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Liability through actions of combinations of men (Growing recurrence of situations like Gheraos)

By

P.P. Salvi*

The law relating to conspiracy as a species of nominate tort in India is generally speaking the same as English law on the subject. The reported cases in the Indian Law Reports dealing with the tort of conspiracy are few, and, the Judges of the Indian High Courts, while expounding the principles of tortious liability for conspiracies, have closely followed the English decisions on the points. In the circumstances, whilst dealing with the topic under consideration recourse to the English principles of tortious liability for conspiracies is a good as inevitable.

We are to deal with some aspects only of this species of civil wrong - viz. tort liability in India resulting from damage through actions of combinations of men in furthering their interests both through permitted and non-permitted means. Ex-hypothesi, damage must ensue as a consequence of actions of men in furthering their interests. We, are therefore, here not concerned with damage resulting from actions of men which are not done in furthering their interests e.g. damage done by a wanton act of mischief or damage inflicted solely through malevolence without any benefit to the persons inflicting it. The subject is this confined to acts purported to be done in furthering one's interest. Further, the damage which is going to result from actions of men may result through permitted as well as non-permitted means. A typical example of damage resulting from combinations of men through permitted means will be the damage inflicted on the rival trader by the combination of traders as illustrated by the leading case of

* Department of Law, University of Poona, Poona

the Mogul Steamship company v. McGregor, Gow and Co. (1892 A.C. 25). But when it is proposed to deal with the damage inflicted by combinations of men through non-permitted means, the scope of the subject under inquiry becomes unduly wide and elastic. We shall in that case have to deal with damage resulting from what are known as criminal conspiracies simpliciter. Criminal conspiracies if damage ensues are no doubt conspiracies recognised by law of tort, but the vice versa is not true. An agreement between two or more persons who have been illegally and wrongfully dismissed from service, to break the machinery of their quondam employer or to break his neck or limb is an illustration on the point. I for one do not feel that we are required to deal with such obvious cases of damage through non-permitted means. We have in India a well drrafted penal code and also a host of other penal statutes which deal with such cases. The words 'through non-permitted means' are therefore, controlled by the fact that we are dealing with conspiracy as a tort, and, further these words are to be understood in the context of the clarifying words-growing recurrence of situations like gheraos.

In the leading case of Sorrell v. Smith (1925 A.C. 700) Viscount Cave L.C. laid down two propositions which we may assume as authoritative so far as the ingredients of the tort of conspiracy are concerned. They are --

(a) "A combination of two or more persons wilfully to injure a man in his trade is an unlawful act and, if it results in damage to him, is actionable;

(b) if the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues.

The distinction between the two classes of cases is sometimes expressed by saying that in cases of the former class there is not, while in the case of the latter class thereis, just cause or excuse for the action taken." Pecularity of this tort of conspiracy lies in this that what is not actionable if done by one becomes actionable if done by more than one. "It appears to me "says Lord Atkin L.J. in Ware and DeFreville (1921, 3 K.B.46) to be beyond

dispute that the effect of the two decisions in Allen v. Flood and Quinn v. Leathem is this: that on the one hand a lawful act done by one does not become unlawful if done with an intent to injure another, whereas an otherwise lawful act done by two or more in combination does become unlawful if done by the two or more in combination with intent to injure another." A further fact to be noted is that 'tort of conpiracy' is to be clearly distinguished from 'a tort committed by a combination of persons'. Lord Dunedin in Sorrell v. Smith rightly observes "that if a combination of persons do what if done by one would be a tort, an avernment of conpiracy is a mere surplusage." Thus the element of combination turns an otherwise lawful act into an unlawful one. What is the reason for this anomalous rule? The reason stated in the Croffers' case is that the common law may have taken the view that there is always the danger that any combination was desirable on the broad grounds of policy.

It may be submitted here that there is no magic in the mere number of the defendants. The reason stated above may not appear to many as adequate. Lord Lindley's idea in Quinn v. Leathem that "number may annoy and coerce where one may not" cannot be regarded as entirely satisfactory, more so in the perspective of the modern social, economic and industrial conditions.

Another reason (and supposed to be a cogent and convincing one) for this anomalous rule is that combination furnishes proof of intent to injure the Plaintiff on the part of the defendants. Critical issue in conspiracy cases is the object or purpose of those acting in concert. Whatever might be the historical reasons for the introduction of this anomalous rule in the English law of tort it is submitted that there is no good reason to continue the same rule in India.

Defendants will be exonerated from liability if there is just cause or excuse, as stated above. They will be thus excused if by their actions they are furthering their own interests. These interests must however be interests legally recognised and protected.

The interests which can be thus protected may be of varied character, but the case law deals mostly with trade interests. Since Crofter's case it has now been decided that the action of conspiracy is

not limited to trade competition, and labour disputes, nor the justification limited to the protection of business interests. The reason for this is not far to seek. In the absence of a competition of interests how can we concieve that the defendants will be enabled to put up the defence of 'just cause or excuse' i.e. justification, referred to above. There must, therefore, be a situation in which both the Plaintiff as well as the conspiring defendants are interested. Parents persuading their daughter to break the engagement with a scoundrel (an illustration given by Lord Simen in Sorrel v. Smith) is an example where the conflicting interests are in respect of a person. Tenants may combine to protect their interests in the lands, cultivated and cultivable by them against their landlord who, in his attempt to take the lands out of ryotwari stock into the proprietary private domain wanted that no tenants should occupy and cultivate the land for more than a year as illustrated by the case of Uchhab Bhol and others v. Sri Lord Jagannath and others reported in A.I.R. 1949 Orissa at Page 80.

Conflict of interests gives rise to competition, and fair competion is never actionable; on the contrary, it may be a desirable thing. Plaintiff may be ruined as a consequence of the combination of other rival traders, but the leading case of the Moguls has established that this does not furnish any cause of action to the plaintiff against the combining traders. In this context is to be further borne in mind that an act otherwise lawful does not become unlawful on the ground that it was actuated with a bad motive, as emphasised in Allen v. Flood.

We shall turn next to the means employed by the conspirators. These may be permitted or non-permitted i.e. lawful or unlawful. In tort of conspiracy we have to closely examine and pronounce upon the legality of those means which apparently are permitted by law, and are not concerned so much with the means are in themselves criminal or tortious. These lawful means may assume the form of advice, warning persuation or inducement, but they should not amount to coercion, threat or intimidation. Even if the predominant purpose is legitimate it will not provide a defence if means unlawful as stated above are used. A conspiracy may be actionable if either the end or the means, or both, are unlawful.

The rule known as the rule in Lumley v. Gye enunciates the principle that inducement or procurement of breach /contract is actionable, in damage /of ensues, and, consequently the procurement of the breach of contract to the detriment of the plaintiff will be tentamount to employment of the unlawful means by the defendants. But the trade dispute Act, 1906 in England and the Trade Union Act 1926 in India confer immunity from civil and criminal actions on the members and officials of the trade unions in respect of trade disputes.

Turning next to the topics of justification, the principle underlying justification may be broadly stated to be that the pursuit of selfish ends provides in law whatever may be the case in morals, its own justification, and self interest is not to be interpreted too narrowly. As stated above, an act otherwise lawful does not become unlawful by the mere existence of a bad motive. Furthermore, there may be this added difficulty that motives may be mixed. Lastly it may be said that in determining the existence of a justification regard must be had to the circumstances of each case as it arises.

Situations known as 'Gheraos' put to the acid test many of the principles stated above. The law relating to gheraos or rather the law of conspiracy in relation to modern situations known as gheraos may be regarded as a peculiar contribution of the India law. Just as India gave to the world a new word 'Satyagraha' some four decades ago, it now seems that it may give the word 'Gheraos'. Whereas 'Satyagraha' is a weapon in the armoury of a person who wants to eschew the use of even the slightest force in getting his demands accepted, 'Gherao' is a weapon in the hand of a person who does not hesitate to use force, even criminal force, to get his demands accepted. Although they are thus theoretically poles apart, they have this in common that the employment of this techniques of 'Satyagraha' and 'gheraos' is not merely peculiar but also unparalled so far, as India concerned. Much light is now thrown on the law of 'Gherao' by the judgment of the Special Bench in Jay Engineering Works Ltd. and others v. State of West Bengal and others reported in A.I.R. 1968 Calcutta at Page 407, 'Gherao' has been thus defined and commented upon therein by Sinha C.J.

"The word 'Gherao' is a physical blockade of a target, either by encirelement intended to blockade the egress and ingress from and to a particular office, workshop, factory or even residence or forcible occupation. The "target" may be a place or a person or persons, usually the managerial or supervisory staff of an industrial establishment. The blockade may be complete or partial and is invariably accompanied by wrongful restriant and/or wrongful confinement and occasionally accompanied by assault, criminal trespass, mischief to person and property, unlawful assembly and various other criminal offences. Some of the offences are cruel and inhuman..... The object is to compel those who control industry to submit to the demand of the workers without recourse to the machinery provided for by law and in wanton disregard of it, in short, to achieve their object not by peaceful means, by violance. Such a 'Gherao' invariably involves the commission of offences".

In as much as Sinha C.J. uses these words "blockade is invariably accompanied by wrongful restraint...." and further uses the words "such a gherao invariably involves the commission of offences" opinion may safely hazarded that gherao does give rise to civil liability for tortious conspiracy.

But in the same judgement Bannerji I, expressed the opinion that 'Gheraos' as such that is to say simple encircle ment is no offence under the criminal law of the country. Leaving apart from our discussion such types of 'gheraos' as are accompanied by assault or other criminal offences, how far the peaceful gheraos unaccompanied by criminal acts are tentamount to actionable enspiracies? In Crofter's case there are observations to the effect that combination to demonstrate the power of those combining to dictate policy or to prove themselves masters in a given situation may under certain circumstances amount to tort of comspiracy. In the light of these observations it is submitted that in some cases even peaceful gheraos may amount to tort of comspiracy. It may be noted here that although the weapon of gherao is generally wielded by the workers, there are a number of instance when the weapon of gherao is used by non-industrial workers e.g. students.

Those who resort to gheraos try to justify gheraos in the name of the legitimate labour movement. For the purposes of the topic under consideration Sec.17 of the Trade Unions Act which deals with criminal conspiracy in trade dispute and Sec.18 which deals with immunity for civil suit merit attention.

"Sec.17 - No officer or member of a registered Trade Union shall be liable to punishment under subsection (2) of Section 120 B of the Indian Penal Code in respect of any agreement made between the members for the purpose of furthering any such object of the trade Union as is specified in Sec.15, unless the agreement is an agreement to commit an offence.

Sec.18 of the said Act lays down that no suit or other legal proceeding shall be maintainable in any civil court against any registered Trade Union or any Officer or member thereof in respect of any act done in contemplation or futherance of a trade dispute to which the member of the Trade Union is a party on the ground only that such act induces some other person to break a contract of employment or that it is an interference with the Trade, business or employment of some other person or with the right of some other person to dispose of his capital or of his labour as he wills.

Thus Trade Unions are subject to the criminal law of the land but they are immune from liability for conspiracies in respect of trade disputes. Trade Unions are thus raised above the law because it is assumed that Trade Unions are a useful and responsible limb of the industry. But if the Unions are going to abuse this privilege of immunity, then suitable steps by legislationor otherwise have to be taken by the Government. Even the majority of Trade Unionists are of the opinion that Gheraos would not only harm the trade Union movement but would also retard the pace and progress of the Industrial development of the nation. Shri V.V. Giri, Vice President of India, the veteran trade union leader has said "Gherao can never be a substitute for organised trade union movement, "Dr. S.P. Aggarwal in his book gheraos has this to say "Gheraos is generally regarded as an ante thesis of collective bargaining and bipartite negotiations, for the element of duress, coereion and intimidation are asscciated with it. Gheraos was unjustified under all circumstances". Since the leading case of Bardford (Mayor of) v. Pickles

(1895 A.C.587) it is a settled rule of English law that malice in the sense of ill will or spite does not make an otherwise lawful act and unlawful one. Although the act may be done withintent to injure, it makes no difference. Thus an act is lawful, even though it is done with intent to injure another provided the act in question is done in the exercise of one's undoubted legal rights and is done by only one person; but if such an act is done by more than one person, and damage ensues it becomes actionable. It is submitted that the rule of law should be rather that even if an act done by a single person is otherwise lawful it should be regarded as actionable if it is done with the sole or at least the predominant purpose to injure another. The law relating to actionable conspiracies may then be deduced as a corollary from the said rule. The rule in Pickle's case has been the subject of much discussion, and there is eloquent argument in favour of the abolition or at least suitable modification of the rule. Such a rule does not find place in the jurisprudence of other countries. Pickle's case is regarded as an example of abuse of right. Whether the conduct of the sole difendant is directed to injure the plaintiff will naturally be a question of fact to be decided by the Judge.

It has been stated above that is the element of combination that turns an otherwise lawful act of a single person into an unlawful one. Here by combination we mean to say an agreement to injure the plaintiff, that is to say, an agreement to do wrongful harm. The object of the combination is thus nothing else but the object of the agreement of the parties to the combination. In India canon to decide the lawfulness of the object of an agreement is provided by Sec.23 of the Indian Contract Act, 1872 which is as follows:-

> S.23 The consideration or object of an agreement is lawful, unless
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> it is forbidden by law; or
> is of such a nature that, if permitted, it would defeat the provisions of any law; or
> is fraude ent; or
> involves or implies injury to the person or property of another; or

the court regards it as immoral, or opposed to public policy.

As we have to deal with combination when dealing with the tort of conspiracy, useful guidance as to legality of the object of the combination is also furnished by Sec.141 of the Indian Penal Code which, while defining an unlawful assembly recites that an assembly of five or more persons is designated as an unlawful assembly if the common object of the person composing that assembly is of the kind mentioned in that section.

It may be recapitulated here that the defendants may also prove justification with reference to their "object" of combination, and sometimes difficult questions relating to the objects of rival parties may crop up as in the case of Scala Ballroom Ltd. v. Ratcliffe, a case relating to colour bar Quare. If a person in protest of the action of an actor, a member of his community, in marrying outside the community publicly exhorts the members of his community to boycott or not to see the films of that actor can claim justification on the ground that his object was to protect the interests of his community in that the members of his community should not marry outside community? Further can a pious batch of teetotallers go on preaching the gospel of prohibition just outside the precints of a liquor shop?

It has already been mentioned that a conspiracy may be actionable if either the end or the means or both are unlawful. End and means so far as criminal conspiracies are concerned are thus defined in Sec.120A of the I.P.C.

Sec.120A - When two or more persons agree to do, or cause to be done, -

(1) an illegal act,

(2) an which is not illegal by illegal means, such an agreement is designated as criminal conspiracy

provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some-act besides the agreement is done by one or more parties to such agreement is persuance thereof.

Explanation - It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to this object.

> Sec43 of I.P.C. says that the word 'illegal' is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action

Further, paras fourth and fifth of section 141 also gives us some instances of 'illegal means' employed by an unlawful assembly.

One of the unlawful means by which damage may be caused to the plaintiff is made a nominate tort and is called the tort of intimidation which includes all of those cases in which harm is inflicted by the use of unlawful threats whereby the lawful liberty of others to do as they please is interfered with. This wrong may consist of the intimidation to the plaintiff himself or of the intimidation of others persons to the injury of the plaintiff. The threat complained of must be a threat to do an act which is itself illegal. No threat to use one's legal rights can amount to a cause of action, even if made for the purpose or intimidation or cocerision, and even if inspired by malicious motive. The offence of intimidation is defined in Sec. 503 of I.P.Code. The tort of intimidation is described as "obscure, unfamiliar and peculiar". It is attempted to widen the scope of this tort beyond cases of physical violance and threats of violence. Rookes v. Barnard (1964 I All E.R.9 has recently given a further boost to this tort.

As stated above the Law of conspiracy as it stands today is to the effect that Conspiracy is not actionable as the tort unless damage actually ensues to the Plaintiff in -- consequence of such combination. In strict logic there is no convincing reason as to why conspiracy should not be actionable as a tort unless damage results therefrom. There are number of torts which are actionable without proof of damage, libel and trespass for property for instance. On the other hand in the case of nominate Tort of negligence, the Plaintiff has no cause of action in tort against the defendant unless the Plaintiff proves that the negligent conduct of the defendant has actually caused damage to him. We may thus conclude that so far as the pre-requisite of damage is concerned the

tort of conspiracy is analogous to the tort of negligence. We have already adverted to the chief distinction between criminal conspiracy and tortious conspiracy - that whereas criminal conspiracy consists of an agreement to commit crime or to achieve a lawful object by unlawful means, a tortious conspiracy requires as intent to injure the Plaintiff and the consequent injury to the plff. Thus the requirement of mensrea (using the phrase in a lose sense) is common to both types of conspiracies. It two or more persons being actuated by racial linguistic or any other motive exhort people not to have professional or trade dealings with the plaintiff and assuming further that these persons have combined with intent to injure the plaintiff, as the law stands today, they will not be liable to the plaintiff for the commission of the tort of conspiracy unless damage ensues. Does this mean that the intended victim of such combination should wait till he is actually damnified by the concerted action of the Defendants? It is submitted that in such cases the victim of such combination requires the protection of law from the potential danger of harm which may be caused to him by the combination of men. The plaintiff in such cases should have a remedy against the conspiring defendants for a declaration that such combination of the defendants is illegal and for an inunction that the defendants be restrained from committing any overt act in pursuance of the object of the said conspiracy.

Although as stated above tort of nonspiracy may be comparable to the tort of negligence, so far as the element of damage ensuing from the defendant conduct is concerned, there is still a real difference between these two nominate torts. In the case of negligence, the defendant never desires to cause damage to the Plaintiff; he fails to take that care which is -- expected of a reasonable man and thus causes damage to the Plaintiff. On the contrary, in the tort of conspiracy there is not merely a desire to cause damage to the Plaintiff, but (to use the language of Lord Bowen in the Mogal Case) there is an intent to do wrongful harm to the Plaintiff. True it is that actions do not lie for a state of mind; but in the case of conspiracy, we deal not with the state of mind of a person but with the phenomenon of the meeting of the minds of two or more persons to perpetrate an act not permitted by law. Sir John Simon in his speech in Crofters' says "...in the case of conspiracy an action on the case will lie for damage at the suit of party suffering, though here the gist of

the action that the damage inflicted was inflicted by the defendants who combined together for the purpose of inflicting it. Lord Dunedin in Sorrel..Vs..Smith says".....the question at the root of such cases (i.e.conspiracy cases) is in what kind of concerted action which bring injury to an individual as its result can the proceedings be restrained at law or damage given for injury done.

In conclusion it may be said that if the Rule of Law of Tort be that any act, even the act of a sole defendant if done with intent to do wrongful harm to the plaintiff is actionable, there would be no necessity for the Tort of conspiracy. What is erprehensible, if done by two or more should also be reprehensible if done by one, provided there is a common element of intent to injure the Plaintiff. J.G. Fleming in his treatise on Law of Torts comes to the conclusion that " effect of modern decisions has been to doom the independent Tort of conspiracy to practically negligible significance, especially in the context of trade and employment relations."