputy Commissioner, Sibsagar, Jorhat. Thus the defendant Nos. 2 and 3 shy away from disclosing the facts of the case. In para 6 of the plaint the specific allegation has been made against the defendant Nos. 2 and 3 that they went to the Mill of the plaintiff with ulterior

motive and that the defendant No. 2 on arrival asked Satya Narayan Sharma P. W, 8 an employee of the plaintiff to give him a bag of "Jiha Rice." There was no rejoinder to this effect by the defendant Nos. 2 and 3. Instead this fact was simply denied in paragraph 6 of the written statement by one Shri D.K. Barthakur, Additional Deputy Commissioner, Sibsagar who was not at all connected with the said allegations. The specific allegation thus amounts to admission. In paragraphs 10 and II of the plaint specific allegation against the defendants to the effect that the defendants forwarded the plaintiff to the Court with a prayer not to release him on bail was not denied by the defendants in written statement. Then again in paragraph 13 of the plaint there is a specific allegation that the defendants managed to obtain an order of the Chief Judicial Magistrate dated 3. 10. 77 to sell the seized rice and paddy on the ground that the commodities be perishable goods. It was further stated in the said paragraph that the paddy and rice are not perishable goods which warranted the immediate sale. This fact was not at all denied by the defendants in paragraph 10 of the W.S. Further, in paragraph 17 of the plaint there is a specific allegation against the defendant Nos., 2 and 3 that the paddy and rice were sold to the henchmen of the defendants at a nominal price. There is no denial to this fact in paragraph 12 of the W.S. It will be thus seen that the defendant Nos.2 and 3 did not at all contest the suit,

19. Let us now come to the most important question of law. Whether the defendants acted with malice ? Malice has been defined in Corpus Juris Secundum 54 Vol. at page 917 note 57 as malice in common acceptation means ill will against a person, but in its legal sense it means a wrongful act, done intentionally without just cause or excuse". Thus malice signifies the presence of improper and oblique motive, a motive other than the desire of bringing the plaintiff to book. It is true that in order to succeed in an action for malicious prosecution, the plaintiff must prove two things :

- a) that defendant was malicious,
- b) that he acted without reasonable and probable cause.

It is also true that in a suit for malicious prosecution the presence of malice alone is not enough, absence of reasonable and probable cause also must be proved. What is a reasonable and probable cause has been propounded in State vs. Rameswar Prasad, AIR 1980 Pat. 267. In the case (supra) their Lordships held reasonable and probable cause means a genuine belief, based on reasonable ground that the proceeding are justified". It is also true that in a suit for malicious prosecution the plaintiff must prove two things as stated earlier. In the case (supra) their Lordships also held that "It may not always possible to have direct evidence of these two requirements of a suit for malicious prosecution but the connected relevant circumstances may some times furnish a clue to the same". Considering the facts and circumstances of the case at hand, which we shall be presently discussed, we respectfully subscribed to this view.

20. In a case for malicious prosecution when accusation is false and false to the knowledge of the prosecution, absence of reasonable and probable cause is obvious. Then the next question to be considered in the case at hand, if the accusation is false then what prompted the prosecutions to go into the plaintiff's Mill? In such a situation it must be held that the prosecution was actuated with "oblique motive". We may reiterate the statement of supply official that there was nothing wrong in the stock as per statement regularly furnished by him.

21. On the facts of the case as discussed above, there was no occasion for the defendant Nos. 2 and 3 to have formed reasonable and probable belief that the plaintiff has illegally stored the essential commodities on the night of 1.10.77. This would go to show that the defendants going to the Mill was prompted by an "oblique motive" a motive other than the desire of bringing the plaintiff to book. In the instant case, the oblique purpose of the prosecution is to demand of a bag of "Jaha rice" as stated by P.W. 8 which fact remained in the record unimpeached, In support of the contention made; in paragraph 6 of the plaint which we have already mentioned plaintiff examined Shri Satya Narayana Sharma P.W; 8. In order to appreciate the evidence of P. W. 8 we reproduced translated copy of the statement and cross-examination in extenso.

"I am an employee of Madhapur National Rice Mill. Prem Raj is the Manager (Munib) of that Mill. Seven years from to day, D.S.P. (Border) went to our Mill and demanded Jaha rice. At that time neither Rabi Babu nor Prem Raj was present. I asked him that Munib is not present. He went inside the Mill with me. Then he seized the paddy and rice. Rabi Babu and Prem Raj was placed under arrest after their arrival.

I narrated the story before Rabi Babu and Prem Raj and Ganesh Sarma that D.S.P. asked me to give for Jaha rice. We respect Prem Raj. He ashamed after his arrest. He also respect Rabi Babu. He also ashamed."

XXX I am working there since 10 years. The incident took place in the evening of 1.10.77. I am alone in the office when D.S.P. came. He approached me to give him a bag of Jaha rice. About the price he does not say anything.

It is not true that D.S.P. did not demand any rice from me.?

This would show that there was a nexus between going of the defendants to the plaintiff's Mill and demanded a bag of Jaha rice. The purpose of going to the plaintiff's Mill, by the defendants are with ulterior motive, a motive other than the desire of bringing the plaintiff to book. Unfortunately, this clear evidence appearing against the defendants was not discussed by the Court below. The Court below simply brushed aside stating that the allegation of the demand of Jaha Rice by the defendant No. 2 was an after thought master minded by the plaintiff in order to add momentum to the allegation in the plaint of the instant suit. The Court below did not consider the evidentiary Value of P.W.8 stating that P.W.8 is an employee of the plaintiff and not independent and disinterested witness. This finding of the Court below is manifestly error of law, perverse and

has resulted in miscarriage of justice.

22. Another error which seem to have been committed by the Court below is that when he equated malice with enmity. In a suit for malicious prosecution it is not the question as to whether there exists enmity between the complainant and the accused and the question to be considered is whether the complainant was tainted with the oblique motive. There is yet another error which has been committed by the Court below. The plaintiff exhibited 23 material exhibits in all during the trial. These exhibits in our opinion were material in deciding the suit of plaintiff for malicious prosecution. This was not considered by the Court below in its proper perspective. What is reasonable and probable cause depends on the facts and circumstances of each case. In the case at hand considering all the facts narrated by us we are convinced that there was absence of reasonable and probable cause in launching the prosecution case against the plaintiff. There was no reasonable and probable cause present to have formed an opinion believing that there was justification in launching prosecution case against the plaintiff at the relevant time.

23. Let us now consider another important aspect of the matter, whether defendants acted in a good faith? "Good faith" has been defined in section 52 IPC as "Nothing said to be done or believed in good faith which is done or believed without due care and attention?". Good faith, therefore, is "devoid" of dishonesty. In other words, it connotes honest intention free from taint of fraud or fraudulent design. If this is correct legal meaning of good faith then definitely there was lack of good faith in the action of defendant Nos. 2 and 3 in launching prosecution case against the plaintiff and subsequent action of the defendants can not be regarded as acted in good faith. Mention may be made the manner in which the defendants disposed of the seized paddy and rice is unholy haste. This is not the way to deal with the citizen's property,

24. Before parting with the case, we hasten to add the manner in which the treatment meted out to the plaintiff by defendants was most atrocious and malicious. The prosecution played hell with the plaintiff. We are also constrained to note the manner in which the learned District Magistrate accorded sanction for prosecution of the plaintiff. The sanction for prosecution was accorded by the learned District Magistrate on 17.11.77 when at that time the law was not at all in force. This was abuse of the process of the Court. It is more disturbing when such treatment is meted out to a citizen by law enforcing agency.

25. Thus considering the facts and circumstances of this case as narrated by us, we are of the view that the defendants are liable for malicious prosecution. The action of the defendants was without reasonable and probable cause and actuated with malice.

26. This leave us to consider now as to what relief the plaintiff is entitled to? In Schedule A, B and C of the plaint the plaintiff set out the damages claimed. However, the plaintiff did not adduce any evidence with regard to the damages in

Schedule A of the plaint. The plaintiff has also stated in cross-examination that the plaintiff was previously arrested by the police in connection with criminal case. The plaintiff, therefore, failed to establish by cogent and convincing evidence the claim in Schedule A of the plaint. With regard to the Schedule B and C of the plaint it is borne out by record and exhibits. The plaintiff is, therefore, entitled to damages shown in Schedule B and C of the plaint. The respondents are liable for damages in Schedule B and C.

In the result, we allow the appeal by setting aside the impugned judgment and decree of the learned Assistant District Judge, Jorhat. The suit is decreed for the amount as damages mentioned in Schedule B and C to the plaint. All the defendants shall be jointly and severally responsible for the decree and they are allowed 3 months time to satisfy the decree, failing which, the decretal amount shall carry interest @ Rs 6% per annum.