

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.348 of 2014

Syed Feroz Ali v. Syed Farhat Ali and Two (2) Others

Plaintiff : Syed Feroz Ali, through Mr Abdul Rashid, Advocate.

Defendant No.1 : Syed Farhat Ali, through Mr Farhat Gul, Advocate

Defendant Nos.2&3 : Mst Tasneem Fatima Razi and Mst Taskeen Abbas, through Mst Seema Waseem, Advocate

Dates of Hearing : 02.05.2023, 09.05.2023, 22.05.2023

Date of Decision : 19.08.2023

J U D G M E N T

Jawad Akbar Sarwana, J.: This is a family dispute. The Plaintiff has filed this suit to recover damages for malicious criminal prosecution and malicious civil prosecution against his siblings. He prays for the following reliefs:

- a) Pass Judgment & Decree in favour of the Plaintiffs;
- b) Declare that the Plaintiffs are entitled for the damages/compensation for malicious prosecution, filing of false, baseless, and not maintainable case, caused damage to their reputation amongst the fellow employees, superiors, family members and friends, mental torture caused due to the false involvement and the damages caused due to the loss of the value of the property due to involvement in false case;
- c) Direct the defendants individually, collectively, severally and jointly to pay compensation/damage to the tune of Rupees Thirty Million along with other damages and compensation may be found feasible in this circumstances of the case;
- d) Grant any other relief/compensation in terms of money as this Hon'ble Court may deems fit and proper;
- e) Award cost.

2. The brief facts of the case are that on 26.02.2014, Syed Shafaat Ali and his son, Syed Feroz Ali, as Plaintiff No.1 and Plaintiff No.2, respectively, filed this suit against Syed Farhat Ali, son of Syed Shafaat Ali (Defendant No.1), Mst. Tasneem Fatima Razi (Defendant No.2) and Mst. Taskeen Abbas (Defendant No.3). Defendants Nos.2 and 3 are daughters of Syed Shafaat Ali. It is pertinent to mention that the Plaintiffs jointly engaged Mr Muhammad Nishat Warsi, Advocate as their Counsel. This aspect of the case becomes relevant later. Be

that as it may, the Plaintiffs claimed that in 1964, Plaintiff No.1 had purchased a bungalow No.C-186, Block 10, Federal "B" Area, Karachi (measuring 600 sq. yds.)(hereinafter referred to as "Family Bungalow"). Defendant No.1, along with his wife and children, lived on the first floor of the Family Bungalow. Plaintiffs Nos.1 and 2 alleged that on 11.10.2012, Defendant No.1 and Defendant Nos.2 and 3 filed Civil Suit No.988/2012 before the VIth Civil Judge, Central Karachi, for declaration and permanent injunction against Plaintiffs (Exhibits "P/2-1" and "P/2-2"). These siblings claimed a share in the Family Bungalow on the ground that it belonged to their late mother, Razia Sultana (Plaintiff No.1's spouse), who had passed away on 21.03.2011. They contended that all the legal heirs of their deceased mother, including her husband (Plaintiff No.1) and her seven children, including Plaintiff No.2 (her son) and the three Defendants in this suit, had a share in the Family Bungalow. The siblings sought Court orders to restrain their father and brother (Plaintiffs) from disposing of the Family Bungalow. The Plaintiffs alleged that because of the civil suit, they had to engage lawyers and incur legal costs and expenses. Eventually, on 11.03.2013, the Civil Court rejected the plaint under Order 7 Rule 11 CPC and the civil suit, along with all pending applications, was dismissed (Ex. "P/2-5"). Additionally, the Plaintiffs attached with their Plaint two (2) FIRs, namely, FIR No.240/2013 dated 06.07.2013, filed by one brother, Defendant No.1, against another brother, Plaintiff No.2 (Ex. "D/4"), and FIR No.300/2012 dated 19.12.2002, filed by the father, Plaintiff No.1, against his son, Defendant No.1 (Ex. "D/3"). All FIRs related to specific incidents that allegedly occurred concerning matters arising from the sale of the Family Bungalow. Essentially Plaintiff No.1 wanted Defendant No.1 (his son) to vacate the first floor of the Family Bungalow. Plaintiff No.1 attached to his Plaint and relied on a Sale Deed of the Family Bungalow dated 13.03.2013, with Shakeel Mirza and Shoaib Mirza (hereinafter referred to as "the buyers"). They alleged that the above-mentioned malicious civil and criminal actions filed/lodged by Defendant(s) apparently spoiled the said sale transaction with the buyers, as a result of which the sale transaction was delayed, as were the payments expected from the buyers and the Plaintiffs suffered a loss of Rs.5 million in the sale price. The Plaintiffs contended that they were constrained to engage an advocate due to the litigation and had to bear more than Rs.200,000 in costs and expenses. Therefore, they lodged this claim for malicious prosecution, compensation and damages, etc., against Defendants. Further, the Plaintiffs claimed that they also suffered a loss of reputation among fellow employees, superiors, and family members and mental torture due to the above-mentioned criminal and civil cases. Suffice it to say, by that time, Plaintiff No.1 had already retired as a Director of the State Bank of Pakistan and was around 82+ years old, and Plaintiff No.2 was a Senior Manager at HBL Bank Ltd.

3. On 25.02.2015, Plaintiff No.1 engaged his own lawyer, Mr Fazal-ur-Rahman, Advocate who filed an Application under Order 1 Rule 10(2) read with Section 151 CPC on behalf of Plaintiff No.1. In the said Application, Advocate for Plaintiff No.1 submitted on behalf of Plaintiff No.1 that after settlement with the Defendants (Syed Farhat Ali, Tasneem Fatima Razi and Taskeen Abbasi), Plaintiff No.2 (Syed Feroz Ali) does not intend to proceed the matter against the defendants and prayed to strike out the name from this matter. Plaintiff No.1 filed an affidavit in support of the Application. Plaintiff No.2 did not file any affidavit in support of Plaintiff No.1's Application. When the Application came up for Orders on 04.05.2015, the newly appointed lawyer of Plaintiff No.1, Fazal-ur-Rehman, was present in Court along with Mr Nishat Warsi, Advocate for both Plaintiffs and Advocate for Defendant No.3. The Court ordered that the applicant of this application be present in person in Court on the next hearing date and adjourned the case to 27.05.2015. On the next date of hearing, Plaintiff No.1 was present in person along with his newly appointed lawyer, Mr Fazal-ur-Rehman, Advocate and the Advocate for Defendant Nos.2 and 3. However, neither Plaintiff No.2 nor his Counsel, Mr Nishat Warsi, Advocate, were present. After hearing the parties, the Court passed the following Order:

"27.05.2015

At the outset, through instant CMA No.2737/2015, plaintiff No.1 seeks withdrawal of this instant suit against the defendants. Learned counsel for the defendant does not claim any cost. Accordingly, suit filed by plaintiff No.1 is dismissed as withdrawn against the defendants. Plaintiff No.2 shall file amended title."

4. Plaintiff No.1 passed away on 17.03.2016, whereafter Defendant Nos.2 and 3 filed their written statement on 03.05.2016, and Defendant No.1 filed his written statement on 16.05.2016. Defendant No.1 alleged that his brother, Plaintiff, pressured his deceased father to sell the Family Bungalow at a throw-away price to Plaintiff's friends, allegedly the buyers (paragraph 5 of the written statement). He contended that filing of Suit 988/2012 was under a misunderstanding of facts as the Family Bungalow was named "Razia Mansion" after his deceased mother and that as soon as Defendant No.1 found out that the said property was in the name of his father, he stopped prosecution of the civil suit. He claimed that he withdrew Civil Suit 988/2012. Defendant No.1 contended that Plaintiff was very litigious and regularly filed actions against Defendant No.1 and misled his father to file criminal actions against Defendant No.1 also. He acknowledged that he had filed FIR No.240/2013 against Plaintiff. He submitted that Plaintiff had allegedly played fraud on his father regarding the purchase of

another plot, whereafter his father had filed Suit No.1710/2015 against Plaintiff, which was still pending in the High Court. Finally, he stated that Plaintiff neither submitted any material supporting his claim for damages nor filed any documentary evidence and no case was made out by him for damages against Defendant No.1. As such, the suit was liable to be dismissed.

5. Defendant Nos.2 and 3, sisters of Plaintiff, alleged that Plaintiff's suit as framed and filed was not maintainable as well as barred under Order 7 Rule 11 CPC as no cause of action had ever accrued to Plaintiff. They contended that after the sale of the Family Bungalow, on the pressure and advice of Plaintiff, the deceased father purchased a house constructed on two adjoining plots bearing No.R-164 and R-165, Block 6, Gulshan-e-Iqbal, Karachi, admeasuring 120 sq. yds. each. The deceased father paid the entire sale consideration of both plots and allegedly spent a considerable amount on renovation and other expenses. They claimed that Plaintiff surreptitiously managed the sale and got himself registered as the owner of one of the plots. Resultantly, the deceased father filed Suit No.1710/2015 against the Plaintiff in the High Court which is still pending. Defendant Nos.2 and 3 prayed for the dismissal of Plaintiff's suit.

6. With the consent of the learned Counsels for the parties, the Court settled the following issues on 08.05.2017:

- (i) Whether the suit as "framed" and "filed" is maintainable under law?
- (ii) Whether Plaintiff has any cause of action against Defendants?
- (iii) Whether Plaintiff as alleged has suffered any damages? If yes, to what extent and to what account?
- (iv) Whether the damages as claimed by the plaintiff are remote in terms of Section 73 of the Contract Act?
- (v) What should the decree be?

7. By the same order dated 08.05.2017, the Court appointed a Commissioner for Recording of Evidence. Plaintiff No.2, Syed Feroz Ali, filed his affidavit-in-evidence on 18.07.2017, and his examination-in-chief took place on 31.07.2017. Defendants cross-examined him on the same date as well as on 07.10.2017. Defendant No.1, Syed Farhat Ali, filed his affidavit-in-evidence on 28.10.2017, and his examination in chief took place on 18.11.2017 and was cross-examined on the same day. Thereafter, the Commission was returned to

the Court. The evidence of Defendant Nos.2 & 3 was recorded in Court on 17.10.2018 and 11.12.2018.

8. During final arguments, learned counsel for the Plaintiff, while reiterating the contents of the Plaint and the Affidavit-in-Evidence, has contended that Plaintiff's examination in chief and cross-examination establishes the Plaintiff's claim for recovery of damages on account of malicious prosecution against Defendants. Learned Counsel for Defendant No.1 has contended that the plaintiff neither established malicious prosecution against the Defendants nor adduced any evidence against them and as such, the suit against the said Defendants is liable to be dismissed. Counsel for Defendant Nos. 2 and 3 has submitted that Plaintiff has admitted in his cross-examination that he does not have any claim against his sisters, hence the suit may be dismissed as against Plaintiff's siblings impleaded in the Plaint.

9. I have heard the learned Counsels for parties, read the material/evidence available on the record, considered the applicable law and my findings on the above issues are as follows:

- (i.) Affirmative.
- (ii.) Negative.
- (iii.) Negative.
- (iv.) Negative.
- (v.) Suit is dismissed.

REASONS

Issue No. (i)

10. Issue no. (i) requires the Court to examine whether the suit as "framed" and "filed" is maintainable. Framing a suit and its subsequent filing involves drafting and filing a Plaint. Therefore, the determination of this issue requires an examination of the Plaint.

11. When the Plaint was initially filed on 26.02.2014, there were essentially two Plaintiffs, namely, Plaintiff No.1, father and Plaintiff No.2, son. However, by May 2015, Plaintiff No.1 (Syed Shafaat Ali) had withdrawn his claims against Defendants. Plaintiff No.2 did not amend the Plaint. He merely amended the title of the Plaint and continued with his suit as Plaintiff, relying on the same facts and grounds that form the suit's original basis.

12. Plaintiff correctly admitted in his cross-examination that he had abandoned the claims arising out of the pleadings which were being pleaded by his deceased father, Plaintiff No.1, who was the owner of the Family Bungalow and alone executed the sale deed of the bungalow with the buyers. Plaintiff admitted in his cross-examination as follows:

“It is correct to suggest that the sale deed dated 13.03.2013 is not filed with the affidavit in evidence. It is correct to suggest that the cheque of Rs.700,000/= (Rupees Seven lacs) dated 11.03.2013 is not filed with my affidavit in evidence. It is correct to suggest that the FIR No.240/2013 is not filed with my affidavit in evidence.”

“It is incorrect to suggest that I have filed the A/E on the basis of my father.”

13. Thus, by not producing the Sale Deed, admitting that his affidavit in evidence was his evidence and not his deceased father's, Plaintiff accepted the position that the grounds agitated by his deceased father against Defendants were no more available to him and that Plaintiff was not going to press his father's claims in the title suit.

14. The original Plaint set out the facts and grounds of the suit, which formed the subject matter of the litigation. While some of these facts and grounds were in relation to Plaintiff's deceased father, several of them also concerned/involved Plaintiff. The following facts and grounds survived the exit of Plaintiff's father:

(i) Plaintiff alleged that Defendants maliciously prosecuted him in Civil Suit No.988 of 2012 filed against Plaintiff and his father. Plaintiff contends that after the civil court rejected the Plaint under Order 7 Rule 11 CPC, the dismissal gave him a right to claim damages under the tort of malicious civil prosecution.

(ii) Plaintiff alleged that Defendant No.1 also maliciously filed against him FIR No.240/2013 dated 06.07.2013, giving him the right to claim damages from Defendants for malicious criminal prosecution.

(iii) Plaintiff claimed that Defendants “filing of false, baseless and not maintainable case” against him (Plaintiff) caused damage to his reputation among fellow employees, superiors, family members and friends and caused him mental torture. Plaintiff claimed damages and compensation for the same.

15. Order 2 of the Civil Procedure Code, 1908, titled the “frame of suit”, stipulates as follows regarding the framing of a suit:

“Order 2, Rule 1. Frame of suit. Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation.”

16. The facts and grounds raised by Plaintiff in the Plaint, as discussed herein above, demonstrate that the Plaint, as framed, afford grounds to render a final decision on the subject in dispute in the Plaint in terms of Order 2 Rule 1. Accordingly, the Plaint filed in the suit appears to be proper, and Plaintiff’s suit as “framed” is maintainable against Defendants.

17. With regard to whether the suit as “filed” is maintainable, there does not appear to be any defect in the Plaint. As such, the Plaint, as filed is maintainable against the Defendants. Of course, after filing the Plaint, Plaintiff must prove his case to succeed in his claim. This is a separate matter which is dealt with in the discussion on the remaining issues.

18. In view of the above, Issue No. (i) is decided in the affirmative.

Issue No. (ii)

19. This issue concerns the determination of whether Plaintiff has any cause of action against Defendants. In Shaheem Nasir Khan v. Mst. Asma Ara, 2002 PLD 408, this Court distinguished the terms “having no cause of action” from “plaint disclosing no cause of action” as follows:

“The applicant asserted that the plaintiffs had no cause of action. Plaintiffs having no cause of action is something different from the plaint disclosing no cause of action. Whether the plaintiff has a cause of action or not can only be determined on the basis of evidence. It could be rejected under Order 7, rule 11, C.P.C. only in case [it had not] disclosed a cause of action.”

20. The Superior Courts of Pakistan have observed in several judgments that the expression “cause of action” comprises a bundle of facts pleaded by a plaintiff. These may consist of a series of facts pleaded, culminating in a Court passing a decree on furnishing proof. Thus, a cause of action may be every act

necessary for a plaintiff to prove his case in support of his right to claim a judgment.¹

21. In the present case, Plaintiff has claimed damages and compensation arising out of and/or in connection with (I) malicious prosecution, (II) “filing of false, baseless and not maintainable case”, and (III) loss of reputation. It has to be seen whether, based on the evidence brought on record, the causes of action of each of the claims as alleged by Plaintiff are made out.

(I) Malicious Prosecution

22. The Supreme Court of Pakistan in Niaz and Others v. Abdul Sattar and Others, PLD 2006 Supreme Court 432, has laid down five (5) elements that form the basis for accepting or rejecting a suit for recovery of damages for malicious prosecution. The five (5) required elements are as follows:

- (a) The prosecution of the plaintiff by the defendant.
- (b) There must be a want of reasonable and probable cause for that prosecution.
- (c) The defendant must have acted maliciously i.e. with a improbable motive and not to further the ends of justice.
- (d) The prosecution must have ended in favour of the person proceeded against.
- (e) It must have caused damage to the party proceeded against.

23. In the present suit, Plaintiff has alleged malicious prosecution in respect of civil proceedings (arising out of Civil Suit 988/2012) and criminal proceedings (arising out of FIR No.240/2013) filed/lodged by Defendant No.1 against Plaintiff. The question arises whether the term “prosecution” referred to in element (a) of the Niaz case relates to criminal prosecution or civil and criminal actions.

24. According to Ratanlal & Dhirajlal Treatise of the Law of Torts (27th Edition), edited by Akshay Sapre (Lexis-Nexis; New Delhi, 2016), the authors relying on the Privy Council’s reported judgment in Mohamed Amin v. Jogendra Kumar Banerjee, AIR 1947 PC 108, opine that “malicious prosecution” does not include “malicious civil prosecution”. They state as follows on page 342:

¹ Nazeer Ahmad v. Naseer Ahmad, 2011 YLR 121; Trustees of the Port of Karachi through Chairman v. Project Shipping Company Limited through Manager, 2006 CLC 919; and, AR Muhammad Siddique v. Saifee High School Board, 1983 CLC 507.

“An action will not lie for maliciously and without reasonable and probable cause instituting an ordinary suit. The reason stated to be is that ‘such a case does not necessarily and naturally involve damage to the party sued. A civil action which is false will be dismissed at the hearing. The defendant’s reputation will be cleared of any imputation made against him, and he will be indemnified against his expenses by the award of costs against his opponent. The law does not award damages for mental anxiety or for extra costs incurred beyond those imposed on the unsuccessful party” [*Mohamed Amin v. Jogendra Kumar Banerjee*, AIR 1947 PC 108].”

25. The aforesaid opinion remains the traditional view on “malicious prosecution” in the Indian Subcontinent since 1947 but not in Pakistan. In *Muhammad Akram v. Mst Farman Bi*, 1990 SC 28, the Supreme Court dismissed a leave to appeal filed by Muhammad Akram against a Judgment of the Lahore High Court dismissing his Civil Revision in a matrimonial case resulting in an award of damages against him in tort for malicious prosecution. The Lahore High Court, in a civil revision, upheld the judgment against Muhammad Akram in a suit for malicious prosecution arising from a false claim made by Muhammad Akram against Farman Bi before the Family Court wherein Muhammad Akram contended that he had consummated the marriage with Farman Bi and had filed a civil action for restoration of conjugal rights. The civil court and thereafter, the Lahore High Court held that Muhammad Akram had filed this case before the Family Court out of spite and without reasonable and probable cause existing for it merely to hurt, humiliate and defame her and lower her reputation in the estimation of others. The Supreme Court of Pakistan, on page 34 of the reported case, held that the earlier filed family suit by Muhammad Akram was undoubtedly a malicious prosecution (in its wider sense) and proceeded to make the following observations on pages 35, 36 and 39 (while referring to the Privy Council’s *Mohamed Amin* case (supra)):

“The learned counsel for the petitioner has vehemently reiterated the legal contention raised before and repelled by the High Court that a "suit for damages for malicious prosecution in respect of civil action does not lie and that in any event, it was not maintainable as there was provision in law for awarding costs to the successful party". Reliance has been placed on "Mohammad Amin v. Jogendra Kumar Bannerjee and others" (A.I.R. (34) 1947 Privy Council 108).

The learned Judge in the High Court as a result of careful survey of case law on the point, which started with the critical analysis of the Privy Council judgment (of course with respect) and ended with reference (with approval) to the English case of *Berry v. British Transport Commission* (3 All E.R. 322 (1960), came to a proper conclusion, that there

was no bar, as canvassed. In this behalf he made reference to the following:--

(1) Mohamed Amin v. Jogendra Kumar Bannerjee and others (A I R (34) 7.947 Privy Council 108).

(2) Savile v. Roberts (1 Ld. Raym. 374).

(3) Jagdeo Sahu v, Dwarka Prasad (A I R 1948 Patna 88.

(4) Quartz Hill Gold Mining Co. v. Eyre (1883) 11 Q B D 674.

(5) Sultan Ahmad Awan v. Ghulam Muhammad Awan PLD 1987 Lahore 663.

(6) Ali Asghar v. Fazal Akbar and 2 others 1988 C L C 147 (Peshawar).

(7) Kapoor Chank Rikhi Ram Mahajan v. Hakin Jagdish Chand Siripat Rai and another A I R 1974 Punjab and Haryana 215.

(8) Premji Damodar v. L-V. Govindji & Co. A I R (34) 1947 Sind 169.

(9) Genu Ganapati Shivale v. Bhalchand Jivraj Raisonni and another AIR 1981 Bombay 170.

(10) Para 717 at page 367 of Halsbury's Laws of England, 3rd Edition Volume 25.

(11) Chhangani Sakarlal v. Municipality of Thana 34 Bom. LR 143, AIR 1932 Bom 259.

(12) Mohini Mohan Misser v. Surendra Narain Singh AIR 1915 Cal 173.

(13) Nasiruddin Karim Mahomed v. Umerji Adam & Co. AIR 1941 Bom 286.

(14) C.M. Agarwalla v. Halar Salt and Chemical Works AIR 1977 Cal. 356.

(15) T. Subraymanya Bhatta v. A. Krishna Bhatta AIR 1978 Ker. (FB).

(16) Berry v. British Transport Commission 3 All England Report 322(1960).

We having carefully perused the reasoning of the learned Judge in the High Court, agree with him that the distinction in our country between criminal prosecution and the 'Civil 'prosecution' for purpose of denying the right to institute the latter for damages in torts, is not at all well founded. The Privy Council judgment showing itself a conflict of trend for some time in the judgments in a country where "the action for damages, for malicious prosecution is part of the common law of England" is no more an authority for us under our own constitutional and legal set up. Even otherwise we do not agree with the learned counsel that the

denial of right to sue for damages in such like cases, was universally accepted as good law. The contrary view, with respect, is more logical and is much convincing. The learned Judge has correctly analysed the case-law in this behalf (pages 35, 36).”

“There is another very important aspect of the matter. Section 9 of the C.P.C. provides that "the Court shall (subject to the provisions herein contained have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly barred or impliedly barred." It has not been denied that suits for damages in tort on account of malicious prosecution are covered by the term 'civil nature'. The question of 'prosecution' of a civil action has Already been dealt with. Thus the present suit was covered by, the 1st part of Section 9. Regarding the second part, learned counsel did not rely on any provision of law expressly barring the, trial of such suit. His reliance on the Privy Council judgment in the case of Mahomed-Amin and in turn on an alleged (though doubted) rule of Common Law of England at best, could be pressed in service as an implied bar. Is it possible?

The answer would be in the negative. The resort to a rule of common law of England in preference to the one of Pakistan law or a rule of Islamic law or jurisprudence; or for that matter, the Islamic common law, is not now possible under the Pakistan Constitutional legal, set up-- See the Lahore case of Haji Nizam Khan v. Additional District Judge, Lyalipur and others (PLD 1976 Lahore 930) as approved by this Court in the case of Mohammad Bashir v. The State - PLD 1982 SC 139. In the present case the suit relates to the right to good reputation granted as a basic right to the citizen. It has already been held so in The Federation of Pakistan through Secretary Law and Parliamentary Affairs Islamabad v. Mohammad Ishaque and another (PLD 1983 SC 273) Shariat Bench). Amongst others under Article 31: of the Constitution, provision for Islamic way of life, is an obligation of the State. Same is the position under the Objectives Resolution. Above all even the enactment of a law which is against the injunctions of Islam, has been prohibited by the 2nd Part of sub-clause (1) of Article 227 of the Constitution. It is not the case of the petitioner either, that a right which is guaranteed by the Constitution as a fundamental right or otherwise, or protected by it or by any other law, would not be enforceable through a civil suit under Section 9; provided of course, other conditions are satisfied. Thus the implied bar intended to be canvassed would be against all that has been said above. Lastly if an express bar cannot be enacted by the legislature with regard to subject of discussion, the Courts in Pakistan have no jurisdiction to import an implied bar from another jurisprudence. It is accordingly held that the suit was competent. (page 39)”

26. Thus, Supreme Court appeared to have accepted a case for malicious civil proceedings in terms of the Muhammad Akram case. Yet again, in 2006, dealing with another matter involving malicious civil prosecution, the Supreme Court of Pakistan in the Niaz case (supra), while approvingly citing Muhammad

Akram's case, once again accepted the concept of recovery of damages for malicious civil prosecution. The Supreme Court observed as follows in para 9 of the judgment:

“9. By Article 4 of the Constitution, it is the inalienable right of every citizen to enjoy the protection of law and to be treated in accordance with law and in particular no action detrimental to the life, and, liberty, body, reputation or property of any person shall be taken except in accordance with law. Article 14 of the Constitution also guarantees the dignity of man and subject to law, the privacy of home. In the context of the Constitution, it is no more necessary to hedge in an action for damages for malicious prosecution by the condition that the action was an abuse of the "process of the Court". It will be more in consonance with the genesis of the Constitution, Articles 4 and 14 in particular, to say that the foundation of the action for damages for malicious prosecution lies, not in the abuse of the process of Court, but in the abuse in the process of law. For, one has to bear in mind the ground realities of life existing in the country, it should appear plainly that proceedings before the police afford a stronger ground for an action for malicious prosecution than proceedings in a Court of law, for it is an unfortunate fact that, as things are, human dignity suffers or is likely to suffer more at the hands of the police than in a Court of law. One of the modes to achieve this goal is to file a suit for damages against the offenders by the aggrieved persons. It is the duty of the members of the Bar Associations 'and Bar Council to educate the people and to file suits for damages against the offenders apart from the criminal proceedings (underlining added).”

27. Thus, the Supreme Court's above-mentioned underlined observations in the Niaz case to “proceedings before the police”, affording a stronger ground for an action for malicious prosecution than proceedings in a Court of Law, appears to suggest that an action for malicious prosecution as a result of proceedings before Law Enforcement may be more critical and impactful than a case of malicious prosecution emerging from proceedings before a Court of Law.

28. While the Supreme Court of Pakistan had recognised malicious civil prosecution by the 1990s, it may not be out of place to mention here that it was only in 2016 in Willers v. Joyce, [2016] UK SC44 (reported in 2016 SCMR 1841), that the United Kingdom Supreme Court held that a claim in malicious prosecution could also be brought in relation to civil proceedings.

29. The upshot of the above discussion is that it appears that the reference to the word “prosecution” in element (a) of the Niaz case (supra) does not necessarily mean “criminal prosecution” alone but includes “malicious civil prosecution” too. Notwithstanding the foregoing, Plaintiff was also required to meet the remaining four of the five elements required for accepting or rejecting

a suit to recover damages for malicious prosecution as laid down in the Niaz case (supra).

30. Another element required in a suit for recovery for malicious prosecution as per the Niaz case is element (b), that is, there must be a want of reasonable and probable cause for that prosecution.

31. In the Niaz case, the Supreme Court of Pakistan observed as follows on page 439-440:

“It is also settled law that in suits for malicious prosecution proof of the existence of malice itself is not enough but should be accompanied by proof of absence of reasonable and probable cause. See as follows:--

- (i) United Bank v. Raja Ghulam Hussain (1999 SCMR 343).
- (ii) Abdul Rauf v. Abdul Razaq and another (PLD 1994 SC 476).
- (iii) Muhammad Akram v. Mst. Farman Bi (PLD 1990 SC 28):
- (iv) Raja Braja Sunder Deb v. Bandeb Das (AIR 1944 P.C.1).
- (v) Balbabaddar Singh v. Badari Sah (AIR 1926 P.C. 46).
- (vi) Abdul Shakoor v. Lipton (AIR 1924 Lah. 1).
- (vii) Noor Khan v. Fiwandas (AIR 1927 Lah. 120).
- (viii) V.T. Strinivasa Fhathachariar v. Thirunvenkat Achariar (AIR 1932 Mad 601).

8. The maxim “The reasonable and probable cause” means that it is an honest belief in the guilt of the accused based upon full conviction, based on reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true would reasonably lead any ordinary prudent man to the conclusion that the person charged was probably guilty of crime imputed. See (1881) 8 QBD 167 Hicks v. Faulkner. It is also a settled principle of law that if reasonable and probable cause is established, then question of malice becomes irrelevant as observed by Denning L.J. in *Tempest v. Snowden* (1952) 1 K.B. 130. H It is pertinent to mention here that judgments of both the courts below are in consonance with the law laid down by this Court in the following judgments keeping in view the conduct of the petitioners:

- (i) Muhammad Bashir v. The State (PLD 1982 SC 139).

(ii) Muhammad Yousaf v. Syed Ghayyur Hussain Shah and others (NLR 1993 SCJ 462).”

32. In the case of Civil Suit 988/2012 filed by Defendants against Plaintiffs, the thrust of the case was on Plaintiff No.1 and not Plaintiff No.2 (the current Plaintiff). This was because the Family Bungalow belonged to Plaintiff No.1 and not Plaintiff No.2 (present Plaintiff). Defendants were alleging title on the grounds that the family bungalow was named after their mother. This was Defendant’s probable cause for the filing of the suit. Yet Plaintiff failed to depose any evidence to show that Defendants had initiated the prosecution without holding that they did not have an honest belief in the truth of the claim. Plaintiff gave no evidence of the want of reasonable and probable cause on the part of Defendants. To the contrary, Defendant No.1 submitted his reasonable and probable cause for filing Civil Suit 988/2012 in his cross-examination as follows:

“It is correct to suggest that the property No.C-186. Block-10, Federal B Area, Karachi is in the name of my father. Voluntarily says during the pendency of the above suit it came our knowledge that the said property was belong to my father. It is incorrect to suggest that the said case was belonged to our maternal uncle, but the utility bill was issued in the name of our mother and the said house name as Razia Mansion.”

In view of the above, Defendants appeared to have a reasonable and probable cause for prosecution, notwithstanding that the burden of proof was on the Plaintiff and that he was unable to meet the burden of proof in the sense of proving the case that there was want of reasonable and probable cause on the part of Defendants. In view of the foregoing, Plaintiff failed to meet this criterion (b) in connection with his case for malicious civil prosecution in relation to Civil Suit 988/2012.

33. Regarding FIR No.240/2013, the same was allegedly filed by Defendant No.1 because Plaintiff apparently assaulted Defendant No.1 during a visit to the Aga Khan Hospital. Plaintiff did not produce the said FIR. Surprisingly Defendant No.1 produced the said FIR with his affidavit in evidence. Defendant No.1 submitted in his affidavit in evidence that after filing FIR No.240/2013 on 06.07.2013, Defendant No.1 had submitted in Court on 22.07.2013 that “due to intervention of elders of the family and others, the matter is amicably patched-up” (Exhibit Nos. “D/5” and “D/6”). The onus was on Plaintiff to prove that FIR No.240/2013 was filed having want of reasonable and probable cause for that prosecution based on pure malice in terms of the element (b) set out by the Supreme Court in the Niaz case. Plaintiff neither produced evidence nor could satisfy the Court that there was want of reasonable and probable cause on the

part of Defendant No.1 in relation to the said FIR. Thus, Plaintiff also failed to meet element (b) criterion for malicious criminal prosecution.

34. The next element, which Plaintiff was required to meet as per the Niaz case, was element (c) which is that Defendant must have acted maliciously, i.e. with an improbable motive and not to further the ends of justice. This means that the proceedings complained of by Plaintiff must be initiated in a malicious spirit that is from an indirect and improper motive and not in furtherance of justice. According to English common law and Pre-partition Indian cases, the malice necessary to be established is not malice in law but malice, in fact, *malus animus* – indicating that the party was actuated either by spite or ill-will towards an individual or by indirect or improper motives. To this end, no such malice was established through Plaintiff's evidence regarding Civil Suit 988/2012 and FIR No.240/2013.

35. The next element for Plaintiff to show was element (d) that the prosecution must have ended in favour of the person prosecuted against. While Plaintiff proved this point in relation to Civil Suit 988/2012, no evidence was produced or relied upon by Plaintiff regarding FIR No.240/2013. Plaintiff submitted no evidence regarding the status of FIR No.240/2013. What was its status? Was it proceeded with in Court? Were charges framed? Was any evidence led? There is simply nothing post the FIR being lodged. The evidence reads that the matter was patched-up with the intervention of elders, and there is no denial by Plaintiff in his cross-examination of Defendant No.1 that Defendant No.1's assertion was incorrect.

36. The last element for Plaintiff to show to succeed in a suit for malicious prosecution is element (e) that the prosecution must have caused damage to the party proceeded against. According to HOLT, CJ's analysis, as summarized in the Chapter on "Malicious Prosecution, in Ratanlal & Dhirajlal's Treatise of the Law of Torts, there are three sorts of damage, any one of which would be sufficient to support an action for malicious prosecution. These are:

"(1) the damage to a man's fame, as where the matter whereof he is accused is scandalous;

(2) the damage done to the person, as where a man is put in danger of losing his life, limb and liberty;

(3) the damage to a man's property, as where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused."

37. Plaintiff did not adduce any evidence with regard to the above items. There was no evidence brought on record to show that Plaintiff suffered damage to his fame, or to person or to his property as a result of the actions filed by Defendant No.1, namely, Civil Suit 988/2012 or FIR No.240/2013. Plaintiff deposed with regard to his reputation at work as follows:

“I was Senior Manager in the year 2013 in the HBL Bank 2013 when the present suit was filed.”

“At the time of filing the Suit No.988/2012 I was Senior Manager of HBL. At present I am on the post of the Assistant Manager but I am holding the post of Senior Manager. It is correct to suggest that I have not given the quantum details of the damages.”

“It is correct to suggest that I am holding the post of Sr. Manager in the HBL.”

38. The Plaintiff did submit that he “[v]oluntarily says that I filed the present suit due to my reputation in Bank and in the family,” yet it is evident that Plaintiff did not depose in his affidavit in evidence that he was ostracised by his colleagues at work or that he was demoted or that he suffered in any way due to the Civil Suit or FIR. Further, it appears that the contesting parties, including the deceased, were a most litigious family. Thus, it is not clear what reputation was lost in either family or among friends, as alleged. Based on the evidence brought on record between the deceased father, Plaintiff and Defendant Nos.1,2 and 3 from 2012 to 2015, the following litigation appears to have been lodged/filed before the Law Enforcement Agency and/or the Court, as the case may be:

Criminal Litigation

- Deceased father filed against Defendant No.1 FIR No.300/2012 dated 19.10.2012 (Ex. “D/3”)
- Deceased father filed against Defendant No.1, FIR No.67/2013 dated 10.04.2013 (Ex. “D/1”)
- Plaintiff filed against Defendant No.1, FIR No.45/2013 dated 13.05.2013 (Ex. “D/2”)
- Defendant No.1 filed against Plaintiff FIR No.240/2013 dated 06.07.2013 (Ex. “D/4”)

Civil Litigation

- Defendant Nos.1,2 and 3 filed against deceased father and Plaintiff Civil Suit No.988/2012 in the Court of 1st Senior Civil Judge Karachi Central (Ex. “P/2”, page 2)
- Deceased father filed Suit No.348/2014 wherein Plaintiff was one of the Defendants. Suit was allegedly withdrawn on 27.05.2015 (Ex. “P/2”, page 2)

- Plaintiff filed against deceased father Suit No.141/2015 (Ex. "P/2", page 5) / Suit No.1441 (Ex. "P/2", page 7) in the Court of IXth Senior Civil Judge Karachi
- Deceased father filed against Plaintiff Suit No.1710/2015 in the High Court of Sindh at Karachi (Ex. "P/2", page 2)

39. In view of the above, it is difficult to say that the civil litigation by Defendants apparently caused any damage to Plaintiff's fame or was scandalous. Rather, it appears that litigation had become common between family members in the deceased father's closing years. One family member prosecuting the other from 2012 to 2015 was common practice in the Plaintiff's household. In such a situation, litigation could not have allegedly led to a loss of reputation.

40. Plaintiff did not specifically state that he spent money to acquit himself of the crime he was accused of. Plaintiff did not submit in his evidence that he paid any lawyer's fee, incurred legal costs, etc. or such expenses were borne by him, or the cost of same was shared between father and son. When Defendant No.1 produced handwritten notes with a list of alleged expenses (Exhibit Nos. "D/8", "D/9" and "D/10"), submitting that they were in Plaintiff's handwriting and that these were totally wrong, fabricated, illegal, etc., Plaintiff did not confront Defendant No.1 in his cross-examination that such allegation was incorrect and not true. Plaintiff simply let it pass without any rebuttal. Thus, the evidence of Defendant No.1 has gone unrebutted and unchallenged. This does not help the Plaintiff's cause, too.

41. There is also another aspect in the matter, i.e. Plaintiff stated as against his sisters, Defendant Nos.2 and 3, in his cross examination that:

"It is correct to suggest that I have not mentioned that I have suffered any loss from sisters, i.e. Defendant Nos.2 & 3."

42. In view of the above discussion, it appears that in relation to Plaintiff's case for malicious civil proceedings arising out of Defendant Nos.1,2 and 3 Civil Suit No.988/2012, Plaintiff is/was unable to satisfy elements (b), (c) and (e) as per the Niaz case and therefore Plaintiff has not made out any cause of action against Defendants for malicious civil prosecution. With regard to Plaintiff's case for malicious criminal proceedings arising out of Defendant No.1 FIR No.240/2013, the Plaintiff is/was unable to satisfy elements (b), (c), (d) and (e) of the Niaz case, and therefore Plaintiff has not made out any cause of action against Defendant No.1 for malicious criminal prosecution.

(II) Filing of false, baseless and not maintainable case

43. Apart from malicious prosecution (criminal and civil), Plaintiff has also alleged that Defendants filed false, baseless and not maintainable case against Plaintiff. Plaintiff's claim appears to be a claim for another tort known as an abuse of legal process. According to Ratanlal & Dhirajlal's Treatise of the Law of Torts, the Plaintiff alleging such a tort must show that the predominant purpose of the defendant in using the legal process has been one other than that for which it was designed and, as a result, it has caused him damage. Adducing false evidence by a person and submitting a false case for the purpose of sustaining his own claim or defeating the other party's claim does not give rise to the tort of abuse of the process of Court.

44. In the present case, Plaintiff's focus remained on alleged malicious civil prosecution, which he failed to make out for reasons discussed above. Plaintiff did not produce any evidence in support of his claim for filing of false, baseless and not maintainable case by Defendants, particularly when the Civil Court, which rejected the Plaint filed by Defendants against Plaintiff, did not award costs. Accordingly, Plaintiff has no cause of action for the alleged filing of false, baseless and not maintainable case against Defendants.

(III) Loss of reputation

45. Plaintiff's claim for alleged loss of reputation is not a stand-alone claim. Plaintiff alleges that he suffered a loss of reputation due to the alleged malicious prosecution. In an action for malicious prosecution, damages can be claimed for damage to reputation. Except for a mere statement that he allegedly suffered a loss of reputation, the plaintiff produced no evidence in support thereof. Mere feelings and emotions could not be sufficient grounds for establishing loss of reputation. Even otherwise, Plaintiff's claim for loss of reputation has been discussed in Paragraphs 34, 35, 36 and 37 above. For the reasons set out in these paragraphs identified herein, Plaintiff also has no cause of action for the alleged loss of reputation.

Issue No. (iii)

46. Whereas in the Niaz case, the Supreme Court of Pakistan identified five (5) elements on the basis of which a suit for recovery of damages for malicious prosecution could be accepted or rejected, the Supreme Court also observed in the Niaz case that once a suit for malicious prosecution was found to be maintainable, the next question which arose was determining granting or refusing damages. To this end, the Supreme Court referred to the six (6)

principles qua the granting or refusing damages with regards to malicious prosecution which were laid down in the Muhammad Akram case (supra). According to the Supreme Court, the six (6) principles for assessing damages are as follows:

- (i) That the plaintiff was prosecuted by the defendant.
- (ii) That the prosecution ended in plaintiff's failure.
- (iii) That the defendant acted without reasonable and probable cause.
- (iv) That the defendant was actuated by malice.
- (v) That the proceeding had interfered with plaintiff's liberty and had also effected her reputation and finally.
- (vi) That the plaintiff had suffered damages.

47. As per Issue No. (ii) decided in the negative, no case for malicious prosecution is made out, neither malicious criminal prosecution nor malicious civil prosecution. Therefore, the question of damages does not arise.

48. Further, with regard to Plaintiff's claim for false, baseless and not maintainable case, once again, Issue No. (ii) for this head of Plaintiff's claim has been decided in the negative. Therefore, no award of damages arises.

49. Finally, with regard to Plaintiff's claim for loss of reputation as Issue No. (ii) stands decided in the negative, no claim can be made out for damages to the reputation for malicious prosecution or for false, baseless and not maintainable case.

50. In view of the above, Plaintiff has not suffered any damages. He is not entitled to any damages, neither general damages nor specific on any account as (I) no case for malicious prosecution (paragraph 42), (II) no case for false, baseless and not maintainable case (paragraph 44) is made out, and, (III) no case for loss of reputation (paragraph III) is made out. Therefore, this Issue No. (iii) is decided in the negative.

Issue No. (iv)

51. The claim raised by the Plaintiff is tortious. There is/was no contract between the parties. No question of breach of contract arises in the facts and circumstances of the case. In view of the foregoing whether damages as claimed by Plaintiff are remote in terms of Section 73 of the Contract Act is irrelevant. Therefore, the Issue No. (iv) is decided in the negative.

Issue No. (v)

52. In view of the above facts, circumstances and discussion, I am of the opinion that Plaintiff has failed to prove his case. Therefore, the suit of the Plaintiff is dismissed.

53. Both parties will bear their own costs.

Karachi;
Dated: 19.08.2023

J U D G E