1931 *Present:* **Macdonell C.J. and Garvin S.P.J.**

BOSANQUET & CO. *v.* RAHIMTULLA & CO.

14—D.C. Colombo, 34,160.

Sequestration of property before judgment—Action for damages—Allegation of fraudulent alienation of goods—No reasonable or probable cause for belief—Malice—Discharge of mandate.

Where property sequestered before judgment has been released from seizure and the writ returned, it is not necessary that the mandate should formally be discharged before an action for damages for wrongful sequestration is instituted.

Where a creditor procures the issue of such a mandate by representing to the Court that his debtor is fraudulenty alienating his property—when in fact the debtor was not doing so—merely for the purpose of enforcing a speedy payment of his debt,—

Held, that the creditor was actuated by malice.

THE plaintiffs sued the defendants by way of summary procedure for the recovery of a sum of Rs. 6,846.73 and interest due on certain promissory notes. When they filed the plaint the plaintiffs applied for and obtained under section 653 of the Civil Procedure Code a mandate of sequestration on the ground that the defendants "are disposing of their stock-in-trade under their market value and appropriating the proceeds for themselves without meeting their engagements with their creditors and have acted fraudulently in disposing of their stock-in-trade in the said manner with a view to avoid payment of their debts due to the plaintiff-company". The defendants filed answer alleging payment of the moneys due but later they abandoned this plea. They further counter-claimed damages Rs. 50,000 for injury to their credit and reputation by reason of the issue of the mandate and of the sequestration of their goods.

On the claim in reconvention, the learned District Judge gave the defendants judgment for Rs. 5,000 and costs. The plaintiffs appealed.

F. de Zoysa, K.C. (with him *B. F. de Silva*), for plaintiffs, appellants

H. V. Perera, for defendants, respondents.

December 18, 1931. MACDONELL C.J.—

In this case plaintiff-appellants sued defendant-respondents by way of summary procedure for Rs. 6,846.73 and interest due on certain promissory notes. On the date, August 23, 1929, when they filed their plaint, they applied for and obtained under section 653 of the Civil Procedure Code a mandate of sequestration of the goods of the defendant-respondents. The latter at first denied that any sum was due to the plaintiffs and they also counter-claimed damages Rs. 50,000 for injury to their credit and reputation by reason of the issue of the mandate and of the sequestration thereunder of their goods. At the hearing of this case defendants did not persist in denial of their indebtedness to plaintiffs in the sum of Rs. 6,846.73 and judgment passed for plaintiffs for that amount with interest. On defendant's claim in reconvention, the learned District Judge gave them judgment and assessed the damages at Rs. 5 000 and costs in that class. It is from this judgment on the claim in reconvention that the plaintiffs now appeal.

The facts were these. The plaintiffs are importers of goods in Colombo and the defendants are and have been for many years vendors of goods in Colombo, selling them to customers in the several shops they have here but also supplying goods to smaller traders at a distance. The course of business between the plaintiffs and the defendants was that defendants would order goods from plaintiffs who would then import them, whereupon defendants would take delivery of the goods imported for them, giving promissory notes at 120 days. Firms so importing goods are in the habit of employing a broker who would guarantee the purchasing firm's transactions. It is in evidence that one Segarajasingham. the guarantee broker of certain other importing firms, had died in May, 1929—the events in this case occurred in August, 1929—and that his death caused embarrassment to the defendant firm in its business dealings with those firms, since for the moment there was no one to guarantee payment for the goods they had ordered from them. The importing firms asked them to pay for those goods as they took delivery. Evidently, at this time, the defendants were not always able to take such delivery; they would take a portion of their order and pay for it, and the rest which they were unable to pay for and so take, would be sold against them and they would be debited with any loss. But defendants also had outstanding promissory notes due to these other firms and payable in August, and it is clear that a considerable number of these they were unable to meet, and of these they had to obtain renewals. It is proved that in August, 1929, defendants were hard pressed for ready cash and had even—it can be put that way—suspended for the moment cash payments as far as possible, but it is equally clear that they were not insolvent. The evidence is that on August 29, 1929, when they had their stock checked and valued, it was worth more than what they owed on it, and it seems also to be the fact that they had book debts more than sufficient to meet their other, mainly Chetty, liabilities. This being the state of things, defendants had on August 19 to meet three promissory notes of Rs. 4,000, Rs. 2,622.57, and Rs. 224.16, respectively, total Rs. 6,846.73, which they had granted to the plaintiff firm in payment for goods, and they wrote to them

enclosing a cheque for Rs. 846.73 post-dated to the 25th, asking plaintiffs to accept it in part payment and to extend payment of the balance Rs. 6,000 for another three months. There were interviews between the parties, plaintiffs refused to accept the cheque offered and certain two promissory notes offered. one for Rs. 4,000 payable on November 7, and the other for Rs. 2,000 payable November 17 (though it would appear that these documents passed into the plaintiffs' possession and remained there for some time) and pressed for an immediate, if small, cash payment. Defendants refused and unfortunately told the plaintiffs that they could do what they liked in the matter. Plaintiffs had heard something of defendants' then financial difficulties as set out above and got alarmed for their money—defendants' refusal to make even a small cash payment no doubt heightened their alarm—and on August 23 they commenced summary action against defendants under chapter 53 for the amount Rs. 6,846.73 due on the promissory notes which they had been asked and had refused to renew, lodging plaint that day without any letter of demand. On the same day, acting under most unfortunate advice, they petitioned under section 653 for a mandate of sequestration. A partner of the plaintiffs' firm swore in the affidavit required under the section that there was owing them the sum of Rs. 6,846.73, that they had no adequate security and then proceeded to say " To the best of our knowledge and belief, the defendants have failed to meet their engagements with several of these creditors and have been recently and still are disposing of their stock-in-trade under market value and appropriating the proceeds for themselves without meeting their engagements with their creditors, and the defendants have acted fraudulently in disposing of their said stock-in-trade in the said manner with a view to avoiding payment of the debts due to the plaintiff-company and other creditors ". The plaintiffs also gave the security required by section 654 against any costs or damages which they might be adjudged to pay. The Court thereupon issued the same day, August 23, a mandate of sequestration. This the Fiscal's agent executed the same day at about 4.30 P.M., but before he had had time to do more than make a list of the contents of two almirahs, a cheque was handed him for the full amount. He thereupon withdrew his sequestration, paid the cheque into Court, and returned his mandate duly endorsed with what he had done, also into Court. It has remained there ever since and once there plaintiffs could not have obtained its reissue or taken any steps by virtue of it, without leave of the Judge. The seizure under the sequestration cannot well have lasted more than an hour and probably not so long.

On September 20, 1929, defendants filed their answer alleging payment prior to the date on which the promissory notes fell due, renewal of which had been refused, but later they abandoned this plea. They pleaded further as follows:—

" (*a*) That the plaintiffs wrongfully obtained a mandate of sequestration in the above action on or about August 23, 1929, and caused the Fiscal to sequester the property belonging to the defendants.

(*b*) That on the Fiscal proceeding to sequester property under the said mandate, the defendants paid to the Fiscal under protest the sum of Rs. 6,846.73 stated to be due on the promissory notes sued upon and a further sum of Rs. 81.05 as costs.

(*c*) That by reason of the issue of the mandate of sequestration and the sequestration of defendants' property they have been injured in their credit and reputation and have suffered damages in the sum of Rs. 50,000."

On this claim the defendants led evidence which showed conclusively that they did not in August, 1929, or indeed at any time, "fraudulently alienate their stock-in-trade with a view to avoiding payment of the debts due to the plaintiff-company", and the member of the plaintiffs' firm who gave evidence did not attempt to show that they had done so but contented himself with setting out fairly and frankly the facts knowledge of which had induced the plaintiffs to apply for the mandate. These facts, showing grave temporary embarrassment on the part of the defendants, have been outlined above. At the hearing, the Court framed a number of issues whereof No. 1 is the most material. "Did the plaintiff wrongfully or maliciously obtain a mandate of sequestration?"

First of all, there is a preliminary point to decide. On the appeal it was argued for the plaintiff-appellants that the defendants' claim in reconvention was not maintainable until they had obtained cancellation of the mandate of sequestration, and this argument relied on the analogy of actions for malicious prosecution. But an analogy is not an argument unless it runs on all fours. An action for malicious prosecution presupposes two Courts, one criminal in which plaintiff has been prosecuted, and the other civil in which he seeks damages for the prosecution. Until the prosecution has terminated in his favour by acquittal or until the conviction against him has been set aside either by reversal on appeal or by acquittal on new trial, his civil action for damages for malicious prosecution cannot well lie. If it could lie with the prosecution still pending or the conviction still unreversed, there would be one Court, a criminal one, which had declared him, or might eventually declare him, guilty, and another, a civil one, which was asked to declare him innocent and entitled to damages. If the civil Court declared him innocent and entitled to damages while the prosecution was still pending, the criminal Court in which that prosecution had been instituted might hereafter declare him guilty and there would thus be the possibility of two contradictory decisions on the same issue. If the civil Court declared him innocent and entitled to damages after the prosecution and while the conviction under it still held good, there would actually be two contradictory decisions on the same issue. To avoid such an impasse, it is an obvious and necessary rule that to enable actions for malicious prosecution to lie, plaintiff must show that the criminal proceedings of which he complains have terminated, and in his favour. The present case is totally different. For one thing all the proceedings are in the same action and in the same Court, not in two actions and in two Courts. Consequently the possibility of contradictory decisions can hardly arise. Moreover, the mandate although it had not been

formally set aside, yet was not in operation when defendants brought their claim in reconvention. The mandate had been acted on, there was a return endorsed on it and it had itself been sent back to the Court issuing it and it could not have reissued thence without leave of that Court. It was not then a process of Court which was of any force or effect at the time when defendants brought their claim in reconvention. On the day of trial the defendants' advocate proposed the following issue additional to others already framed: "Are the defendants entitled to have the mandate of sequestration discharged?" The plaintiffs do not seem to have raised any objection to this issue, still less to have urged that until it was decided, the claim in reconvention would not lie, and I do not think they should be allowed to raised this preliminary point now. Besides, their contention, if sound, would tend to duplicate the proceedings by arguing what is substantially the same point twice over. One would be inclined to say that the payment by the defendants of the amount claimed in the plaint does of itself discharge the mandate of sequestration and thus is analogous to the acquittal which is the *sine qua non* of an action for malicious prosecution. But, if this be not so, and if it would be necessary for the defendants formally to obtain a discharge of this mandate in a distinct proceeding or application, then they could only do so by showing that it was improperly obtained in the first instance. But proof of this is a very large part of their case in reconvention. Consequently they would have to lead the same evidence twice over, first to show that the mandate had been improperly obtained and so should be discharged, and then to show that it had been improperly obtained and that so they were entitled to damages. No doubt the second time they would have to lead evidence additional—*e.g.*, as regards malice—to that led the first time, but to a large extent it would be the same evidence, repeated. This consideration by itself is sufficient to throw grave doubt on the argument that until the mandate has been discharged the claim in reconvention will not lie.

It would almost seem, however, that the point has been concluded for us by the case, *McTurk & Rose v. Bent*,[1] which was an appeal from British Guiana, a colony then under Roman-Dutch law. There the plaintiff had obtained an interdict restraining the defendants from selling or consigning any portion of the proceeds of their plantation. The defendants sued for damages and the Court in the same action declared that the interdict had been improperly obtained and condemned the plaintiff to make good to the defendants the damages they had suffered by reason of the same. At a later stage, the Court refused to assess the damages sustained, and the successful defendants had to go to the Privy Council to compel the Court to assess those damages. The Judicial Committee held that the first decree of the Court, that in the defendants' favour, must be taken as a simultaneous sentence discharging the interdict and pronouncing for damages. That, as I have pointed out, was a Court administering Roman-Dutch law, though not, of course, the Codes which govern our procedure, but it is at least some authority that a party can obtain damages for the improper use of civil process even while that civil process remains formally uncancelled.

[1] *4 Moore 212, 13 E. R. 283.*

Returning now to the main issue in this matter, did the plaintiffs wrongfully or maliciously obtain the mandate of sequestration? The plaintiffs could not have obtained the mandate without swearing in their affidavit that the defendants were fraudulently disposing of their stock-in-trade with a view to avoiding payment of their debts, and that mandate could properly issue only if there was reasonable evidence that the defendants were at the time so alienating their stock-in-trade. The defendants showed in their evidence that they had not at any time fraudulently alienated any property, and the plaintiffs in their evidence did not attempt to show that they had, or that at the time of swearing the affidavit of August 23, 1929, they, the plaintiffs, knew of any fact or facts which justified them in stating that the defendants were or had been fraudulently alienating any property. Then in swearing to the affidavit of August 23, 1929, the plaintiffs were asserting something that they had no reason to believe was true, and so something that they could not believe to be true; consequently they had no reasonable or probable cause for petitioning for the mandate of sequestration. This in itself is evidnce of malice, for these reasons. What was the object of plaintiffs in swearing to the affidavit and petitioning for the mandate of sequestration? Obviously that they might the quicker obtain the money owing to them. But the special process of sequestration which they were asking for was grantable only if certain facts existed, and they had no belief that those facts existed, since there was nothing within their knowledge to warrant the belief that they did. Then they were endeavouring to gain an object, it was their intent to gain it, by means which they could not justify. But intent to obtain an object by means that can not be justified is a wrong and improper intent, and what the law calls malicious. It is an actionable *injuria* "when a person in bad faith and with the object of occasioning an injury causes the goods or the person of another to be arrested in accordance with the practice of the present day". *Voet, bk. XLVII, tit. 10, s. 7*, quoted in *de Villiers on Injuries, page 75*. On this passage of *Voet*, de Villiers comments as follows in the same work at page 222: "An arrest" (sc. of the person, but the same rule would hold good with regard to arrest of goods) "would be justified by probable cause existing for its being made; for instance, the genuine belief on the part of the alleged creditor that a certain debt is due and that the debtor is trying to evade payment by means of flight. When, however, no such probable cause has existed and the plaintiff acted maliciously in obtaining the arrest he will clearly be liable in the action of injury on account of the malicious arrest". Then the defendants have made out their case for they have shown that plaintiffs acted without reasonable and probable cause and with malice.

In his judgment the learned District Judge says: "They (plaintiffs) have given security to meet any claim for damages, and in such a case it does not matter whether they acted maliciously or not, but if it had been necessary I should have held that they did act maliciously, using that word in the sense in which it is understood in law." If this means that it was unnecessary for defendants in their claim in reconvention to show malice, I must respectfully dissent, but I think the learned District Judge has been misled by a sentence in the judgment of Shaw J.

in *Hakim Bhai v. Abdulla*.[1] Shaw J. referred to *Abdul Azeez Marikar v. Abdul Caffoor*,[2] and then proceeded to say (page 188). "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 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 this is his only remedy in an ordinary case." Section 667 of the Civil Procedure Code provides that if it appears to the Court granting the injunction "that there was no probable ground for applying for the injunction" that Court may award against the party obtaining it, to the party against whom it was granted, compensation for "expense and injury" caused to him. I take it that this section 667 enunciates not only the remedy but also the grounds on which the remedy may be adjudged; it is a substantive enactment as well as a procedural one. Section 654, that giving a remedy for improperly obtaining a mandate of sequestration, is to a different purport and is differently worded. It is as follows:—

> "654. Before making the order for a warrant of arrest or mandate of sequestration, the Judge shall require the plaintiff to enter into a bond (form No. 105, Schedule II.), with or without sureties, in the discretion of the Judge, to the effect that the plaintiff will pay all costs that may be awarded and all damages which may be sustained by reason of such arrest or sequestration, by the defendant or by any other person in whose possession such property shall have been so sequestered; and it shall be competent to the Court to award such damages and costs of suit either to the defendant or too those in whose possession such property shall have been so sequestered."

Now this, it seems to me, is a purely procedural enactment. It requires security to be given to pay costs that may be awarded to and damages that may be sustained by defendant. But unlike section 667 which states the grounds on which such costs and damages may be claimed by him, namely, no probable ground for applying for the injunction, this section 654 is silent as to what defendant must prove before he is entitled to costs or damages. For the substantive law on what defendant has to prove so to entitle him, we must look beyond the words of section 654 and doing so we find, in the authorities quoted *supra*, that what defendant must prove is that plaintiff acted without reasonable or probable cause and with malice. The learned District Judge says "if it had been necessary, I shall have held that they (plaintiffs) did act maliciously". I respectfully concur in this conclusion but at the same time hold that such a finding, namely, the presence of malice, is a necessary one for the defendants to succeed in their claim in reconvention.

There only remains the question of damages. Now there is no evidence that the defendants did suffer in their business through the sequestration and it is clear that their difficulties in meeting their promises to pay,

[1] *23 N. L. R. 180.* [2] *1 S. C. D. 76.*

and the consequent restriction of their credit by the firms to whom they owed money, were due to other causes. The sequestration lasted a minimum time, and though it was known to those who saw it and became known, according to the evidence, beyond the jurisdiction, still there is nothing to show that this affected the defendants in their business. Therefore when the judgment says " But the seizure must have discredited defendants' firm to some extent ", it utters an opinion probable may be, but not supported by evidence. The learned District Judge says " They must have suffered pain of mind and they were put to the expense of having their stocks verified". This may be readily conceded, and there is also the fact that the defendants are a firm of good and long standing. On these grounds, therefore, annoyance of mind and the right to be exempt from such an attack upon them, they are entitled to a substantial solatium. As the plaintiffs acted with something difficult to distinguish from *contumelia*, this lets in the exemplary or punitive factor in computing the damages. But the amount granted them at the trial, namely, Rs. 5,000, is clearly too high, and all things considered should, I think, be reduced to half, namely, Rs. 2,500.

I wish to add one word. A mandate of sequestration is a lawful method of process, and nothing in this judgment must be read as discouraging its use under the proper circumstances, and these are that the debtor actually is fraudulently disposing of his goods with a view to avoiding payment of debts due, or that there are facts within the knowledge of the person applying for the sequestration which would justify a man of ordinary experience and common sense in supposing that the debtor was so fraudulently alienating his goods, for in either of these circumstances the applicant will have reasonable or probable cause for his application. But if neither of these circumstances be present, that is, if the debtor is not fraudulently alienating his goods and if there is nothing known that would justify a reasonable man in supposing that he was, then an applicant for sequestration would not have reasonable or probable cause for his application and would in all probability be acting with that wrongful or improper motive which the law calls malice, and would thus be exposing himself to liability in damages at the suit of the debtor. Here the plaintiffs acted under bad advice and made statements for which there was neither reasonable nor probable cause and that with an intent which one is compelled to hold malicious in the legal sense of them. But these, the facts in the present case, do not affect or limit the availability of the remedy of sequestration, in appropriate circumstances.

For the foregoing reasons I am of opinion that the appeal against the judgment itself must be dismissed but that that judgment must be altered into one for Rs. 2,500 damages with the costs appropriate thereto. As each side has partly succeeded on this appeal, I think there should be no order as to the costs of the same.

GARVIN S.P.J.—

The plaintiffs appeal from a judgment for Rs. 5,000 in favour of the defendants being damages alleged to have been sustained by them in consequence of the plaintiffs having wrongfully and maliciously obtained a mandate sequestration before judgment and caused the seizure of their stock-in-trade.

On August 23, 1929, the plaintiffs filed action under chapter 53 of the Code claiming from the defendants in respect of three promissory notes the aggregate sum of Rs. 6,853.58 as principal and interest up to date of action with further interest and costs. On the same day the plaintiff filed a petition supported by the affidavit of Frank Cunningham, the manager of the plaintiffs' Import Department, and R. Sivagurunathan, the plaintiffs' Broker, and obtained a mandate to sequester the stock-in-trade of the defendants at their business premises Nos. 214 and 49, Main street in Colombo. That afternoon the Fiscal's officer went to the business premises with a representative of the plaintiffs, their proctor's clerk, and two guards. They arrived at 4.50 P.M. The manager was absent but the officer was informed that he would be returning soon. He waited for 10 or 15 minutes and at the request of the plaintiffs' agent and the proctor's clerk commenced to make an inventory of the property. He had made a list of the goods in two of the almirahs when Mr. Wilson a proctor of the Supreme Court arrived, offered to pay the amount of the claim and requested him not to go on with the sequestration. The Fiscal's officer consulted the plaintiffs' agent and the proctor's clerk and on being told by them that he need not proceed further if Mr. Wilson gave him a cheque for that amount he accepted a cheque and withdrew. On September 2 the Fiscal reported to the Court that a sum of Rs. 6,927.80 had been recovered without sale from the defendants under protest and returned the mandate of sequestration to Court. Summons under chapter 53 was allowed on August 23, returnable in 5 days. It was issued on August 26 and was served on the defendants on August 28. The defendants accordingly appeared on August 30. The matter was fixed for September 6, when both parties were represented, and after hearing them the learned District Judge made order as follows:—

"The plaintiffs' claim as far as I can ascertain from statements at the bar and from the affidavit is not contested. The money has now been paid to the Fiscal but the defendant wishes to claim damages for the wrongful issue of the mandate of sequestration. That is, he wishes to make a claim in reconvention. I think that he ought to be allowed to make this claim and Mr. Weerasooriya does not contest his right to do so. He merely asks that judgment be entered for plaintiff for the amount claimed, but I think it would be awkward, even though a claim in reconvention is a separate claim, to enter a decree at this stage. Defendant will be allowed to file answer on September 20."

It is to be noted that the defendants did not deny their indebtedness to the plaintiffs. They were not admitted to answer the plaintiffs' claim but they were permitted by the Court to file a pleading for the purpose of ascertaining by way of a claim in reconvention their claim to damages in consequence of the issue of the mandate of sequestration and their right to do so was not contested by the plaintiffs' proctor. The plaintiffs did not appeal from the District Judge's refusal to enter judgment for the plaintiffs and they acquiesced in the order of the Judge permitting the defendants to assert their claim by way of a claim in reconvention.

In the answer which was filed on September 20, 1929, the defendants set out the grounds of their claim for damages but they also pleaded that they had given the plaintiffs a cheque for Rs. 846.73 and renewal note

for the sum of Rs. 6,000 in payment of their debt. The order which only permitted them to file answer for the purpose of claiming damages in consequence of the wrongful and malicious sequestration appears to have been lost sight of when the answer so far as it contained this plea in defence to the plaintiffs' claim was accepted. However, it was at the outset admitted by counsel that the only purpose of this plea was to obtain the return of the cheque and promissory notes handed to the plaintiffs and no defence to the plaintiffs' claim was set up at the trial. The only matter submitted for decision was the plea that the mandate was wrongfully and maliciously obtained and the claim for damages alleged to have been sustained in consequence thereof. The plaintiffs' claim was determined save only that the District Judge refused to enter up judgment until the defendants' claim had been considered and in this the plaintiffs acquiesced. The trial therefore was concerned only with the defendants' claim. It was urged that this claim was not maintainable as the defendants had not obtained a discharge of the mandate of sequestration. The case of *Lees v. Paterson*[1] was relied on for the proposition that no action for damages was maintainable until the plaintiff had first obtained a "discharge" of the writ. The claim was for wrongful arrest and imprisonment upon a writ *ne exeat* which it was alleged had been improperly and irregularly issued. It was urged that no such writ should have been issued except for a definite and ascertained amount and that it was bad for the reason that the defendant was returning to Canada which was his home. The *ratio decidendi* of that case would appear to be that so long as the writ remained undischarged it must be taken to have been properly issued. There could be no question, therefore, of wrongful arrest or imprisonment.

There was no allegation in *Lees v. Paterson* (*supra*) that the issue of the writ had been procured maliciously upon affidavits which were false to the knowledge of the defendant.

In general no action for malicious prosecution or for maliciously instituting other proceedings in a Court of law will lie until the prosecution or proceeding is first determined in favour of the person claiming damages—so no action is maintainable for maliciously procuring the issue of a commission in bankruptcy while the commission remains undischarged—so also no action for maliciously obtaining the issue of an injunction is maintainable while the injunction remains operative and undischarged. But there is a distinction between such cases and that of a claim for damages sustained in consequence of a sequestration under a mandate of sequestration, the issue of which was procured maliciously, by deceiving the Court into the belief that the defendant was fraudulently alienating his property with intent to avoid payment of the debt, and where the mandate has had its effect and has expired. Damages are not claimed in this case for an illegal seizure nor were the goods under sequestration at the date of the claim. It is by no means clear to me why it should be necessary before the institution of such an action to move the Court to "discharge" a mandate of sequestration which has been returned to Court and where the property sequestered under its authority has been released and is no longer under sequestration.

[1] *(1877-8) 7 Ch. D. 866.*

Under the provisions of section 654 of the Code security has to be given by the person applying for a mandate of sequestration for all damages which may result from the sequestration. In the case under consideration security was given. The present claim was made in and to the Court which issued the mandate. The Court gave him time to prefer his claim. Apart from the circumstance that the plaintiffs acquiesced in the order of the Court, it was in my judgment competent for the Court to give relief in the one proceeding and treat it, if that be necessary, as an application to discharge the mandate of sequestration and for damages. Two separate proceedings in the same Court covering practically the same ground would have been in the circumstances a waste of time. I am not satisfied that where the property sequestered has been released from seizure and the mandate returned an action for damages based on the allegation that the mandate was maliciously procured is not maintainable until the mandate so returned is first " discharged ".

Towards the conclusion of the argument it was urged that the procuring of a mandate of sequestration no matter how maliciously made was not actionable. The case of *Rama Ayyar v. Govinda Pillai et al.*[1] which was relied upon, proceeds upon the ground that an application for sequestration before judgment does not necessarily and naturally involve damage. In that case no attachment had been made. All that the defendant had done was to make application to the Court and take out a notice and it was thought that, no matter how false or malicious the application may have been, it did not necessarily or naturally tend to cause damage.

In this case there was a partial sequestration. The Fiscal's officer entered the defendants' premises and engaged for some time in making a list of the property sequestered. There was therefore publication of the fact that the defendants' property was being sequestered under a mandate of sequestration.

The proposition that the bringing of an action, although falsely and maliciously and without reasonable or probable cause, will not support an action, though generally true, is not without exception. Where the proceeding is from its very nature calculated to injure the credit of the person against whom it is brought an action will lie—as in a petition to wind up a trading company (*The Quartz Hill Consolidated Gold Mining Co. v. Eyre*[2]) or in the case of the false and malicious presentatioon without reasonable or probable cause of a petition for the winding up of a trading company (*Johnson v. Emerson and Sparrow*[3]).

The judgment in *Rama Ayyar v. Govinda Pillai* (*supra*) does not support the contention that where property has been sequestered under a mandate obtained maliciously and without reasonable and probable cause an action is not maintainable. An action is clearly maintainable for damages for sequestration before judgment upon a mandate obtained maliciously and without reasonable and probable cause—*vide Nanjappa Chettiar v. Canapathi Goundon*[4]. Such actions have been successfully maintained in our Courts—*vide Serajudeen v. Allagappa Chetty*,[5] and I cannot see upon what principle a person can be denied the right to maintain an action for damages in consequence of sequestration provided

[1] *(1916) I. L. R. 39 Mad. 952.*
[2] *(1882-83) 11 Q. B. D. 674.*
[3] *(1870-71) L. R. 6 Exch. 329.*
[4] *I. L. R. 35 Mad. 598.*
[5] *(1919) 21 N. L. R. 428.*

he is able to prove that the material averments in the affidavit sworn in support of the application for the mandate were false in fact and made maliciously.

A plaintiff who applies for sequestration before judgment must by his affidavit satisfy the Judge that "he has a sufficient cause of action in respect of a money claim of or exceeding two hundred rupees or because he has sustained damages to that amount and that he has no adequate security to meet the same and that he does verily believe that the defendant is fraudulently alienating his property to avoid payment of the said debt or damages."

There is no question here of the existence of a money claim or that it exceeds Rs. 200. The most important averment in such an application is that the defendant is fraudulently alienating his property to avoid payment of his debt to the plaintiff.

The representations made to the Court in this case were that the defendants were disposing of their stock under market value and appropriating the proceeds for themselves without meeting their engagements, that they did not even deposit the proceeds to their credit in the bank and that they had acted and were acting fraudulently in disposing of their stock with intent to avoid payment of their debts, that the stock was daily decreasing in quantity and that unless a mandate of sequestration was issued the plaintiffs believed they would be prevented from recovering any portion of their claim. These are grave allegations to make. They were made for the purpose of inducing the Court to issue a process which it will only issue when and if it is satisfied by affidavit or evidence on oath that a defendant was acting in the manner alleged. The defendants have denied all these allegations. They have proved conclusively that their stock-in-trade was valued on August 29 and 30 by Mr. Sibbald whose evidence is not challenged at Rs. 249,000, and there is no suggestion that anything was added to their stock after the 20th and before the 29th August. They have shown that they had Rs. 14,000 in fixed deposit at the bank and have shown that though moneys were regularly deposited to the credit of their current account in the ordinary course of business they did not keep a considerable balance to the credit of that account. There is not the slightest reason for thinking that the defendants were fraudulently disposing of their stock or that there was any risk of the plaintiffs not being able to recover the amount of their claim. There is moreover ample evidence that the defendants' financial position was perfectly sound though for the time being their liquid assets were not sufficient to meet all their liabilities promptly as they fell due.

The representations upon which this mandate was issued have been proved to be untrue in fact, and they are representations which manifestly should not have been made except after the most careful inquiry. It is difficult to conceive of an act which has a greater tendency to damage the credit and reputation of a merchant or trader than the sequestration of his stock-in-trade upon the ground that he was fraudulently disposing of his goods to avoid payment of a debt.

The purpose of a mandate of sequestration before judgment is to prevent the alienation of his property by a debtor who is fraudulently

alienating it with intent to avoid payment of a debt. A creditor who procures the issue of such a mandate by representing to the Court that his debtor is fraudulently alienating his property when his debtor is not doing so in fact and merely for the purpose of enforcing and assuring speedy payment of his debt is actuated by an indirect motive and is therefore in the eyes of the law acting maliciously.

The evidence for the plaintiffs appears to have been directed to show that the defendants were at the time financially embarrassed. This is not denied by the defendants, who say that in consequence of the depression in trade they found it difficult though perfectly sound financially to meet every one of their obligations as they fell due. Their debts to the plaintiffs were payable on August 20. On August 19 they sent the plaintiffs a post-dated cheque and two promissory notes in renewal of the promissory notes which fell due on that day and informed them of their inability to pay. The plaintiff-company replies insisting upon payment. An interview took place on August 20 and it is Mr. Cunningham's story that the third defendant refused to pay even Rs. 500 and told him to do what he liked. Here there is a conflict of evidence. But this at least was clear that Mr. Cunningham was willing to give the defendants further time if Rs. 500 was paid and would have been content to trust them to pay the balance sum which amounted to over Rs. 6,000.

This was the position on August 20, and yet on August 23 this affidavit was sworn in support of the application for a mandate of sequestration alleging that the defendants were fraudulently disposing of their stock. There is nothing in the evidence which could fairly be referred to as either reasonable or probable cause for the belief that the defendants were so disposing of their stock. There is no evidence to show even that the sales at the defendants' place of business were unusually brisk and none at all to show that any excessive or unusual quantities of stock were being removed from their premises. An attempt was made to show that the two sales of comparatively small quantities of cloth had taken place at below the market price. But even this is by no means clearly established. But it is hardly necessary to pursue the matter further for it is evident from Mr. Cunningham's own evidence that to use his own words he " was not in a position to say on the day I (he) swore this affidavit that the defendant was trying to avoid his liabilities ". In point of fact the defendants have met all their liabilities.

It is evident that this witness regarded a mandate of sequestration as a normal process to be restored to " if the people concerned made no effort to meet their obligations "; that he made the representations he did without reflection and without reasonable or probable cause; that he did so to enforce payment of a debt by a person who appeared to him to be making no effort to meet his obligations, and not because he believed that the defendants were actually engaged in fraudulently disposing of their stock to avoid paying their liabilities.

In these circumstances the plaintiff-company is liable for damages. I agree with the Chief Justice whose judgment has just reached me and for the reasons given by him that these damages should be assessed at Rs. 2,500. I agree also to the order proposed by him as to the cost of this action.

Appeal dismissed.