VENKATA-RAMIAH PANTULU v. RAMA-KRISHNA PANTULU.

held that as the claim was not brought within the period of limitation calculated from the time of the advance, the plaintiff's right was barred.

It seems to us that similarly in the present case the obligation under the note was the only one on which the plaintiff was entitled to sue and that the provision in exhibit A as to the realization of the decree debt and the payment of the balance, if any, did not affect the right of the plaintiff to sue on the promissory note, or create an independent right of suit in favour of the plaintiff. It follows that as the present suit was brought after the expiry of the period of limitation which would have governed the suit if brought upon the note, and taking account of the fact that exhibit A contains an admission of liability within the meaning of section 19 of the Limitation Act, we must hold that the decree of the learned Judge dismissing the suit is right. In this view it is not necessary to go into the cross claim made by the defendant. We dismiss this appeal with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice and Mr. Justice Subrahmania Ayyar.

1906 January 5, 8, 23.

THAKDI HAJJI (DEFENDANT), APPELLANT,

v.

BUDRUDIN SAIB (PLAINTIFF), RESPONDENT *

Malicious arrest, action for—Not maintainable when arrest ordered by officer invested with discretionary power, before whom the full facts were placed by the defendant.

An action for malicious arrest is not sustainable, when the defendant has placed all the facts before the officer having the discretionary power to order such arrest and when such officer with full knowledge of all the facts exercised his discretion and ordered the arrest.

In an action for false imprisonment the onus is on the defendant to plead and prove affirmatively the existence of reasonable cause whereas, in an action for malicious prosecution the plaintiff must allege and prove affirmatively its non-existence.

Hicks v. Faulkner, (51 L.J.Q.B., 268), referred to.

---

* Original Side Appeal No. 21 of 1905, presented against the judgment of Mr. Justice Boddam in Civil Suit No. 69 of 1904.

THE facts necessary for this report are fully set out in the judgment.

Mr. *E. Norton*, Mr. *D. Chamier* and Mr. *A. Read* for appellant.

The Advocate-General (Hon. Mr. *J. P. Wallis*) for respondent.

JUDGMENT.—This is an appeal from a judgment of Boddam, J., by which the learned Judge awarded the plaintiff Rs. 1,000 damages in a suit for damages for malicious arrest.

The material facts and dates are shortly as follows :—

On January 6th 1904, the defendant obtained a decree against the plaintiff for Rs. 40,000 with interest and costs. On January 25th, on an *ex parte* application by the plaintiff for a stay of execution pending appeal, an order was made that notice should go to the defendant to show cause why the order should not be made, and an interim stay was granted on the terms of the plaintiff paying into Court, within three days, the amount of the decree with interest and costs. The amount of the decree with interest and costs was paid into Court by the plaintiff.

On February 11th the application for a stay of execution was dismissed with costs. No formal order was made discharging the order for an interim stay.

The defendant applied for the payment out to him, of the money which had been paid into Court and, on February 22nd the Court made an order that the money should be paid out to the defendant on his giving security for the amount. The defendant was unable or unwilling to give security and the money remained in Court.

On March 5th the defendant's solicitors wrote to the plaintiff's vakil "With regard to the amount payable under the decree in respect of which we applied for payment out of Court and in view of the fact that your client took an unnecessary objection to such payment and asked that security should be given by our client, we give you notice that our client does not intend to apply for payment out of this sum and your client is at liberty to receive the said sum out of Court. We shall give your client time to obtain this money and shall then proceed to execute the decree."

On March 14th the defendant made an application in execution in which he asked that a warrant should issue for the arrest of the plaintiff. On March 15th the warrant was issued and the plaintiff was arrested.

THAKDI HAJJI v. BUDRUDIN SAIB.

The plaintiff's contention was that the money had been paid into Court in satisfaction of the decree, that the decree had been satisfied in fact and in law and that the order for the issue of the warrant was illegal. The defendant's contention was that the money had not been paid into Court in satisfaction of the decree, but as a condition precedent to the plaintiff obtaining an interim order for the stay of execution, that, inasmuch as he (the defendant) was precluded by the order of the Court, from taking the money out except upon the terms of giving security, the decree had not been satisfied, and this being so, any remedy which the law allowed him, by way of execution, was still open to him.

It is not necessary for us to decide whether the payment into Court by the plaintiff of the amount of the decree obtained by the *defendant* against him with interest and costs, is to be regarded, in the events which had happened, as a payment into Court in satisfaction of the decree. We assume that the payment into Court was in law a payment in satisfaction of the decree and that, this being so, the order directing that the warrant should issue for the arrest of the plaintiff was an order which ought not to have been made. On this assumption we have to consider whether the defendant in applying for the warrant acted without reasonable and probable cause.

Mr. Branson, a member of the firm of solicitors, who acted for the defendant, was called as a witness on the defendant's behalf. With reference to the application for the issue of the warrant Mr. Branson said "I saw Mr. Bakewell (the Deputy Registrar) who had to pass the order, personally, on the matter. It is issued under the rules. I told him exactly what had taken place. We discussed the question whether there had been any stay of execution. He passed the order for a warrant." Mr. James Bakewell (the Deputy Registrar) was called and he said "I see this execution application filed on 14th March 1904. I recognise my endorsement on it. I can't say I remember this application. I remember an execution application being made in this matter. I remember I had an interview with Mr. Branson. I remember something passed between us in addition to handing in the application. I made the order."

An order for the execution of a decree by arrest is a discretionary order. Rule 542 of the Original Side Rules provides that the

Registrar shall have power in his discretion to make the order, with a proviso that he may, if he thinks fit, refer the matter to a Judge in Chambers, who may thereupon make such order as he thinks fit. We must take it therefore that the Deputy Registrar was of opinion on the facts stated to him by Mr. Branson (Mr. Branson says he stated the facts fully and the Deputy Registrar does not suggest otherwise) that the case was one in which an order for arrest ought to be made and he made the order accordingly. In the absence of any suggestion of fraud or suppression of facts we are of opinion that it cannot be said that a party acted without reasonable and probable cause in applying for an order which the Court thought was a proper order, in the exercise of its discretion to make, and which the Court, in fact, did make. With regard to the case of the *Quartz Hill Consolidated Gold Mining Company* v. *Eyre*(1) which was cited by the Advocate-General on behalf of the respondent, all that need be said is that the winding up petition, which was held to have been presented without reasonable or probable cause, was withdrawn before any order was made upon it and was ultimately dismissed.

An action for maliciously prosecuting proceedings to make a man a bankrupt or wind up a company will only lie when the application has failed or the order made thereon has been rescinded. See the case cited above and *Whitworth* v. *Hall*(2) and *Metropolitan Bank* v. *Pooley*(3).

In defence to the present suit the defendant pleaded that the order for the issue of a warrant of arrest was made by an officer of the Court who is empowered to exercise a discretion judicially, and with knowledge of all the facts. The defendant proved the facts here alleged, and we are of opinion that they constitute a good defence, and that this is so whether the suit be regarded as a suit for damages for malicious prosecution or a suit for damages for malicious arrest.

No doubt in an action for false imprisonment the onus is on the defendant to plead and prove affirmatively the existence of reasonable cause, whereas in an action for malicious prosecution the plaintiff must allege and prove affirmatively its non-existence See *Hicks* v. *Faulkner*(4).

---

(1) L.R., 11 Q.B.D., 674. (2) 2 B. & Ad., 695.

(3) L.R., 10 A.C., 210. (4) 51 L.T.,Q.B., 265, affirmed in 46 L.T., 127.

THAKDI HAJJI v. BUDRUDIN SAIB.

If the present case is to be regarded as one in which the onus is on the defendant, we are of opinion that he discharged that onus.

Upon the short ground stated above we allow the appeal and set aside the decree. In the circumstances we direct that each party pay his own costs in this Court and in the Court of first instance. Memorandum of objections is dismissed.

Messrs. *Branson & Branson*—Attorneys for appellant.

Messrs. *Short & Bewes*—Attorneys for respondent.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

1905 November 30. December 1, 7.

SOMASUNDARAM CHETTIAR (PLAINTIFF), APPELLANT,

v.

NARASIMHA CHARIAR AND OTHERS (DEFENDANTS NOS. 1 AND 2 AND LEGAL REPRESENTATIVES OF THE DECEASED SECOND DEFENDANT), RESPONDENTS.*

Promissory note—Collateral covenant not to sue for limited time no bar to suit on—Indorsee with notice of covenant may sue.

A collateral covenant not to sue for a limited time on a promissory note does not suspend the right of action on the note and cannot be pleaded in bar to an action on the note.

Thimbleby v. *Barron*, (3 M. & W., 210), referred to and followed.

Ray v. *Jones*, (9 C.B.R. (N.S.), 416), referred to and followed.

The payee of a promissory note executed an agreement in the following terms:—"You will aver from the 1st of May be paying interest to me on account of the (promissory) note for Rs. 5,000 executed this day by you in my favour, the interest for every month being sent on the first of the next month. I shall take the above rupees five thousand from you after giving jivanamsam (maintenance money) to my mother-in-law, and obtaining a release bond; or I will take the said rupees five thousand after the lifetime of my mother-in-law."

Held, that this agreement was only a collateral covenant not to sue for a limited time and was no bar to an action by an indorsee with notice of the agreement.

---

* Appeal No. 101 of 1902, presented against the decree of M.R.Ry. T. M. Ranga Chari, Subordinate Judge of Madura (West), in Original Suit No. 13 of 1901.