

Sanatan Sahu Vs. Kali Sahu

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Court : Orissa

Decided On : Dec-24-1963

Reported in : AIR1964Ori187; 1964CriLJ168

Judge : R.L. Narasimham, C.J.

Appeal No. : Second Appeal No. 238 of 1962

Appellant : Sanatan Sahu

Respondent : Kali Sahu

Advocate for Def. : N.C. Panda and ;M.M. Sahu, Adv.

Advocate for Pet/Ap. : R.C. Misra, Adv.

Disposition : Appeal allowed

Judgement :

R.L. Narasimham, C.J.

1. This is an appeal by the defendant against the appellate judgment of the Subordinate Judge, Berhampur reversing the judgment of the Munsif of Aska, and decreeing the plaintiff's suit for damages for malicious prosecution.

2. The defendant, and the plaintiff are neighbours residing in village Serankuda, P. S. Patpar, but they have been on terms of enmity for several years. On 10-7-1959

defendant lodged information, at Patpur P. S. at 10 a.m. alleging that on the previous day (9-7-1959) at about noon the plaintiff set fire to the thatched portion of his house. The allegations in the F.I.R. are not quite clear as to whether the defendant had actually seen the plaintiff setting fire to his house. There he says that he saw the plaintiff fleeing away, when the house was on fire, holding a glass and match box in his hand. The relevant passage in the F.I.R. reads as follows:

'Kali Sahu Hatera Gotia Rasa Glass' Nia Pidi thila.'

This may mean that he only saw the plaintiff hurrying away with a glass and match box when the house was already on fire and that he inferred that he had set the thatch on fire. In his evidence in Court the defendant clearly stated that he did not actually see the plaintiff setting fire to the thatch of his house but saw him going away with a glass and a match box.

3. On the basis of the information lodged by the defendant the plaintiff was arrested by the Police, kept in custody at the thana and produced before a First Class Magistrate of Aska on 12-7-1959. He was remanded to the jail custody till 14-7-59. On that day his bail was opposed by the Court Sub-Inspector and the evidence of the plaintiff shows that the defendant took a prominent part in opposing bail. The learned Magistrate declined to grant bail. Subsequently on 18-7-59 when the police submitted final report the plaintiff was released from custody forthwith. Thus the plaintiff was in judicial custody from 12-7-1959 till 18-7-1959 and was also in thana lock up for a day. The plaintiff alleged that the entire allegations against him were false and malicious made on account of enmity.

4. The lower appellate Court after discussing the inherent improbability in the defendant's version as given in the F.I.R. held that the allegations against the plaintiffs were malicious and there was complete absence of reasonable and probable cause. Accordingly it decreed the claim for damages.

5. Mr. Misra for the appellant (defendant) raised two questions of law; firstly he urged that apart from police investigation nothing else happened and hence it could not be said that there was any 'prosecution' of the plaintiff so as to justify a claim for damages. Secondly he urged that the plaintiff has failed to discharge the

initial onus that lay on him of showing absence of reasonable and probable cause.

6. The question as to when 'prosecution' commences against accused person is not free from difficulty. But for the purpose of justifying an action in tort for malicious prosecution the Privy Council in *Mahomed Amin v. Jogendra Kumar*, AIR 1947 PC 108, has clarified the law beyond any doubt: To quote their Lordships:

'To found an action for damages for malicious prosecution based upon criminal proceedings, the test is not whether the criminal proceedings have reached the stage at which they may be correctly described as prosecution. The test is whether such proceedings have reached the stage at which damages to the plaintiff results.'

In Clerk and Lindsell on Torts (12th Edition) page 1696 it is stated:

'To prosecute is to set the law in motion and the law is set in motion only by an appeal to some person clothed with judicial authority in regard to the matter in question, and to be liable for malicious prosecution the person must be actively instrumental in so setting the law in motion.'

It is true that mere giving of information to the Police in consequence of which an accused is arrested may not suffice to show that prosecution against the accused has already commenced. Some action by a judicial authority either by way of issuing summons or issuing warrant of arrest is generally taken as a decisive test. The same principle must apply where (in cognizable cases) the Police have the right to arrest without warrant and where they have actually produced the accused before a Magistrate who, subsequently remands the accused to judicial custody.

7. In the present case the order sheet of the Magistrate shows (See Ext. 3) that the plaintiff was produced before him in open Court on 12-7-59 and remanded to jail custody. He was again produced on 14-7-1959 and his prayer for bail was opposed by the defendant himself through C.S.O. He was released only on 18-9-1959 on receipt of final report. Thus, his being produced in Court and his being taken to the Jail at Aska publicly' must necessarily have caused considerable damage to the plaintiff's reputation, and the case against him must be held to have

reached the stage where action for malicious prosecution would lie as pointed out in the aforesaid decision of the Privy Council. On two successive dates considerable publicity was given to the arrest of the plaintiff by his being marched to the Court room of the Judicial Magistrate and his being taken back to jail custody and his bail being opposed in open Court by the C.S.I, with support of the defendant. I may also refer to a decision of the Patna High Court reported in *Madan Mohan Singh v. Bhirgunath Singh*, AIR 1952 Pat 283. There also a person was alleged to have committed dacoity on the information given by the defdt. and he was remanded to jail custody for nearly 39 days. Though, ultimately no cognizance was taken of the offence, the learned Judges held that there was 'prosecution' for the purpose of an action for malicious prosecution.

8. Mr. Misra then cited *Dattatray Pandurang v. Hari Keshav*, AIR 1949 Bom 100 where it was held (by a single Judge) that the mere arrest of a person and his being remanded to custody on the basis of an information lodged by the defendant throwing suspicion on the plaintiff was not sufficient to show that the plaintiff was 'prosecuted'. But that case seems distinguishable because, there, apart from giving information to the Police and conveying his suspicion, the defendant did nothing else. Here however the plff's evidence which has been believed by the lower appellate Court shows that the defendant actively assisted the Court Sub Inspector in opposing grant of bail to the plaintiff and thereby securing his custody in jail for some days. Apart from this distinguishing feature the aforesaid single Judge decision of the Bombay High Court cannot prevail over the Privy Council decision in AIR 1947 PC 108 where as already stated the test to be applied is whether the proceedings have reached the stage at which damage to the plaintiff results.

I must therefore over-rule the first contention of Mr. Misra.

9. Mr. Misra's second contention however seems sound. It is settled law that the initial onus of proving the absence of reasonable and probable cause is on the plaintiff even though this means that he has to prove the negative. See *Winfield on Torts* (Sixth Edition) page 754 and *Salmond on Torts* (13th Edition) page 721. It is true that where the criminal case has ended in the acquittal of the accused person

and the complainant had claimed to be an eye witness to the commission of the offence by the accused, slight evidence on the accused's side may suffice to discharge his initial burden. But some evidence on his side is absolutely necessary and he, cannot merely rely on the fact that the Magistrate did not take cognizance of the case or that the case ended in the acquittal of discharge of the accused. -- See Nagendra Kumar v. Etwari Sahu, AIR 1958 Pat 329. The plaintiff has therefore to give some evidence tending to establish absence of reasonable and probable cause operating in the mind of the defendant.

10. As to what is meant by 'reasonable and probable cause' I may quote the following observations at page 1714 of Clerk and Lindsell on Torts;

'An honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances which assuming them to be true would reasonably lead an ordinary, prudent and cautious man placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed'.

Here apart from merely denying having set fire to the defendant's thatch the plaintiff has led no evidence whatsoever, to discharge his initial onus. He has not stated that he was not in the village that day. In the F.I.R. the defendant had also categorically asserted that he saw the plaintiff going away with a glass and match box when he found the house on fire. The plaintiff had not stated on oath that he was not near the place when the house was on fire or else that he did not have any glass or match box in his hands at the time as alleged. By merely denying the fact that he set fire to the thatch of the defendant's house he cannot be said to have discharged the initial burden cast on him. The position would doubtless have been somewhat difficult if the defendant had asserted that he actually saw the plaintiff setting fire to the house. But the relevant passage in the F.I.R. are somewhat ambiguous on this point. Moreover in his evidence the defendant made it absolutely clear that he only inferred from the plaintiff's conduct in going away from the place with a glass and a match box that he must have set the thatch on fire. As already pointed out there has been previous enmity between the parties. If, as argued by defendant's Counsel, he found his thatch on fire and the plaintiff

going away from the place with a glass and a match box he might have in good faith believed -- in view of their past enmity -- that it was the plaintiff who set fire to his house. The F.I.R. also contains allegations that on a previous occasion also a portion of the defendant's thatch was set on fire but the culprit could not be traced. I must accordingly hold that the plaintiff has not discharged his initial onus.

11. The lower appellate Court has doubtless referred to some improbabilities in the defendant's story. But here also he has, to some extent, utilised inadmissible evidence. For instance he relied on what one Trinath Dakhua was said to have told the police during investigation (see Ext. C) but as this person was not examined as a witness his statement before the Police would be only hearsay. He has also utilised the report of the Karji in which the name of the plff was not mentioned but as the Karji was also not examined as a witness his report should not have been utilised. The question ultimately does not depend on whether a Court after reviewing the entire evidence and the probabilities of the case would believe as true allegation that the plaintiff had set fire to the defendant's house. The question is a narrower one and is limited to whether on the facts and circumstances, as they appeared to the defendant at that time, he is in good faith believed that it was the plaintiff who set fire to the house. In the absence of an express denial by the plaintiff of his presence at the spot or of his having gone away from the place with a glass and a match box in his hand at the time the defendant's house was on fire, it cannot be said that there was want of reasonable and probable cause for the information given by the defdt. at the Police Station, charging the plaintiff with the offence.

12. I would therefore allow the Appeal, set aside the judgment and decree of the lower appellate Court, and dismiss the plff's suit with costs throughout.