1942 *Present :* **Howard C.J. and Soertsz J.**

HEWAVITARNE *v.* GOVINDARAM.

239—D. C. Colombo, 3,813.

Sequestration of goods—Wrongful and malicious—Mandate not carried out—Security by defendant—Claim for damages.

Where the plaintiff wrongfully and maliciously applied for and obtained a mandate of sequestration against the defendant but the sequestration of goods was not effected as the defendant gave adequate security to satisfy the plaintiff's claim,—

Held, that the defendant was entitled to claim damages if the issue of the mandate injured his reputation.

Hadjiar v. Adam Lebbe (*43 N. L. R. 145*) followed.

APPEAL from a judgment of the District Judge of Colombo.

H. V. Perera, K.C. (with him *J. E. A. Alles* and *M. Ratnam*), for the plaintiff, appellant.

J. E. M. Obeysekere for the defendant, respondent.

Cur. adv. vult.

October 27, 1942. HOWARD C.J.—

The plaintiff appeals from a decree of the District Court, Colombo, ordering him to pay to the respondent a sum of Rs. 1,000 on his claim in reconvention in respect of the plaintiff wrongfully applying for and obtaining a mandate of sequestration against the respondent. In deciding this issue in favour of the respondent the learned Judge has held that the appellant acted wrongfully and maliciously, the term

"maliciously" being used in the sense as explained in the course of the judgment in *Bosanquet & Co. v. Rahimtulla & Co.*[1] The following passage from the judgment of the learned District Judge throws a light on the reasoning that guided him in arriving at a verdict in favour of the respondent :—

> "If the plaintiff chose to entrust the litigation to an unscrupulous agent or if he chose to act upon the false statements of Gajanayake without making sufficient investigation himself in order to ascertain the truth of those statements he must be held responsible for the acts of his agent or to have acted recklessly and so liable for the consequences."

The appellant brought his action for the recovery of the sum of Rs. 1,356.33 due on a promissory note on September 19, 1939. On September 20, 1939, he filed a petition and moved the Court to issue a mandate of sequestration authorising the Fiscal, Western Province, to seize and sequester the goods, stock-in-trade and the effects of the respondent lying at No. 111, Chatham street, Colombo, to a value sufficient to cover the petitioner's claim and costs. In view of the allegations in the affidavit made by one Gajanayake, filed with the petition, the Judge directed that a mandate of sequestration be issued to seize and sequester goods belonging to the defendant to the value of Rs. 1,500 on the appellant giving security by hypothecating immovable property and by deposit of costs. The Fiscal was also directed not to sequester the goods of the respondent if the respondent gave adequate security in Rs. 1,500. On September 21, 1939, the respondent deposited the sum of Rs. 1,500 in Court. The mandate of sequestration was subsequently dissolved.

The law with regard to an action to recover damages for wrongfully obtaining a mandate of sequestration was considered in the recent case of *Hadjiar v. Adam Lebbe* (*supra*). In that case it was held that an action will lie even where there has been no actual sequestration of the goods, provided the issue of the mandate resulted in some damage to reputation. In the present case there was no actual sequestration of the goods, but there was evidence that the reputation of the respondent was damaged. The onus was also on the respondent to prove (*a*) that the appellant acted maliciously and (*b*) there was want of reasonable and probable cause. This involves a consideration of the manner in which the appellant obtained his mandate of sequestration. It was obtained on two affidavits, which were made in support of the petition. The first affidavit was made by the appellant himself. After declaring and affirming as to the respondent's indebtedness to him, the appellant goes on to say that he is informed and verily believes that the respondent is transferring his business to Rama Silk Stores of Chatham street and that in doing so he is acting fraudulently and with a view to avoid payment of the said debt. The appellant also declares that the respondent intends as soon as the said transfer is concluded to go back to his home in India. The second affidavit is made by Gajanayake, who declares and affirms as follows :—

> (1) That he carries on business in Chatham street quite close to the business of the respondent.

[1] *(1931) 33 N. L. R. 324.*

(2) That it is common talk among the traders of the said locality that the respondent is transferring his business to Rama Silk Stores of Chatham street and that as soon as he has effected the said transfer he proposed to go back to his home in India.
(3) That he had questioned the respondent and he admitted that he was transferring his business.
(4) That he requested the respondent to pay the amount due to the appellant and the respondent was unwilling to do so.
(5) That he informed the appellant of this fact.

In giving evidence, the respondent stated that at no time did he arrange to sell the stock in his shop in Chatham street either to Rama Silk Stores or anyone else. So far as the alleged sale to Rama Silk Stores is concerned the evidence of the respondent on this point is corroborated by one Jamandas Gianchand, the proprietor of Rama Silk Stores. The respondent further states that in March, 1939, he engaged a shop in Hatton and he was intending to open a branch and take his stock there, which he eventually did. Gianchand also states that he knew of the respondent's projected move and approached him so that he could obtain an introduction to the respondent's landlord and secure his shop. The respondent also denied that he ever told Gajanayake that he was selling his stock. Moreover, he gave evidence with regard to the value of his stock. This evidence, if believed, would show that he was solvent. The appellant admitted that Gajanayake was the man who gave him the information. That, although in addition he got information from the respondent's salesman and from a bhai, he acted on Gajanayake's information. Gajanayake in the witness-box maintained, as in his affidavit, that the respondent admitted he was going to transfer the stocks to the Rama Silk Stores. He also stated in evidence that Gianchand told him he was going to take over the respondent's stocks.

The learned Judge has accepted the evidence of the respondent and Gianchand and rejected that of Gajanayake in regard to the supposed statement of the respondent that he was selling his stocks to the Rama Silk Stores. This is a finding of fact which it is not for this Court to canvas. The respondent has, therefore, established that he had not at any time fraudulently alienated any property. The appellant has not been able to show that, at the time of swearing the affidavit of September 18, 1939, he knew of any fact or facts which justified him in stating that he believed the respondent was fraudulently alienating any property. If he accepted the information of Gajanayake and acted on it, his conduct was not that of a reasonable man of ordinary prudence. In swearing to this affidavit the appellant was asserting something that he had no reason to believe was true and so something he could not believe to be true. Consequently, he had no reasonable or probable cause for petitioning for the mandate of sequestration. His object in applying for such a mandate and swearing to the affidavit was in order to obtain more quickly the money owing to him. He was, therefore, attempting to achieve this object by improper means. His action was in bad faith and therefore malicious in the legal sense of the term.

In these circumstances, I am of opinion that the learned Judge was right in holding that the appellant acted wrongfully and maliciously. The amount of damages, namely Rs. 1,000, is clearly too high and must be reduced to Rs. 250. Inasmuch as each side has partly succeeded on this appeal, I think there should be no order as to costs.

SOERTSZ—I agree.

Appeal dismissed.