

RAJASTHAN HIGH COURT

Sugan Kanwar

Vs.

Rakesh

S.B. Civil First Appeal No. 615 of 2004

(Satya Prakash Pathak, J.)

17.04.2006

JUDGMENT

Satya Prakash Pathak, J.

1. This appeal arises out of the judgment and decree dated 12.3.2004 passed by Addl. District Judge No. 2, Jodhpur in Civil Original Suit No. 51 of 2002 - Rakesh v. Smt. Sugan Kanwar allowing the suit filed by respondent plaintiff for damages for malicious prosecution.

2. The respondent is the original plaintiff and appellant is the original defendant, who are hereinafter referred to as "plaintiff" and "defendant" for the sake of convenience.

3. The trial Court in this case has granted decree in favor of the plaintiff and has held him entitled to get the damages from defendant to the tune of Rs. 1 lac with interest @ 12% from the date of riling of the suit, against which the defendant has approached this Court by filing the present appeal under Section 96 Civil Procedure Code.

4. The facts, involved in the case, in brief, are as follows:

1. Plaintiff filed the suit *inter alia* stating that defendant Sugan Kanwar, who is daughter of Late Smt. Sugan Kanwar and sister of Jyoti Prakash, in collusion with her mother and brother lodged a false report at Police Station, Sadar Kotwali on 17.7.1998 to the effect that the plaintiff entered into the house of Mohan Kanwar, scuffled, beaten and disgraced her for which First Information Report No. 127/98 under Sections 323, 451 Indian Penal Code was registered and chargesheet in that regard was filed in the Court of Judicial Magistrate No. 2 at Jodhpur. It is said that thereafter the matter was transferred to the Court of Judicial Magistrate No. 3, Jodhpur bearing Original Criminal Case No. 4122/98

in which false statements were made, however the Court ultimately acquitted the plaintiff on 16.12.2000 on coming to the conclusion that the defendant had lodged a false report against him in collusion with his brother Jyoti Prakash. According to the plaintiff, on account of criminal proceedings he suffered mentally as well as physically and this lowered down his image in the society, relations and friends and he had to incur expenditure and for that he claimed compensation of Rs. 1 lac with interest @ 12% per annum.

2. The defendant in her written statement stated that she had only accompanied her mother to the police station and in that criminal case her mother was the complainant and she herself was not. The defendant admitted the filing of First Information Report against plaintiff and stated that it was rightly lodged and denied having made any false statement rather stated that the police after investigation had rightly filed the charge-sheet against the plaintiff as he had entered in the house of her mother and inflicted injury on her feet, pulled defendant's 'Sari' (long piece of cloth worn by Hindu females round the waist passing over the head) and tried to molest her by hurling his hand towards her breasts. She referred to the judgment of Judicial Magistrate No. 3 dated 16.12.2000 in which it has come that the prosecution did not produce the eye-witness Ritu and Jyoti Prakash, who could be the witness of sterling worth and further Mohan Kanwar was also not examined as she has expired, therefore, prosecution story and the injuries sustained by the complainant could not be proved. It was pleased by the defendant that as she was only an eyewitness in case and had given the true version of the incident, the suit filed against her for awarding compensation on account of malicious prosecution was not maintainable rather the plaintiff was liable for his acts and objected to compensation.

3. The trial Court on the basis of the pleadings of the parties framed issue in relation to malicious prosecution.

4. In support of its case, plaintiff examined himself as PW-1 and on behalf of defendant, defendant herself examined as DW-2. Some documents were filed by both sides, which were exhibited.

5. Learned Addl. District Judge No. 2, Jodhpur passed the judgment and decree as aforesaid.

6. Aggrieved, the defendant has filed the First Appeal for setting aside the judgment and decree *dated 12.3.2004 passed in the - Rakesh v. Smt. Sujan Kanwar with costs.*¹

5. The learned counsel for the appellant has assailed the legality of judgment and decree mainly on the ground that the court below has taken the defendant as complainant in the criminal case on the basis of FIR lodged by the mother of the defendant against plaintiff. According to him, defendant had only accompanied her mother at the time of filing report at the police station and as she had not filed any complaint/FIR against the plaintiff therefore no compensation could be claimed from her especially when no allegation of disgracing her was made in the criminal case nor the case proceeded on that basis. It has also been submitted that the injuries sustained by Smt. Mohan Kanwar could not be proved as she had expired prior to recording of her statement in the criminal Court and that led to the acquittal of the plaintiff but in the statements of PW3 Dr. C.P. Swarankar and PW4 Dr. Jugtawat it has come that the injury sustained by Smt. Mohan Kanwar showed fracture therefore it was of grievous nature and as such it cannot be said that false allegations were made against the plaintiff in the FIR and the statement made before the learned criminal court by the defendant so as to make her liable for malicious prosecution. It has also been submitted that the entire approach of the trial Court in decreeing the suit for damages was against the established principles of law.

6. On the other hand, it has been contended that with an intention to harass and humiliate the plaintiff, the defendant lodged a false report with the police along with her mother with false averments, thereupon a criminal case was registered and a challan was filed against the plaintiff for offence under Sections 451 and 325 Indian Penal Code, wherein after trial, the learned trial court found the case to be absolutely false and the learned trial Court while deciding the present matter correctly appreciated the findings recorded by the criminal Court and decreed the suit which requires no interference by this Court in appeal.

7. I have heard the learned counsel for parties and carefully perused the material available on record.

8. The point, which requires consideration, in this case is as to whether the learned trial Court has correctly decreed the suit for malicious prosecution on the basis of material placed before it ?

9. Before the contentions of the learned counsel for parties are examined, I deem it proper to examine the law developed in such matters.

10. In *Babu Ganesh Dutt Singh v. Mugneeram Chowdhry* ² as early as in eighteenth century, their Lordships of the Privy Council said:

"For they agree with that Court that witnesses cannot be sued in a Civil Court

for damages in respect of evidence given by them upon oath in a judicial proceeding. Their Lordships hold this maxim, which certainly has been recognized by all the Courts of this country to be one based upon principles of public policy. The ground of it is this : that it concerns the public and administration of justice that witnesses giving their evidence on oath in a Court of justice should not have before their eyes the fear of being harassed by suits for damages/but that the only penalty which they should incur if they give evidence falsely should be an indictment of perjury".

11. In *Fakir Mohomed v. Fakir Mohomed Nanji* ³ their Lordships observed that mere fact that the defendant made a subsequent statement to the police implicating the plaintiff and reiterated the same statement in Court is not sufficient to support claim for damages for malicious prosecution.

12. In *Radhy Naik v. Dhadi Sahu* ⁴ the Orissa High Court opined that mere giving of information, even though it was false, to the police cannot give cause of action to the plaintiff in a suit for malicious prosecution it is not proved to be the real prosecution by establishing that he was taking active part in the prosecution and that he was primarily and directly responsible for the prosecution.

13. In *Kachrual Thavrji & Anr. v. Rameshwardayal* ⁵ it was observed that in the matters arising out of torts what is required to be seen is whether the plaintiff has proved that the defendant invented and instigated the whole proceedings for prosecution and in absence thereof suit for malicious prosecution is bound to fail.

14. In *Nandlal v. State of Rajasthan* ⁶ a Division Bench of this Court in relation to proceedings launched for malicious prosecution observed :

"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. It may be pointed out that malice alone is not enough. Absence of reasonable and probable cause must also be shown. If the respondent honestly believed a criminal offence to have been committed and had a reasonable and probable cause for so doing, he is not liable in an action and even though the act may be malicious, he still would not be liable if he had reasonable and probable cause for believing in the appellant's guilt.

15. The Court relied to a decision reported in (*Nagendra Kumar v. Itwari Sahu*), ⁷ and said:

"A man is not bound before instituting proceedings to see that he has such evidence as would be legally acceptable to secure a conviction. It is sufficient if he proceeds on such information as a prudent and cautious man may reasonably accept in the ordinary affairs of life and it is for the plaintiff to show that there was a want of proper care in testing that information."

16. In *Satya Kam v. Dallu* ⁸ this Court held that for malicious prosecution requirement is that prosecution must have commenced without reasonable or probable cause.

17. In *Smt. Goran (Goridevi) v. Anand Ballabh* ⁹ this Court, while considering a matter arising out of tort, observed :

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

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

The onus of proving every one of the above conditions of liability is on the plaintiff.

18. The Court in para 17 of the judgment, on facts, observed:

"As pointed out earlier, the plaintiff has been acquitted by the criminal court on the ground that the injuries sustained on the person of Moti Ballabh have not been explained by the prosecution and in cross-examination to the defendant-appellant a suggestion was put that Moti Ballabh was beaten by the complainant party. This fact also shows that definitely the occurrence had taken place. During the course of the criminal proceedings, eye-witnesses who were named by the defendant-appellant unfortunately did not support her statement and that was one of the foremost reason that accusation against the plaintiff resulted in his acquittal otherwise a man is not bound before instituting the proceedings to see that he has such evidence as will be legally sufficient to secure a conviction.

In these circumstances, it cannot be said that the defendant, Smt. Goran Devi, set the law in motion *mala fide*ly and nor the purpose of vindicating justice or perversion of the machinery of justice for improper purpose, or that the proceedings were carried on maliciously, or there was absence of any reasonable and probable cause for such proceedings. The main basis for holding that the question is as to absence of reasonable and probable cause and malice is a question of law, appears to be that the finding of reasonable and probable cause and the presence of malice are matters of inference to be deduced from basic or proved facts but that is not sufficient to make the question one of law or one of mixed question of law and fact unless there are legal principles to be applied to the basic facts before the ultimate conclusion is drawn."

19. In *State of Rajasthan v. Mohan Lal*¹⁰ this Court while considering a matter in which the accused who after trial was acquitted of the charges under Section 3/7 of the Essential Commodities Act, filed the suit for malicious prosecution, observed:

"In a case filed for damages for malicious prosecution, the plaintiff has to prove that (1) he was prosecuted by the defendant, (2) the proceedings relating to prosecution terminated in favor of the plaintiff, (3) that the prosecution was without any reasonable or probable cause, and (4) that the prosecution was due to *mala fide* intention and was not with the intention of carrying the law into effect. The burden of proving all these elements is on the plaintiff. He has to prove that there was no reasonable and probable cause for initiating the prosecution. He has also to prove that the prosecution was launched with malice. Absence of reasonable and probable cause and malice are two separate ingredients, which are to be proved. The absence of reasonable and probable cause does not necessarily lead to an inference of malice or ulterior motive. In a suit for malicious prosecution, though the absence of reasonable and probable cause is negative assertion, yet the burden of proving it lies on the plaintiff. Merely because it is a negative fact, the burden does not shift to the defendant to show that the incident, for which the plaintiff was prosecuted did take place and that there was a justification for prosecuting the plaintiff".

20. In *Amar Singh v. Bhagwati*,¹¹ this Court, in relation to burden of proving malice, has observed :-

"...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. The burden of proving absence of reasonable and probable cause is on the plaintiff who has to undertake task of proving a negative. Reasonable and probable cause means a genuine belief, based on reasonable grounds, that the proceedings are justified. As regards grounds for belief, even if the defendant honestly believed the proceedings to be justified, there is no reasonable and 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".

21. The Court further observed:

"To lodge an FIR 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. Further it cannot be said 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)".

22. After carefully examining the concerning law, now I proceed to examine the matter in view of the point framed by me.

23. It is to be seen that in the present case Smt. Mohan Kanwar, the mother of defendant appellant lodged a report Ex.1 in Police Station, Kotwali on 17.7.1998 at 10:25 P.M. with the averments that on that day in the evening at about 7:30 P.M. while she (since dead) was being served meals by her daughter defendant Sugar Kanwar, at that point of time accused entered into the house having an iron rod in his hand and tried to give blow with the rod on her head but she saved herself, however sustained injury on left leg. Accused plaintiff thereafter tried to molest her daughter and on her

shouting he ran away saying that he will kill her son. On the basis of the allegations, First Information Report No. 127/98 was registered at Police Station, Kotwali. The learned trial Court after trial while acquitting the accused vide its judgment dated 16.12.2000 in Original Criminal Case No. 4122/98 - State v. Rakesh (Ex.3) reached to the conclusion that the defendant in collusion with his brother got a false report registered and created fake evidence.

24. It may be noticed here that in the above criminal case, the prosecution examined the defendant as PW1. PW2 Ramakishan was examined in relation to prove the site, PW3 is Dr. P.C. Swarnkar, who has proved the reports in respect of injury and X-ray and PW4 Dr. Jagdish Jugtawat is the Medical Jurist. The accused in his defence produced himself as DW1. The evidence of the prosecution disclosed that while PW1 Sujan Kanwar was serving meals to her mother deceased Mohan Kanwar at about 7:15 P.M. in the evening, accused came there with iron rod in his hand and inflicted a blow on the left leg of the mother of defendant, which as per the evidence of PW3 Dr. P.C. Swarnkar and PW4 Dr. Jagdish Jugtawat resulted in fracture. The trial Court in its judgment at page 4, in para 13 recorded the finding that since complainant Mohan Kanwar could not be examined as she had expired before recording of her statement, the matter in relation to the injury sustained by her could not be proved and as she was the most crucial and important witness, therefore, the case of the prosecution was not liable to succeed. It has also been stated in this Para that other important witnesses namely Ritu, the daughter of defendant DW1 and Jyoti Prakash brother of defendant have not been examined therefore also the prosecution case was liable to be rejected. In this para, it has also been stated that the defendant made improvement in her statement before the Court to falsely implicate the plaintiff because in her statement recorded in police there was no allegation of removing her Sari or molesting her. In Para 14 of the judgment, it has been stated that since the first information report was lodged at 10:25 P.M. by the complainant along with defendant and a first information report was also lodged by the plaintiff against the brother of defendant at 9 P.M., therefore, in order to falsely involve the accused plaintiff, a bogus case has been lodged against the accused. The accused plaintiff on the basis of above two findings was acquitted.

25. A perusal of the first information report as well as the judgment delivered in Criminal Case i.e. Ex.3 clearly indicates that there is nothing in the first information report which may go to show that without there being any incident at all a baseless prosecution was launched against the plaintiff. It is significant to notice here that the police proceedings on Ex. 1 i.e. FIR clearly state that the first information report was registered at about 10:25 P.M. and the incident was stated to have taken place in the evening at about 7:30 P.M. The accused in his statement as DW1 has accepted this aspect of the matter that no allegation of any type of whatsoever nature in relation to any role played by Mst. Mohan Kanwar or the defendant was there in the report

lodged by him. What has been stated by the accused as DW1 before the Magistrate is that infect at about 8:15 P.M. on the day of incident while he was going on his Luna to his house, the brother of defendant Jyoti Prakash stopped him on the way and gave a blow by iron angle on his person. Though he has denied any incident as alleged by the mother of the defendant but only for the reason that he got registered the first information report earlier in the time than defendant's mother, it could not be a basis to arrive at a conclusion that there was no basis whatsoever for the defendant's mother to lodge the report with the police and that she lodged a false report. It is again an important aspect of the matter which requires consideration that infect the first information report Ex. 1 has been lodged by the mother of the defendant, who unfortunately died and the trial Court mainly only for the reason that Mohan Kanwar could not be produced, reached to the conclusion that on the basis of statement of defendant in the Criminal Court, the prosecution was not liable to succeed. It is not desirable to make any comments on the findings recorded by the learned Magistrate while acquitting the accused, however, it is suffice to say that one of the eye-witness of the incident i.e. defendant in the present case has been examined and she has clearly stated about the fact of accused entering in their house and the act of the accused plaintiff. The injury sustained by complainant Mohan Kanwar was a fracture and the evidence of the doctors PW3 & PW4 proved that. In criminal cases, the quality of the evidence is required to be examined not the quantity of the witnesses. It is further to be seen the learned Magistrate while acquitting the plaintiff drew a conclusion that not examining and brother and daughter of defendant was adverse to the prosecution, appears legally not tenable for the simple reason that in the FIR lodged by Smt. Mohan Kanwar no presence of Jyoti Prakash has been mentioned therein and further in relation to incident defendant appellant appeared as PW1 in the case and narrated the entire incident and nothing material came out in the cross-examination to show that she was giving a false statement. Thus, the findings of the trial Court that the accused has been falsely implicated in the case, is not supported by any evidence whatsoever. Be as it may, now the matter is required to be examined in the light of above evidence and judgment of acquittal recorded in the criminal case in favor of the plaintiff.

26. In the suit for malicious prosecution, the respondent plaintiff has stated that he was involved in a false criminal case by the defendant in collusion with her mother and brother and on account of that he has to face a false prosecution and his reputation has been lower down in public and society. It has also been averred that he had to remain on leave for several days from his job as he was attending the court proceedings during the course of trial or had to spend money. It has been claimed that a sum of Rs. 20,000 be awarded in relation to attending court proceedings and a sum of Rs. 65,000 for mental agony and other sufferings. He has also claimed a sum of Rs. 15,000 on account of lawyers fees, expenditure etc. The allegations in the plaint go to show that defendant in collusion with her mother and brother had lodged the first information

report but the defendant has denied the allegations in the written statement. In the statement before the Court, the plaintiff respondent has admitted this aspect of the matter that complainant in the criminal case was the mother of the defendant. It is also admitted that there is no signature on the first information report of the defendant. Thus, it appears that infact even if the facts of criminal case are taken to be as it is then too it cannot be said that defendant was complainant in the case. At best, her status was like a witness in the case. Even if the defendant would have signed the police proceedings that could not mean that she was the complainant in the case. It also appears from the material available on record that a police person recorded this FIR Ex.1 in writing. The allegation mainly in the first information report appears to be of beating by the accused to the mother of the defendant and when defendant tried to save her accused caught hand of the defendant and tried to remove the Sari. Thus the behavior of the defendant cannot be said to be improper in the facts stated in the first information report. In a suit for malicious prosecution, it is required to be proved by a person, who is filing a suit for malicious prosecution, that the criminal proceedings were maliciously launched in absence of reasonable and probable cause and there was no occasion for lodging such frivolous complaint. In the instant case, on the basis of judgment of acquittal delivered by the criminal Court, it could not be presumed that *prima facie* there was no cause for lodging FIR by the mother of the defendant in the police. The learned Additional District & Sessions Judge, who has decreed the suit, in fact has not properly appreciated the evidence adduced before it and decreed the suit in a mechanical manner. It appears that the suit has been decreed on the basis of judgment of acquittal recorded in favor of the plaintiff on the basis of conclusions arrived at in the criminal case by the learned Magistrate without there being any material while decreeing the suit to draw a conclusion that defendant in collusion with her mother and brother to save themselves from being prosecuted in another criminal case in which the plaintiff had lodged the FIR, lodged this false case.

27. It may be noticed here that there appears no mention of any role played either by the defendant or by her mother in the FIR lodged by plaintiff in the police against the brother of the defendant-appellant at 8:15 P.M. that is after the incident that had taken place at the house of Mst. Mohan Kanwar. It also appears, that without there being any material on record, conclusions have been drawn by the learned trial Judge that a false criminal case was lodged against the plaintiff in the police by the mother of the defendant and the defendant made a false statement before the Magistrate in the criminal case as such the suit filed for damages was liable to be decreed against defendant appellant. It shall be significant to note here that the criminal prosecution launched against the plaintiff as per FIR was under Sections 323 and 451 Indian Penal Code and ultimately charge-sheet in the matter was filed for offence under Sections 325 and 451 of the Indian Penal Code Thus, the re-appears to be no charge of Section 354 Indian Penal Code etc. even at the time of filing of the charge-sheet and even when the charges were framed against the plaintiff there was no such charge framed

which may be attributed to the defendant's allegations as stated in the plaint. When questions were put to the witness, the defendant who appeared in the criminal Court narrated the entire story and there appears nothing to disbelieve her testimony. The plaintiff in his statement was not able to say that before whom and in what manner his reputation was lowered down in public or society. Be as it may, after carefully considering the entire matter and taking into consideration the principles laid down by this Court time and again that defendant instituted or carried on such proceedings mechanically and there was an absence of reasonable and probable cause for such proceedings, I am of the opinion that the learned trial Judge has miserably failed to consider the above basic requirements of law to be proved by the plaintiff in a case for malicious prosecution. Therefore, I am of the opinion that Mst. Mohan Kanwar, who sustained the injury on her leg resulting in a fracture, had an occasion to lodge FIR against the accused. It cannot be presumed that there was no reasonable or probable cause for lodging the FIR.

28. As discussed hereinabove, I have found that the proceedings, which were initiated by lodging the FIR against plaintiff, cannot be said to be initiated with a motive to falsely implicate the plaintiff. There appears to be no malice in the instant case either on the part of defendant or the deceased Mohan Kanwar, who lodged the First Information report against the plaintiff to set the machinery of law in motion. Simply acquittal in a criminal case of an accused would not be sufficient to entitle him a decree in his favor wherein damages have been claimed.

29. Thus, in view of foregoing discussion, the answer to point framed by me is that the accusations made by Smt. Mohan Kanwar (mother of the defendant) against plaintiff was without any malice and was not baseless therefore the suit filed by the plaintiff was liable to be dismissed as the learned trial Court committed error of law and misread the evidence while decreeing the suit.

30. In view of my answer to the point, the appeal of the appellant requires to be allowed, hence the same is hereby allowed and the judgment and decree dated 12.3.2004 passed by the learned Add. District Judge No. 2, Jodhpur in Civil Original Suit No. 51/2002 is hereby set aside. Consequently, the suit of the plaintiff stands dismissed.

31. No order as to costs.

Appeal allowed.

Cases Referred.

1. Civil Original Suit No. 51/2002

2. (1873) 11 Beng L.R. 321
3. (AIR 1937 Sind 44)
4. (AIR 1953 Orissa 56)
5. (AIR 1960 M.P. 305)
6. (1970) RLW 201)
7. AIR 1958 Pat 329
8. (1982 WLN 387)
9. (1988(2) RLR 551)
10. (1992 RLR(1) 625)
11. (AIR 2001 Raj 14) : 2001(4) R.C.R.(Civil) 379