

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.162 of 2009

Mrs. Rehana Jadoon-----Plaintiff.

Versus

Arab Khan-----Defendant.

Dates of hearing: 11.01.2018 & 14.03.2018

Date of Judgment: 18.04.2018

Plaintiff: Through Mr. Adnan Ahmed &
Mr. Bilawal Channa, Advocates.

Defendant: Through Mr. Abdul Hayee S.M. Shaikh,
Advocate.

J U D G M E N T

Muhammad Junaid Ghaffar, J. This is a Suit for Damages on account of Malicious Prosecution against the defendant for implicating the plaintiff in a false FIR.

2. Briefly stated facts are that the Plaintiff's husband had advanced a loan of Rs.900,000/- to the Defendant, out of which certain repayments were made, and they had good relations with the Defendant and somewhere in June, 2007 they were accommodated as tenant of the Defendant, and thereafter the Defendant lodged FIR No.407/2008 under Section 380 PPC at P.S. Shahrah-e-Faisal, Karachi on the ground that the Plaintiff had stolen ornaments and other articles as stated in the FIR. Investigation was carried out and ultimately report was furnished

by the Police under (cancelled) "C" Class, which was accepted by the Judicial Magistrate through Order dated 14.11.2008, hence instant Suit has been filed claiming damages in the following manner:-

- (a) To award damages amount of Rs.20 million in favour of the plaintiff and against the defendant.
- (b) To award decree of Rs.50 thousand amount spending by the plaintiff in her defence in favour of the plaintiff and against the defendant.
- (c) Cost of the suit.
- (d) Any other/better relief/s as this Hon'ble Court may deem fit and proper.

3. Learned Counsel for the Plaintiff has contended that the prosecution initiated at the behest of the Defendant was malicious in nature as a false FIR was registered, which not only tarnished the image of the Plaintiff; but made to suffer mental torture, agony and loss of reputation. Per learned Counsel proper evidence has been led on behalf of the Plaintiff and no defects have been pointed out in such evidence, therefore, the Plaintiff is entitled for Judgment and Decree. According to the learned Counsel all ingredients for claiming damages are fulfilled, whereas, the Plaintiff being lady had to seek bail before arrest and was humiliated. He has relied upon the cases reported as **PLD 1994 SC 476** (*Abdul Rauf v. Abdul Razzak and another*), **2007 YLR 3089** (*Abdul Ghafoor v. Riaz Ahmed*), **2004 YLR 173** (*Muhammad Hanif and another v. Muhammad Bashir and others*), **2006 MLD 62**, (*Muhammad Feroze Panjani v. Mrs. Mehr-un-Nisa and another*), **2012 SCMR 954** (*Abdul Rehman and another v. Zia-ul-haque Makhdoom and others*), **PLD 1990 Supreme Court 629** (*Themas and 16 others v. Dawar Khan and 7 others*), **PLD**

2012 SC 80 (*Abdul Majeed Khan v. Tawseen Abdul Haleem and others*), 2012 CLC 644 (*Muhammad Nazir Khan v. Muhammad Ameer*) & PLD 2006 SC 432 (*Niaz and others v. Abdul Sattar and others*).

4. On the other hand, learned Counsel for the Defendant has contended that theft was committed in the house of the Defendant for which a proper FIR was lodged, whereas, the investigation was faulty, and therefore, a "C" Class report was filed but in any case, it does not entitles the Plaintiff to claim any malicious prosecution. Per learned Counsel no adjudication on merits has come on record and the Plaintiff has also failed to substantiate and prove the quantum of damages as claimed for the reason that no documentary evidence has come on record to substantiate that the Plaintiff ever suffered any mental torture or incurred any medical expenses or for that matter she was entitled for any claim of damages. Learned Counsel has further contended that since the Plaintiff was never sent for trial and it is a case only of investigation, therefore, the ingredients of malicious prosecution are lacking in this matter. In support he has relied upon **PLD 1970 Karachi 344** (*Abdur Rashid V. The State Bank of Pakistan and another*), **2013 CLD 456** (*Mst. Shamim Akhtar V. Muhammad Hanif Qureshi*), **2013 MLD 584** (*Abdul Wadood and others V. Muhammad Iqbal and another*), **PLD 2013 Lahore 170** (*Abdul Majeed and others V. Manzoor Hussain and others*), **2016 MLD 139** (*Messrs Summit Bank Ltd. V. Mohammad Ramzan*), **2016 CLC 1585** (*Mehrban V. Ghulam Hassan*), **2017 MLD 2101** (*Muhammad Habib V. Wali Muhammad*) and **2017 MLD 666** (*Dr. Abdul Qadir Akhund V. Ms. Shahila Parveen*).

5. I have heard both the learned Counsel and perused the record. The case, as stated in the Plaint is that the Plaintiff was implicated in FIR No.407/2008 and after investigation by first Investigation Officer, it was recommended for "C" Class but the said investigation was objected and thereafter a fresh investigation was carried out and vide recommendation dated 11.10.2008, the matter was placed for perusal of the Judicial Magistrate under Cancelled Class as according to the Investigation Officer, no case was made out. The learned Magistrate through his Order dated 14.11.2008, accepted the report under Cancel Class and being aggrieved this Suit has been filed. On 01.11.2010 only one Issue was settled, which reads as under:-

- i. Whether the Plaintiff is entitled to damages as claimed by her, if so, upto what extent?

6. The Plaintiff in support filed its affidavit-in-evidence and was extensively cross-examined. She exhibited various documents including FIR No.497/2008 as Ex.P/1, Order dated 23rd May 2008 passed by Police Official as Ex.P/16, Final Report as Ex.P-18 & 18/1, Administrative Order passed by Vth Civil Judge and Judicial Magistrate, Karachi East as EX.P/19. The Plaintiff also examined her husband Lt. Comdr. (Retd.) Muhammad Akhtar Javed as Ex.7. he was also cross-examined. On the other hand, the Defendant examined himself as Ex.9.

7. Insofar as the facts are concerned, they do not appear to be in dispute to the effect that an FIR was lodged by the Defendant implicating the Plaintiff for committing an offence under Section 380 PPC. Investigation was twice carried out, statements were recorded and report was furnished by the Police authorities under

Section 173 Cr.P.C. as Cancelled Class. Such report was accepted by the learned Judicial Magistrate vide Order dated 14.11.2008 and the operative part reads as under:-

“I have perused police file and come to the conclusion that the occurrence took place on 14th September-2007 while the report was lodged on 23.05.2008, after a delay of more than 8 months for which no explanation. The names of eye-witnesses find no place in the FIR nor there is any receipt of stolen articles to show the ownership of the complainant or possession of the same as well as several defects in the case. Contrary to that accused appears that she committed no offence, as evidence collected appears that she committed no offence, as evidence collected by the prosecution placed on record. No reason to disagree.

In view of the above reasons, I therefore, allow the prayer of the I.O of the case in the interest of justice.”

8. The finding of the learned Magistrate reflects that according to the Defendant's allegations the incident occurred on 14.09.2007, whereas, the report was lodged on 23.05.2008 i.e. after a delay of more than 8 months. He further observed that the name of the eye-witness is missing from the FIR, whereas, even the Defendant could not prove his ownership of the alleged stolen articles and on these findings of the Investigation Officer, the report under “C” Class was accepted. Though the learned Counsel for the Defendant vehemently argued that this is not a case, wherein, the Plaintiff was sent for trial, and therefore, no case for malicious prosecution is made out; however, while confronted as to whether the order of the learned Judicial Magistrate was impugned any further, the learned Counsel responded in negative but argued that a direct complaint was filed in this matter. On this assertion the Defendant was cross-examined and he replied as under:-

“It is correct that there is no detail mentioned in my written statement in paras 9 and 10. Please see para-14 of the affidavit in evidence and say that I have not filed any copy of private or direct

complaint alongwith my written statement and affidavit in evidence.

Q. I put it to you that you are falsely deposing in your private or direct complaint filed before Vth Judicial Magistrate Karachi (East) as it is subjudice?

Ans. On the date of my filing of affidavit in evidence dated 12.3.2011 the complaint was pending before Vth Judicial Magistrate Karachi (East).

Q. I put it to you that you have not submitted private complaint in the court of Vth Judicial Magistrate Karachi (East)?

Ans. I did not follow since then.

Q. I put it to you that whether you have written any date of filing of complaint?

Ans. I do not remember.

9. The above conduct of the Defendant does not support the case to the extent that the Plaintiff was not involved in any false case. The very fact that FIR was lodged after a delay of 8 months negates the contention of the Defendant that no false case was initiated. If, any incident as alleged had taken place then an immediate cause had accrued and for which the Defendant was required to approach the police authorities immediately. It is not that the Defendant was unaware as to who allegedly had committed the offence. It is the defendant's own case that Plaintiff had allegedly committed the offence and she resides in his property as a tenant, therefore, it cannot be a case, wherein, the Defendant could claim and say that he was unaware about the person, who has allegedly committed the offence. Moreover, the Defendant ought to have impugned the order of the Judicial Magistrate in accordance with law, if the Defendant was of the view that such order was incorrect or for that matter the evidence was not collected properly or appreciated by the trial Court. The Plaintiff

was nominated in the FIR and had to seek bail before arrest notwithstanding that she is a lady; therefore, the grounds of humiliation and/or inconvenience are readily available in this case. As to filing of a direct complaint after the order was passed by the Magistrate, nothing has been brought on record to that effect, rather the evidence led by the defendant as well as his cross examination does not support such assertion.

10. The entire case of the defendant is that since the plaintiff was not put on trial, therefore, no case for malicious prosecution is made out. However, this is not true in each and every case. Even in cases where, the accused is sent for trial and is thereafter acquitted on the principle of benefit of doubt, it is not that malicious prosecution will be established without any further evidence. It is rather, always dependent on the fact that whether such prosecution was based on malice or not. Malicious prosecution means to obtain a collateral advantage. The act of a defendant is to be seen, that is to say, was it by spite or ill will or any indirect or improper motive. In this case the relationship of the plaintiff and defendant has been explained hereinabove, and the very fact of lodging FIR of an incident which happened at least eight months before, is itself a step which speaks volumes of malice on the part of the defendant. Moreover, a lady was involved in it. And to add to it, after the order of the Magistrate no further steps were taken including challenge to it before a higher forum. If the case of the defendant was that faulty investigation resulted in leading to order of the Magistrate, then it was incumbent upon the defendant to impugn the same further. To come out of the wriggle of a suit for malicious prosecution, the defendant was required to

show that there was reasonable and probable cause for him to implicate the plaintiff in the FIR, and if this had been done, then no amount of malice would have made him liable for damages. And it is settled law that reasonable and probable cause must be such as would operate on the mind of a discreet and reasonable man; 'malice' and 'want of reasonable and probable cause,' have reference to the state of the defendant's mind at the date of the initiation of criminal proceedings, which in my view is reflected from the conduct of the defendant in the present case that efforts were made to implicate the plaintiff for settling personal score. The argument of the learned Counsel for the defendant that the plaintiff was never sent for trial and such fact cannot be equated with honorable acquittal is also not tenable in the given facts. As soon as the FIR was lodged, the plaintiff had to go through the rigors of obtaining a pre-arrest bail and face investigation (at least twice) at the instigation and behest of the defendant. She remained under the imminent threat of being arrested. A learned Division Bench of the learned Lahore High Court, in the case reported as ***Rana Shaukat Ali Khan v Fayyaz Ahmad (2017 MLD 120)***, wherein, the plaintiff was discharged similarly by the Magistrate and not acquitted and the trial Court dismissed the Suit for malicious prosecution, overturned such decision and held that the plaintiff was entitled to damages.

11. The Honourable Supreme Court in the case reported as ***Niaz and others v. Abdul Sattar and others (PLD 2006 Supreme Court 432)*** has been pleased to dilate upon 'reasonable and probable cause' and further in respect of filing and lodging of false FIR's. The following, observation in my view is relevant to decide the controversy in hand:-

8. The maxim "The reasonable and probable cause" means that it is an honest belief in the guilt of the accused based upon full conviction, based on reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true would reasonably lead any ordinary prudent man to the conclusion that the person charged was probably guilty of crime imputed. See (1881) 8 QBD 167 Hicks v. Faulkner. It is also a settled principle of law that if reasonable and probable cause is established, then question of malice becomes irrelevant as observed by Denning L.J. in *Tempest v. Snowden* (1952) 1 K.B. 130.

"10. We have also re-examined the evidence in the interest of justice and fair play. We are of the view that both the courts below were justified to award nominal damages to the petitioners. It is a high time to put the nation on a right path to promote the law of tort. According to us in case citizens and the courts are conscious to save the nation from the agony of telling lies or involving innocent persons in criminal cases, then the only solution to stop this frivolous litigation for the purpose of taking revenge from the other side is to file suits for damages as and when the competent forum has declared the accused persons as innocent acquitted/discharged by the competent court so that prosecution must lodge genuine cases."

Again in the case reported as *Muhammad Yousaf v. Abdul Qayyum* (PLD 2016 Supreme Court 478), the Honourable Supreme Court while discussing malicious prosecution and registration of a false FIR has been pleased to observe as under:-

9. This has meant that the plaintiff has had to establish, inter alia, malice as well as absence of reasonable and probable cause to succeed in a claim for malicious prosecution. Mere absence of reasonable and probable cause' has not been held to be sufficient to establish malice, although it can be used as evidence for establishing malice. Malice is a state of mind and can be inferred from the circumstantial evidence. We can take judicial notice of our societal norms which appears to be at variance on norms of English society. **The mere lodging of an FIR creates a public perception adverse to the reputation of the accused. Where the FIR is proved either to be false or to have been lodged without reasonable and probable cause, the circumstances of any given case may be sufficient to show that the lodging of the criminal case was malicious.** For instance, in certain cases a prior enmity or a family dispute or differences between the families of two spouses can lead to the lodging of a criminal case and initiation of a prosecution based on allegations of a factual nature which are motivated by the aforesaid circumstances rather than a truthful assertion of fact to bring an accused to book through the criminal legal process. In the present case, the falsity of the allegation made against the

respondent/plaintiff is established from the fact that the only basis stated by him for lodging the FIR was some information received by him from a person named Sadiq, after the FIR had been registered. Since the said Sadiq was not summoned and produced as a witness by the petitioner/defendant the element of malice on the part of the petitioner can be inferred.

10. We have examined in detail the facts and circumstances of the case and have also gone through the record with the assistance of learned counsel for both sides. Malice on the part of the petitioner is floating on the surface of the record. There was no occasion or reasonable basis for nominating the respondent as an accused. We may note that in the original FIR, the respondent was not named but it was at a subsequent point in time that the petitioner mentioned the name of the respondent as an accused. The basis on which he did so namely information given to him by M. Sadiq also appears to be a fabrication by the petitioner because the said M. Sadiq who could have appeared in Court to testify in this regard was neither summoned nor produced by the petitioner. No explanation for this material omission has been given by the petitioner.

11. We cannot help taking notice of the fact that in numerous criminal cases which are initiated through filing of FIRs a wide net is cast to implicate accused persons and their family members particularly able-bodied males. This ordinarily is done to ensure that such able-bodied males are arrested and there is none left free to pursue their case in Court. After trial in many cases the accused who are nominated are acquitted. The accuser/complainant in most cases walks away without facing the consequences of a false accusation. Section 182, P.P.C. quite often is not used even if there is reasonable ground for initiating action under the said provision for prosecuting a person who has filed a false FIR. The societal propensity towards false accusation in FIRs can potentially be curbed through civil suits for malicious prosecution."

11. Having said that, the question now remains to be answered is that whether the plaintiff has been able to prove the loss and or damages claimed through instant Suit. Though I have come to the conclusion that in view of the above facts it has been established that the plaintiff's implication in the FIR amounts to malicious prosecution; however, this does not clearly establishes that the Plaintiff is, at the same time entitled for damages as well to the extent as claimed in the plaint and the affidavit-in-evidence. There

is no specific claim in respect of the damages, which are being claimed through this Suit nor any supporting documents have been brought on record to quantify the exact nature of the damages allegedly suffered. But again this does not mean that the plaintiff cannot be granted any general damages by this Court. Reference in this regard may be placed on the case reported as ***Abdul Majeed Khan v Tawsee Abdul Haleem (2012 CLD 6)***, wherein the Hon'ble Supreme Court has been pleased to hold as under;

“.....It is, however, correct that the petitioner has failed to quantify the damages claimed by him as required under the law. This does not mean that the petitioner was not entitled to the grant of general damages under the rule of thumb on the face of the material brought on record by him during trial.”

In view of hereinabove above facts and circumstances, of this case, I am of the view that admittedly the Plaintiff was involved in a false case, whereas, the Defendant chose not to proceed further in challenging the order of the Judicial Magistrate accepting the report under Section 173 Cr.P.C. as (cancelled) “C” Class, therefore, the Plaintiff was not only humiliated but was subjected to malicious prosecution. Accordingly, exercising powers to grant general damages under the rule of thumb, the issue is answered in affirmative; and the Suit is hereby decreed by granting damages to the extent of Rs.200,000/- (*Two hundred Thousand only*), with 5% simple mark up (*not on compound basis*) from the date of decree till its realization. The Suit is further decreed to the extent of cost(s) as well.

Dated: 18.04.2018

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