

(1982) 05 RAJ CK 0013
In the Rajasthan High Court
Case No : Second Appeal No. 330 of 1972

Satyakam

APPELLANT

Vs

Dallu

RESPONDENT

Date of Decision : 01-05-1982

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145

Citation : AIR 1983 Raj 193 : (1982) WLN 387

Hon'ble Judges : Guman Mal Lodha, J

Bench : Single Bench

Advocate : H.C. Rastogi, for the Appellant;

Final Decision : Dismissed

Judgement

Guman Mal Lodha, J.—Where Sarva Shri Joshi, Lodha and Mridul failed can any one expect that Dallu Dhakar would succeed?

2. When three eminent members of Bar Council, two of whom are adorning this Bench and third one equally eminent, adjudicates that land in dispute had some similarity in shape and measurements with the land in earlier litigation, causing grave suspicion against conduct of Advocate, can it be held that Dallu Dhakar unwary illiterate simple villager is expected to possess third sense having more knowledge awareness than Sarva Shri Joshi. Lodha and Mridul. is the real controversy in this case.

3. Mr. H.C. Rastogi. counsel for the appellant and plaintiff Satvakam Advocate wants me to hold that in spite of the above glaring speaking feature of the case, I must hold that Dallu had no reasonable and probable cause to complain against the Advocate, who was exonerated by the Bar Council on the "benefit of doubt" theory, as if this benefit also cannot be extended to the Door undefended Tiller.

4. This is a plaintiff's civil second appeal, who was successful in the trial Court, but was unsuccessful in the first appellate Court, in his effort to obtain damages for malicious prosecution against the villager, who has filed a complaint against

him in the Bar Council of Rajasthan. Dattu, who was once defended by plaintiff-Satyakam, as an Advocate, became an adversary in second inning of litigation, where the plaintiff-Satyakam Advocate decided to appear against him. When Shri Dattu objected to this conduct of Satyakam Advocate by an application in the Court. Satyakam Advocate defended, himself, by saying that the land in dispute in the earlier suit and the present suit are different and therefore, he can very well opt to appear against his own client Dattu of the earlier litigation, as there is no bar in law.

5. Shocked by this behaviour of Shri Satyakam. Dattu knocked the door of Disciplinary Committee of the Bar Council to provide him protection. The committee of the Bar Council which was presided by Shri M.L. Joshi, the then member of the Bar Council who later on adorned the bench of this High Court and, associated with another important member, Shri S.K. Mal Lodha who also now adorns this bench of High Court, and the third member of, Shri M. Mridul found the conduct of Shri Dattu as plausible and attractive and held as under:--

"The argument being apparently plausible and attractive was given due consideration as there was some similarity in the shape of the land and the measurements of the lands in question. But on careful consideration looking to the dissimilarity of the boundary and want of cogent explanation it cannot be held that the land involved in the previous litigation was the same as in dispute between Girraj and the petitioner. At the best it is a case of grave suspicion but even the gravest suspicion cannot be sufficient to hold a person guilty in absence of evidence beyond any manner of doubt."

6. At the end of the order, the learned members of the Bar Council decided to give benefit of doubt to Shri Satyakam and dismissed the complaint as such, but did not allow any costs to Shri Satyakam. The relevant operative portion of the order reads as under:--

"The result is that we give benefit of doubt to the respondent and dismiss the complaint accordingly but without any order as to costs."

7. On 29th April, 1966 after getting benefit of doubt from the Bar Council. Satyakam, the Plaintiff, did not feel satisfied and fled the present suit on 14th April, 1967 for damages of Rupees 5,500.

8. Plaintiff's case was that Dattu has filed a complaint in the Bar without any reason and plausible cause and with malice. Dattu controverted the above allegations. The trial Court after framing of the issues and recording of the evidence, agreed with the plaintiff that the complaint in the Bar was without any reason and plausible cause but refused to grant damages of Rs. 5,500 and granted only damages of Rs. 1,400 in favour of the plaintiff.

9. For Dattu, the villager, who was pitched against an Advocate, the next round of inning was started by his appeal in the District Court. This time, Dattu had a score as the District Judge, Bharatpur reversed the judgment of Civil Judge

holding that the plaintiff has failed to prove that the complaint was without reasonable and probable cause.

10. Shri Satvakam, Advocate, has filed this appeal being aggrieved against the above judgment of the first appellate Court and Dallu who was served with the second notice by this Court when his counsel failed to appear at the time of hearing; has not been able to appear to defend, himself. With the result that the appeal was heard ex prate. Dallu remaining undefended and unrepresented before this court.

11. My task of adjudicating the various contentions raised by Shri Harish Chandra Rastogi, the learned counsel for another counsel. Shri Satvakam. has therefore, become much more difficult because of absence of representative of the respondent-Dallu.

12. Shri Rastogi submitted. inter alia, that the first appellate Court has decided the case in a perfunctory manner without discussing the documentary and oral evidence. According to him. admitted and in any case proved documents on record consisting of exhibit 5. Exhibits 6. 7. 9. 13. Exhibit A-3 and A-12, provide a clinching evidence to show that the land in dispute in which Satyakam, the plaintiff, appeared against Dallu was patently different from the land in dispute of the earlier suit and litigation where Shri Satvakam. Advocate appeared to defend Dallu. Shri Rastogi's contention was that there is no manner for doubt and. therefore, the first appellate Court was not justified in dismissing the suit holding that the plaintiff has failed to prove that there was no reasonable and probable cause for filing the complaint by Dallu in the Bar Council. The oral evidence consisting of the plaintiff and the defendant was also read over before me. as according to Shri Rastogi. the first appellate Court failed to go through the evidence.

13. Shri Rastogi also pointed out that the duty of the first appellate Court is to carefully analyse the evidence produced in the case and. to discuss it. in details. He relied upon the observations made by this Court in Dhanrai v. Hirachand 1963 RLW 316 which reads as under:--

"As a court of first appeal, the findings of fact whereof are binding on this court it is the duty of that court to come to grips with the evidence led at the trial by the parties with the requisite case and attrition and to analyse the evidence and then weigh it so that this Court may stand assured that the finding of fact has been arrived at in a proper and judicial manner. A vague reference to the evidence produced by the parties that it is worthy of credence or otherwise renders no assistance whatsoever to this Court sitting in second appeal. It is because- of judgments of this type that a good deal of burden is thrown on this court in second appeal which is entirely unnecessary and perfectly avoidable, if only Judges in the first appellate Courts perform their duties in a objective and careful manner in accordance with law. In the vast majority of the cases which come before our courts it is impossible to arrive at proper decisions and to give

adequate reasons for the same unless all the important evidence led by the Parties is carefully marshalled weighed, and then adjudged. Of course, it is not necessary to reproduce the evidence of each of the witnesses in the judgment. But what is necessary is that the evidence must be carefully analysed with reference to the salient points arising in the case and then weighed in an intelligent and intelligible manner: and the fact that the entire material evidence has been so grasped and weighed must appear from the judgment itself. It may be conceded that a judgment of affirmance may not. give the reasons with that elaborate detail which a judgment of reversal may, generally speaking, re-aire. But the judgment should be self-contained, and. substantially comply with the requirements of Order 41, Rule 3, C.P.C. (Paras 8, 9 & 12).

14. Shri Rastogi also pointed out that the slightest evidence of the plaintiff in the case of malicious prosecution should be sufficient, to shift burden of proof on defendant for proving that there was no reasonable and probable cause for launching prosecution. He relied upon the observations made in *Kedarnath and Another Vs. Brahmanand*, which are as under:--

"In an action for malicious prosecution the onus of establishing that the defendant had no reasonable or probable cause for the prosecution lies on the plaintiff. Where two parties come to court with two positive case has got to see as to which positive case is more believable. In such a case, if the court comes to the conclusion that the positive case of the plaintiff is less believable than the positive case of the defendant whether the facts were true or false to the personal knowledge of the prosecutor should not come in the way of the court throwing out the suit for malicious prosecution. Of course there are many cases where the plaintiffs case is negative and very slight evidence on the part of the plaintiff might do to shift the onus on to the defendant. In such a case after the plaintiff has denied on oath his participation in a particular crime the defendant has to prove by positive evidence that the plaintiff had committed the act complained of. There might be other cases in which the facts are not within the personal knowledge of the prosecutor and he has to rely upon the information given by others. In these cases, the court has got to see whether it is satisfied by the evidence that the defendant honestly believed in the guilt of the plaintiff when he started criminal proceedings. In such cases. it would not be a conclusive factor whether the information given to the prosecutor by others was false or true, AH that has got to be seen in such case; is whether the information conveyed to him was such which might have been honestly believed to be true." (Para 11)

15. Shri Rastogi further pointed out that the grounds of discharge, acquittal or dropping of the proceedings against the plaintiff by the Bar Council are irrelevant and the question of reasonable and probable cause should be decided on the basis of the evidence produced in this suit. Reliance was placed upon the observations made in *Channappa v. Sivarudrappa*. AIR 1962 Mys 153 which read as under:--

"In a suit for recovery of compensation for malicious prosecution, a fact of acquittal or discharge is a fact in issue and therefore a relevant fact. That be-inc so, an order of discharge or acquittal made by a criminal court is not only admissible to prove that fact but also for the purpose of ascertaining the circumstances leading to the order of acquittal or discharge. But it is however, clear that the grounds on which the order of discharge or acquittal rested are irrelevant evidence. The civil court before which a suit is instituted for the recovery of compensation for malicious prosecution should independently record a finding whether the person prosecuted was or was not guilty of the offence with which he was charged and whether the prosecution was commenced without reasonable or probable cause" (para 12).

"Where the Munsif not only found that the plaintiffs were innocent but also further found that the complaint was made by the defendant without reasonable or probable cause but with an improper and oblique motive without any desire or the vindication of justice the only possible conclusion is that the prosecution was a malicious prosecution." (Para 13).

16. There is no room for doubt that as laid down in the decision of Dbanrai's case (1963 RLW 316) (supra) the first appellate Court, in the instant case, has failed to consider and elaborately discuss the oral as well as the documentary evidence produced in the present suit and to that extent the judgment of the first appellate Court, is vitiated. It was in this background that I permitted Shri Rastogi to argue the case as first appellate court and to read before me the entire documentary as well as oral evidence.

17. As a first reaction in the hearing of the case. I was tempted to remand the case for fresh hearing of the appeal after discussing of the entire oral as well as the documentary evidence. However. I felt that the contest is. in the present litigation, between two unequals. one being an Advocate of some standing at the Bar and the adversary being a villager, who has not been able to even arrange for his representation before this Court. I, therefore, decide to dispose the case one way or the other, so that the ordeal of litigation is put to an end and is not prolonged for either of the parties. In the present hearing. I. therefore, permitted Shri Rastogi to read all the documentary evidence and read. myself, the oral evidence also.

18. In view of this, it is not necessary for me to "now discuss, as to what are the implications of the decision of this court in Dhanraj v. Hirachand 1963 R LW 3161 (supra) and what, are the infirmities of the first appellate court in not discussing the oral and documentary evidence.

19. I have also sot no hesitation in accepting the principles regarding burden of proof laid down in the above referred decision of Rajasthan Primarily the burden of proof of course, is on the plaintiff that the prosecution was without reasonable and proper cause but once the plaintiff succeeds in proving it then it shifts on the defendant. In my opinion, in the present case, the question of burden is

academic because both the parties have led the evidence and I have to decide on the totality of the evidence, whether the preponderance of the evidence shows that there was reasonable and probable cause for filing a complaint before the Bar council. I would deal with this aspect, of the matter a little later.

20. Before that, I must analyse the implications of the decision of the Mysore High Court referred to by Shri Rastogi. In Mysore case, it was held that the order of acquittal or discharge is relevant and admissible to prove the circumstances, leading to it. but the grounds on which the order was passed are not relevant for the civil suit of damages for malicious prosecution.

21. In that case, the Munsif found that the plaintiffs were innocent and further found that the complaint was made by the defendant without reasonable or probable cause. It was further found by the Munsif that the complaint was made by a labourer without any desire for verdict of court. The first appellate court came to a contrary conclusion. The High Court was of the view that the finding of the first appellate court was passed on speculation and conjectures.

22. When the finding of the Munsif was assailed before the High Court on the ground, that it is based on order of discharge made by the Civil Judge court, the High Court repelled it. that the use of that order of discharge was limited to ascertain the circumstances leading to the order of acquittal or discharge. While doing so. in para 12. it was observed that the suit for malicious prosecution should be decided by an independent finding, whether a person prosecuted was or was not guilty of the offence with which he was charged and whether the prosecution was commenced without reasons or probable cause. With all respect, I have not been able to agree with this finding that in a civil case for malicious prosecution, a civil court should first decide whether the person prosecuted was or was not guilty of the offence with which he was charged. In my considered opinion, all that is required to be considered is. whether the prosecution was commenced without reasonable or probable cause.

23. In view of the above discussion. Mysore decision cannot provide any important guidelines for the decision of the present, case. Now coming to the facts of the present case, it would be important to notice first the facts which are not in dispute. The defendant. Dallu filed a suit No. 3/65 in the court of Munsif Bayana against Girraj Dhakar on 2nd January, 1965 for the recovery of some land. The defendant Girraj engaged Satya Kam Advocate as his counsel. Dallu moved an application for temporary injunction and obtained ex parte injunction. This application was contested by Girraj through Satya Kam, Advocate. Dallu also, at this stage, objected to the appearance of Satva Kam, Advocate against him on the ground that Satya Kam, Advocate was his counsel in the earlier litigation about this land and therefore, he cannot be allowed to change sides and appear against him. This application was rejected. Dallu then filed a complaint before the Bar council against Satya Kam. in which he has alleged inter alia as under:--

"One Shri Ram Sahai Takur R/o Swahans filed proceedings u/s 145. Cr. P.C. in the court of the Sub Divisional Magistrate. Bayana, a civil suit in the court of the Munsif, Bayana and its appeal in the court Civil Judge. Bharatpur against him Dallu and his three companions S./Shri Sukha. Ramjilal and Sohanlal all Dhakar and R/o Weir, in respect of the same piece of land which was subject matter of the said suit No. 3/65 and he (plaintiff Shri Satya Kam) appeared in all these three courts for him (Dallu). But now he (plaintiff) refused to appear on his (Dallu) behalf in the said suit No. 3/65 and appeared against him in order to cause loss by giving secrets to his opponent Shri Girraj Dhakar, Weir. He has also not returned his papers in respect of the previous cases."

24. This complaint of professional misconduct was entertained by the Bar Council and as mentioned at the very threshold of this judgment, the Members of the Bar Council found some similarity in the land in dispute but ultimately, were of the opinion that they were two different lands and therefore, giving benefit of doubt to Shri Satyakam (Advocate) dismissed the complaint but refused to allow costs to Shri Satya Kam (Advocate).

25. The sole question of dispute between the parties is, whether the land which was subject matter of threefold earlier cases mentioned in the complaint was absolutely different from the land which was subject matter of dispute in the present suit where Shri Satya Kam Advocate appeared against Dallu. In order to decide this question, whether there was reasonable and probable cause for filing the complaint. I am of the opinion that, not only it is necessary to decide whether the two properties were different, but it is further necessary to consider whether the two properties are patently so different having no inter-connections or interwoven, with an illiterate villager, in litigation can have no reasonable or probable cause to think that a lawyer who has conducted previous case for the earlier property, can have any secret, professional infirmities from him, which can damage him in the present litigation. In other words, the test should be whether there should have been any bona fide thinking of the defendant Dallu that the properties in the two cases, are so linked or interconnected that, the litigation of one will have some repercussions on the litigation of the other.

26. In order to appreciate this aspect it would be necessary to first analyse the site plan (Ex. 5) which was cited by Shri Rastogi. ex parte and which I am assuming to be correct in the absence of any contest in appeal. This is site plan (Ex. 5) dated 7th Feb.. 1957, a true copy of which has been taken from the Municipal Board, Weir of Bharatpur district. Shri Rastogi pointed out to me that the land which was in dispute has been shown in red pencil lining in it and this land marked by red lines on all sides, was in dispute in the earlier dispute in the three cases where the Advocate Shri Satyakam represented Shri Dallu. According to Ex. 5. the site plan, the land which was in dispute now where Shri Satyakam, Advocate. appeared against Dallu is adjoining to it on the western side and which has been mentioned as land of Kishorilal Brahmin. Assuming it to be so, though this site plan bears a note that the defendant is not admitting it, the fact is

established from it, that the two lands are adjoining to each other without there being any land in between and they covered the entire dimensions of 44 yards. The first appellate Court has made the following important, observations:--

"The lower court has conceded that areas shown in the site plans (Ex. A-1) which was produced in subsequent suit No. 189/57 and Ex. A-2 (produced in subsequent, suit No. 3 of 19651 were similar in shape and form. The dispute in the subsequent suit was in respect, of the land on the south-west of this plot measuring 169 square yards in area. In Ex. 5 a portion of this land bounded by "Kachcha Posh Chhappar" and the land of Ramjilal Sohanlal on the north land of Sukha Bhagat to the east, a public way on the south and the land of Pandit Kishore Lal Brahmin on the west has been shown. The dispute portion in Ex. A-2 runs in the line UP to the south-west corner of the "CHHAPPAR POSH KACHCHA" . premises of Baboo, Golu. Maniya and others. The dispute in the subsequent suit, therefore. was in regard to a portion of the land, which had been the subject matter of dispute in the previous suit,"

"The argument that looking to the measurements given in the site plans and similarity in the shape of the land and its topography the dispute involved pertained to the same land, which was covered by the previous litigation, appeared to be plausible and attractive to the Bar Council also, but on a careful consideration, looking to dissimilarity of the boundary and want of cogent explanation, it was not held that the land involved in the previous litigation was the same as in the subsequent litigation and at the best it was a case of grave suspicion and even the gravest suspicion could not be sufficient to hold a person guilty in the absence of evidence beyond any manner of doubt. In my opinion, there was a reasonable and probable cause for the appellant for lodging the complaint against the respondent in the Bar Council; there was a prima facie dispute in respect Of the land which had been the subject matter of dispute in the previous suit and when there was a bona fide controversy it was certainly ill advised for the lawyer who had accepted brief of one the parties in the earlier suit to accept brief against that client, in subsequent litigation pertaining to the same subject matter of dispute."

27. In view of the above finding of the first appellate court which again extracts some of the observations of the trial court. I have closely examined Ex. A. 1, Ex. A. 2 and Ex. 5. the three site plans, referred to above. On a detailed and close examination and comparisons of all the three. I feel that the observations Of the first appellate court made in para 10 in this respect and extracted above, that, to certain extent the land in dispute in the first suit and litigation. where the plaintiff represented Shri Dallu and the subsequent litigation where the plaintiff appeared against Dallu are overlapping, is correct. In any case, even if by telescopic examination some difference is found out making two areas adjoining to each other but not overlapping., yet what, is to be seen is what should be understanding of illiterate villager, non-conversant with law. I am constrained to observe that the trial court did not consider the case from this point of view,

because what is to be excluded is a reasonable and probable cause. Can it be excluded is a reasonable and probable cause. Can it. be said that there was no reasonableness and probability even of a confusion about the overlapping premises, which in any case were adjoining? In my view, in cases of malicious prosecution, the moment it. is found that risced in the situation of a litigant, the defendant could have bona fidely thought that Shri Satva-kam who has represented him in three consecutive litigations of the lands either overlapping each other, or adjoining to each other, should not now turn round and conduct, the case against him: then it cannot be said that it was unreasonable or improbable for him to have thought so.

28. The fact, that the plaintiff-Shri Satyakam Advocate insisted on appearing against Dallu in spite of objection does not leave good taste. It may not be professional misconduct in the strict sense of it. The members of the Bar owe solemn duty towards the litigant public. If in three consecutive cases about the land which in any case were adjoining and, likely to be overlapping he has represented Shri Dallu and taken instructions about it. it would have been proper, if he would have avoided appearing against him, in the fourth case. More so, when according to Shri Dallu. he was prepared to engage him.

29. The well known principle of our legal jurisprudence is that "justice should not only be done but it must appear to be done" and. if that is so. how can the members of the Bar and Bench claim damages for malicious prosecution, if an unwary illiterate litigant who has placed full confidence in a lawyer in three cases, makes a grievance that in the fourth case which is connected one. although it may exactly not be about the same property, the counsel should refrain from conducting a case against his old client. In this view of the matter. I am in agreement with the view of the first appellate Court discussed in paras 10 and 11 while discussing the point No. 3. that there was no want of bona fides and utter absence of malice, that Shri Dallu. the defendant moved the Bar Council, as the plaintiff insisted on appearing against him in spite of his objection.

30. Shri Rastogi, tried to point out by reading oral evidence and documents. Exs. 6, 7. 9 & 13 and Ex. A-11 that Dallu was conscious of the fact that the land in dispute, where the plaintiff filed suit against him and the land in dispute, where the defendant was conducting the case against him. were different and therefore, there could have been no earthly reason for filing a complaint in the Bar Council. On a careful reading of these documents. I have not been able to appreciate the patent distinction drawn by Shri Rastogi, though it may be latent. It is a result of serious deep study and permutations and combinations of the measurements of the boundaries of premises, that one can decipher which are the two lands. If I have to make a frank confession, I must say that even after study of these documents and making comparison of the site plans. Ex. A-1. Ex. A-2 and Ex. 5. I have not become more wiser to give a precise finding whether there is patent distinction between two pieces of land. It is on account of this lurking suspicion and doubt in my mind that I have always used the words, that they may or may

not be overlapping, but in any case, they are adjoining and similar. These words. I have not borrowed from the judgment of the Bar Council or the first appellate Court, but they are my own deduction, although they confirm what has been stated by the first appellate Court, and the Bar Council.

31. In view of the above, confused factual position, I am not inclined to discuss separately each evidence oral as well as documentary, because in my considered opinion, that would not improve the situation.

32. All that I am convinced is that the deduction of the first appellate Court is Just proper and reasonable, and even if the entire oral and documentary evidence, part of which I have discussed and part of which I feel unnecessary to discuss, would have been discussed by the first appellate Court: it would not have made any difference.

33. In the interest of the best standards of professional ethics, I am convinced that it would have been a wise exercise of discretion if the plaintiff Shri Satya Kam Advocate would have respected the objection of Shri Dattu and stayed away from the second litigation where he appeared against him. even though, as held by the Bar Council, by Riving benefit of doubt to him. he might not have been guilty Of misconduct.

34. The result of the above discussion is. that since I am in agreement with the final decision of the first appellate Court, for the reasons given by it. and for the additional reasons, which I have given. I am of the opinion that this appeal deserves to be dismissed. It would have been proper if the plaintiff would not have entered into this litigation, and that would have been consistent with the high traditions of noble profession, which is very much in "fumes and fire" these days.

35. The appeal, therefore, fails and is hereby dismissed with costs.