APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Srinivasa Ayyangar.

1927, November 21.

RAMA ROW AND ANOTHER (PLAINTIFFS 2 AND 3), APPELLANTS,

v.

SOMASUNDARAM ASARY AND OTHERS (DEFENDANTS), RESPONDENTS.*

Suit for damages—Action on the case—Action for trespass—Order for injunction obtained by defendant against plaintiff in a previous suit—Suit dismissed—Subsequent suit by the plaintiff against defendant for damages in respect of the injunction—No proof of malice or want of reasonable and probable cause or abuse of process of Court—Plaintiff's right to damages for trespass.

Where the plaintiff sued for damages against the defendant, who had obtained an order of injunction prohibiting the plaintiff from building on his land in a previous suit eventually dismissed, but the plaintiff failed to prove malice and want of reasonable and probable cause on the part of the defendant in obtaining the injunction;

Held, that apart from an "action on the case," for which malice and want of reasonable and probable cause must be proved, the plaintiff has no separate cause of action for trespass.

Norendra v. *Bhusan*, (1920) 31 C.L.J., 495 (F.B.), and *Bhut Nath* v. *Chandra Binode*, (1912) 16 C.L.J., 34, dissented from; *Nanjappa Chettiar* v. *Ganapathy Goundan*, (1912) I.L.R., 35 Mad., 598, followed.

APPEAL against the decreee of the Additional Subordinate Judge of Rāmnād in Appeal Suit No. 2 of 1924 preferred against the decree of the District Munsif of Paramakudi, in Original Suit No. 820 of 1925.

* Second Appeal No. 58 of 1925.

The material facts appear from the judgment.

T. L. Venkatarama Ayyar and *K. Sankara Sastri* for appellants.

A. V. Narayanasami for respondents.

The JUDGMENT of the Court was delivered by

WALLACE, J.

WALLACE, J.—The original suit in this case was for damages for maliciously procuring an injunction in a suit on title. In a suit by the defendants against the plaintiffs for a declaration of their title to a strip of ground and for an injunction restraining the plaintiffs from erecting any construction thereon, the defendants obtained an *ad interim* injunction which remained in force from 11th January 1917 till 31st December 1918. The title to the strip of ground was eventually found in favour of the plaintiffs. Plaintiffs on this filed the present suit.

The first Court found the plaintiffs were entitled to damages. The lower Appellate Court dismissed the suit. The main reason given by the lower Appellate Court was that the plaintiffs had failed to prove want of reasonable and probable cause and malice. Plaintiffs here in second appeal do not contest that finding, which is a finding of fact, but contend that, apart from their cause of action on the abuse of the process of the Court, to maintain which they admit they are bound to prove want of reasonable and probable cause and malice, they have a separate cause of action in the nature of a trespass on the ground of defendant's interference with their lawful rights to build on their own property, and that the lower Appellate Court ought to have given them a decree on that alternative cause of action, it being unnecessary for such a cause of action to prove want of reasonable and probable cause or malice.

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Thus the question argued before us is whether apart from the "action on the case" a separate action for trespass will lie. On first impression one would have decided that such a suit could not lie since the trespass, if there is a trespass, is not by the party but by the Court, and when the Court after hearing both parties passed an order which involved an interference with the legitimate rights of a party he has no cause for damages unless the interference of the Court was obtained by an abuse of its process, actuated by malice and involving want of reasonable and probable cause, in which case the action would lie "on the case" and not on the trespass. But our attention has been called to a Full Bench decision of five Judges in the Calcutta High Court reported in *Norendra* v. *Bhusan*(1), which appears to support a bench ruling of that Court reported in *Bhut Nath* v. *Chandra Binode*(2). In the latter case it was held that an action lies on the footing of trespass on an injunction wrongfully issued by a Court against the party who moved the Court for the injunction, the injunction not being without jurisdiction and there being no proof of malice or want of reasonable and probable cause, the reasoning being that the obtaining of such an injunction was in the nature of a trespass by the mover on the rights of the party restrained. The case before the Full Bench was a case of wrongful attachment of the plaintiff's goods, and before the referring bench the case in *Bhut Nath* v. *Chandra Binode*(2), was strongly relied upon. The referring Judges in the Full Bench case both doubted the correctness of the *Bhut Nath* v. *Chandra Binode*(2) case, but the Full Bench in a very brief judgment appears to approve or does not disapprove that set of decisions which lay down "that a

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(1) (1920) 31 C.L.J., 495. (2) (1912) 16 C.L.J., 34.

person who unlawfully interferes with the exercise of the property rights of another does an act in the nature of a trespass of property and is liable for damages in an action for trespass", and puts forward the case of *Bhut Nath* v. *Chandra Binode*(1), as an illustration of that class of decisions. The Full Bench referred the case back to the Division Bench. The Division Bench ruling is reported in *Bhusan* v. *Morendra*(2), and that bench followed *Bhut Nath* v. *Chandra Binode*(1), and held that an action for trespass lay. A ruling of this Court which has been relied on by the respondents herein, *Nanjappa Chettiar* v. *Ganapathi Goundan*(3), was referred to before the Division Bench and was put on one side as it was "not regarded as a case of trespass at all".

Now the authority of the Full Bench of Calcutta is of course of great weight, but we are not precluded here from considering for ourselves the correctness of that decision. As we have said, it contented itself merely with refusing to say that *Bhut Nath* v. *Chandra Binode*(1), was wrong, although invited to do so. We have therefore to consider the correctness of the decision in *Bhut Nath* v. *Chandra Binode*(1). It relies, chiefly on an English case *Clissold* v. *Cratchley*(4). That was a case where a writ of *fi fa.* had been taken out by a solicitor to direct the Sheriff to levy execution on the plaintiff's goods, after the decree under which execution was taken out had been satisfied, and therefore after the judgment had come to an end. The learned Judges there held that, the judgment being at an end, the writ was without jurisdiction and therefore was null and void, and that the defendant therefore could not justify his interference by pleading any valid order of

(1) (1912) 16 C.L.J., 34.
(2) (1920) 32 C.L.J., 236.
(3) (1912) I.L.R., 35 Mad., 598.
(4) [1910] 2 K.B., 244.

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the Court, and therefore he was in the position of a trespasser liable in damages as such. The principle is that where the interference is by way of a valid or regular order of the Court the only action which will lie is one "on the case", but when it is by means of a void order the proper action is one of trespass. It appears to us therefore that this decision is no authority for the position taken in *Bhut Nath* v. *Chandra Binode*(1).

The exact position set out in *Clissold* v. *Cratchley*(2), was adopted by the Calcutta High Court itself in an earlier case in *Bishun Singh* v. *A. W. N. Wyatt*(3). We think the principle which we have deduced from *Clissold* v. *Cratchley*(2), is the correct one. It has been also laid down by LUSH, J. in *Smith* v. *Sidney*(4).

"The authorities distinguish between an act of Court and an act of parties, and it is only when the proceedings are set aside on the latter ground that the party is made a wrong-doer."

It surely would not be right to hold in effect that every interference by a Court with the person or property of a party at the instance of another is *prima facie* a trespass by that other, unless that other succeeds in proving that he had justification in law. There seems no more reasonable ground for holding this than for holding that any unsuccessful suit brought against a party is a cause of action for damages, and that proposition has been repeatedly repudiated by Courts of law, see *Norendra* v. *Bhusan*(5), *Bishun Singh* v. *A. W. N. Wyatt*(3), already quoted, and the remarks of BOWEN L.J. quoted, at page 639 in *Arjun Singh* v. *Musammat Parbati*(6).

(1) (1912) 16 C.L.J., 34.
(2) [1910] 2 K.B., 244.
(3) (1911) 14 C.L.J., 515.
(4) (1869) 5 Q B., 203 at 206.
(5) (1920) 31 C.L.J., 405 (F.B.)
(6) (1922) I.L.R., 44 All., 687.

The ruling of this Court in *Nanjappa Chettiar* v. *Ganapathy Goundan*(1), is in point. The learned Judges lay down at page 602 as a 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 reaso able and probable cause:"

that is, the only action maintainable is an action "on the case". No attempt to found an action on trespass appears to have been put forward in that case, nor has it, as a matter of fact, been put forward as an alternative in the plaint in the present case. We are of opinion therefore that no action lies here on trespass, and that the lower Court was right. We therefore dismiss this appeal with costs.

K.R.

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(1) (1912) 35 Mad., 598.