1921.

*Present :* Shaw J.

## HAKIM BHAI *v.* ABDULLA.

*294—C. R. Kegalla, 16,207.*

*Civil Procedure Code, ss. 653 and 654—Sequestration before judgment—Definite facts should be placed before Court—Action for damages for obtaining sequestration* malâ fide.

The defendant obtained sequestration of the property of the plaintiff before judgment in suit No. 16,002 on an affidavit which was false to the knowledge of the defendant. The Court did not direct the defendant to give security under section 654 of the Civil Procedure Code. The plaintiff in this action claimed damages for the expenses of getting the sequestration set aside and causing loss in his business and to his reputation.

*Held*, that an action for damages lay.

"Plaintiff did not get any cost in this respect in the previous action, and in a case of this sort, where the loss has been caused by the malicious act of the defendant, he is not restricted to the taxed costs of the proceedings, but he is entitled to the full costs to which he was reasonably put."

*Abdul Asees Marikar v. Abdul Caffoor*[1] commented upon.

THE facts appear from the judgment of the Acting Commissioner of Requests (Ælian Ondaatjie, Esq.) :—

The plaintiff in this case is a man of Baluchistan, who arrived in Ceylon about three and a half years ago for the purpose, as he says, of earning money. He was at one time employed on an estate. At the beginning of 1919 he started as a shopkeeper, with a boutique or store at the village of Udakumbura, which he stocked with cloth. Goods were supplied him by the defendant. Plaintiff paid Rs. 300 in part payment of the goods, and gave defendant at the same time a promissory note for Rs. 250.

It is not necessary to go into the question of whether the promissory note for Rs. 250 represented actual balance due to defendant, or whether it was made for an amount to cover the cost of goods which defendant was to supply the plaintiff with on another occasion.

It is admitted that plaintiff made a payment of Rs. 25 on account in February, 1919.

On March 6, 1919, plaintiff purchased at Colombo cloths for his shop to the value of Rs. 427·81, and on March 12, 1919, he purchased cloths again at Colombo to the value of Rs. 234·52 (P 1 and P 2).

. . . . . .

Either at the end of April or the beginning of May, 1919, defendant went from Kegalla to Udakumbura to plaintiff's shop. Defendant says he did not meet plaintiff on this occasion and found his shop locked, and was unable to find out where plaintiff had gone to, and suggested that he

[1] *1 S. C. D. 76.*

received information that plaintiff was about to leave Udakumbura. Plaintiff, on the other hand, says that he was at Udakumbura when defendant went there, that he met defendant, and that defendant found fault with him for having purchased goods at Colombo for ready cash, and made use of defendant only when he wanted stock on credit.

I may say at once that I prefer to believe plaintiff's story on this point. It is supported by evidence. But I should have believed him in preference to defendant even without his (plaintiff's) witnesses.

Defendant, no doubt, asked for the balance due to him on this occasion.

He was not paid it by plaintiff.

Defendant returned to Kegalla and put his note in suit. He applied at the same time for a mandate of sequestration of plaintiff's movable property. His application for the mandate was supported by the affidavit of May 5, 1919 (P 4).

> Paragraph 9 of the affidavit contains the following :—" I am informed, and verily believe, that the defendant, anticipating an action at law by me, is making arrangements to dispose of the said movable property and preparing to leave Udakumbura with a view to prevent my recovering the amount due to me.
>
> " The above facts come to my knowledge from inquiries I made from defendant's neighbours."

The application for a mandate was allowed by Court.

The defendant proceeded to Udakumbura in a motor car on May 8, 1919, and all plaintiff's stock in trade was seized by the Deputy Fiscal of Kegalla and conveyed to Kegalla.

The plaintiff on May 12, 1919, moved the Court (D 2) to release his property from sequestration.

He tendered security in Rs. 250 ; this motion was consented to by the other side, and allowed by Court. The evidence is that plaintiff's shop was closed for ten or twelve days in consequence of the sequestration of his property.

This action is instituted to recover damages consequent on this sequestration, which plaintiff alleges was obtained by allegations which the defendant made falsely in his affidavit (P 4).

Plaintiff claims—

(1) Rs. 50 as damages consequent on his shop having had to be closed for the period that the goods were with the Fiscal.

(2) Rs. 50 being the cost incurred in the steps he had to take to have his goods released.

(3) Rs. 200 for loss of reputation.

The first issue to be decided is whether the allegations in paragraph 9 of the defendant's affidavit (P 4) are false and malicious.

I have already said that I prefer to believe plaintiff's version of defendant's visit to Udakumbura.

Plaintiff's version is supported by witnesses whom there is no reason to disbelieve, except it be said that, being neighbours of plaintiff's, they were found willing to come forward and give false evidence in support of his case.

The defendant has called no evidence on his side. His story of what took place on his visit to Udakumbura makes it reasonable to have expected him to have called witnesses in support of it.

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He says in his affidavit (P 4) that he is worth about Rs. 20,000. He was content to rest his case on his own evidence alone. He filed a list and additional list of witnesses.

I can only infer that the witnesses named by him were unwilling to bear out the defendant's story.

The defendant in his cross-examination admitted that the plaintiff had no means of knowing that he intended suing him on the promissory note. This rather contradicts defendant's affidavit (P 4), wherein he says that the defendant (*i.e.*, the plaintiff in the present case), anticipating an action at law, was making arrangements to dispose of his property.

I cannot resist the conclusion that the allegations in defendant's affidavit (P 4) were made by him without the slighest foundation therefor. In his eagerness to make sure his money, he did not hesitate to deceive the Court into believing that those facts were present which would entitle him to a mandate of sequestration before judgment.

Proctor for defendant argued that the mandate having been issued by Court, no action would lie against his client. Also, that the allegations in the affidavit complained of, even if false, were privileged, being evidence given in a Court of law.

I do not think the decisions quoted support these contentions. Besides, this action is based not merely on damage consequent on injury to plaintiff's honour and reputation. It is also for actual loss sustained by the plaintiff in releasing and recovering his goods, and for loss of profit during the time they were not available to him for sale. To recover damage on this ground proof of malice was not necessary. But there is proof in this case of malice as well.

Plaintiff's evidence is to the effect that he made a profit of Rs. 7 or Rs. 8 per day. He claims Rs. 50 for loss of profit during the time he was prevented from making sales. This is quite reasonable charge. Rs. 50 would also be about the amount he would have had to expend in getting his property released from seizure, giving security in Rs. 250, and taking it back to Udakumbura.

I would also allow damages on the score of loss of reputation.

It is true plaintiff is only a shopkeeper on a small scale, and carries on business in an out-of-the-way village, but it cannot be that a good name and reputation are without value to him. He struck me as being a straightforward man.

I would give judgment for plaintiff for Rs. 200, with costs of suit.

*Canakaratne*, for the appellant.

*H. V. Perera*, for the respondent.

May 13, 1921. SHAW J.—

This was an action claiming damages in consequence of the defendant having in a previous suit maliciously obtained the sequestration of the property of the plaintiff, causing him to pay the expense of getting the sequestration set aside, and causing him loss in his business and to his reputation. It appears that the defendant in the present suit was plaintiff in case No. 16,002 of the Court of Requests of Kegalla, when he sued the present plaintiff on a promissory note. Immediately upon issuing his plaint in the case,

he filed an affidavit to the effect that the defendant in that case was making arrangements to dispose of his movable property and preparing to leave his place of business, with a view to preventing the plaintiff in the suit recovering the amount due on the promissory note. He applied to the Court on this affidavit for a sequestration of the goods of the defendant in the case, and the Commissioner issued the sequestration on his application. I would like, before proceeding further, to point out the Commissioner of Requests should not have ordered a sequestration on the affidavit that was before him, because it stated no definite facts which should have been sufficient to make the Commissioner issue a process of this serious nature. Also, the Commissioner, when issuing sequestration, did not direct the plaintiff in the case to give security under section 654 of the Code to pay all costs and damages that might be sustained by reason of the sequestration, if it were proved to be improperly issued. The sequestration was directed on May 6, and the plaintiff in that suit, under the order of sequestration, seized the stock in trade of the business carried on by the present plaintiff. The present plaintiff, thereupon, took steps to have the sequestration set aside, and it was so set aside on May 13. The present action is brought to recover damages for the obtaining of that sequestration by the defendant, the plaintiff in the previous suit. The Commissioner has in this suit found that the application for the sequestration was entirely unfounded, and that it was not *bona fide*, that the affidavit on which it was obtained was false, and I entirely agree with his finding. It is perfectly clear that paragraph 9 of the defendant's affidavit on which he obtained the sequestration was untrue to his knowledge, and was made for the purpose of deceiving the Court, and in fact deceived the Court and induced the Commissioner of Requests to direct the seizure of the goods. The Commissioner has given damages under three heads: Firstly, the actual loss occurred in consequence of the shop having been closed from May 6 to May 13; secondly, the costs incurred by the present plaintiff in getting his goods released from sequestration; and thirdly, for damages for loss of reputation as a trader. In all the sum of Rs. 200. The defendant's counsel contends before me that no action lies at all in respect of the injury proved, and also that the losses under the first two of the heads of damage are not recoverable in an action of this nature. On the first point I am referred to the case of *Abdul Asees Marikar v. Abdul Caffoor.*[1] In that case a Court of two Judges held in a somewhat similar case that the action was not maintainable. It was an action to recover damages for improperly obtaining an interim injunction in a case, and it was held that in that case no action lay. The Judges pointed out that the law provides the remedy for a person against whom an injunction has been improperly obtained. Under the Code there is a similar

[1] *1 S.C.D. 76.*

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provision to that which I have referred to in section 654 with reference to giving security, and the person against whom an injunction is issued has his remedy or should have his remedy in law against the security which is given by the person obtaining the injunction, and that is his only remedy in an ordinary case. In the case before the Court on that occasion it was held that the application was in fact a *bona fide* one for the purpose of obtaining an injunction, and the Judge held that a person who *bona fide* puts the law in motion is not responsible for damage that he may cause to his opponent, and the only remedy he has is the remedy provided by law against the security which should be given on the application for an injunction. But Hutchinson C.J. went somewhat further in that case, and he suggested that it is possible that, even if there were evidence of malice or *malâ fides* on the part of the person obtaining the injunction, the action might fail, and he cited *Addison on Torts, page 31*, to the effect that " if one man prosecutes a civil suit against another maliciously and without reasonable and probable cause, an action for damages is not maintainable against him." This all depends on what is meant by the word " malice." If a man does a thing that he is lawfully entitled to do, although he does it with ill-will, no action would lie. But as Wendt J. pointed out in the same case, " it might be different if the person obtaining an injunction by *dolus malus* deceived the Court on a question of fact." I think that the distinction drawn by Wendt J. is fully justified, and applies to the present case. The application for the sequestration was not *bona fide*, and the defendant obtained the order by *dolus malus* and by deceiving the Commissioner of Requests by a false statement in his affidavit. There appears to be nothing in the case that I have referred to which obliges me to hold that in such a case an action would not lie, and that the plaintiff has no remedy in consequence of the Commissioner of Requests not having directed security to be given at the time when the sequestration issued. That an action of this sort lies under our law appears by the statement made in *De Villiers on the Law of Injuries at page 75*. It is also shown by the case of *Serajudeen v. Allagappan Chetty*.[1]

With regard to damages, I see no reason why the plaintiff in this action should not recover the costs to which he was put for the purpose of getting the sequestration set aside. He did not get any costs in this respect in the previous action, and in a case of this sort, where the loss has been caused by the malicious act of the defendant, he is not restricted to the taxed costs of the proceedings, but he is entitled to the full costs to which he was reasonably put. I am of opinion also that he is entitled to recover damages for the loss of reputation. He was a trader in a considerable way of business, and his boutique was compulsorily closed in consequence of the sequestration and the removal of his goods. It seems the natural and

[1] *(1919) 21 N. L. R. 428.*

probable result from such a proceeding that he should suffer some loss in his reputation as a trader which he should be entitled to recover as being the natural consequence of the defendant's wrongful act. In the case that I have referred to in *21 N. L. R.*, De Sampayo J., at the end of his judgment on page 431, recognizes this item of damage as being recoverable when he says " the seizure of a trader's stock in trade in execution has a serious effect on his credit and reputation, and I think the amount of damages ordered by the District Judge is not excessive." In my opinion the amount of damages given by the Commissioner is recoverable in law, and I dismiss the appeal, with costs.

*Appeal dismissed.*