

## APPELLATE CIVIL.

*Before Fletcher and Richardson JJ.*

1914

June 25.

### MOHINI MOHAN MISSER

*v.*

### SURENDRA NARAYAN SINGH\*.

*Injunction—Limitation.—Suit for damages for obtaining perpetual injunction maliciously and without reasonable cause—Limitation Act (IX of 1908), Sch. I, Art. 42.*

No suit lies for damages against a defendant for, maliciously and without reasonable or probable cause, obtaining a perpetual injunction which was subsequently dissolved on appeal.

*Nand Coomar Shaha v. Gour Sunbar* (1) doubted.

*Quartz Hill Mining Co. v. Eyre* (2), *Smith v. Day* (3), *Hari Nath Chatterjee v. Motdur Mohun Goswami* (4), *Chandler Cant Mookerjee v. Ram Coomar Coovloo* (5), *Cotterell v. Jones* (6), *Turner v. Ambler* (7) referred to.

Under Art. 42, Sch. I of the Limitation Act (IX of 1908) time begins to run from the date when the injunction ceases.

APPEAL by Mohini Mohan Misser and others, the plaintiffs.

This appeal arises out of a suit instituted by the plaintiffs to recover from the defendants Rs. 1,91,932-8-6 as damages for malicious prosecution of a civil suit brought against the plaintiffs.

On the 1st of December 1896, the executor of the father of the defendant No. 1 instituted a suit in the

\* Appeal from Original Decree, No. 242 of 1912, against the decree of Ram Lal Das, Subordinate Judge of Purneah, dated March 18, 1912.

(1) (1870) 13 W. R. 305. (5) (1874) 22 W. R. 138.

(2) (1883) 11 Q. B. D. 690. (6) (1851) 11 C. B. 713.

(3) (1882) 21 Ch. D. 421. (7) (1847) 10 Q. B. 252.

(4) (1893) I. L. R. 21 Calc. 8; L. R. 20 I. A. 188.

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Court of the Subordinate Judge of Purneah against the present plaintiffs for the purpose of obtaining an injunction restraining the present plaintiffs from erecting an indigo factory on the land let for agricultural purposes and on the same date an application was made *ex parte* to the Subordinate Judge for an interlocutory injunction restraining the defendants, till the trial of the suit, from proceeding with the erection of the buildings. The learned Subordinate Judge granted the interlocutory injunction prayed for. An appeal was preferred against that order to the District Judge who dismissed the appeal.

The suit came on for hearing before the Subordinate Judge on the 30th September 1899. The learned Judge decreed the suit and granted a perpetual injunction restraining the erection of an indigo factory on the land. The present plaintiffs appealed against that decree to the District Judge who on the 16th of August 1900 reversed the decision of the Subordinate Judge and dismissed the suit. The present defendants who were then the plaintiffs in that suit (the original plaintiffs having previously died) preferred an appeal to this Court against the decision of the District Judge. On the 1st of June a Division Bench of this Court reversed the decision of the District Judge and restored the decree passed by the Subordinate Judge. The present plaintiffs then appealed to His Majesty in Council and, on the 1st of June 1907, the decree passed by this Court was set aside and the judgment of the District Judge restored.

The proceedings, having terminated in favour of the present plaintiffs, they brought this present suit to recover damages for malicious prosecution of the suit for an injunction. The learned Subordinate Judge dismissed the suit on the ground that it was barred by limitation.

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*Mr. S. P. Sinha* (with him *Babu Jogendra Nath Mukerjee*), for the appellants, contended that the suit was not barred under Art. 42 of the Limitation Act and submitted that suit for damages was maintainable upon an order granting injunction if it was sought for and obtained maliciously and without reasonable and probable cause: *Nand Coomar Shaha v. Gour Sunkar* (1), *Jit Lal Singh v. Raja Kamaleswari Prosad* (2), *Bishnu Singh v. A. W. N. Wyatt* (3), and Volume 19 of the Encyclopædia of the Laws of England, pp. 689, 690 and 691.

*Dr. Rashbehari Ghose* (with him *Babu Golap Chandra Sarkar*, *Dr. Dwarka Nath Mitra* and *Babu Rishindra Nath Sarkar*), for the respondents, submitted that no suit lay from an order granting injunction. He relied upon *Cotterell v. Jones* (4), *Smith v. Day* (5), *Quartz Hill v. Eyre* (6), *Chunder Cant Mookherjee v. Ram Coomar Coondoo* (7), *Salmond's Law of Torts* (3rd Edition) p. 495.

*Mr. Sinha*, in reply.

*Cur. adv. vult.*

FLETCHER J. This is an appeal by the plaintiffs against the judgment of the learned Subordinate Judge of Purneah dated the 18th of March 1912. The suit was instituted to recover from the defendants Rs. 1,91,932-8-6, as damages for malicious prosecution of a civil suit brought against the plaintiffs. On the 1st of December 1896, the executor of the father of the defendant No. 1 instituted a suit in the Court of the Subordinate Judge of Purneah against the present plaintiffs for the purpose of obtaining an injunction restraining the present plaintiffs from erecting an

(1) (1870) 13 W. R. 305.

(4) (1851) 11 C. B. 713.

(2) (1912) 16 C. L. J. 555.

(5) (1882) 21 Ch. D. 421.

(3) (1911) 16 C. W. N. 540, 543.

(6) (1883) 11 Q. B. D. 674, 690.

(7) (1874) 22 W. R. 136, 146.

indigo factory on the land let for agricultural purposes and on the same date an application was made *ex parte* to the Subordinate Judge for an interlocutory injunction restraining the defendants, till the trial of the suit, from proceeding with the erection of the buildings. The learned Subordinate Judge on that application granted the interlocutory injunction prayed for. An appeal was preferred against that order to the District Judge who dismissed the appeal.

That suit came on for hearing before the Subordinate Judge on the 30th of September 1899. The learned Judge decreed the suit and granted a perpetual injunction restraining the erection of an indigo factory on the land. The present plaintiffs appealed against that decree to the District Judge who on the 16th of August 1900 reversed the decision of the Subordinate Judge and dismissed the suit. The present defendants who were then the plaintiffs in that suit, the original plaintiff having previously died, preferred an appeal to this Court against the decision of the District Judge. On the 1st of June, a Division Bench of this Court (Banerjee and Pargiter JJ.) reversed the decision of the District Judge and restored the decree passed by the Subordinate Judge. The present plaintiffs then appealed to His Majesty in Council and, on the 1st of June 1907, the decree passed by this Court was set aside and the judgment of the District Judge restored.

The proceedings in this Court are reported in *Surendra Narain Singh v. Hari Mohan Misser* (1) and before the Judicial Committee in *Hari Mohan Misser v. Surendra Narayan Singh* (2). The proceedings having terminated in favour of the present plaintiffs they have brought this present suit to recover damages for malicious prosecution of the suit

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(1) (1903) I. L. R. 31 Calc. 174. (2) (1907) I. L. R. 34 Calc. 718.

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for an injunction. The learned Subordinate Judge has dismissed the suit on the ground that it is barred by limitation. The first question for our decision is—is such an action as the present maintainable? The rule in England is very clear that a suit such as the present cannot be maintained. As was observed by Bowen L. J. in the case of the *Quartz Hill Mining Co. v. Eyre* (1), “In the present day and according to our present law the bringing of an ordinary action however maliciously and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution.” This general rule is no doubt subject to certain exceptions in case where the proceedings involve “either scandal to reputation or the possible loss of liberty to the person.” That the exceptions would not include a suit such as the present is clear. This general rule I think must apply to India except in so far as the same has been modified by statute. Section 95 of the Code of Civil Procedure, 1908, provides: “(1) where, in any suit in which an arrest or attachment has been effected or a temporary injunction granted under the last preceding section,—(a) it appears to the Court that such arrest, attachment or injunction was applied for on insufficient grounds, or (b) the suit of the plaintiff fails and it appears that there was no reasonable or probable ground for instituting the same, the defendant may apply to the Court, and the Court may, upon such application, award against the plaintiff by its order such amount, not exceeding Rs. 1,000, as it deems a reasonable compensation to the defendant for the expense or injury caused to him.” The section also enacts that “an order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction.” This section

(1) (1893) 11 Q. B. D. 674, 690.

in effect takes the place of the undertaking in damages which is usually required in England from a plaintiff as a condition of a grant of an interlocutory injunction in a pending suit in his favour, except that under section 95 the damages are limited to Rs. 1,000. The history of such undertaking is given by Jessel M. R. in the case of *Smith v. Day* (1).

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I now come to the case that has been principally relied upon by the plaintiffs in this appeal; namely, the case of *Nand Coomar Shaha v. Gour Sunkar* (2). That case was a reference by a Small Cause Court Judge. The questions referred for the opinion of this Court were, *first*, whether a fresh suit for compensation on account of damages incurred in consequence of obtaining improperly an injunction under section 92 of Act VIII of 1859 can be entertained when the question had been once brought forward for decision before an Appellate Court but rejected on a distinct ground; and, *secondly*, if the suit can be admitted on the ground of its not being decided on its merits by the Appellate Court, is the cause of action to be considered as having accrued from the 18th of August 1868, the date of the decision of the Munsif or from the 23rd of November 1869 when the cross appeal by the plaintiff was dismissed? The learned Judges (L. S. Jackson and Glover JJ.) in answering the questions referred to them remarked that section 96 of Act VIII of 1859 (which for the present purpose is the same as section 95 of the present Code) would not debar the Small Cause Court from entertaining the suit. They do not, however, express any opinion on the question whether the cause of action set up by the plaintiff was or was not a good cause of action although no doubt their judgment implies that the cause of action was sufficient. No authority is cited

(1) (1882) 21 Ch. D. 421.

(2) (1870) 13 W. R. 305.

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in the course of the judgment, and the counsel who argued the case before us were unable to cite to us any other authority either in England or in India in which a plaintiff has recovered damages against a defendant who had obtained maliciously and without probable cause an interlocutory injunction. I must confess that the case of *Nand Coomar Shaha v. Gour Sunkar* (1) appears to me to be a questionable authority in so far as it decides that a plaintiff can maintain a suit for damages against a defendant for maliciously and without probable cause obtaining an interlocutory injunction. *Nand Coomar Shaha's Case* (1) was decided by this Court on the 30th of March 1870. In the Limitation Act of 1871, first appears Article 86 fixing a period of limitation in which a suit must be brought to recover compensation for damages caused by an injunction wrongfully obtained, the Article in the present Act of 1908 being Article 42. The reason for the insertion of Article 86 in the Act of 1871 was obviously the decision in *Nand Coomar Shaha's Case* (1). But of course nothing in the Limitation Act can give a party a right of suit unless such a right exists independent of the Limitation Act *Hari Nath Chatterjee v. Mothur Mohun Goswami* (2). Another case that has been relied upon is the case of *Chunder Cant Mookerjee v. Ram Coomar Coondoo* (3). But all that that case decided was that a suit will lie for bringing a suit in the name of a third party maliciously and without reasonable or probable cause whereby the party against whom the action is brought sustains damage. This had already been decided by the Court of Common Pleas in the case of *Cotterell v. Jones* (4).

No case has, however, been cited before, or authority shown to, us to suggest that if a party maliciously and

(1) (1870) 13 W. R. 305.

(3) (1874) 22 W. R. 138.

(2) (1893) I. L. R. 21 Calc. 8.

(4) (1851) 11 C. B. 713.

without probable cause brings a suit for a perpetual injunction, and succeeds at the trial but the judgment is reversed on appeal. he is liable in damages for the injury caused by the injunction. Besides, the decision of the Court of first instance granting the injunction would indicate that the suit was instituted under such circumstances as would induce a prudent man to act. The want of probable cause is not to be inferred because of mere evidence of malice: *Turner v. Ambler* (1).

The result, therefore, is that there is no case in the books of a suit for damages against a defendant for maliciously and without reasonable or probable cause obtaining a perpetual injunction which was subsequently dissolved on appeal. The only case in which a suit of a similar nature was maintained with reference to an interlocutory injunction, is *Nand Coomarr Shaha's Case* (2), the authority of which I think is questionable. But assuming that case to be a binding authority for that proposition, the interlocutory injunction in the present case ceased and came to an end when the Subordinate Judge at the trial on the 30th September 1899 granted a perpetual injunction. The present suit was not instituted until the 13th of May 1910. Under Article 42 of the Indian Limitation Act, 1908, time begins to run from the date when the injunction ceases. Any right of suit that the plaintiffs might have with reference to the obtaining of the interlocutory injunction, is therefore barred by limitation. It is further to be noticed that nowhere in the plaint in this suit is it stated that the suit for an injunction was instituted or prosecuted without reasonable or probable cause. It would appear, however, that the plaintiff's allegations in support of want of reasonable and probable cause are that the

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(1) (1847) 10 Q. B. 252.

(2) (1870) 13 W. R. 305.



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defendants were actuated by malice and that the suit for an injunction ultimately proved unsuccessful when the decree of this Court was set aside by His Majesty in Council.

Such an allegation, however, is not a sufficient allegation of want of reasonable or probable cause. The fact that the Subordinate Judge granted the injunction and a similar view was taken by a Division Bench of this Court, although their opinion ultimately proved mistaken, shows that it could not be said that there was a want of reasonable or probable cause in instituting and prosecuting the suit: see the judgment of Couch C. J. in *Chander Cant Mookerjee v. Ram Coomar Coondoo* (1).

In the result I agree with the conclusion arrived at by the learned Subordinate Judge though for different reasons. The present appeal, therefore, fails and must be dismissed with costs.

RICHARDSON J. I agree that if relief is sought by the plaintiff on the ground that the previous suit, which was a suit for a perpetual injunction, was instituted maliciously and without reasonable and probable cause, that is not a good cause of action. Paragraph 15 of the plaint, however, points rather to the issue of the interlocutory injunction as the cause of action on which the plaintiffs rely. The interlocutory injunction is treated as though it subsisted up to the date of the order of His Majesty in Council. I agree that the interlocutory injunction was *ipso facto* dissolved by the decree of the first Court granting a perpetual injunction and that assuming that damages may be claimed by suit for "wrongfully" obtaining such an injunction, the present suit, as a suit for damages, is barred by limitation under Art. 42 of

the Schedule of the Limitation Act. As to the word "wrongfully," clause (2) of section 95 of the Civil Procedure Code of 1908 seems to contemplate the possibility of a suit being brought to recover compensation in respect of a temporary injunction applied for on insufficient grounds or in a suit instituted without reasonable and probable cause. It is at the least doubtful whether such a suit is maintainable in the absence of an undertaking to pay compensation: *Dhurmo Narain v. Sreemutty Dossee* (1). But if it be maintainable, it would no doubt be governed in regard to limitation by Article 42. The conduct imputed to the defendant in such a suit would be in its nature tortious or wrongful. It is idle to say that the suit could not have been instituted until the determination of the appeal to the Privy Council. The words of Article 42 are clear. Time runs from the date "when the injunction ceases."

In point of substance the damages which the plaintiffs say they have suffered were due principally to the permanent injunction granted by the Court of first instance and the High Court. In view of the result of the appeal to the Privy Council, those decisions must no doubt be regarded as erroneous but as the learned Subordinate Judge points out a party is not liable in damages for procuring an erroneous decision. A successful appellant is entitled under sub-section (1) of section 144 of the Code to such restitution "as will, so far as may be, place the parties in the position which they would have occupied" but for the decree which has been varied or reversed. Sub-section (2) lays down that no separate suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1). I do not know

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(1) (1872) 18 W. R. 440.

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whether the plaintiffs could have obtained any relief under these provisions. I am disposed to think not. The removal of permanent injunction restored the *status quo ante*—so far as it could be restored. But however that may be, at any rate the plaintiffs cannot obtain by suit any relief which they could have obtained under section 144 by application. They cannot in this suit obtain any relief by way of restitution.

The result is that the plaint, whatever construction be put upon it, discloses no cause of action except possibly a cause of action to which the bar of limitation applies.

On the facts, so far as they appear, it would be very difficult to say that the previous suit was instituted without reasonable and probable cause or that the temporary injunction was applied for on improper or insufficient grounds. But, as I understand, we do not decide the appeal with reference to that consideration.

I agree that the appeal should be dismissed with costs.

S. K. B.

*Appeal dismissed.*