1941 *Present* : **Soertsz and Wijeyewardene JJ.**

COORAY *v.* FERNANDO

59—D. C. Colombo, 7,880

Malicious civil proceedings—Grounds of action—Malice—Maliciously instituting maintenance proceedings—Roman-Dutch law.

Under the Roman-Dutch law an action will lie for maliciously instituting civil proceedings in respect of a maintenance case falsely instituted.

In such a case the grounds of action are similar to those of an action for malicious prosecution.

Malice in the case of malicious civil proceedings is not confined to actual personal malice but may include the case where the defendant has been actuated by any other improper or indirect motive.

The difference between the English and the Roman-Dutch law explained.

APPEAL from a judgment of the District Judge of Colombo.

H. V. Perera, K.C. (with him *A. H. C. de Silva*), for plaintiff, appellant.

L. A. Rajapakse (with him *G. P. J. Kurukulasuriya*), for defendant, respondent.

Cur. adv. vult.

March 13, 1941. SOERTSZ J.—

The plaintiff brought this action to recover damages on the ground that "the defendant falsely, maliciously and with intent to injure the plaintiff, caused and procured one P. Panchohamy . . . . to sue the plaintiff falsely . . . . for maintenance of her illegitimate child whom she falsely, and at the instigation of the defendant, alleged she bore to the plaintiff". The trial Judge dismissed the action with costs.

A peculiar feature of this case is that it arises from proceedings instituted to obtain maintenance under the Maintenance Ordinance. Such proceedings although they have been described in certain cases, as *quasi*-criminal, do not amount to a criminal prosecution. In fact, in the case of *Eina v. Erineris*[1], Bonser C.J. said: "This Ordinance is not one dealing with a criminal matter, but it provides a speedy and less expensive way of enforcing a civil obligation". That view has been adopted in several later cases.

It seems to follow from this that proceedings under the Maintenance Ordinance cannot properly be regarded as proceedings out of which an action for malicious prosecution can arise, for "malicious prosecution consists in maliciously and without reasonable or probable cause laying a false criminal charge against anyone, which has led to the *prosecution* of the latter, and has thus injured him in person, property or reputation" (*Maasdorp Book III., p. 80*).

But Counsel for the appellant contended that in that view of the matter, he stood in a more advantageous position, that is to say, in the position of one suing a party for "maintenance" of civil litigation. He submitted that a plaintiff in such a case had a much lighter burden to discharge than a plaintiff suing on the ground of malicious prosecution, and that all he had to establish was that the defendant caused the initiation of civil proceedings, or fostered civil proceedings already set on foot, from an indirect motive, that is to say, "without lawful justification".

In English law, "Maintenance" consists in instituting, carrying on or defending civil proceedings in the absence of lawful justification. The essence of it is intermeddling with litigation in which the intermeddler has no concern. The leading case on this topic is that of *Neville v. London Express Newspapers, Ltd.*[2] In that case it was held by the majority of the Law Lords that an action for maintenance lay even where the

[1] *4 N. L. R. 4.*

[2] *(H. L.) 1919 A. C. 368*

"maintained" action had been successful, for the cause of action is the violation of the absolute right every person has to protection against "maintenance", in other words "the right to be spared from *officious* litigation".

In another leading case *Harris v. Brisco*[1], the Court of Appeal held that a person helping another in litigation on grounds of charity, comes within the exception of "lawful justification". So would a person who is solely actuated by considerations of kinship, and of interest in the litigation. If then the principles of the law of England were applicable, Counsel's contention that a much lighter burden lay upon him than would have lain if this action were to be regarded as one for malicious prosecution, appears to be justified.

But, we must guide ourselves by the principles of Roman-Dutch law in a matter of this kind. Maasdorp quoting *Beukes v. Steyn*[2] says: "with respect to malicious legal proceedings *whether civil or criminal,* it may be laid down that when a person sets the law in motion, and damage to another person accrues therefrom, he is liable in damages *if it can be shown that in doing so he acted maliciously and without reasonable or probable cause*", and again on page 86 "an action will lie not only for malicious prosecution, but also for malicious civil proceedings, the grounds of the action being similar in each case". Maasdorp then proceeds to explain what is meant by "maliciously" and "without reasonable and probable cause." He says, at page 83 of the same book, "malice" in the case of . . . . malicious civil proceedings is not confined to actual personal malice, that is to say, to spite or hatred against or a wish to annoy the plaintiff, but may include the case where the defendant has been actuated by any other improper or indirect motive". Commenting upon "reasonable and probable cause", he says: "it will be necessary for the defendant to show not merely that he had an honest belief, but also that his belief was such as would have been entertained by any person of ordinary discretion and prudence".

While, therefore, in English law it is sufficient for a plaintiff to show that a civil action was instituted, carried on or defended by the defendant in the absence of lawful justification as explained already, under the Roman-Dutch law, a plaintiff must prove in addition that there was malice, as well as want of reasonable or probable cause on the part of the defendant.

The learned trial Judge found that "even assuming that the maintenance case filed by Pancho is false, there is not sufficient evidence . . . . to justify a finding that this defendant falsely, maliciously and with intent to injure the plaintiff caused and procured her to file that case". This is somewhat ambiguous language. It is not clear whether the Judge meant to say that he was not satisfied that the defendant did, *at all* cause and procure Pancho to file the case, or that he was not satisfied that in causing or procuring Pancho to file the case, the defendant was acting maliciously, &c. But, I should think, that in the context of the whole judgment, the concluding paragraph which I have quoted, was meant to convey the meaning that the Judge held that he is not satisfied on the evidence that the defendant, *at all* caused or procured the filing of the

[1] *L. R. 17 Q. B. D. 504.*

[2] *7 Buch 24, bk. 3. p. 80 (1909 ed.)*

case. That is my view too. Certainly so far as Pancho's first resort to the Court is concerned, there is not even a suggestion that the defendant was responsible for that. In fact, the suggestion appears to be that, on that occasion, she was instigated by the defendant's brother, the Police Vidane, between whom and the plaintiff there is alleged to have been ill-feeling which it is said, was fanned to flaming point by an incident that occurred on January 17, 1937.

Even this suggestion of instigation by the Police Vidane is not borne out by the course of that case. Pancho went into Court on January 17, 1937. The case came to an abrupt end on February 18, 1937, because she had no money to secure the attendance of her witnesses and this fact negatives the allegation against the Police Vidane, for if the headman was the evil genius urging her on, it is only reasonable to suppose that he would have seen to it that the case ran its course.

Pancho revived the maintenance case on February 25, 1937, and it is here that the intervention of the defendant is alleged. That allegation is based mainly on the evidence of M. A. Fernando, P. H. S. de Silva and Dhanapala, and also on the complaint made by the plaintiff to the Moratuwa Police on March 28, 1937.

The learned Judge disbelieves the evidence of the three witnesses mentioned above, and I must say that, although I have not had the advantage of seeing and hearing those witnesses, I share the disbelief of the trial Judge. Their evidence sounds unconvincing. The entry in the Police information book is a piece of self-serving evidence, and as the learned Judge has pointed out, the plaintiff is not too shy of fabricating evidence. For instance, it is quite clear that he sought to create evidence in an attempt to establish that Pancho had first declared that the plaintiff's lunatic brother was the father of the child as is shown by documents P 2 and D 2, and by a perusal of evidence of H. S. Fernando whom the Judge has disbelieved.

The plaintiff's case fails whichever way it is examined, whether according to the principles of English or of Roman-Dutch law. If the concluding part of the trial Judge's judgment means, as I think it does, that he is not satisfied that the defendant caused or procured the institution of the maintenance proceedings, the action fails under the English law for want of proof of the essential fact of officious interference in litigation. If, however, it is assumed that the trial Judge meant to say that he was not satisfied that the defendant when he caused and procured the filing of the maintenance case was acting maliciously and without reasonable or probable cause, then again the action fails under the Roman-Dutch law which governs this case for the reason that two essential conditions have not been satisfied.

On the matters before us, it is impossible for us to differ from the view taken by the trial Judge that there is no proof of malice and of want of reasonable and probable cause.

For these reasons, I am of opinion that the appeal fails and that it must be dismissed with costs.

WIJEYEWARDENE J.—I agree.

Appeal dismissed.