exemption of agricultural income from income-tax. No other reason is suggested than the equity of exempting from further burden income which had already paid toll to the State in the shape of land revenue. This applies equally whether the land is liable to ryotwari assessment, or whether Government demands have been permanently commuted as in the case of a permanently-settled estate. Logically, the exemption from further burden should apply to both; and it would seem that it ought to cover all sources of income which had been commuted under a permanent settlement.

We would answer the Reference by saying that the income from forests and fisheries in the Singampatti zamindari is not liable to income-tax.

M.H.H.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Venkatasubba Rao.

JOSEPH NICHOLAS (PLAINTIFF), APPELLANT,

v.

SIVARAMA AYYAR AND ANOTHER (DEFENDANTS), RESPONDENTS*

1922. January 10.

Malicious attachment before judgment—Steps taken to effect attachment but not completed—Suit for damages—Payment of amount mentioned in attachment—Defendants causing proceedings to be dropped—Necessity of proving favourable termination of proceedings.

In executing an order for attachment before judgment obtained by the defendant against the plaintiff, the Amin proceeded so far as to take out the plaintiff's cloths from the shelves of his shop and to measure them, when the plaintiff paid

* Appeal Suit No. 67 of 1920.

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the amount mentioned in the warrant, and the defendant caused the warrant to be returned to the Court with an endorsement by him that the claim had been settled.

In a suit for damages for malicious attachment, held (*a*) that the acts done were sufficient to entitle the plaintiff to sue, though there was no completed attachment: *Rama Ayyar* v. *Govinda Pillai*(1) distinguished; and (*b*) that as the defendants themselves had caused the further proceedings in the suit to be dropped, it was not necessary for the plaintiff to show that those proceedings ended in his favour.

APPEAL against the decree of K. A. KRISHNAN, Subordinate Judge of South Malabar at Calicut, in Original Suit No. 9 of 1919.

The facts are stated in the judgment. Plaintiff, whose suit was dismissed by the lower Court, preferred this Appeal to the High Court.

C. Madhavan Nayar, with *A. V. K. Krishna Menon*, for the appellant.—The defendants' conduct in procuring the attachment was malicious. Reference was made to various acts to show malice. Plaintiff had lost his credit and reputation owing to defendants' conduct. Defendants' false affidavit in support of attachment before judgment shows his malice. To entitle the plaintiff to damages, it is not necessary that the attachment should be completely effected. *Rama Ayyar* v. *Govinda Pillai*(1) is wrong in some portions. As the defendants themselves caused the further proceedings to be dropped, the suit could not go on and it is not necessary for the plaintiff to show that the proceedings in the suit terminated in his favour: see *Gilding* v. *Eyre*(2) and *Steward* v. *Gromett*(3). Counsel then referred to the evidence to show what damages should be given.

C. V. Ananthakrishna Ayyar, with *T. S. Anantarama Ayyar*, for the respondents.—There was no malice on the part of the defendants. The circumstances

(1) (1916) I.L.R., 39 Mad., 952. (2) (1861) 10 C.B. (N.S.), 592.
(3) (1859) 7 C.B. (N.S.), 191.

in which the plaintiff was placed, and his previous conduct in dealing with his properties justified the procuring of the attachment. The plaintiff is not entitled to any damages, as the attachment was not completed and as he has not shown that the suit ended in his favour. Reference was made to *Rama Ayyar* v. *Govinda Pillai*(1). Plaintiff had no credit in the market and any damage to him was not owing to the defendants' conduct. The evidence shows that plaintiff was not entitled to any damages.

The Court delivered the following JUDGMENT :

This Appeal is against the lower Court's dismissal of the plaintiff's suit for damages in connexion with the defendants' application for attachment before judgment. The facts are that the attachment before judgment was ordered by the District Munsif of Calicut on 10th February 1919 and that first defendant accompanied by an Amin proceeded to the plaintiff's shop. The lower Court has dealt at considerable length with what happened there. It is not necessary to repeat its observations on the evidence. We need only say that there is a preponderence of evidence, including that of an European sergeant, whom we have no reason for distrusting, to the effect that the Amin proceeded so far as to take out the plaintiff's cloths from the shelves of his shop and began to measure them, when the plaintiff who had heard by then of what had happened paid the amount of the claim. We therefore reject the defendants' case on this point, that nothing was done towards making the attachment at all. It is in respect of this action of the defendants and the Amin at their instance that plaintiff claims damages.

(1) (1916) I.L.R., 39 Mad., 952.

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No doubt, there was not, in our opinion, a completed attachment by seizure of any of the plaintiff's property; but that is not material. For the claim, as stated in the plaint, is generally in respect of the acts done and not expressly or exclusively in respect of a completed attachment; and there is in our opinion no doubt that the plaintiff may be entitled to compensation, even though the attachment was not completed, if, notwithstanding that he sustained injury by what was actually done. No authority has been adduced by the defendants to show that a completed attachment is necessary. In *Rama Ayyar* v. *Govinda Pillai*(1) it was held that a mere procuring of an order for attachment before judgment did not afford a cause of action for damages. Without expressing any opinion as to the correctness of certain parts of that decision, we can distinguish it from the facts now before us on the ground that they included several acts of the defendants and the Amin, by which injury to the plaintiff has, as we shall show, been established.

That being our conclusion as to the actual occurrence in respect of which the plaintiff claims, we have now to see whether he has established what according to the authorities he must establish, that the defendants acted maliciously and without reasonable and probable cause. Certain heads of proof of this were attempted at the trial; for instance, the plaintiff's refusal to sell to the defendants a pony and jutka, the institution by the defendants of the suit in which this attachment was made in a Court which would not ordinarily exercise jurisdiction over the plaintiff and lastly the fact that the plaintiff had borrowed from Nedungadi Bank at 12 per cent interest instead of continuing to borrow from the defendants as he had done in the past. In this Court

(1) (1916) I.L.R., 39 Mad., 952.

the pony transaction has not been relied on. It is not shown that the defendants' choice of the Court in which they brought their suit was in any way unreasonable. The plaintiff's resort to the Nedungadi Bank instead of to the defendants for a loan is explained by the admitted fact that the defendants had refused to advance him more than they had already done. In these circumstances, these items of evidence are useless to establish malice.

This part of the plaintiff's case is however far better supported with reference to Exhibit XV, filed by the first defendant in order to obtain the conditional attachment with which we are concerned, since the allegations in it are in our opinion not merely unfounded, but such as he could not have possibly supposed himself entitled to make. The absence of reasonable and probable cause for taking legal action in execution or otherwise is, as was decided by the Court of Appeal, in *Brown* v. *Hawkes*(1), some evidence from which malice may be inferred; and we may say at once that in this case with reference to the surrounding circumstances we are prepared to infer it therefrom. The defendants were proceeding under Order XXXVIII, rule 5, Civil Procedure Code, and under that provision they had to satisfy the Court that the defendant with intent to obstruct or delay the execution of the decree that might be passed against him was about to dispose of the whole or any part of his property. That being the only matter which they could legally present to the consideration of the Court to obtain the order which they desired, it is useless for Mr. Anantakrishna Ayyar on their behalf to represent to us that there were other facts available to them on which their application might have been founded, and as to the truth of which there can be no doubt. We

(1) [1891] 2 Q.B., 718.

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must confine ourselves to what they in fact had to submit to the Court. We find in paragraph 2 of Exhibit XV, that the first defendant said

> "that the defendant becoming aware of the fact that the aforesaid plaint was being prepared, with the intention of defrauding the creditors executed (to amend the Court translation in accordance with the agreement of the practitioners before us) documents in respect of the properties belonging to him in the name of his wife and others and borrowed large amounts from the Nedungadi Bank on mortgage of his properties. If the defendant receives money and appropriates the same and alienates the properties as aforesaid, there will be no remedy whatever to realize the amount in respect of the decree that may be passed against him."

The substantial allegation here, on which the Court was asked to act, was that the plaintiff on becoming aware of the fact that the plaint was being prepared executed documents in respect of the properties belonging to him in the name of his wife. The only matter relied on by Mr. Anantakrishna Ayyar as in any degree supporting this statement, as it stands, is that the plaintiff had in 1916 purchased some property in his wife's name and that he had subsequently paid for improvements to it. The only admissible evidence of payment for improvements to the property is given by plaintiff himself, other evidence being admittedly hearsay. The sixth witness for the defendants no doubt speaks to the purchase of property by the plaintiff in his wife's name, and it may be true that he did so or that even though he purchased the property in his wife's name, it was intended to be at his own disposal. That, however, is absolutely immaterial, because the charge, in consequence of which the Court was asked to pass the order of attachment, was that he had done this in consequence of his knowledge that the plaint in the suit was being prepared. The plaint in the suit was according to Exhibit II, and that is the earliest

evidence we have on the point, being prepared on 8th June 1918; that is long after the only purchase in the plaintiff's wife's name, of which we have any information. In these circumstances, there is nothing to justify the allegation in Exhibit XV and it was, as the plaintiff must have known, clearly untrue. There is also a statement in Exhibit XV, that plaintiff in consequence of his knowledge of the preparation of the plaint executed documents in respect of his properties in the names of others also, although there is no evidence whatever and no sort of attempt has been made to justify this. In these circumstances, our finding must be that the affidavit on which the defendants obtained the order of attachment was not merely given in a material particular without reasonable or probable cause but was also known to him to be without any justification at all.

As throwing light on the defendants' conduct, there are further their relations with the plaintiff. The defendants appear to have lent money to the plaintiff for some time and to have been quite unsuccessful in obtaining repayment thereof. It is unnecessary to go through the details which appear in the oral evidence and from correspondence. It is clear that the plaintiff was living from hand to mouth, and not paying debts until he had no alternative but to do so, and that the defendants had shown very considerable forbearance. The crisis was evidently reached just before the suit was brought, because the plaintiff succeeded in borrowing from the Nedungadi Bank already referred to at 12 per cent the sum of Rs. 15,000 and he even promised to use a portion of this in repaying the defendants. The situation then was that the defendants, having no alternative, brought their suit and that they knew that there was in the plaintiff's hands a means by which they could get satisfaction of their debt, if they could only secure it. It is

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a fair presumption, which there is nothing to rebut, that the defendants actually did what they did in order to secure for the satisfaction of their own debt the money of which the plaintiff had become possessed. Taking that as their motive, and having regard also to the unjustifiable character of the allegations in the affidavit, we have no hesitation in finding, differing on this point from the lower Court, that they acted not merely without reasonable and probable cause for setting the law in motion, but also maliciously.

Before dealing with the question of damages, we consider an argument advanced by Mr. Anantakrishna Ayyar, that the plaintiff had no cause of action, because he did not allege in his plaint that the proceeding, by which he was aggrieved, had ended in his favour and because it never in fact did so end. The facts are that the proceeding or the application for and the lower Court's conditional order of attachment under Order XXXVIII, rule 5, came to an end, as the plaintiff paid the amount of the defendants' claim and the warrant was returned to the Court with the endorsement by the first defendant that "the matter of the plaint having now been settled, there is no necessity for attachment." It does not appear from the record what happened to the suit, but, as the amount of the defendants had been paid, it either has been or should have been dismissed. As regards the failure to mention the result of the proceedings in the plaint, it need only be said that no objection was taken with reference to it at the trial and that, if such an objection were pressed before us in Appeal, we should meet it by allowing an amendment. As regards the more substantial objection that the proceedings are not shown to have terminated in plaintiff's favour and that they could not be regarded as having so terminated so long as the order for conditional attachment was not discharged at his instance

or otherwise, we observe first that it would be quite useless for him to obtain such a discharge when his creditor himself had informed the Court, as he did by the endorsement on Exhibit XVI and elsewhere, that the attachment need not be proceeded with, because the matter had been settled. On the broad question whether the termination of the proceedings in the plaintiff's favour is essential, there is no doubt abundant authority that it is so; but such authority is applicable only to cases in which a distinct termination in favour of one party or other is possible, and not to a case such as that before us, in which the proceedings cannot end by their nature in any judicial disposal and in fact have been terminated by an act of the first defendant himself. In support of this distinction we were referred to *Gilding* v. *Eyre*(1), and *Steward* v. *Gromett*(2). In the former of these cases the facts were very similar to the present and the Court dealt particularly with one feature of the case, the abandonment of the proceedings by the creditor in consequence of the payment which the debtor-plaintiff made in order to obtain his release from arrest, holding that nothing arose in favour of the defendant from it. In these circumstances, the argument founded on the absence of the termination of the proceedings in the plaintiff's favour must fail.

We have now to settle what damages we shall award. Reference has already been made to the state of the plaintiff's credit and we need not deal with it in greater detail. It is clear that he found it most difficult to obtain funds at any reasonable rate of interest, that there had been other claims against him in the Courts, that he had lost his credit with the defendants at least and that it was possible for him to borrow elsewhere only at 12 per cent. There is practically no evidence of value as to any

(1) (1861) 10 C.B. (N.S.), 592. (2) (1859) 7 C.B. (N.S.), 191.

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detriment to his credit or position generally, owing to the defendants' action. He himself says that customers did not resort to his shop; but it is not possible to connect the falling off in his retail cloth trade with the state of his credit. He says again and has adduced some evidence that the subscribers to a Chit Fund which he was conducting began to default after this occurrence. The Chit Fund has five hundred subscribers, and it is not in our experience unusual for a proportion of the subscribers to such Chit Funds to default. It is not shown by any evidence which we can accept that the default of some fifty subscribers in the present case is due to what happened on 10th February 1919. If it had been so, it should have been easy for the plaintiff to adduce much better evidence by calling some of the defaulting subscribers or producing accounts of the Chit, and he has not done either. Lastly, there is the evidence of an apparently respectable gentleman, fifth witness for the plaintiff that the plaintiff's credit had suffered. He, however, gave no details and his general assurances do not seem to us of any affirmative value. In these circumstances we are unable to accept the plaintiff's claim for the large sum of Rs. 5,250 as damages. At the same time we are not prepared to grant only contemptuous damages. The facts are that the plaintiff was put to annoyance, and no doubt to some extent to dishonour, by this public employment of coercive processes without legitimate necessity and without justification. We think that, in the circumstances, Rs. 50 will be a sufficient compensation for such mental pain and loss of reputation as he may have sustained. We therefore allow the Appeal, set aside the lower Court's decree and grant the plaintiff a decree for Rs. 50 with costs thereon throughout. The plaintiff will pay the defendants their costs throughout, not on the whole amount in respect of which the suit was filed, but in the circumstances of the case on Rs. 1,500.

N.R.