

(1874) 05 CAL CK 0004

Calcutta High Court

Case No: None

Ramcoomar Koondu
and Another

APPELLANT

Vs

Chunderkant
Mookerjee

RESPONDENT

Date of Decision: May 28, 1874

Judgement

Sir Richard Couch, Kt., C.J.

The plaint in this suit stated that the defendant conspired and agreed with certain persons, named John McQueen and Mary Anne (his wife), to cause or suffer to be instituted and maintained in their names a civil suit for the possession of certain lands and premises of which the plaintiffs were in possession as owners, and it set out a deed made between McQueen and his wife and the defendant, in which, after reciting the title of McQueen and his wife to the premises of which the plaintiffs were in possession, it is recited that McQueen and his wife had applied to the defendant to assist them in commencing and conducting such proceedings as might be necessary for the recovery of the said premises, "and to pay all advances, and disburse all and every sum or sums of money whatever, which should or might be necessary for stamps, fees to counsel, or mukhtars" fees, or for any purpose whatever referring to the said proceedings." It also recited that these two persons requiring assistance, the defendant had agreed to pay to them the sum of Rs. 150 a month for their support and maintenance until the final determination of the suit and proceedings. It was then covenanted on the part of the defendant to provide the money to carry on the suit and to pay Rs. 150 monthly, and it was agreed between McQueen and his wife and the defendant that the defendant was, in the first place, out of the moneys to be recovered from the defendants in that suit, or in case of recovery of the lands held by them, out of the proceeds of the sale thereof, to retain and reimburse himself all moneys he might have paid, advanced, or disbursed under the agreement, either in respect of the suit or suits so to be commenced or otherwise, with interest at the rate of 12 per cent per annum, or in respect of the monthly sum of Rs. 150, and then to retain by way of remuneration for his trouble and risk in

conducting and carrying on the business and advancing the necessary funds therefore, and for the monthly payments, one equal third part or share in the clear net proceeds of such suit or suits after all payments with interest. The plaintiff states the proceedings in the suit, and charges that the defendant, by reason of the acts which he is alleged to have committed, had made himself liable for all costs incurred by the plaintiffs in defending the suit, and for the rents and profits which the plaintiffs would have received in respect of the property since possession was obtained of it by McQueen and his wife under the decree of this Court.

Macpherson, J.

2. Made a decree in favor of the plaintiffs, from which there is an appeal. What we have to determine is, whether, on the facts proved, the action or suit can be maintained. Now, an action may be maintained against a person for maliciously, and without reasonable or probable cause, procuring a suit to be instituted. The law on this subject is stated by Williams, J., in a case to which I shall presently refer. The action may be brought against the defendant, although he was not a party to the suit; because an action would be maintainable against the plaintiffs in the suit if they instituted it without reasonable or probable cause. Practically, such actions are seldom or never brought, because if the suit has been brought without reasonable or probable cause, the judgment will be in favor of the defendant, and he will get his costs by the judgment in the suit. Consequently, actions for instituting proceedings without reasonable or probable cause are mostly where the proceedings were of a criminal nature, as an action for a malicious prosecution; or where the action is one in which the defendant has been arrested, and then the action is for the malicious arrest. But in order to maintain an action of this kind, there must be malice, and the suit must have been brought without reasonable or probable cause. Williams, J., in *Cotterell v. Jones* 11 C.B., 713; at p. 730 says:--"It is clear that no action will lie for improperly putting the process of the law in motion in the name of a third person, unless it is alleged and proved to have been done maliciously and without reasonable or probable cause; but if there be malice and want of reasonable or probable cause, no doubt, the action will lie, provided there be also a legal damage."

3. In this case Macpherson, J., has found, and I agree with him, that there could not be said to be a want of reasonable or probable cause for instituting the suit. A Division Bench of this Court made a decree in favor of the plaintiffs. It is true that the decree was reversed on appeal to Her Majesty in Council, but the fact that two of the learned Judges of this Court were of opinion that the plaintiffs were entitled to a decree would show that there was reasonable and probable cause for the plaintiffs prosecuting the suit and attempting to recover possession of the property. We must take it, on the authority of the highest tribunal, that the learned Judges of this Court were mistaken in the view which they took of the plaintiffs' case; but we cannot say that persons who have obtained a judgment of the High Court, although it was afterwards reversed, had not reasonable or probable cause for bringing the suit. If there had been no reasonable or probable cause for bringing the suit, the want of it would have been evidence of malice. But that is not the

case here. And there is no evidence that the defendant entered into this agreement with McQueen and his wife from any malicious motive. In fact, all the evidence we have as to how the agreement came to be made is in the recital in the deed. That shows that these persons, thinking they had some right to recover possession of the property, and being without means to institute proceedings for that purpose, applied to the defendant to lend them money and to give them the means of remaining within the jurisdiction of the Court, and to support them whilst the suit was proceeding. So far as there is any evidence in the case, I think there is no ground for holding that an action for malicious prosecution, and without reasonable or probable cause, can be maintained against the defendant.

4. I may, in addition to *Cotterell v. Jones* 11 C.B., 713, upon the law for this part of the case, also refer to *Flight v. Leman* 4 Q.B., 883.

5. The case has been presented in the plaint in another form, viz., as an action for what is called maintenance,--for maintaining a suit which was brought by McQueen and his wife. Now, we have to see whether such an action can be maintained in India. When we look at the ground upon which it is maintainable in England, it will be seen that the cases where it has been allowed will not apply in this country, and cannot be considered as being the law here. In England, maintenance and champerty were offences by the Common Law--offences punishable according to the Common Law. This is shown in *Hawkin's Pleas of the Crown*, where he treats of this subject. The Statutes in England were declaratory of the Common Law, and imposed penalties for these offences in addition to the penalties which were imposed by the Common Law. So that the state of things in England is that maintenance was an offence, and punishable as such: and an agreement in England to maintain an action, or an agreement of a champertous nature, was void, because it was to do that which was illegal; it was an agreement to do what was an offence, and so it was void. The reason that a person who suffered injury by an action being maintained by another was allowed to bring a suit, was that if a person did an illegal act by which another suffered special damage, an action might be brought against him for the damage. An illustration of this is to be found in an action being allowed to be brought against a person guilty of the offence of obstructing a public highway by a person who suffered special damage by reason of the highway being obstructed. On the same principle, an action for maintenance was allowed in England; but that does not apply to India. It has been always admitted that the English Common Law and the Statutes as to maintenance and champerty are not applicable, and are considered as having no force in this country. They certainly do not apply in the *mofussil*, whatever question there might be how far they had been introduced within the jurisdiction of the Supreme Court. The ground upon which agreements which are champertous, or agreements for maintenance, have been held to be void in this country is that they are contrary to public policy, or, as described by the Judicial Committee of the Privy Council in *G.F. Fischer vs. Kamala Naicker*, are considered to be immoral and against public policy, and such as the law will, therefore, not enforce here, and will treat as void. But if this is the ground on which agreements of this kind are void in India, as I consider it to be,

according to the decisions on the subject in India, and also by the Judicial Committee, it will not enable an action to be brought against the person who maintains the suit. The ground on which an action is allowed in England, viz., that the defendant has been guilty of an offence by which the plaintiff has suffered damage, does not exist here. When we examine the English law and see the grounds of the action there, I think that in this country an action for maintenance cannot be brought. This part of the case of the plaintiffs in this suit is, therefore, unsupported.

6. But the case was also put on another ground. It is said that the defendant had an interest in the suit, which was brought by McQueen and his wife, and having an interest in the suit, and having also (as it is not disputed he did) supplied the means of carrying it on, he ought to be made liable to pay the costs by an action being brought against him. This argument assumes that the agreement in the indenture is a valid one, and is not void as being contrary to public policy; for if it were, the defendant acquired no interest in the property. Taking it that the defendant did acquire an interest in the subject-matter of the suit by the agreement, and that it was carried on for his benefit, as well as that of the plaintiffs in it, the objection against the present suit is that the defendant was not guilty of any wrongful act. If he had an interest in recovering the property, it was not a wrongful act to supply the money to carry on the suit. For this reason it was in England an answer to a suit for maintenance that the party had an interest in the suit which was brought, and which he was charged with having maintained. In considering the third ground on which it is sought to support the case of the plaintiffs, we must take it that the defendant did not do a wrongful act, and there is no ground around for the plaintiffs being allowed to bring an action against the defendant, although they may have sustained an injury by the defendant supplying the means for carrying on the suit. If the act is one which the defendant might lawfully do, the plaintiffs cannot sue him for damages which they have sustained by reason of it. The course which ought to have been taken, assuming, as we must in this part of the case, that the agreement was not void, and that the defendant had an interest, was to make the defendant a party to the suit, and to require that he who had become entitled to one-third part of the proceeds of the suit should, by becoming a party to it with the other plaintiffs, put it in the power of the Court to give judgment against him, and to bind him by the judgment as the others would be bound, and, if necessary, to make an order that he should pay the costs. It was known to the plaintiffs that this deed had been made; but whether it was known or not, and if they did not discover it before the suit was finally disposed of, which would be their misfortune, they are not in a worse position than where persons may be made liable in a suit as defendants; but the plaintiff, not being aware of their liability, does not join them in the suit; the plaintiff cannot afterwards sue them. Here the plaintiffs might have insisted that the defendant should be made a party to the suit. And if it was doubtful whether that could be done, there are various authorities to show that, if the suit was really his suit, and was carried on for his benefit, the defendant might have been required to give security for the costs. Mr. Kennedy has cited several cases on the point which were decided by the Courts in Ireland, and there are cases in the English Courts to the same effect. If a person who has

an interest in having a question decided puts forward another to have it tried in a suit in his name, but the person putting the nominal plaintiff forward is the substantial plaintiff in the case (as where a landlord puts forward his tenant to dispute a claim of a right of way), the Court has power to, and would, require the real plaintiff, although not appearing as such, to give security for the costs.

7. It appears to me that, in this case, either the defendant ought to have been required to be a plaintiff with McQueen and his wife, or that he ought to have been called upon to give security for costs. The Court having erroneously refused to do that, there ought to have been an appeal. The plaintiffs have omitted to take the course which the law prescribed, and they cannot remedy it by bringing an action when there is no principle of law on which it can be sustained.

8. I think the suit should be dismissed; but, looking at all the circumstances of the case, it is not one in which the defendant should get his costs. The decree of Macpherson, J., will be reversed, and the suit will be dismissed without costs in either Court.

Pontifex, J.

I also think this suit must be dismissed.