

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

NAM KEE v. AH FONG.*

1934

Dec. 6.

Actionable wrong—Inducer's liability—Inciting another to commit wrongful act—Actor's deed not wrongful—Illegal means employed by inducer—Motive or intention—Lawful act and wrongful act.

A person who procures the act of another is legally responsible for its consequences (1) if he knowingly and for his own ends induces that other person to commit an actionable wrong, or (2) if he induces a person to act where the act induced is within the right of the immediate actor and therefore not wrongful so far as the actor is concerned, but is detrimental to a third party and the inducer procures his object by the use of illegal means directed against such third party.

Allen v. Flood, (1898) A.C. 1—followed.

The motive or intention of a person in doing an act is immaterial if what he is doing is a lawful act and he has a right to do it. If the act is legally wrongful, however good the motive might be, a person has no right to do it.

The Mayor etc., of the Borough of Bradford v. Pickles, (1895) A.C. 587—referred to.

The appellant, who was unsuccessful as against the respondent in obtaining a pawnshop license from the Pegu Municipality, obtained from the Minister for Education a stay order pending his application to revise the Commissioner's order. The application was ultimately rejected, and thereupon the respondent sued the appellant for damages on account of the *interim* stay order which he alleged had been obtained by the respondent by means of false and malicious averments. These averments were set out in the appellant's application for revision, and in the affidavits in support of it; and they were held to be unfounded. But the statements of which complaint was made were not set out in the application for the stay order, and there was no evidence that they were urged before the Minister when the stay order was obtained.

Held, that the appellant had a right to apply to the Government for a stay order and that the Government had the right to pass the stay order, but assuming that the respondent had suffered damage thereby there was no evidence that illegal means were employed in obtaining the order, and the suit for damages failed.

McDonnell for the appellant. Where a person exercises a legal right which causes harm to another the exercise of such legal right, however malicious it may be, cannot found an action for damages

* Civil First Appeal No. 17 of 1934 from the judgment of this Court on the Original Side in Civil Regular Suit No. 376 of 1933.

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for malicious prosecution. Under ss. 218 and 219 of the Burma Municipal Act the Commissioner of the Division concerned exercises a supervisory power of control over the municipalities in his Division; and the appellant had a legal right to apply to the Commissioner under those provisions against the action of the municipality. He had also a right to apply to the Local Government under s. 222.

The existence of a bad motive in the case of an act which is not in itself illegal will not convert the act into a civil wrong. Malice alone, as understood in law, is not sufficient to support such an action. Where the act is within the right of the actor he may be liable if it can be shown that he procured his object by the use of illegal means, and thereby caused damage to another. *Allen v. Flood* (1); *Quartz Hill Co. v. Eyre* (2); *Mayor etc., of Bradford v. Pickles* (3). The appellant's action was for the advancement of his own trade or business; even if the respondent had in fact suffered damage thereby he has no cause of action. *Quinn v. Leathem* (4); *Sorrell v. Smith* (5).

Clark for the respondent. The stay order was obtained from the Government on false statements; the trial Judge has found this as a fact. An action for damages for malicious prosecution is not confined to criminal cases. The Court has to apply the same test in all cases, namely, whether the defendant acted honestly and with reasonable and probable cause. In Bankruptcy law and in Company law, the special provisions for the award of damages for wrongful acts are illustrations of this rule.

(1) (1898) A.C. 1.

(3) (1895) A.C. 587.

(2) 11 Q.B.D. 674.

(4) (1901) A.C. 495, 508.

(5) (1925) A.C. 700.

The present action falls under the 3rd class of cases where damages can be awarded, as laid down in *Saville v. Roberts* (1) [see also *Wiffen v. Bailey & Romford Urban Council* (2)].

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The respondent had already acquired rights under the pawnshop license, and the appellant had no rights therein. The appellant's action, therefore, was in violation of the respondent's rights; and the false affidavits filed before the Local Government were the unlawful means adopted to procure the object of the appellant which caused damage to the respondent. *National Phonograph Co., Ltd. v. Edison Bell Consolidated Phonograph Co., Ltd.* (3). In *Quinn v. Leathem* the use of mere threats was held to be actionable, also in *Conway v. Wade* (4). In *Pratt v. British Medical Association* (5) threats were used, and though no malice was proved the act of the Association was held to be actionable. Though the act itself may be legal the means adopted may, in the eye of the law, make the act illegal. *Sorrell v. Smith* (6).

Costs are generally regarded as sufficient compensation for malicious civil actions; but, in the present case no costs could be obtained because the proceedings were all executive proceedings.

McDonnell in reply. Even granting that there were false representations in the application to the Local Government there is no evidence to show that such representations induced the Minister to grant the stay order.

PAGE, C.J.—The appellant and the respondent are pawn brokers at Pegu, and the appellant was.

(1) 1 Ld. Raym. 374, 378.

(2) (1915) 1 K.B. 600.

(3) (1908) 1 Ch. 335.

(4) (1909) A.C. 506.

(5) (1919) 1 K.B. 244.

(6) (1925) A.C. 700, 719.

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the holder of a pawnshop license which expired on the 31st of March 1933. A public notice calling for tenders for pawnshop licenses for a period of one or three years was issued by the Municipality of Pegu on the 11th of February 1933. On the 28th of February 1933 the sub-committee of the municipality received eight tenders. The persons who submitted the tenders were present at the meeting. The tender of the respondent, which was Rs. 19,500 per year for a period of three years, was the highest and was accepted. The tender of the appellant was only Rs. 10,200. The respondent executed a security bond and became entitled as between himself and the municipality to receive the pawnshop license for three years from the 1st of April 1933. On the 7th of March the appellant and three other persons who had submitted tenders for the pawnshop license made an application to the Commissioner of Pegu to revise the action of the municipality in accepting the tender of the respondent. By his order of the 24th of March the Commissioner of Pegu refused to interfere and rejected the petition. On the 27th of March the appellant presented an application to the Minister for Education, representing the Local Government, for an order staying all further proceedings in respect of the issue of the pawnshop license to the respondent, and restraining the Municipal Committee, Pegu, from allowing the respondent to act as the licensee until the application of the applicant in revision had been heard and determined by the Local Government. On the 28th of March the Local Government ordered that all further proceedings in connection with the license should be stayed until the revision application had been determined.

Now, the petition of the 27th March for a stay order was in the following terms :

"IN THE OFFICE OF THE HON'BLE THE
EDUCATION MINISTER.

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MISC. REVISION APPLICATION No. OF 1933.

SUBJECT :—*The Pawnshop License at Pegu.*

The humble application of Nam Kee, Pawnshop
Licensee of Pegu.

Most Respectfully Sheweth :—

1. Your petitioner along with four others on 7th March 1933 filed a revision application protesting against the scrutiny of tenders in respect of the pawnshop license at Pegu. The said application has been disposed of by the office of the Pegu Commissioner.

2. Your petitioner is informed and believes the same to be true that Ah Fong, whose tender is alleged to have been accepted by the Municipal Committee, Pegu, is attempting to conduct the business of the pawnshop within three or four days hereof, and to deprive him thereby of his rights to the pawnshop under his tender.

3. Your petitioner submits that if pending the disposal of his revision at this office the said Ah Fong and the Municipal Committee are not restrained from disturbing him (the petitioner) in the conduct of his pawnshop he will suffer serious and irreparable loss.

4. It is therefore just and necessary that the rights of your petitioner should not be disturbed pending his revision, and that the *status quo* should be maintained.

5. Your petitioner undertakes to file his revision at this office as soon as possible.

Wherefore your petitioner prays that the Hon'ble Minister for Education may be pleased to order a stay of all further proceedings in respect of the pawnshop license of Pegu, to restrain the Municipal Committee, Pegu, from allowing the said Ah Fong to act as the licensee of the pawnshop, and to make all necessary directions for the said purpose.

And shall ever pray."

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On the 20th of April 1933 three of the persons who had submitted tenders for the pawnshop license, of whom the appellant was one, presented a formal petition to the Minister for Education for an order

"to set aside the license given to the said Ah Fong, to direct the disposal of the license either by public auction or by calling for fresh tenders, and to make such further or other order as may seem just and proper."

Certain affidavits were filed by the parties for and against this application in revision. On the 2nd of June the application in revision to the Local Government was rejected; and on the 6th of June the license was issued by the Municipality, Pegu, to the respondent. In these circumstances the respondent has filed the present suit for the purpose of obtaining damages from the appellant for wrongfully procuring the Local Government to issue an order restraining the municipality from issuing the license to the respondent, and thereby depriving him of the opportunity of carrying on the business of the pawnshop from the 1st of April till the 6th of June. At the trial a decree was passed in favour of the respondent.

Now, it is common ground and we find (1) that the Local Government was legally entitled to pass the stay order; (2) that damage thereby resulted to the respondent; (3) that the appellant had a legal right to apply for the stay order. I decline to plunge into the welter of judicial decisions on this subject, because, in my opinion, for the purpose in hand the law applicable to the present case is to be found in the judgment of Lord Watson in *Allen v. Flood* (1) :

(1) (1898) A.C. 1 at p. 96.

"There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to the law laid down by the majority in *Lunley v. Gye* (1), the inducer may be held liable if he can be shewn to have procured his object by the use of illegal means directed against that third party."

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In my opinion the motive or intention of the appellant in procuring the stay order in the circumstances obtaining in the present case is *nihil ad rem*; for

"this is not a case in which the state of mind of the person doing the act can affect the right to do it. If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it. Motives and intentions in such a question as is now before your Lordships seem to me to be absolutely irrelevant"

[*per* Lord Halsbury in *The Mayor, Aldermen and Burgesses of the Borough of Bradford v. Edward Pickles* (2)]. Illegal means in this connection means acts which are illegal not because they are morally wrongful, but because they are legally wrongful. In *Sorrell v. Smith and others* (3) Lord Dunedin observed

"when *A* by his action causes loss to *B*, the sole question is, was *A*'s action a tort? and the law as to what is and what is not a tort may be said to be well settled. With any law, however well settled, difficulties may and do still arise in its application to the ever varying kaleidoscope of circumstances. But except

(1) 2 E. & B. 216.

(2) (1895) A.C. 587 at p. 594.

(3) (1925) A.C. 700 at p. 716.

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for that there cannot be said to be much difficulty in the law of tort. One noticeable attempt for its extension was put an end to by *Allen v. Flood* (1). I shall have to revert to that case, but in its application to action by an individual, and that was all that as a decision it dealt with, it settled that the only question was, was there a tort? and that in the solution of that question the motive of the doer of the act had no significance."

Now, applying the law thus enunciated to the facts of the present case the only question that falls to be determined is what were the illegal means, (if any), alleged and proved by which the appellant procured the stay order from the Local Government. In paragraphs 6 and 7 of the plaint⁴ it is alleged :

"(6) That as the defendant was unsuccessful he the defendant with a view to obstruct and prevent plaintiff from starting his business as a pawnshop licensee, and to enable him the defendant to continue to carry on his pawnshop business which would have ordinarily terminated on 31st March 1933, falsely and maliciously made certain averments in a petition addressed to the Hon'ble the Minister for Education knowing the same to be false and untrue, alleging corruption on the part of the plaintiff and the Municipality of Pegu, and succeeded in inducing the Hon'ble the Minister for Education to pass an order preventing the plaintiff from opening his two pawnshops on the 1st April 1933, with the result that it enabled the defendant to continue to carry on the said business until the 6th day of June 1933 when he was ousted.

(7) That in consequence of the said false and malicious allegations and insinuations made against the plaintiff the plaintiff was prevented from opening his business of two licensed pawnshops on the 1st day of April 1933."

The defendant in paragraph 6 of his written statement called upon the plaintiff to give full and better particulars of the "false and malicious allegations",

(1) (1898) A.C. 1 at p. 96.

and "averments" alleged to have been made by the defendant according to paragraphs 6 and 7 of the plaint. Thereafter on the 11th September 1933 the plaintiff furnished the following particulars of the allegations referred to in paragraphs 6 and 7 of the plaint :

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"(1) In his application and affidavits to the Hon'ble the Minister for Education the defendant made the following false and malicious allegations and averments.

(2) That the transaction between the plaintiff and the Pegu Municipality has created a dangerous precedent which will inevitably leave the door open for dishonest and corrupt practices in transactions between the municipality and the public.

(3) That he was prevented from checking the opening of the tenders, and had every reason to believe that this departure from the usual procedure and practice as required by law was deliberate and designed.

The action of the municipality (in dealing with the plaintiff) left the door open for fraud and corrupt practice. That immediately after the declaration that Ah Fong's tender of Rs. 19,500 had been accepted, he (the defendant) vigorously protested against the whole proceeding and challenged its fairness. His protest was ignored."

Now, by Order 6, rule 4, of the Code of Civil Procedure

"in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading."

It was incumbent, therefore, upon the plaintiff-respondent in the present case to establish that the stay order had been procured by the appellant by means of the particular charges as laid [*Abdul Hossein Zenail Aba'di and another v. Charles Agnew Turner*,

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Official Assignee (1); *Mahomed Mira Ravuthar and others v. Savvasi Vijaya Raghunadha Gopalar* (2)].

True it is that in the revision application of the 20th of April 1933 and in the affidavits filed in support of it such statements as those set out in the particulars of the allegations in paragraphs (6) and (7) of the plaint were made, and that it was proved at the trial that they were unfounded; and further, it may well be that these misrepresentations were made deliberately and fraudulently with a view to prevent the license being granted to the respondent. But they failed in their object; for the appellant's application in revision was rejected by the Local Government, and the license was issued to the respondent. It is common ground, however, that the misrepresentations alleged in the particulars are not to be found in the petition of the 27th of March upon which the stay order was granted. In order to make good the deficiency in his case it was contended by the learned advocate on behalf of the respondent, and the learned trial Judge held, that the stay order was obtained because the learned advocate who presented the petition for a stay order to the Local Government must be assumed to have supported the petition by oral submissions containing the substance of these misrepresentations. In the course of his judgment Leach J. observed:

"It was argued on behalf of the defendant that the order was not obtained as a result of these affidavits, but as the result of the petition of the 27th of March 1933. It is true that that petition does not contain allegations of the nature of those contained in the affidavits which were subsequently filed, but it seems to me that they must have been advanced by the defendant's advocate when the stay order was obtained, otherwise it is difficult to see any justification for the order."

(1) (1887) I.L.R. 11 Bom. 620.

(2) (1899) I.L.R. 23 Mad. 227.

The answer to this contention, in my opinion, is twofold : (1) that, although the respondent specifically set out in the particulars that he filed the misrepresentations upon which he relied in support of his claim, it is not alleged or suggested in the particulars or elsewhere in the pleadings that these allegations or any of them were orally made by the learned advocate who presented to the Minister for Education the petition for a stay order on the appellant's behalf, and (2) that there is not a scintilla of evidence on the record to justify the contention that the learned advocate supported the petition of the 27th March 1933 by any such oral submissions. No evidence in that behalf was led at the trial, and no attempt was made by the respondent to obtain the evidence of the learned advocate who presented the petition for a stay order to the Local Government. If an allegation of that nature had been set out in the pleadings and an issue had been raised in respect of it, it may well be that the evidence of the learned advocate who presented the petition on behalf of the appellant on the 27th March 1933 would have been forthcoming, or that evidence in rebuttal would have been led.

In these circumstances it follows that the respondent has failed to prove the illegal means by which he alleged that the appellant had procured the stay order in question. The result is that the appeal is allowed, the decree of the trial Court set aside, and the suit dismissed with costs in both Courts.

MYA BU, J.—I agree.

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