**RAJASTHAN HIGH COURT**

Amar Singh

Vs.

Smt. Bhagwati

Civil First Appeal No. 18 of 1993
(Arun Madan, J.)

29.05.2000

**JUDGMENT**

**Arun Madan, J.**

1. This first appeal is directed against the Judgment and Decree dated 30.10.92 of the District Judge, Bharatpur in Civil Suit No. 58/88 for recovery of Rs. 25,000/- as damages for malicious prosecution which was dismissed.

2. The facts leading to this appeal, briefly Stated are that plaintiff appellant instituted as suit for damages for malicious prosecution launched in a criminal case arising out of FIR No. 466/86 lodged by defendant at Police Station Kotwali (Bharatpur) on 22.9.86 for offence punishable under Section 435 Indian Penal Code. The case of the plaintiff as per the plaint is that aforesaid FIR was totally false because the defendant had pressurized upon the police by adducing false evidence which resulted in filing of challan against the plaintiff for offence under Section 435 Indian Penal Code and for which he had to apply for anticipatory bail twice before the trial Court and once before the High Court and whereupon he had incurred expenses for advocates' fees, and the launching of such false prosecution by the defendant culminated into acquittal in his favor by judgment dated 26.11.87 in Sessions Case No. 26/87. The plaintiff therefore pleaded that his acquittal is the outcome of malicious prosecution which was launched by the defendant in order to wreck vengeance which caused physical as well as mental agony for which he is entitled to damages for such malicious prosecution by way of a decree for Rs. 25,000/- against the defendant.

3. The defendant contested the suit by contending *inter-alia* that she lodged a true and correct FIR with no malice on her part because she along with other witnesses

Jagannath and Parbhati etc. had seen the plaintiff running after setting her hut and sheds ablaze. She admitted to have lodged FIR resulting into investigation and production of challan at the instance of the police and then conducting of trial by the Criminal Court. She denied to have any knowledge as to grant of bail and acquittal of the plaintiff by the trial Court.

4. On the basis of pleadings as many as five issues were framed. Plaintiff examined himself as P.W.1, and produced Chunnilal (PW 2) and Matthoram (PW 3). The defendant examined herself as DW1 besides Chhotey Lal (DW 2) and Kamal Singh (DW 3). After trial, the trial Court by its impugned judgment dismissed plaintiff's suit on the basis of findings arrived at by it on issues Nos. 1 and 4 against the plaintiff. Hence this appeal.

5. Shri B.L. Mandhana, learned counsel for the plaintiff (appellant) contented that the impugned Judgment resulting in dismissal of plaintiff's suit on the basis of conclusions on issues Nos. 1 and 4 is contrary to the pleadings, and evidence on record, inasmuch as the conclusions arrived at by the trial Court are vitiated on account of misconstruction of law. Therefore, according to Sri Mandhana, the learned trial Court committed serious error of law and facts in deciding issues Nos. 1 and 4 and the conclusions drawn on these issues are based on surmises and conjectures besides miss appreciation of evidence on record, rather from the material on record it stands established that the report lodged by the defendant with the police was false to her knowledge and there was no reasonable and proper cause for her to have launched the criminal prosecution against the plaintiff.

6. It has further been contended that the trial Court has failed to appreciate the back-ground, in the context of which false report was lodged as the case was already pending due to prior animosity and that apart the trial Court misconstrued contents of the FIR wherein the complainant (defendant) is purported to have stated that she had seen the plaintiff while setting fire to her hutment and sheds and according to her, Jagannath and Prabhati were two eye witnesses to the occurrence, whereas during her evidence, she has admitted that she did not see plaintiff setting fire to the hut, which shows that the report was falsely made without any reasonable and probable cause but simply out of malice and during her statement she had taken complete somersault.

7. Sri P.N. Agarwal, learned Advocate, who was assisted by Sri Virender Agarwal,

learned counsel, while controverting aforesaid contention raised by Sri Mandhana, vehemently contended on behalf of the respondent that it was only after having examined the pleadings of the parties and appreciated evidence on record, the trial Court has correctly recorded its findings on fact and law on all issues including Nos. 1 and 4 against the appellant and therefore his suit was rightly dismissed in its entirety being not maintainable.

8. Sri Agarwal also urged that it is only as a result of his acquittal in criminal case for offence under Section 436 Indian Penal Code the plaintiff had instituted this suit claiming damages on the ground of alleged malicious prosecution. But according to Sri Agarwal mere filing of the suit is not sufficient since burden of proof was heavily on the plaintiff that the allegations made in FIR by the defendant as regards setting fire to her hutment on the basis of which he faced criminal trial for offence of Section 436 Indian Penal Code were falsely made without reasonable and probable cause. The plaintiff has failed to shift his onus and establish his burden of proof.

9. Sri Agarwal then contended that two witnesses named in the FIR could not have been produced by the prosecuting agency and merely because the prosecution had failed to examine these eye witnesses, would not, by itself be sufficient to disbelieve version of the complainant/informant of the report in criminal case who was examined and in her statement had specifically named the plaintiff as an accused.

10. I have heard the learned counsel for the parties and given my thoughtful consideration to their rival contentions as well as perused the impugned Judgment and evidence led by the parties on record, with reference to the controversy raised in this appeal. Admitted facts are that the FIR was lodged against plaintiff on 22.9.86, on the basis of which challan was filed against him before the criminal court and it has not been disputed that the plaintiff was not only granted anticipatory bail but also acquitted of the offence punishable under Section 436, Indian Penal Code

11. *Prima facie*, in my considered view, the action to claim for damages for malicious prosecution as well as wrongful imprisonment, both are neither in common law nor based on any statutory law but are the actions at tort. The difference, mainly between these two actions is that while action to claim damages for malicious prosecution is based upon abuse of process of law, action to claim damages for wrongful imprisonment is based upon wrongful deprivation of right to liberty guaranteed by the

Constitution. Similarly action to claim for damages for wrongful prosecution is based upon right to approach the courts for justice or to get the machinery of law in motion to provide justice to everyone. Thus, the act of person indulging in abuse of process of law is, of course, actionable in law of tort. And, in a suit to claim damages for abuse of process of law, it must be established that the person who set the machinery of law into motion is not only actuated by malice with the accused but also he acted in putting the machinery of law into motion without any reasonable and probable cause, which is the essential element to get a decree for damages for such malicious prosecution. Therefore, the burden of proof as regards aforesaid essentials always rests upon the plaintiff and it never shifts throughout trial. Therefore, I find no substance in the contentions canvassed on behalf of the appellant. In such cases, what shifts is only the onus of proving the facts but it must not be misunderstood by shifting burden of proof. There is sheer difference between shifting to burden of proof and onus on proving a fact. This leads me to deal with first and foremost question, as to whether the defendant can be said to be the prosecutor ?

12. In treatise of "Salmond and Henston Law of Tort" under the caption "Essentials of malicious prosecution" at p. 407, it has been observed that in order that an action shall lie for malicious prosecution or the other forms of abusive process the following conditions must be fulfilled :

1) The proceedings must have been instituted or continued by the defendant;
2) He must have acted without reasonable and probable cause;
3) He must have acted maliciously;
4) The proceedings must have been unsuccessful, that is to say, must have terminated in favor of the plaintiff now suing.

13. Laying an information before a magistrate is sufficient to prove an action, no action lies for institution of legal proceedings. Howsoever malicious, unless instituted without reasonable and probable cause. Malice alone is not sufficient, because a person actuated by the plainest malice may nonetheless have a justifiable reason for prosecution. (See. ***Williams v. Taylor, (1829) 6 Bing 183***, per Tindal, C.J.)

14. First of all, the burden of proving absence of reasonable and probable cause is on the plaintiff and thus it is the plaintiff who has to undertake task of proving a negative. Therefore, if the defendant denies it, it is neither the practice requiring him nor he is required, or obliged to give particulars of his denial. Secondly, the existence of

reasonable and probable cause is a question for the Court concerned to examine and deal with on the basis of due appreciation of evidence on record.

15. Reasonable and probable cause means a genuine belief, based on reasonable grounds, that the proceedings are justified. Similarly, the terms "reasonable and probable" are synonymous, and "probabilis causa" was a classical Latin expression "probabilis" means primarily provable and "probabilis causa" means a good reason. The defendant is not required to believe that the accused is guilty and it is enough if he believes that there is reasonable and probable cause for prosecution. Therefore, he need only be satisfied that there is a proper case to lay before the Court. If a person honestly states his complaint to a responsible police officer, who advises him to prosecution, he will be protected.

16. As regards grounds for belief, even if the defendant honestly believed the proceedings to be justified, there is no reasonable an probable cause unless this belief was based on reasonable grounds and it can be determined by the facts actually known to the defendants at the time when he laid the information and subsequently proceeded with the prosecution, and not to the facts as they factually existed. Thus, facts unknown to the prosecutor do not prevent the facts being known to him from constituting reasonable and probable cause.
17. However, if a person embarks upon a prosecution without any evidence at all or with evidence on which the accused would not reasonably be convicted, then there is strong evidence that he had no reasonable and probable case. But it is not enough in itself to establish a reasonable or probable cause that the plaintiff was committed for trial or even that he was convicted by a Court at first instance and subsequently acquitted on appeal. It seems good sense, for, though these facts would be weighed by evidence of a reasonable and probable cause, they should not be conclusive, therefore, malicious prosecution is not an action at law but is an action at tort. It is a statutory liability and in absence of a contract, a party cannot be sued. In a case of wrongful imprisonment, a *bona fide* belief is not for the plaintiff to establish it but for the defendants to prove and establish in order to discharge the onus.

18. In the instant case admittedly the defendant is the person who furnished information to the police station Kotwali (Bharatpur) as commission of cognizable offence, whereupon the police conducted investigation and upon its investigation *prima facie* found the charge of Section 436, Indian Penal Code being made out

against the accused (plaintiff herein), thereby the police set the machinery of law into motion by submitting a charge sheet against the accused.

19. It has nowhere been stated that the proceedings have ever been instituted or continued by the defendant. It has neither been proved that the defendant ever acted without reasonable and probable cause, nor it has been proved that he was actuated by malice in having filed the FIR resulting in launching of prosecution.
20. As regard "liability", the term "liability" has been defined in Chapter 17 of treatise "Salmond Jurisprudence" at page 396 as under :

> "Liability is in the first place either civil or criminal, and in the second place either remedial or penal. The nature of these distinctions has been already sufficiently considered in a previous chapter on the Administration of Justice (b). Here it need only be recalled that in the case of penal liability the purpose of the law, direct or ulterior, is or includes the punishment of a wrong-doer in the case of the remedial liability, the law has no such purpose at all, its sole intent being the enforcement of the plaintiffs' right, and the idea of punishment being the wholly irrelevant. The liability of a borrower to repay the money borrowed by him is remedial; that of the publisher of a libel to be imprisoned, or to pay damages to the person injured by him, is penal. All criminal liability is penal; civil liability, on the other hand, is sometimes penal and sometimes remedial."

21. Liability or responsibility is the bond of necessity that exists between the wrong-doer and the remedy of the wrong.

22. Shri P.N. Agrawal on behalf of the defendant placed upon the decisions in (1) *Nagendra Kumar v. Etwari Sahu,* [1] *M/s. Bharat Commerce Industries Ltd. v. Surendra Nath Shukla,* [2] *Badri Prasad v. Jagannath,*[3] *Ravindra Sharma v. State of Assam,* [4] and *Railway Board v. Chandrima Das,* [5]

23. In *Nagendra Kumar v. Etwari Sahu* (supra) the Division Bench of Patna High Court observed as under (Para 12) :-

> "The plaintiff in order to succeed in an action for damages for malicious prosecution, must prove :

(i) the prosecution by the defendant on a criminal charge against the plaintiff before a tribunal into whose proceedings the Courts are competent to enquire, and,
(ii) that the proceedings complained of terminated in his favour, if from their nature they were capable of so terminating; and
(iii) that the defendant instituted or carried on such proceedings maliciously; and
(iv) that there was an absence of reasonable and probable cause for such proceedings; and
(v) That the plaintiff has suffered damages.

24. The onus of proving the above conditions as regards determination of liability is on the plaintiff.

25. In *M/s. Bharat Commerce Industries v. S.N. Shukla* (supra) the Division Bench of Calcutta High Court observed as under (Paras 7, 13) :

"Therefore, the only relevant and material time when a reasonable and probable cause for prosecution has to be found out is the time when the criminal proceedings is commenced or set in motion. It is only from this point of view that the evaluation of the evidence in a suit for malicious prosecution should be made.
Held on facts and circumstances of the case that the defendant has reasonable and probable cause in commencing the criminal proceeding and that there was no malice in such prosecution."

26. In *Ravindra Sharma v. State of Assam* (supra) the Apex Court observed as follows (Para 26) :

"The remedy in a suit for damages for false imprisonment is part of the law of torts in our country (*A.D.M. Jabalpur v. Shivakant Shukla,*[6] (at 579), Lord Devlin stated :
"The defendant can claim to be judge not of the real facts but of those which he honestly, and however erroneously, believes; if he acts honestly upon fiction, he can claim to be judged on that."
The question is not whether the plaintiff was ultimately found guilty but the question is whether the prosecutor acted honestly and believed that the plaintiff

was guilty. As pointed out by Winfield and Jolowicz on Tort (15th Ed. 1998, p. 685) in prosecutions initiated by police officers, the fact that they did so upon advice or instruction of superior officers is one of the relevant facts unless it is proved that the particular police officer did not himself honestly believe that the plaintiff was guilty of an offence.

The High Court was, in our opinion, wrong in concluding that there was absence of reasonable and probable cause because the action, in view of the notification of the Central Government, was unauthorized or illegal, illegality does not by itself lead to such a conclusion."

27. In *Railway Board v. Chandrima Das* (supra) on the question of vicarious liability for offence of rape committed by railway employees on a lady form Bangladesh in Railway building in a claim for compensation, the Apex Court observed as under:

"Where the gang rape was committed by railway employees in the building of railways namely Yatri Niwas, on a woman from Bangladesh, the Central Govt. would be vicariously liable to pay the compensation to the victim. It was an not act committed by railways from employees in discharge of functions delegated to them as referable to sovereign powers of Govt. Running of Railways is a commercial activity. Establishing Yatri Niwas at various Railway Stations to provide lodging and boarding facilities to passengers on payment of charges is a part of the commercial activity of the Union of India and this activity cannot be equated with the exercise of sovereign power. The employees of the Union of India who are deputed to run the Railways and to manage the establishment, including the Railway Stations and Yatri Niwas, are essential components of the Govt. machinery which carries on the commercial activity. If any of such employees commits an act of tort, the Union Govt. of which they are the employees, can, subject to other legal requirements being satisfied, be held vicariously liable in damages to the person wronged by those employees. It was so when instant case was under Public Law domain and not in a suit instituted under Private Law domain against persons who, utilizing their official position, got a room in the Yatri Niwas booked in their own name where the act complained of was committed."

28. Applying the above principles of law to the instant case, I am of the opinion that the defendant can never be said to be a wrong-doer, unless he does some act. No liability can be fastened on the defendant. To lodge a F.I.R. which is not wrong to the

knowledge of the person who files it in the police station, can never be said to be a wrong because whether it results in conviction or acquittal is absolutely immaterial to determine the question whether the doer of such an act can be said to be wrong-doer and as such the bond of necessity between the wrong-doer and the remedy of wrong does not exist in the present case. Further it cannot be said by any stretch of imagination that the defendant could have perceived results of the prosecution launched on his first information report, which resulted in initiation of trial. He could not have known in advance whether the prosecution launched on his information would result in conviction or acquittal of the accused (plaintiff). The learned trial Court has dealt with the case with a deep and minute consideration and all the relevant facts and circumstances of the case and there is absolutely no reason to interfere with the decision of the trial Court. The findings arrived at by it in the impugned judgment deserve to be upheld.

29. As a result of the discussion made above, this first appeal being devoid of any merit is dismissed. No order as to costs.

Appeal dismissed.

Cases Referred.

1. AIR 1958 Pat329
2. AIR 1966 Cal 388
3. 1971 Raj LW 430 (SB)
4. 1999 AIR SCW 3578
5. 2000(1) R.C.R.(Crl) 803
6. (1976) 2 SCC 521