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

HADJIAR *v.* ADAM LEBBE.

102—D. C. Batticaloa, 58.

Wrongful sequestration—Action to recover damages—No actual sequestration of goods—Damage to reputation—Proof of malice and want of reasonable and probable cause.

An action to recover damages for wrongfully obtaining a mandate of sequestration lies even where there was no actual sequestration of goods, provided the issue of the mandate of sequestration resulted in some damage to reputation.

Such an action cannot be maintained without proof of malice and want of reasonable and probable cause.

PLAINTIFF sued the defendant to recover a sum of Rs. 595.70 alleged to be due for goods sold and delivered. On the day the action was filed plaintiff obtained a mandate of sequestration to seize the goods of the defendants on the ground that he was fraudulently alienating them. A mandate of sequestration was issued to the Fiscal, whose officer reported that there were no goods in the defendant's shop.

In his answer, the defendant admitted that he owed the plaintiff a sum of Rs. 389.10 only. In addition, the defendant set up a counter-claim for damages consequent on the sequestration of his stock-in-trade by the plaintiff. The learned District Judge held that the grounds on which the mandate of sequestration had been obtained were false and that the plaintiff had acted maliciously. He further held that the defendant had suffered in credit as a result of the mandate and awarded him Rs. 750 as damages.

H. V. Perera, K.C. (with him *M. M. I. Kariapper*), for plaintiff, appellant.—The counter-claim of the defendant-respondent is not maintainable in law. It is based upon an allegation of fact that there was a sequestration of the defendant's goods before judgment. There was, in fact, no sequestration of the defendant's goods. The appellant only obtained a mandate of sequestration, which could not be executed. The mere obtaining of a mandate of sequestration gives rise to no cause of action for damages. (See *Rama Ayyar v. Govinda Pillai*[1].) The case of *Bosanquet & Co. v. Rahimatulla & Co.*[2] does not apply to the fact of this case, and is clearly distinguishable for, in that case, there was a sequestration of goods, which lasted an hour. In this case there were no goods available for sequestration because the defendant had secreted them.

It is also submitted that the learned Judge has misdirected himself and taken an erroneous view of the law applicable to a claim of the defendant. The defendant complains of malicious legal proceedings of a civil nature. To succeed in such a claim, the defendant must among other essential requisites allege and prove that the prosecution (or civil proceeding) was instituted (3) maliciously and (4) without reasonable and probable cause. (*Maasdorp, Vol. 3. p. 81 (1909 ed.)*). "As regards the third and fourth

[1] *I. L. R. 39 Mad. 952.* [2] *33 N. L. R. 324.*

essentials, it is absolutely indispensable for the purposes of this action that the prosecution (or proceeding) shall have been instituted both maliciously and without reasonable and probable cause. If one or other of these elements is lacking, the plaintiff will be entitled to no relief (*Maasdorp, vol. III., p. 82 (1909 ed.)*). There is no proof that the appellant acted without reasonable and probable cause, nor is there a finding by the Judge on this point.

C. V. Ranawake. for defendant, respondent.—A mandate of sequestration need not necessarily be executed fully or in part in order to found an action for malicious sequestration of property. The test is whether there was publication of the fact that the defendant's goods were to be sequestered under a mandate of sequestration. It is sufficient if as a result the defendant's reputation suffered though no damage to property followed. Nothing can be more fraught with damage to the credit and reputation of a trader than the issue of a mandate of sequestration of his stock-in-trade on the ground that he was fraudulently disposing of his goods to avoid payment of a debt. This aspect of the matter was considered by Mr. Justice Garvin in the case of *Bosanquet & Co. v. Raimatulla & Co.*[1] In the case of *Rama Ayyar v. Govinda Pillai (supra)* relied on by the appellant there was no publication; all that was done there was the application for a mandate of sequestration and the taking out of a notice, the matter did not proceed further.

As regards damages, there is all the evidence on record necessary for holding that the plaintiff acted maliciously and without reasonable and probable cause. All the circumstances justify the inference against the plaintiff and the learned District Judge has in fact held so. Even though the defendant was financially embarrassed, still he was entitled to claim against the plaintiff. See *Rajadurai et al. v. Thanapalasingham et al.*[2]

Cur. adv. vult.

January 29, 1942. HEARNE J.—

The facts involved in this appeal are these. On April 17, 1939, the defendant charged the plaintiff with theft in the Magistrate's Court and on April 28, 1939, the plaintiff filed a plaint against the defendant to recover a sum of Rs. 595.70 alleged to be due for goods sold and delivered. On the latter date the plaintiff and his Kanakapillai also swore affidavits to the effect that the defendant had fraudulently alienated goods in his shop "by secreting the same in the houses of friends" and that there remained in his shop goods to the value of Rs. 200 only. A mandate of sequestration was applied for, it was issued by the Court on May 24, 1939, and the Fiscal's officer visited the defendant's shop on the following day. According to the plaintiff's evidence a boy in the shop opened the almirahs and it was found that there were no goods in them. The mandate was returned by the Fiscal's officer who stated "that no property had been pointed out to him or surrendered". On a subsequent date the defendant moved for the discharge of the mandate. It was held that the allegations in the affidavits were false and the mandate was accordingly discharged. The plaintiff's suit was before the Court in August, 1940. The defendant admitted that he owed the plaintiff a sum of Rs. 389.10 only but the Judge held that the defence he had raised in respect of the balance of

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

[2] *(1933) C. L. Rec. 233.*

Rs. 206.60 was utterly false. In addition to resisting the plaintiff's claim in part the defendant set up a claim in reconvention. He stated that in consequence of "the sequestration of his stock in trade by the plaintiff" he had suffered special damages amounting to Rs. 2,850. The damages claimed under one head (Rs. 2,600) were so remote that they could not have been allowed in any event. There was no allegation in the defendant's pleading that the plaintiff had acted maliciously and without reasonable and probable cause. Two issues were framed in regard to the claim in reconvention. (1) Did the plaintiff obtain the mandate of sequestration without reasonable and probable cause and was it malicious in law? (2) If so, what damages is the defendant entitled to? An objection was properly taken by Counsel for the plaintiff that the defendant had not pleaded malice or want of reasonable and probable cause and that special damages were claimed in the answer. The Judge allowed the issues and granted another date on terms. At the conclusion of the trial he held (1) that the grounds on which the mandate had been obtained were false, (2) that the plaintiff had acted maliciously in that he had been actuated by the filing of the criminal action against him, and (3) on the evidence of two witnesses that they had stopped giving the defendant credit, that he had suffered "in his credit". He held a sum of Rs. 750 to be a fair measure of damages.

Counsel for the plaintiff-appellant argued firstly that the claim in reconvention could not be maintained as no goods belonging to the defendant were in fact seized and secondly, that the plaintiff's evidence was not disbelieved and there was no finding against him that he had acted without reasonable and probable cause.

In connection with the first submission the case of *Rama Ayyar v. Govinda Pillai et al.*[1] was cited. That case is precisely the same as an action of trespass to goods in England in which it is not necessary to prove malice, and it decided no more than that an action would not lie for alleged wrongful attachment, if no attachment had in fact taken place. Similarly in England a person may take out a writ of execution but if he does not endorse on the writ a direction to the Sheriff to levy he is not liable in trespass. If he were, it would be a contradiction in terms.

The present case is a very diffenent one. It was based or rather, when the issues were framed it was based, on "maliciously suing out process". Unlike trespass in which no harm is done till the writ of execution has been acted upon, considerable harm may be done by the mere fact of setting a judicial officer in motion. The presence of the Fiscal in the defendant's shop on an order of Court was calculated to suggest to the world that he was financially unsound. If the Fiscal's mission had been procured maliciously and without reasonable and probable cause and his presence had already adversely affected the defendant's credit and reputation, can it be said that he cannot maintain an action because there were no goods to be seized?

In *Bosanquet & Co. v. Rahimatulla & Co.*[2], it was held that, where the Fiscal's officer entered the defendant's premises and was engaged for some time in making a list of the property sequestered, there was "partial sequestration" and "publication of the fact that the defendant's property

[1] (1916) *I. L. R. 39 Mad. 952.* [2] (1931) 33 N. L. R. 324.

was being sequestered under a writ of sequestration". That case is not an authority for saying that no action would lie unless there was at least "partial sequestration". It was only decided on the basis that there was "partial sequestration". My own view is not in conflict with 33 N. L. R. 324 but goes beyond the necessity of that case. In my view where a person has suffered a wrong, an injury to his reputation, and the wrong so suffered is the consequence of sequestration proceedings taken by another both maliciously and without reasonable and probable cause, the latter's conduct is actionable even where, as in the present case, no actual sequestration was effected, partial or otherwise. In England, at any rate, the infliction of a wrong in that way when coupled with malice and want of reasonable and probable cause gives right to an "action on the case" as distinct from an action in trespass. It is clear from the decided cases, *e.g., Quartz Hill Gold Mining Co. v. Eyre*[1], that if civil proceedings are taken maliciously and without reasonable and probable cause, an action will lie in respect of them if they produce some damage of which the law will take notice. In this case there was no damage to property, but, if there was damage to reputation, the other conditions being fulfilled, the claim in reconvention would be maintainable.

In regard to his second submission Counsel for the appellant is, I think, on more substantial ground. The Judge appears to me to have misdirected himself. It may well be that the plaintiff had an improper motive in that he was getting even with defendant who had, as appears from the result, falsely prosecuted him for theft and it may also be that the statements in the affidavits filed in Court were false. But that did not, as the Judge seemed to think, conclude the matter. It would have concluded the matter if the statements in the affidavits were found to have been false to the knowledge of the plaintiff, but this was not so found. In *3 Maasdorp 120 (4th ed.)* it is stated that both malice and absence of reasonable and probable cause must be proved, and the questions the Judge should have considered and did not consider are whether the plaintiff honestly believed, on reasonable grounds, that the information he had received that the defendant was removing his shop goods to the houses of his friends was true? Whether an ordinary, prudent man, placed in his position and with the information which had come to him, would have acted as he did in order to safeguard his own interests?

According to the defendant himself payment to the plaintiff fell due on April 14, 1939, and he refused to pay him anything. On April 8, six days previously, he had removed Rs. 905.71 worth of goods from his shop to Karavaku market (D 7). On April 9th according to him the plaintiff removed Rs. 208.60 worth of goods (this is expressly disbelieved by the Judge) and thereafter he had goods worth Rs. 500 only. It is to be noted that the defendant had attempted to account for the disappearance of the goods by an excuse that was false. When the plaintiff passed the defendant's shop at the end of April he noticed a great shortage of stock and in one month's time. when the Fiscal arrived, it had vanished altogether. In the meantime the defendant was admittedly paying other creditors and ignoring the plaintiff.

[1] *11 Q. B. D. 674 (C. A.).*

Now, having regard to the progressive and admitted dwindling of the goods in defendant's shop from April 8th of which the plaintiff was aware. was it unreasonable on his part to believe, as he says he believed, the information he had received from his Kanakapillai even though, as has been found, the information was incorrect. The Judge has taken the view that the defendant is a dishonest man. I do not gather from his judgment that he takes the same view of the plaintiff, and had he addressed his mind to all the essential aspects of the case, he would in all probability have dismissed the claim in reconvention. In my opinion he should, on the evidence, have done so.

The defendant is undeserving of sympathy. On his own admission he was preferring certain favoured creditors of his, though it was not in the particular way the affidavit of plaintiff's Kanakapillai suggested. He was not paying them in kind. But he admits he was removing his stock from his place of business, realizing it and paying selected creditors in cash.

The appeal is allowed with costs and the claim in reconvention must be dismissed. It was agreed at the trial that the plaintiff would give the defendant credit in a sum of Rs. 200 on account of costs in the sequestration proceeds. The plaintiff is therefore entitled to judgment for Rs. 595.70 less Rs. 200 or Rs. 395.70 and costs in the class to which the claim of Rs. 595.70 belongs.

HOWARD C.J.—I agree.

Appeal allowed.