Present: Schneider and Lyall Grant JJ.

1928.

RATNAYAKE *v.* FONSEKA *et al.*

311—D. C. Colombo, 22,759.

Action for damages—Injury resulting from wrongful conviction—Fraud and conspiracy—Rejection of plaint—Civil Procedure Code, ss. 46 and 839.

An action to recover damages in respect of an injury resulting from a conviction for a criminal offence, alleged to have been obtained by fraud and collusion, cannot be maintained, while the conviction remains unreversed.

The Court is entitled to reject the plaint in such an action on the ground that it is barred by a positive rule of law even after service of summons.

THE plaintiff stated that the defendants caused a false charge of criminal breach of trust to be preferred against him and by fraud and collusion obtained his conviction, whereupon he was sentenced to undergo three years' imprisonment. By reason of the conviction the plaintiff was injured in his name and reputation and removed from the roll of practising proctors and thereby suffered damage which he estimated at Rs. 30,000. He asked for a declaration that the said conviction was obtained by fraud and collusion and claimed recovery of the said damage. After summons had been served on the defendants, they moved, before filing answer that further proceedings in the action be stayed on the ground that the action was frivolous and vexatious and an abuse of the process of Court. The learned District Judge made order dismissing plaintiff's action.

H. V. Perera (with *Deraniyagala*), for plaintiff, appellant.—The learned District Judge has accepted the plaint and issued summons. It is too late at this stage to act under section 46 and reject the plaint. That would be going behind his own order. In any case one can only reject a plaint under section 46 when the action is barred by a positive rule of law. A " positive rule of law " is a law created by the legislature and embodied in the form of a statute. There is no statute forbidding such an action as this.

We do not allege that the finding in the criminal case was wrong, nor do we seek to bring the matter up for retrial in this guise. All we do is to allege a conspiracy to injure us which is actionable. The conviction may have been perfectly correct, and there may have been perfectly true evidence on which it was based, but at the same time there may have been a conspiracy to injure us, between

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certain parties, as a result of which, besides the true evidence in the case on which the conviction is based, there may have been a mass of false and perjured evidence, which was intended to cause us to be punished more than we merited. A finding in our favour in this case, therefore, is not necessarily inconsistent with the correctness of the verdict in the criminal case.

It has been held in Ceylon that the correctness of the proceedings of a criminal case may be questioned in the course of a civil action *Pedris v. Manufacturers Life Insurance Co., Ltd.*[1]

This is undoubtedly a healthy rule and tends to prevent the very great hardships that may result from false criminal charges in which conclusive proof of the innocence of the accused is only forthcoming after he has been convicted.

The law is by no means clear that the plaint discloses no cause of action, and in such a state of doubt it should have been accepted.

Hayley, K.C. (with *Canakaratne*), for defendant, respondent.— The plaint discloses no cause of action known to the Roman-Dutch law, and should have been rejected. The Roman-Dutch law is clear that such an action as this cannot be maintained (*Voet XLVII. 10, 20*). There will be no end to litigation if findings of judicial bodies can be questioned in this manner in separate suits.

Counsel cited *Bynoe v. Governor of Bank of England et al.*[2]

The Court was entitled to reject the plaint, although summons had been served.

When the Court omits to do what the Code required it to do on the plaint being presented, it might do it when the omission is brought to its notice *Read v. Samsudeen.*[3]

H. V. Perera in reply.

March 14, 1928. LYALL GRANT J.—

The plaintiff in this case alleged that the defendants caused a false charge of criminal breach of trust to be preferred against him and by fraud and collusion obtained his conviction on February 28, 1925, under the said charge, whereupon he was sentenced to three years' rigorous imprisonment and at the date of the plaint he was still undergoing the same. He alleged further that in consequence of the said conviction and sentence he was injured in his fair name and reputation, suffered great pain of mind and body and pecuniary loss; that his name had been removed from the roll of practising proctors and his bond had been cancelled, to his damage which he estimated at Rs. 30,000. He claimed the right to sue (1) for a declaration that the said conviction was obtained by fraud and collusion and (2) for the recovery of damages.

[1] *19 N. L. R. 321.* [2] *(1902) 1 K. B. 467.*
[3] *1 N. L. R. 292.*

The plaint appears to have been admitted and summons issued on the defendants. Before lodging answers the defendants appeared and moved that the order for issue of summons and for filing answers should be set aside and that all further proceedings in the action should be stayed on the grounds (*a*) that the action was frivolous, vexatious, and an abuse of the process of Court, and (*b*) that the action was one without any foundation.

The objection appears to have been argued at length before the learned District Judge, and he has made an order dismissing the plaintiff's action with costs. He has given very full reasons for the order which he has made. The first point which he considered was whether, having admitted the plaint, he had any further power to act under section 46 of the Civil Procedure Code. Section 46 directs the Court to reject the plaint *inter alia* when the action appears from the statement of the plaint to be barred by any positive rule of law. The learned District Judge considered that in this case the action was barred by a positive rule of law, and he thought that section 839 of the Code made it clear that where the plaint ought to have been rejected on presentation and was not then rejected owing to an oversight, the Court was not debarred from subsequently rejecting it when the true state of affairs was brought to its notice. He has quoted authority in support of this proposition and I think that he is right in thinking that the mere fact that summons was issued does not prevent the Judge rejecting the plaint at a subsequent stage.

I would refer to the case of *Soysa v. Soysa* [1] where the facts were similar to those in the present case. In that case the previous decision of *Read v. Samsudeen* [2] was quoted with approval. It was there held that when a Court omits to do what the Code requires it to do on a plaint being presented, it may do it at any time when the omission is brought to its notice, that is to say, it may act on the material which it had before it when the thing should according to the Code have been done.

The only question which remains therefore is whether on the face of the plaint the plaintiff's action is barred by a positive rule of law. The action is one for damages in respect of injury caused to the plaintiff by a conviction. No case has been cited to us where such an action has been allowed. On the other hand numerous authorities have been cited to show that the Courts in England will not allow such an action to be brought while the conviction remains unreversed. The case of *Bynoe v. Governor & Company of the Bank of England and Williams* [3] reviews the English authorities. A previous case was there referred to where the point was raised that this doctrine could not be held to defeat an

[1] *17 N. L. R. p. 118.* [2] *1 N. L. R. pp. 292 and 295.*
[3] *1 K. B. D. 1902, p. 467.*

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action for malicious prosecution which resulted in a conviction, from which there could be no appeal and which therefore remained unreversed. The Court overruled the objection. Byles J. said: "I think we should be disturbing foundations if we were to admit that there is any doubt that the criminal proceeding must be determined in favour of the accused before he can maintain an action for a malicious prosecution. If this were not so, almost every case would have to be tried over again upon its merits." *Voet* in book 47, title 10, section 20, lays down the Roman-Dutch law as follows:—

> "In all such cases the person who has been apprehended or prosecuted, has, of course, no cause of action if he has been tried and found guilty, even if he had been innocent, for the fact of his conviction is the best proof of there having existed probable cause."

It was argued on appeal that the present case was not an action for malicious prosecution, as the gist of the action was fraud and collusion. I am unable to understand this distinction. Fraud and collusion are elements from which one may infer malice, and if it is held to be essential, as it is in both systems of law, in an action for malicious prosecution to show that the proceeding alleged to be instituted maliciously and without probable cause has terminated in favour of the plaintiff, it is equally necessary to show that such a termination has taken place, where the defendants are alleged to have acted fraudulently and collusively. The fact of the conviction is the best evidence, not only that the prosecution was not instituted maliciously, and was not false, but also that it was not obtained by fraud and collusion. While it stands it must be held to decide the guilt of the accused. What the Court is asked in effect to do in the present case is, to review the evidence led in the criminal cases and this is precisely what Courts of law steadily refuse to do. The appellant asks the District Court practically to re-try the case, a course which is inconsistent with the policy of the law.

The appeal is dismissed with costs.

SCHNEIDER J.—I agree.

Appeal dismissed.