ORIGINAL SIDE.

Before Mr. Justice Beasley.

1924

Feb. 26.

K. A. ASSAN MAHOMED
v.
S. M. KADERSA ROWTHER.*

Attachment of goods of a third party—Reasonable and probable cause to believe them to belong to the party sued—Suit for damages at the instance of the owner for wrongful attachment—Malice not a necessary ingredient of the tort.

A having brought a suit against B and obtained an order for the attachment before judgment of goods belonging to C, *held*, that this was a case in which a trespass to the goods of C having been committed by A, C had a cause of action, against A and was entitled to recover from him damages without proving either an absence of reasonable and probable cause or malice in fact.

Damodhar Tuljaram v. *Lallu Khusaldas*, (1871) 8 Bom. H.C.R., 177; *Kissorimohun Roy and Others* v. *Harsukh Das*, (1889) 17 Cal., 436; *Mussamat Subjan Bibi* v. *Sheik Sariatulla*, (1869) 3 Ben. L.R., 414—*followed*.

Joseph Nicholas v. *Sivaram Ayyar*, (1922) 45 Mad., 527; *Nanjappa Chettiar* v. *Ganapathi Gounden*, (1912) 35 Mad., 598; *Palani Kumarasamia Pillai and Others* v. *Udaya Nadan and Others*, (1906) 32 Mad., 170—*distinguished*.

Parker—for the Plaintiff.

Jeejeebhoy—for the Defendant.

BEASLEY, J.—This is a suit to recover Rs. 2,600 damages caused to the plaintiff by the alleged wrongful attachment of the plaintiff's goods.

According to the plaint, in Civil Regular No. 4185 of 1922 of the Court of Small Causes, Rangoon, the defendant in the suit filed a suit, on July 3rd, 1922, against one Mohamed Abubacker and in that suit attached before judgment all the goods of the plaintiff which were in a shop at No. 83 Fraser Street, Rangoon. The plaintiff applied for the removal of the attachment and the attachment was removed on the 15th of August 1922. On the 17th of August 1922 the defendant filed a suit in this Court against the plaintiff

* Civil Regular No. 352 of 1923.

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and against Mohamed Abubacker for a declaration that the said goods were the absolute property of Mohamed Abubacker and that the plaintiff had no right title or interest in them and that the defendant in this suit was entitled to attach and sell the goods in execution of the decree obtained by him in the Small Causes Court.

At the time of filing this suit the defendant obtained an order from this Court attaching the goods before judgment and subsequently on 28th August 1922 this Court removed the attachment and the released goods were then handed over to the plaintiff. These goods had, however, on the 19th of August 1922, in accordance with the order of the Court, been seized by the Bailiff and were removed from 83 Fraser Street, and the plaintiff claims that he suffered damages by this wrongful and malicious attachment of his goods. The defendant's suit for a declaration before mentioned was dismissed by this Court with costs. The particulars of the damage alleged by the plaintiff to have been suffered by him, are as follows :—

(1) Damage to the goods done by seizure and removal	Rs. 1,000
(2) Loss of plantiff's business ...	,, 600
(3) Loss of business reputation and credit	,, 1,000
Total ...	Rs. 2,600

The defendant in his written statement admits that the Bailiff took the goods away from the shop and says that he does not know what was done with the shop and he is not concerned with that. He further denies that the plaintiff has suffered any damage by reason of the attachment of the goods and submits that he acted *bonâ fide* and not maliciously in attaching the goods which he had reason

to believe belonged to his judgment-debtor. The following issues were framed :—

(1) Did the defendant maliciously and wrongfully attach plaintiff's goods in shop No. 83 Fraser Street?

(2) Is the plaintiff entitled to bring this suit in his own name? (This issue however was abandoned by the defendant at a later stage).

(3) What damages, if any, has the plaintiff suffered?

In the course of his argument at the close of the case Mr. Jeejeebhoy, on behalf of the defendant, raised the point that there was not sufficient evidence that the defendant had without reasonable and probable cause and with malice wrongfully attached the goods, and argued that in order to support such a claim as is put forward in this suit the plaintiff must prove that there was an absence of reasonable and probable cause on the part of the defendant in attaching the goods, and that he did so with malice, *i.e.*, from an improper motive. Although this point has been raised in the written statement I was not asked to frame any issue with regard to it, but I think I can properly deal with it in considering the first issue.

Mr. Patker for the plaintiff, on the other hand contended that even assuming there was no proof of absence of reasonable and probable cause and malice, the plaintiff would still be entitled to recover damages as the foundation for such a claim as this did not necessarily rest upon such an allegation. I propose first of all, to deal with the question as to whether the defendant acted without reasonable and probable cause and with malice. The plaintiff's contention on this point is, firstly, that, according to the evidence of both the plaintiff and the defendant, they were not

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on friendly terms before the attachment; and secondly, that malice may be inferred from the fact that immediately after the first attachment, that is to say, the attachment in the Small Causes Court had been removed, the defendant filed a suit in the High Court for the declaration already referred to and had the plaintiff's goods again attached before judgment; thirdly, that it was at the defendant's instigation that the goods were removed from the shop at 83 Fraser Street, to the High Court, and fourthly, that the defendant was present when these goods were removed and by his active encouragement to the Bailiff of the High Court's staff caused them to be removed in such a way that unnecessary damage was occasioned.

With regard to the evidence as to plaintiff and defendant being on bad terms, in my view, although it is quite clear that there was bad feeling between the parties this would not of itself justify me in finding that the defendant attached the plaintiff's goods on that account unless this evidence is coupled with evidence of absence of reasonable and probable cause. If, however, the defendant acted without reasonable and probable cause the bad feeling which the defendant had towards the plaintiff would supply the improper motive. It therefore remains to be seen whether there was an absence of reasonable and probable cause and this also is a necessary point to be considered in connection with the defendant's second point that malice may be inferred from the fact that immediately after the first attachment had been made the defendant, for the second time, attached the plaintiff's goods. The facts of importance with regard to the reasonable and probable cause for the second attachment seems to me to be that Abubacker was the tenant of the shop No. 83 Fraser Street, and

hired that shop as a sub-tenant from Abdul Kader. He was, therefore, *primâ facie* the tenant of the shop in which the goods were, and he was also carrying on the business there, because the evidence does not stop at merely showing him to be the tenant of the shop, as, according to the evidence of Kasim, one of the plaintiff's witnesses, Abubacker and a youth were conducting the business in No. 83 Fraser Street. The youth was subsequently identified as Nina Mohamed who was a partner with Abubacker and the plaintiff in 83, Fraser Street in the sense that he received a 4½-anna share of the profits. Also, according to the witness, Mohamed Saleh, Abubacker was in the shop when the summons with regard to the first attachment was brought to him and with this evidence the defendant agrees because, he says he was present and saw him there but that Abubacker ran away. Under these circumstances there was, in my view, some ground for the defendant's believing that Abubacker, even if he were not the owner of whole of the goods, at least had some share in them, and it is quite clear that to a certain extent, at any rate, Abubacker was in partnership with the plaintiff although the evidence is that he was merely a partner in profits of the business having, like Nina Mohamed, a 4½-anna share of the profits. It is true that the attachment was removed by the Small Causes Court and that the defendant nevertheless caused the goods to be attached but it does not follow that because the defendant was erroneous in his belief that notwithstanding the goods did belong to Abubacker or that he had interest in them, that necessarily means that there was no reasonable and probable cause for his belief. His story is that he lent Abubacker the money sued for in the Small Causes Court in order that he (Abubacker) might purchase goods and having known

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him apparently carrying on business in 83, Fraser Street selling goods and finding him there at the time of the attachment, it is in my view, impossible to say that the plaintiff has proved that there was an absence of reasonable and probable cause for the defendant believing Abubacker to have an interest in the goods.

There is one other matter in connection with this which I propose to mention and that is that the goods were attached by order of the Small Causes Court on the 3rd of July 1922 and it transpires that, only a few days before this the partnership between the plaintiff and Abubacker had been dissolved, and it is not unreasonable for a party who finds, when he has attached the goods, that the person whose goods he has obtained an order to attach has ceased to be a partner in the business carried on in connection with those goods only a few days before, to be somewhat suspicious with regard to the genuineness of the dissolution of the partnership. It now turns out that Abubacker had no interest in the attached goods. That matter has been decided in the Civil Regular suit in this Court, but, erroneous though the defendant's opinion as to the ownership of the goods may have been I am not satisfied that he had not some reasonable cause for believing them to be the goods of Abubacker or believing Abubacker to have some interest in those goods.

Upon the question of malice again the defendant relied on the further point that it was at the defendant's instigation that these goods were removed to the High Court instead of being allowed to remain at 83, Fraser Street. In my view, on the evidence it was not at the instigation of the defendant at all that the goods were removed from 83, Fraser Street.

The Bailiff of this Court has stated that it was by his orders that they were removed and that they were removed because of the smallness of the shop and because he thought that the goods were likely to suffer where they were owing to the heavy rain the shop being merely a wayside stall. The evidence completely negatives even a request by the defendant for the removal of the goods.

Lastly, I come to the fourth point urged by the plaintiff and that is that the defendant was present when the goods were removed and through his actions caused them to be unnecssarily damaged.

The evidence with regard to the defendant's presence when the goods were removed is conflicting.

The plaintiff says that the defendant was there and Mr. Vertannes, a Barrister of this Court, also says that he was there. The circumstances under which Mr. Vertannes went to the shop are as follows :—

He says that the plaintiff complained to him about the manner of removal of the goods and that he accordingly went to 83, Fraser Street to remonstrate with the Bailiff's staff. When he got there, he says that he remonstrated, and that the defendant was there and he gathered from his conduct that it was due to the defendant that the goods were being removed in the manner he describes. He says that all the goods were being thrown on to a blanket on the floor and that the goods, which were in cardboard boxes, were taken out and the boxes were thrown on the floor. The goods in fact were all jumbled together.

The Bailiff, however, says that when he went to 83, Fraser Street the defendant was not there.

Maung Lun Maung, who is on the staff of the Bailiff of the Court and was there during the whole of the time when the goods were being

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removed, says that the defendant was not there at any time. The defendant himself says that he was not there. He was busy with Court matters. Under the circumstances, I think, that Mr. Vartannes was mistaken and that he mistook someone else who was there for the defendant. It must be remembered that Mr. Vartannes had not seen the defendant either before this occasion or since until he saw him in the Court. I have come to the conclusion that the plaintiff's allegation that the defendant was there and deliberately causing as much damage to the goods as he possibly could is not supported by the evidence. In my view, therefore, the plaintiff has not shown that the defendant acted without reasonble and probable cause and with malice.

The next point to be considered is whether the plaintiff having been unable to show that the attachment, although wrongful, was without reasonable and probable cause and with malice, the plaintiff is entitled to succeed in his claim. Numerous authorities were quoted to show, on the one hand, that such a claim is maintainable without such an allegation and, on the other hand, that it is necessary, in order to recover damages, that there should be an absence of reasonable and probable cause and malice.

The first case to which I was referred is the case of *Damodhar Tuljaram* v. *Lallu Khusaldas* (1), the headnote of which is "A judgment-creditor who attaches property which does not belong to his judgment-debtor commits a trespass for which he is responsible in damages, even though he may have acted without malice and mistakenly." It will be noticed that this is a case of attachment, like the present one, of property of a third person.

(1) (1871) 8 Bom. H.C.R., 177

The next case to which I refer is that of *Mussamat Subjan Bibi* v. *Sheikh Sariatulla* (2). In that case the defendant had caused certain cattle of the plaintiffs to be seized and taken in execution of a decree against his judgment-debtor, and it was held that the defendant was liable to pay the plaintiff's damages sustained by them in consequence of the seizure and detention of the cattle. In this case there was no suggestion of malice at all. Jackson, J., in his judgment on page 420, says: "There is no allegation of malice in the plaint. The attachment was a wrongful act although it may have been made *bonâ fide*. The defendant has not attempted in any way to justify it." This case also, it will be noticed is a case where the property of a third party and not a party to a suit was attached.

Then there were three reported cases in the Madras High Court to which I was referred in support of the defendant's contention that it is necessary to prove absence of reasonable and probable cause and malice. The first of them is *Palani Kumarasamia Pillai and one* v. *Udayar Nadan and others* (3). The headnote of that case reads as follows:—"An order of attachment under section 483 of the Code of Civil Procedure, found by the Court under section 491, to have been made on insufficient grounds must necessarily cause damage to the credit and reputation of the party against whom the order is made; and such party is entitled, in a suit for damages, to general damages for loss of credit and reputation where the attachment is obtained maliciously and without reasonable and probable cause."

In this case the suit for money was brought against the plaintiff by the defendant who, on certain allegations, applied for and obtained an order

(2) (1869) 3 Ben. L.R., 413. (3) (1909) 32 Mad., 170

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for attachment before judgment of certain goods belonging to the plaintiff. On notice of attachment being given, the plaintiff appeared and showed cause and the attachment was withdrawn. The lower appellate Court found on the facts that the 1st defendant had acted maliciously and without reasonable and probable cause and it was held by the High Court that general damages were recoverable. The difference between this case and the other cases already referred to is, that the suit in respect of which the attachment was obtained was one between the plaintiff and the defendant, in the suit claiming damages.

The next case is *Nanjappa Chettiar* v. *Ganapathi Gounden* (4). This was a suit for damages for attachment before judgment and it was held that the plaintiff is bound to prove want of reasonable and probable cause for applying for attachment and malice in fact. In this case also the suit in which the goods were attached was a suit instituted by the defendant against the plaintiff.

The next case is *Joseph Nicholas* v. *Sivarama Ayyar* (5). In this case, as in the other two Madras cases, the defendant had attached the goods of the plaintiff before judgment in a suit instituted against the plaintiff. The allegations were that the attachment was malicious and damages were awarded and on appeal the plaintiff's suit in the lower Court was dismissed. But, in the Appellate Court, the appeal was allowed and the lower Court's decree was set aside and the Appellate Court found that the defendant had acted not only without reasonable and probable cause but also maliciously.

The last case to which I propose to refer is a decision of the Privy Council in *Kissorimohun Roy*

(4) (1912) 35 Mad., 598. (5) (1922) 45 Mad., 527

and others v. *Harsukh Das* (6). In that case the plaintiff having taken, without success, summary proceedings under section 278 of the Civil Procedure Code to get the release of goods which have been attached in a suit to which he was not a party afterwards in a suit brought by him in accordance with section 283, established his right of property in the goods and it was held that (*a*) in order to entitle him to the full indemnity for the wrongful attachment he was not bound to allege and prove that the defendants had resisted his previous application under section 278 maliciously, or without probable cause; and that (*b*) the goods having been sold under the Court's order, the difference in market value of the goods at the time of their attachment and their price when they were sold, the selling prices having fallen intermediately, must be added to the damages.

On page 442, in the judgment of Lord Watson, he states the law to be as follows :—"The appellants argued that to condemn them in payment of the market value of the jute on the 28th November 1883 was, in reality, to make them responsible for delay occasioned by litigation, and that the respondent could not recover the difference between that value and the depreciated price arising from such delay, unless he alleged and proved that they had litigated maliciously and without probable cause. That is a rule which obtains between the parties to a suit when the defendant suffers loss through its institution and dependence It does not apply to proceedings taken by the injured party, after the wrong is done, in order to obtain redress. But, in this case, there has been no action and no proceedings instituted by the appellants against the respondent Harsukh Das. The summary proceeding under

(6) (1889) 17 Cal., 436 (P.C.).

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section 278 was taken by the respondent for the purpose of getting the release of an attachment issued in a suit to which he was not a party; and it does not appear to their Lordships that, in order to entitle him to recover full indemnity for the wrongful attachment of his goods, the respondent is bound to allege and proved that the appellants resisted his application maliciously, and without probable cause."

It seems to me that the distinction between the Madras cases and the other cases, and applying the judgment in the Privy Council case just referred to, lies in that in the Madras cases the plaintiff in the suit for damages for wrongful attachment was a party to the suit in which the goods were wrongfully attached and that in the other cases the plaintiff in the suit for damages was not a party to the suit in which the goods were attached. In my view, this is a very important distinction.

In England, the cases which are analogous to the cases in which a claim is made for damages for wrongful attachment of goods where the suit for damage is between the same parties as in the proceedings giving rise to the suit for damages are actions to recover damages for malicious prosecution or for wrongfully presenting a petition to wind up a trading company and cases of that description. Those are all cases in which the person claiming damages was the person who was wrongfully prosecuted or wrongfully had a petition in Bankruptcy presented against him or a company who has a petition to wind it up wrongfully presented against it. In the former case, it is necessary to prove that the prosecution was undertaken maliciously and without reasonable and probable cause, and similarly in the case of a company which has a petition to wind it up presented

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against it, that the petition was presented maliciously and without reasonable and probable cause.

This case, however, is a very different case, because the plaintiff was not a party to the suit against Abubackar and his goods have been wrongfully attached, and it seems to me that following the case of *Damodhar Tuljaram* v. *Lallu Khusaldas* (1), that this is a case in which a trespass to the goods of the plaintiff has been committed and that a suit will lie even although the attachment may have been made in good faith but wrongfully. Under these circumstances, I hold that the plaintiff is entitled to recover damages although he has not proved an absence of reasonable and probable cause or malice in fact.

APPELLATE CIVIL.

Before Sir Sydney Robinson, Kt., Chief Justice and Mr. Justice May Oung.

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Mar. 3.

M. A. RAEBURN & COMPANY AND FIVE.
v.
ZOLLIKOFER & COMPANY.*

Insolvency—Fraudulent preference of a creditor—Dominant intention in the mind of the insolvent—Motive of the insolvent to benefit himself.

Held, that an act done by the insolvent, not as a free agent but under pressure, or as a purely voluntary act in order either to protect the insolvent from legal proceedings or to gain for him some immediate advantage, would not be a fraudulent preference, although it might have the result of preferring one creditor at the expense of the others.

Held also, that what the Court has to ascertain is what was the dominant intention in the mind of the insolvent at the time the act was done and that it is for the other creditors to establish that the principal object of the transaction was intended to be fraudulent preference.

Butcher v. *Stead,* (1875) L.J., 44 C. & B., 129 ; *Sharp* v. *Jackson,* (1899) L.R., A.C., 419 ; *In re Lake,* (1901) L.R. 1 K.B.D., 710 ; *Nripendra Nath Sahu* v. *Ashutosh Ghose,* (1916) 43 Cal., 640—*followed.*

Vertannes—for the Appellants.

Paget—for the Respondents.

* Civil First Appeal No. 267 of 1922.