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Present : Fisher C.J. and Garvin J.

RAMANATHAN CHETTY *v.* MARIKAR

213—D. C. Colombo, 19,790.

Wrongful seizure of goods—Warrant issued under section 32 of the Insolvency Ordinance—Malice—Absence of reasonable and probable cause—Burden of proof.

In an action to recover damages for wrongful seizure of goods on a warrant issued under section 32 of the Insolvency Ordinance, the same questions arise for consideration as in an action for malicious prosecution.

The burden of proving malice as well as the absence of reasonable and probable cause for the seizure lies on the plaintiff.

PLAINTIFF, a Chetty, sued the defendant to recover a sum of Rs. 50,000 for wrongful seizure of goods in pursuance of a warrant obtained by the latter under section 32 of the Insolvency Ordinance. A firm of tea merchants (Ibrahim Rawther & Co.) was indebted to the plaintiff in a large sum of money. The plaintiff being concerned as to the financial position of the firm came to an arrangement with them to take over certain tea lying at the offices and the stores of the firm. The defendant, who had two cheques of the firm for goods supplied, presented one of them for payment, when it was dishonoured.

Hearing of the insolvency of the firm, the defendant took steps to protect the interest of the creditors of the firm. One step taken by him was to swear an affidavit containing a statement as to the removal of the tea and an application for the seizure of the tea.

The learned District Judge gave judgment for the plaintiff.

H. V. Perera (with *Canagaratne* and *Peri Sunderam*), for defendant, appellant.—In this case one has to take into consideration those questions which arise in an action for malicious prosecution. It is incumbent on the plaintiff to prove the absence of reasonable cause for the prosecution. The relevant questions are : Did the prosecutor believe the story upon which he acted ? Was his conduct in believing it, and acting on it, that of a reasonable man of ordinary prudence ? Has he any indirect motive in making the charge ? The defendant in this case had no motive whatever. He was, as a matter of fact, selected and put forward by several creditors of the insolvent firm. The plaintiff has failed to prove malice or absence of reasonable and probable cause on the part of the defendant. (*Corea v. Peiris.*[1])

[1] *12 N. L. R. 147.*

H. H. Bartholomeusz (with *Navaratnam* and *Nadaraja*), for plaintiff, respondent.—In an action for wrongful seizure of property, all that the plaintiff has to prove is that the property seized was his at the date of seizure. It is for the defendant then to show that the seizure was lawful and not in violation of any right of the plaintiff.

The case of *Corea v. Peiris* therefore does not apply.

The question that arises here is: Did he swear a false affidavit in the belief that a false statement is necessary to secure a seizure? There is nothing in the affidavit to justify the seizure of plaintiff's goods, except the statement that the goods were removed from Sea street after their insolvency. That statement is false. At the time he swore the affidavit he only knew that the goods had been removed. He did not know actual date of removal, which was falsely stated. (*De Alwis v. Murugappa Chetty*[1]; *Maasdorp bk. IV., 73*; section 362 of Civil Procedure Code.)

The goods were seized in our possession and not in the insolvents' and the seizure was *ultra vires*. Hence it is not incumbent upon us to prove malice.

H. V. Perera, in reply.—*Salmond on the Law of Torts, 5th ed., pp. 398 and 399.* Ministerial officer can be made use of as an agent. But even here it must be shown that there was an express authorization to such an officer as to make the officer an agent.

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In this case the defendant-appellant obtained a warrant under section 32 of the Bankruptcy Ordinance, No. 7 of 1853, and in pursuance of the warrant, some tea, which for the purposes of this case must be taken to be the property of the plaintiff, was seized by the Fiscal. The plaintiff thereupon sued the defendant claiming Rs. 50,000 damages on the ground that "the defendant in causing such seizure was acting unlawfully and wrongfully, and the defendant procured the issue of the said warrant by false and incorrect statements made to the Court." (Clause 4 of the plaint.) The plaintiff amended his plaint and further alleged (Clause 4 (*a*) of the plaint) "for a second cause of action, that the defendant in obtaining a search warrant and causing such seizure was acting wrongfully and maliciously."

The important facts, which can be gathered from the evidence of Suppramaniam (known also as Suppiah), the plaintiff's agent in Ceylon, are as follows:—The plaintiff is a Chetty, and a firm by the name of N. M. Mohamadu Ibrahim Rawther & Co., who carried on business at 35 and 65, Second Cross street, as tea merchants, were indebted to him in a large sum. The plaintiff being anxious as to the financial position of the firm came to an arrangement with them on June 16, 1925, under which all the tea at 35, Second Cross street

[1] *12 N. L. R. 353.*

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(otherwise known as Prince Street), and at 65, Second Cross street (a store rented by them), was to become the property of the plaintiff, who had never dealt in tea, the value of the whole being set down at Rs. 21,700. Suppramaniam states "The memorandum shows that "41,000 lb. of tea was sold to us. It was not weighed. It was not valued by me, but the insolvents fixed the price." He also said "I did not actually pay Rs. 21,000 to the insolvents, but I was given the tea in order that I might sell and credit them with value in our books," and also, "I did not credit the value of tea, Rs. 21,000, to the insolvents' account in our books. I have not done so up to date. That is not because we wanted first to sell the tea and find out what it realized. It is because the insolvency proceedings commenced. No. I wanted to sell the tea and get the proceeds and then credit the insolvents."

On the same day, June 16, the plaintiff took over the tenancy of the premises of Rawther & Co., and started removing the tea from there on June 16 and 17. On June 18, Rawther & Co., were adjudicated insolvent on the petition of one of their clerks, one Hamid, who had typed and signed his name as witness to the memorandum referred to. The plaintiff remained tenant of 35, Second Cross street, for four or five months, and during the whole of this period the place was kept shut up, and apparently the board with the name of the insolvent firm still remained there.

Suppramaniam's evidence is to the effect that "the best tea was removed on June 16 and 17," and that by 12 noon on the 17th he had completely removed the greater part of the tea. He says further "On Sunday (*i.e.*, on the 21st) I took carts to No. 65, to remove the tea which was lying there. When I first went there I heard about the filing of the insolvency papers, and so again I went on Sunday with carts to remove it. On the day I had heard of the insolvency I had gone to No. 65 for the purpose of removing the tea. I took carts and coolies on that day. Before I went to No. 65 for the first time I had heard of the filing of the insolvency papers, and that is why I went. June 16, the day on which we purchased the tea, was a Tuesday. I may have heard of the insolvency on the 19th, Friday. I stated in the District Court that we went to remove the tea from No. 65, but was prevented from doing so. As soon as I heard of the filing of the insolvency papers I went up to No. 65 for the purpose of removing the tea. As soon as I reached No. 65, I was also informed that insolvency papers had been filed." He says further "I showed the assignee my memorandum of purchase. I am sure that either on the 19th or 20th I showed the assignee the memorandum and he consented to my removing the tea," and "when I went on the 21st I loaded 7 or 8 bags in a cart. Intended to remove that tea to 45, Prince street, not to 35, Second Cross street. The latter

place is at the junction of Prince street and Second Cross street. K. M. S. Segu Mohamadu owns 42, Prince street. I had not removed any tea to that place."

In my opinion this case involves consideration of substantially the same questions as the questions involved in an action for malicious prosecution. In *Corea v. Peiris* (*supra*) the Privy Council dealt with the question of what it was incumbent on the plaintiff in an action for malicious prosecution to prove. In the opinion of the Privy Council the burden of proving malice under the Roman-Dutch law as under the English law lies on the plaintiff and " the principles of the two systems of law on the subject are practically identical." They were further of opinion that the burden of proving the absence of reasonable cause for the prosecution also lay on the plaintiff, and (page 150) that " the crucial questions for consideration are : Did the prosecutor believe the story upon which he acted ? Was his conduct in believing it, and acting on it, that of a reasonable man of ordinary prudence ? Had he any indirect motive in making the charge ? "

Applying therefore these tests to the evidence in the present case, was the plaintiff entitled to succeed ? It is clear in the first place that there was no evidence that the defendant had any indirect motive in making the charge. On the contrary, the evidence shows that the defendant was selected and put forward by several creditors of the firm of Rawther & Co., to take steps to protect his and their interests, and Counsel for the respondent, for the purpose of supporting the proposition that malice had been proved against the defendant, found himself restricted to a statement in paragraph 7 of the affidavit upon which the search warrant was obtained. The paragraph in question, so far as it is material, is as follows :—

> " The insolvents have after their insolvency removed the following goods and deposited them in the several places set out hereinafter. Tea of the approximate value of Rs. 5,000 has been removed by the insolvents to 42, Prince street, Colombo, the store of K. M. S. Sego Mohamado. Nana Kavanna Mana Nana Suppiah has, from June 19 to 21, removed tea of the value of about Rs. 30,000 to his store at Sea street, Colombo . . . ." The words " after their insolvency " are relied upon to support the argument on behalf of the respondent. It is urged that they were untrue to the knowledge of the defendant, and inserted with the object of inducing the Court to grant him what he could not have obtained had he stated the true facts.

The defendant's position was this : he had two cheques in payment for kapok supplied, drawn by Rawther & Co., in his favour on June 15, and postdated respectively June 19 and 20. On

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presentation of one of them on the 19th it was dishonoured and on the 20th he heard of the insolvency. On the 21st he actually saw tea being removed by Suppiah from 65, Second Cross street, and made a complaint to the Police at 1.15 P.M. on that day, and on the same day he was appointed to protect the interests of himself and other creditors. On the 22nd, after consulting his Proctor, he filed a petition to the Court asking (1) for the removal of the assignee on the ground that he was not acting in the best interest of the creditors, and (2) for the seizure of tea removed by the insolvents, and in support of it he swore the affidavit referred to containing the statement as to the removal of tea on a date when the assignee had assumed responsibility.

Such being the circumstances under which the defendant took action, can it be said that the plaintiff has discharged the onus of proving that the defendant in making the allegation contained in paragraph 7 of his affidavit acted with malice and without reasonable and probable cause ? I see no ground for the view that the application of section 32 is limited to property which has been removed after adjudication, still less can I think that the deponent would have it in his mind that there was such a limitation and have designedly worded his affidavit accordingly. It would, therefore, in my opinion, be quite unreasonable to impute to the defendant an intention to mislead the Court for his own ends. The action and conduct of the Agent of the plaintiff points to there being abundant foundation for the belief that property of the firm had been removed to the prejudice of creditors, and in view of the fact that the defendant lives in Second Cross street, and was at the time carrying on business in a boutique opposite to No. 35, there is no doubt but that he was well aware of what was going on there.

Notwithstanding, therefore, that in the result the defendant failed to upset the transaction between the insolvent firm and the plaintiff, the latter has, in my opinion, signally failed to prove that there was malice or absence of reasonable and probable cause on the part of the defendant. In my opinion that is the only question with which we are called upon to deal, and I think, therefore, that the action should be dismissed.

The decree will be set aside and judgment will be entered for defendant dismissing the action with costs in this Court and in the Court below.

GARVIN J.—I agree.

Appeal allowed.