

IN THE HIGH COURT OF SINDH AT KARACHI

SUIT NO.628 of 2012

Plaintiff Captain (R) H.A. Rahim,
In person.

Defendant Adam A. Muchhada,
Nemo for defendant.
(Declared ex-parte)

Date of hearing : 16.11.2015.

Date of order : 01.03.2016.

J U D G M E N T

SALAHUDDIN PANHWAR, J. Through instant judgment, I am going to decide the above suit (Suit No.628 of 2012) which the plaintiff has filed for '**Recovery & Damages for Mal-prosecution**'.

2. Succinctly, relevant facts are that plaintiff claims to be a member of Jet Pur Memon Association and that he was Honorary Joint Secretary of Kathiwar Cooperative Housing Society at the relevant time. He was married on 03.2.1994 with Ms. Rukhsana daughter of A. Aziz Sagar, who was a close friend of defendant. He claims that actual age of Mst. Rukhsana was 46 years but was told to be 34 years and was also got incorporated in the Nikahnama. He alleged that Mst. Rukhsana was *even* unable to conceive a child due to age problem. She

deserted the plaintiff alongwith golden jewelry, and ultimately the marriage was dissolved only after two month i.e 7th April, 1994. Dowry articles was returned to the Jamat who assured for return thereof. Plaintiff approached the Jamat several time and also wrote letters but all in vain and no heeds was given to the request of the plaintiff. Defendant in order to usurp the dowry articles and golden ornaments which were illegally taken away by Mst. Rukhsana in collusion with his fast friend, filed a false and frivolous suit against the plaintiff in order to humiliate and involve him in malice litigation. The defendants claimed to issue notice to the plaintiff and filed a forged and manipulated receipt of Hawk Express as Annexure 'D' in their suit, which contained forged signature of the plaintiff and thus made a forgery hence *per plaintiff*, he is entitled and reserved right to file criminal proceedings. He further pleaded that he *in his written statement* denied allegations and even challenged maintainability of suit. Rukhsana's father forged and fabricated NIC card of his daughter Ms. Rukhsana and a forged and fabricated 'Application Form Marriage' was submitted in the Jetpur Memon Association by the defendant and his friend Aziz Sagar. Per claim of plaintiff Adam A. Muchhada, the defendant herein, Habib latif, Waheed Lodikawala and Ali Tabba, alongwith other officials of the Association took away all the dowry articles on 17.4.1994 according to the list submitted by Ms. Rukhsana and her father A. Aziz Sagar and they had promised to the plaintiff in the presence of Mr. Ghaffar Sozer (Mama of the plaintiff)

that they have taken possession of the dowry articles, viz Gold ornaments, of the value of about Rs.400,000/- stolen by Rukhsana from the plaintiff's house which are in their custody. They further undertook to return on 18.4.1994.

3. It is further pleaded that plaintiff visited several times to the officials of the Association, including Adam A. Muchhada, the defendant herein, for return of the plaintiff's dowry which were misappropriated by Ms. Rukhsana and her father A. Aziz Sagar alongwith the defendant, Habib Latif, Wahid Lodhikawala, Ahmed Munshi and thus cheated and defrauded the plaintiff. Plaintiff through his advocate Mr. Hameed Lakhani also sent a legal notice on 23.8.1999 to the Hon. Secretary General, Jetpur Memon Association for return of the dowry articles of the plaintiff and even wrote number of letters to Association demanding return of the dowry articles but the Association neither returned the jewelry articles to the plaintiff nor replied. In the Jetpur Memon Association the defendant is a Member of Managing Committee of the Association. Plaintiff also made a complaint to the SDM Ferozabad on 18.1.2000. Jetpur Memon Association by its letter dated 26.6.1999 informed the plaintiff to collect the dowry articles from the Association and also directed the plaintiff to return the 'Forged N.I.C Card' of Rukhsana prepared by Aziz Sagar and Adam Muchhada. Plaintiff also alleged that Defendant in collusion with the President and General Secretary and other officials of the Society misappropriated a sum of Rs.25, 00,00,000 and thus caused a

wrongful loss to the Jetpur Memon Relief Society but despite asking by the President and other officials of the Society, defendant did not return the same yet these officials did not take any action against the defendant for fraud and forgery. Per plaintiff, he complained to Hon. Secretary General of Society about fraud of defendant and others but no action was taken while leaving it upon GOD. Plaintiff through number of letters complained misappropriation; for return of the dowry articles and an action against the defendant but the Association neglected and failed to take any action against the defendant and not relied to the plaintiff's letters.

4. It is further pleaded that defendant and his friend Aziz Sagar made a complaint to Major Masood Ahmed, Formation Monitoring, Malir Cantonment and C.P.L.C and these Authorities issued illegal summons of appearance of plaintiff without any authority as they have no jurisdiction to trial family suits. Per plaintiff, the defendant returned the plaintiff's dowry articles to his friend Mr. A. Aziz Sagar illegally, unlawfully and without the plaintiff's knowledge or notice to the plaintiff, hence the Association & defendant are bound and liable for refund of the plaintiff's dowry articles of the value of Rs.400,000/-. The suit No.1699/2000, filed against the plaintiff, was dismissed vide order dated 13.01.2006 which the defendant *malafidely* challenged in appeal before High Court but it was also dismissed vide order dated 26.5.2011.

With reference to such, the plaintiff sought for following relief(s):-

- a) Decree for Rs.10 Million (Rupees 10 Million only) in favour of the plaintiff being the cost incurred by the plaintiff on account of malice prosecution, and hurdles faced by him due to defendants intentional and deliberate false litigation;
- b) Decree for Rs.10 Million (Rupees Ten Million only) as Special damages on account of mental agony and mental torture faced by the plaintiff resulting deteriorating of health of plaintiff;
- c) Direct the Formation Monitoring, Malir Cantonment and C.P.L.C. Authority to provide the material given to them by the defendant and his friend Aziz Sagar.
- d) Attachment of the defendant's property bearing No.199, Block-B, Adamjee Nagar, Kathiawar Cooperative Housing Society, Tipu Sultan Road, Karachi to the extent of the collective claim of the plaintiff stated in prayer clause a & b which amounts to Rs.20 million.
- e) interest / mark-up at the rate of 15% per annum on the decretal amount from the date of suit till realization.
- f) Any other additional relief (s) that this Hon'ble Court may deem just and proper in the circumstances of this case.
- g) Grant cost of the suit.

5. The record shows that summons were issued to the defendant; service was held good on 16.8.2013 with direction to file written statement within four weeks. The defendant *however* did not file written statement within stipulated period but filed it on 22.11.2013

without any application for condonation of delay therefore, on 25.11.2013 an order was passed whereby directing the defendant to explain why written statement filed by him should be taken on record and why ex-parte order against him should not be passed.

6. The record *further* shows that defendant did not turn up, therefore, vide order dated 10.02.2015 the service was ordered to be effected upon defendant through all modes including publication. Accordingly, after publication of notice in daily '*Express*' dated 17.2.2015, the service upon the defendant was held good vide order dated 04.5.2015 and matter was adjourned for filing written statement. On continuous failure of the defendant, this Court vide order dated 04.8.2015, debarred the defendant from filing the written statement and plaintiff was directed to file affidavit in evidence which he (plaintiff) filed on 17th August, 2015.

7. The plaintiff, *present in person*, was heard who reiterated contents of the plaint and prayed for decree of the suit, as prayed.

8. Though, it is a matter of record that the defendant despite service did not opt to cause his appearance for defending or *least* denying the claims of the plaintiff. However, non-appearance of the defendant alone shall not *necessarily* result in decreeing a suit but the plaintiff *even* in an *exparte* proceedings has to prove his cause / claims.

9. The perusal of the available record would show that present plaintiff raised his claims on three different allegations i.e:

- i) *he was made to marry with Mst. Rukhsana, a daughter of defendant's close friend by putting plaintiff in deception about age of lady; dispute of return of dowry articles;*
- ii) *defendant and other office bearers of Jetpur Memon Association misappropriated funds of the association;*
- iii) *defendant launched a malicious prosecution against him;*

10. I have no hesitation in saying that *first* two allegations are of no help for the plaintiff to advance his (plaintiff's) case for malicious prosecution. The marriage is a contract between two where two persons agree to lead a *married life* after accepting the status of each other as '*husband & wife*'. The mentioning of *less age* in relevant record of a child is a *normal* practice, prevailing in our society and since the child's age is *normally* determined through such record with which a child or a stranger, as in the instant case the present defendant, have no control hence cannot be blamed for same. Further, the issue of the recovery of dowry or otherwise can also not be determined by this Court as the same exclusively falls within domain of *Family Court*.

11. As regard, the second allegation of misappropriation by defendant and others in funds of Association, it would suffice to say that since subsequent office bearers , including President, did not opt to take action hence present plaintiff in a case of *malicious prosecution*

cannot seek determination of misappropriation or fraud which *otherwise* if standing alone shall require an action within *limitations* of **memorandum of association.**

12. Now, I would revert to the main cause and claim of the plaintiff i.e *malicious prosecution*. The plaintiff with reference to claimed malicious prosecution has sought two kind of compensation/damages i.e *General & Special* . I would take the *first one first*. The plaintiff specifically pleaded in his plaint that in result of causelessly filed civil suit wherein he caused his appearance and faced agony of trial thereof which ended in *dismissal*; further the defendant challenged dismissal in appeal which was also contested by plaintiff, however such appeal was also dismissed by High Court. Before proceeding further, I would take advantage of operative part of the judgment passed in Suit No.1699/2000 whereby suit, filed by present plaintiff against defendant, was dismissed while holding as:

‘... from the Judgment it follows that the qualified privilege will not be available if anyone of the following elements are missing the case:

(i) Malice (ii) Personal ill-will (iii) Any direct motive or publication actuated by spite and deliberate and false attack of one’s personal life.

The question of malice and ill-will in the present case can be determined only on the basis of contents spelled out in the plaint and through evidence of the parties.’

(*emphasis provided*)

Further, in a case of malicious prosecution, one has to establish three things i.e *launching of prosecution; its end in favour of claimant and that it was causeless & malicious*. The perusal of the record makes nothing ambiguous that :

- i) *it was defendant who initiated prosecution against the plaintiff;*
- ii) *the prosecution ended in favour of the plaintiff;*

Now, what remains to be examined is whether prosecution was causeless or *bonafide*. In the instant matter, the plaintiff specifically claimed such litigation as *causeless* and to have been initiated by defendant with an object to *harass & humiliate* him (plaintiff). It is also a matter of record that the defendant despite active knowledge and notice of the instant claim (suit of plaintiff) did not attempt to deny the same through available legal course/procedure hence such active failure of the defendant to deny such claim of the plaintiff shall result in letting an adverse inference against him. Not only this, but it is a matter of record that the plaintiff did contest the suit and even appeal, *launched* by the defendant which *prima facie* failed. The plaintiff also affirmed such claim on *Oath* while submitting his *affidavit in evidence* therefore, I am inclined to hold the plaintiff entitled for *general damages*. What remains to be discussed is the '*amount*' of compensation. The claim of the plaintiff to be a well reputed person; member of Association and his *old age* and agony of continuous suffering in defending the prosecution make, if are considered, allow me to grant

an amount of Rs.10,00,000/- (Rupees one million) as reasonable damages.

13. Now, I shall attend to the claim of the plaintiff regarding *special damages*. Before going any further, I would refer the operative part of the case of Abdul Hameed v Additional District Judge 2014 CLC 5, wherein it is held that:-

'11. In concurrent findings, both the learned lower courts have correctly observed that damages suffered and quantity of amount claimed under each head would have to be proved by cogent evidence and mere assertion of inflated amount without any corroborative evidence would be of no avail to the plaintiff. Damages for mental suffering may be mental and physical shock, inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life, attributable to medical treatment for the injury and the amount of compensation will vary with the intensity of pain and suffering of plaintiff. **Mental suffering and psychiatric injury follows from foreseeable physical injury may be compensated under the head 'pain and suffering' or mental suffering which amounts to recognizable psychiatric illness, requires psychiatric evidence, which is lacking in this case.**

It is a matter of record that the plaintiff produced no evidence or document to substantiate his claim to have suffered *mental agony & mental torture* resulting into deteriorating his (plaintiff's) health hence *simple* words of the plaintiff shall not be sufficient to grant *special damages*.

14. In view of above discussion the suit of the plaintiff is decreed to extent of prayer clause (a) but for a total amount of Rs.10,00,000/- (Rupees one million) only, while suit of the plaintiff for rest of the prayer(s) is dismissed.

Let such decree be drawn. Announced in open court this 1st day of March, 2016.

Imran/PA

J U D G E