APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Phillips.

1911. September 19 and 28.

NANJAPPA CHETTIAR (APPELLANT),

v.

GANAPATHI GOUNDEN (RESPONDENT).*

Damages—Wrongful attachment, suit for damages for—Want of reasonable and probable cause and malice must be proved—Malice, what amounts to—Special damage, proof of—Amount of

In a suit for damages for attachment before judgment, the plaintiff is bound to prove want of reasonable and probable cause for applying for attachment and malice in fact.

The provisions of section 95 of the new Code of Civil Procedure and section 491 of the old Code which empowered Courts to award compensation when the attachment was applied for on insufficient grounds, were not intended to affect the applicability of the aforesaid rule of law in regular suits brought for compensation.

Malice means any improper or indirect motive, *i.e.*, some motive other than the one which should actuate the party. No hatred or enmity is required.

Where the motive for the attachment is not to defeat any intended fraud on the part of the debtor, but to enforce speedy payment, it will amount to malice.

The plaintiff in such a suit must prove special damage. It is not necessary however to show pecuniary loss, or that the plaintiff was affected in a specific manner. It will be sufficient if it is shown, that the allegations made against him, must damage his reputation and credit. It will be sufficient if the plaintiff must have sustained some damage such as the law takes notice of

Quartz Hill Gold Mining Company v. *Eyre* [(1883) 11 Q.B.D., 674], referred to.

Kumarasami Pillai v. *Udayar Nandan*, [(1909) I.L.R., 32 Mad., 170], followed.

The fact that the defendant is a man of slender means ought not to be taken into consideration as a ground for reducing the amount awardable as damages to the plaintiff.

SECOND APPEAL against the decree of S. Authinarayana Aiyar, the Temporary Subordinate Judge of Coimbatore, in Appeal Suit No. 117 of 1908, presented against the decree of T. Sreenivasa Aiyangar, the District Munsif of Tiruppur, in Original Suit No. 37 of 1908.

The facts for the purpose of this case are fully set out in the judgment.

T. Subrahmania Ayyar for appellant.

The Hon. Mr. *L. A. Govindaraghava Ayyar* for respondent.

* Second Appeal No. 272 of 1910.

JUDGMENT.—The suit in this case was for damages sustained by the plaintiff by reason of the defendant causing his properties to be attached before judgment in a suit instituted by the defendant against the plaintiff (Original Suit No. 6 of 1906 in the District Court of Coimbatore). The defendant along with his plaint in Original Suit No. 6 of 1906 put in an application for attachment of all the properties of the plaintiff. The suit was for a sum of Rs. 6,000 on a promissory note executed by the present plaintiff in favour of the defendant's brother. The properties attached were according to the District Munsif's finding in this case worth at least Rs. 60,000 and on the defendant's own admission their value was not less than Rs. 30,000. The defendant stated in support of his application for attachment that the plaintiff had alienated some of his properties and was about to alienate his other properties in order to defeat the execution of any decree the defendant might obtain against him. He obtained an interim order of attachment, but it was set aside on the plaintiff's application, the Court holding that there was no ground for the application for attachment. The defendant in his written statement alleged "that the plaintiff had plenty of debts and warrants against him, and getting afraid at the action of the plaintiff, who, without paying the defendant's debt, mortgaged properties for Rs. 15,000 to his elder brother and executed some other documents in favour of others, the defendant issued a notice for the discharge of his debt; but it has not been discharged." He then proceeded to state that his debt was not discharged by the plaintiff for two months after he obtained the decree. All the defendant's allegations about the plaintiff's indebtedness and alienations have been found to be untrue, except that the plaintiff had executed a mortgage for Rs. 15,000 in favour of his brothor. The District Munsif found that the defendant had absolutely no grounds to believe that the plaintiff intended to defeat him or any other creditor. He also found that the defendant had no reasonable grounds for believing his allegations. He then observes that "unless the defendant had some object (which from his conduct appears to have been sinister and indirect) in view, he could not have applied for attachment of all the plaintiff's properties worth about Rs. 75,000 at the least for his debt of Rs. 5,000 and odd." He also says that the defendant had no information before putting in his application for attachment of any intention on the plaintiff's part

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to make alienations or of his being indebted to any one except his brother. He found also that the plaintiff must have been put to great mental suffering and apparently credited the plaintiff's statement that he suffered in reputation. He allowed Rs. 500 as damages. On appeal the Subordinate Judge concurred in the Munsif's finding that there was no reasonable and probable cause for the defendant's application, though the language used by him is not quite happy. With regard to the defendant's motive again, his finding is not as precise as might be desired. He refers to the defendant's allegations in his written statement already referred to and then states. "From these pleadings it appears to me that the object of the present defendant in applying for an attachment before judgment in Original Suit No. 6 of 1906 was simply to have his money paid without delay and without enabling this plaintiff to take the objections he took in the previous suit, and thus to delay payment." The objection in the previous suit spoken of by the Subordinate Judge was that the defendant's brother, to whom the promissory note sued on had been executed, assigned it to the defendant deliberately with a view to deprive the plaintiff of the opportunity of pleading a set-off of certain debts, which the defendant's brother owed to him. The Subordinate Judge then says "plaintiff does not say in his evidence and has adduced no other proof of enmity between him and the defendant or of any evil motive of the defendant." The finding therefore must be taken to amount to this that the defendant wished to use the process of attachment before judgment to obtain prompt payment of his debt and not with the view of preventing the plaintiff from alienating his properties so as to defeat any decree, but at the same time not on account of any enmity. With regard to the question whether the plaintiff sustained any damage, the Subordinate Judge merely observes: "For the injury sustained by the plaintiff by reason of all his properties being attached improperly he is no doubt entitled to damages." He reduces the amount of damages to Rs. 250 in consideration of the defendant not being a wealthy man. The defendant has appealed to this court against this judgment, and the plaintiff has preferred a memorandum of objections objecting to the reduction of the amount awarded as damages.

The first argument in second appeal is that in a suit for damages for attachment before judgment the plaintiff is bound

to prove both that the defendant had no reasonable and probable cause for applying for attachment and malice in fact. For the respondent it is contended that the law in India is different in this respect from the English Law, as section 95 of the Code of Civil Procedure, 1908 (section 491 of the old Code) provides that the court trying the suit may award compensation against the plaintiff, where it finds that attachment before judgment was applied for on insufficient grounds. Neither absence of reasonable and probable cause nor malice is required under this section. The question for decision is whether the rule laid down in that section is applicable to a case where the defendant who complains of improper attachment before judgment files a distinct and regular suit for compensation. This question, so far as we are aware, has never been expressly decided by this court. We have come to the conclusion that the appellant's argument is well-founded. The section in our opinion creates a special jurisdiction in the court trying a suit to award compensation as an incidental relief and limits the amount it may award to Rs. 1,000. It gives in our opinion an alternative remedy in cases of wrongful attachment and provides that, in case a party complaining resorts to it, he shall not afterwards resort to a fresh suit by enacting that "an order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction." There is no reason for holding that the section in any way interferes with the principles regulating suits for damages for the abuse of the process of courts. The general rule governing such cases has always been in England that actual malice must be proved. The section allows a limited remedy, without proof of malice, which it is open to a party to avail himself of, if he chooses. It must be noted that the code makes provision only for some kinds of abuse of the process of courts and does not deal with all kinds of abuse. Section 95 of the Code of Civil Procedure is analogous to section 250 of the Civil Procedure Code which allows a criminal court to award compensation not exceeding Rs. 50 to a complainant when it is satisfied that the accusation against him is frivolous or vexatious. That section does not alter the law regulating regular suits for damages for false prosecution where the plaintiff would be bound to prove absence of reasonable and probable cause and malice while under the section, it is enough for the criminal court to find that the

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complaint was frivolous or vexatious. That section unlike section 95 of the Code of Civil Procedure does not bar a suit for false prosecution, but merely provides that the amount awarded as compensation under it shall be taken into account in decreeing compensation in a subsequent civil suit. The Allahabad High Court in *Goutiere* v. *Robert*(1) held that the corresponding provision in the Civil Procedure Code of 1859 did not alter the law applicable to suits for damages for arrest or attachment. The Calcutta High Court was apparently of the same opinion in *Raj Chunder Roy* v. *Shama Soondari Debi* (2), though the case was one for improper attachment after decree. There is also a dictum of the judicial committee of the Privy Council in *Kissorymohan Roy* v. *Hursook Dass* (3). The case was one in which a third party sought to recover damages for wrongful attachment of his property as the property of the defendant in the suit. It was contended that it was necessary to prove malice and absence of reasonable and probable cause in making the attachment. Their Lordships say "that is the rule which obtains between the parties to a suit when the defendant suffers loss through its institution and dependence." The same view was taken by the Bombay High Court in *Surajmal* v. *Manekchand* (4). The absence of reasonable and probable cause was taken to be necessary in *Thakdi Hajji* v. *Budrudin Saib* (5) but no reference was made to malice. We must hold that there is no reason for departing, when a suit is filed for damages from the well-established rule that when the plaintiff's grievance arises directly from the order of a Judicial Tribunal though it is moved thereto by a private party the defendant would not be responsible in damages unless he had acted with malice as well as without reasonable and probable cause. Has the Subordinate Judge then found in this case that the defendant acted with malice? On the one hand he says in effect that he was not satisfied that there was previous enmity between the plaintiff and the defendant, or that the latter was influenced by any evil motive arising from such enmity to apply for the attachment. But on the other hand he has not only found that there was no reasonable cause for the application but also says that the defendant's object was not to prevent an alienation of

(1) (1870) 2 N.W.P., 353. (2) (1879) I.L.R., 4 Calc., 583.
(3) (1889) 17 I.A., 17 at p. 27. (4) (1904) 6 Bom. L. R., 704.
(5) (1906) I.L.R., 29 Mad., 208.

the defendant's property so as to defeat the execution of his decree but to have his money paid without delay—a motive which unfortunately often induces suitors in this country to apply for atfachment before judgment. It need hardly be said that a plaintiff acts improperly in making use, for putting undue pressure on his debtor of a process intended to prevent fraudulent conduct on the debtor's part. We are of opinion that such conduct amounts to malice in the sense in which that expression is understood with reference to suits of this kind. Malice has been explained to mean any improper or indirect motive, *i.e.*, some motive other than the one which should properly actuate the party. No hatred or enmity is required. See *Hicks* v. *Faulkner* (1) also *Quartz Hill Gold Mining Company* v. *Eyre* (2). He who believes that there is no ground for an attachment before judgment, on account of any intended fraud on the part of his debtor, must be actuated by some other motive than a desire to further the ends of justice. In *Brown* v. *Hawkes*(3) CANE, J., speaking of suits for malicious prosecution explained malice as "some other motive than a desire to bring to justice a person whom he honestly believes to be guilty." If the object be the levying of blackmail, the coercion of the accused in respect of some unconnected matter the obtaining of compensation or restitution from the accused that would amount to malice as pointed out in the same case. The object of the defendant in this case must clearly be held to be malicious in the light of the explanation above given. Recklessness regarding the truth or otherwise of the allegations would also amount to malice. The defendant must certainly be taken to have outstripped his due limits when he took upon himself to state that the plaintiff was about to alienate his properties with a view to defeat his own debt.

The next contention on behalf of the appellant is that as the plaintiff sustained no actual pecuniary loss, he is not entitled to recover any damages, as in all suits of this kind special damage must be alleged and proved in order to entitle the plaintiff to recover. It is no doubt often stated that special damage is one of the essentials necessary to maintain such an action. But as pointed out by Bowen, LJ., in *Ratcliffe* v. *Evans* (4) the expression "special damage" is apt to mislead and care is required to find

(1) (1878) 8 Q.B.D., 167 ar p. 175.
(2) (1883) 11 Q.B.D., 674 at p. 681.
(3) (1891) 2 Q.B.D., 718.
(4) (1892) 2 Q.B.D., 524.

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out in what particular sense it is used in each context. That very learned Judge points out that the expression has at least three different meanings. In the first place it means actual damage arising out of special circumstances of the case which if properly pleaded, may be super-added to the general damage which the law implies in every breach of contract and other infringement of an absolute right, *i.e.*, the particular damage which results from the particular circumstances of the case. In the second place where no actual and positive right has been disturbed and where it is the damage done that is the wrong, the expression denotes the actual and temporal loss which has in fact occurred and is also called particular damage. In the third place in actions brought for a public nuisance such as the obstruction of a river or a highway. The expression means that actual and particular loss which the plaintiff must allege and prove that he has sustained beyond what is sustained by the general public if his action is to be supported such particular loss being the cause of action. Dealing with the case before him, which related to a statement maliciously published by the defendant about the business of the plaintiff, the learned Judge observes that the allegation of special damage necessary to support the action would vary according to the circumstances of the case, while damage is the gist of such an action it is not always necessary, he observes, to prove the actual loss specially and with certainty and "cases may occur where a general loss of custom is the natural and direct result to the slander, and where it is not possible to specify particular instances of the loss." "In all actions accordingly in the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved." In the *Quartz Hill Gold Mining Company* v. *Eyre* (1) where the action was for maliciously and without reasonable and probable cause, presenting a petition under the Companies Acts to wind up a Trading Company, it was held by the Court of Appeal to be unnecessary to prove actual pecuniary loss to the Company. Brett, M. R., said that all that was necessary was that

(1) (1883) 11 Q.B.D., 674.

the plaintiff company must have sustained some damage "such as the law takes notice of." By the very presentation of the petition the credit and reputation of the company were sure to be affected, Bowen, L.J., observing that "a trading credit was as valuable as his property." When a blow is struck at the credit of a person it would be a pity if the law did not place in the hands of the injured and aggrieved person a means of righting himself and recouping himself as far as can be for the mischief done to him. This principle was adopted by the Madras High Court in *Kumarasamia Pillai* v. *Udayar Nadan* (1) in an action for malicious prosecution see also *Wyatt* v. *Palmer* (2) where the Court of Appeal doubted whether after the decision in *Quartz Hill Gold Mining Company* v. *Eyre* (3) an allegation of special damage could be considered necessary in an action for damages for getting the plaintiff adjudicated a bankrupt. In Halsbury's 'Laws of England', volume X, the law is thus stated where actual damage is necessary to sustain an action. "In these cases the character of the acts themselves which produce the damage, and the circumstances in which these acts are done, regulate the degree of certainty and particularity with which the damage done ought to be stated and proved." See section 639, p. 347. In Clark and Lindsell on Torts, IV Edition, p. 659 the learned authors observe that an action for the abuse of an ordinary civil process differs from an action for malicious prosecution in that the gist of it seems to be 'special damage.' It is not clear whether they mean that pecuniary damage or specific damage to reputation should be proved. If they do, we are with all respect, not prepared to agree with them: and the learned authors cite no English cases in support of such a position. We cannot doubt that the attachment of a respectable man's property before judgment on the ground that he is attempting to alienate his properties with a view to defeat his judgment-creditors must in this country damage his reputation and credit. It is immaterial that it is not proved that they were affected in some specific manner and we are prepared to follow the learned Judges who decided *Kumarasamia Pillai* v. *Udayar Nadan* (1) in applying the rule in *Quartz Hill Gold Mining Company* v. *Eyre* (3) to such a

(1) (1909) I.L.R., 32 Mad., 170. (2) (1899) 2 Q.B., 106.
(3) (1883) 11 Q.B.D., 674.

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suit. We hold therefore that the plaintiff is entitled to a decree for damages in this suit. The Subordinate Judge in assessing the amount reduced the sum awarded by the District Munsif on the ground that the defendant was not a man of large means and that the costs payable to the plaintiff would amount to Rs. 260. He was not right in taking the former of these circumstances into consideration. The District Munsif observes that the defendant did not object to the amount of compensation claimed by the plaintiff in his plaint, viz., Rs. 2,000 nor do we find any objection taken to the amount decreed by the Munsif in the grounds of appeal to the Lower Appellate Court. In all the circumstances of the case we think that the Subordinate Judge was wrong in making a reduction in the sum awarded by the Munsif. We shall therefore modify the decree of the Subordinate Judge by awarding to the plaintiff the sum of Rs. 500 allowed by the District Munsif. The Second Appeal is dismissed with costs and the memorandum of objections is allowed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Spencer.

1911. September 29.

Re VELU NATTAN (PETITIONER), COMPLAINANT.*

Criminal Procedure Code, s. 203—*Dismissal of complaint under* s. 203 *without taking sworn statement of complainant.*

A Presidency Magistrate may dismiss a complaint under section 203 of the Criminal Procedure Code on a police report without examining the complainant. The verification on oath of a complaint before a Magisttate is a sufficient compliance with the provisions of section 203.

The omission to examine will, at the most, amount to an irregularity of the description covered by section 537, Criminal Procedure Code.

PETITION under sections 435 and 439 of Criminal Procedure Code praying the High Court to revise the order of Mr. W. S. Marshall, Third Presidency Magistrate, Georgetown, Madras, in Application No. 2991, dated 10th May 1911.

P. Sambandam for petitioner.

The Crown Prosecutor on behalf of the Government.

ORDER.—It is argued that the Presidency Magistrate had no power to dismiss a complaint under section 203, Criminal

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* Criminal Revision Case No. 333 of 1911.