

IN THE HIGH COURT OF SINDH AT KARACHI

II-Appeal No. 193 of 2022

Appellant: Zulfiqar Ahmed through Mr. Farjad Ali Khan advocate
Respondent No.1: Nemo
Respondents No.2 & 3: Mr. Ali Zardari AAG
Date of hearing: 17.05.2023
Date of Judgment : 12th July 2023

J U D G M E N T

Salahuddin Panhwar, J- Through captioned IInd-**Appeal**, the appellant has challenged judgment dated **08.09.2022**, passed in Civil Appeal No.60/2022, whereby the first appeal was **dismissed** and order dated **18.02.2022** passed by trial Court in **Suit No. 453/2021**, whereby the plaint was rejected under Order **VII** Rule **11** C.P.C was upheld.

2. Briefly facts relevant for disposal of the instant **appeal** are that the respondent No.1 lodged **FIR** bearing Crime No. 143/2016 at PS FIA, AHT Circle, Karachi for offences under section **17(2)**, **22(6)** of Immigration Ordinance 1979 against the appellant and others. After full-dressed trial, the appellant was **acquitted** of the charges vide judgment dated **29.02.2020**. After earning **acquittal**, the appellant filed a suit for "*Defamation, Damages, Compensation for malicious prosecution for amount of Rs.140,00,000/-*" against the respondent No.1. In the first round, the trial Court **rejected** the **plaint** of the Suit vide order dated **02.03.2021**, on appeal, vide judgment dated **28.10.2021**, the matter was remanded back to the trial Court with direction to decide the queries with regard to *jurisdiction* and **maintainability** of suit as afresh in accordance with law after providing *opportunity* of hearing to the counsel for both the parties. On remand, the plaint was again **rejected** under **Order VII** Rule **11** C.P.C and on **appeal** the said order was upheld, hence this *second appeal*.

3. Notices were issued to the respondent No.1, but he chose to remain absent, therefore after completing all the modes of the service including publication, against the respondent No.1, he was proceeded in *Ex-parte*.

4. Learned counsel for the appellant argued that the **impugned judgment/order** are passed without taking into consideration the material; that no *opportunity* was provided to the appellant to adduce the evidence in support of his claim; that no application under Order VII Rule 11 CPC was moved. However, the trial Court by exercising suo moto powers **rejected** the **plaint** under Order VII Rule 11 CPC, without any cogent reasons; that false implication of the appellant is apparent from the judgment passed by the learned Special Judge (Central-I), Karachi in Case No. 26/2017; that even in evidence the respondent No.1 has taken contradictory version, hence the **benefit of doubt** was extended in *favour* of the appellant, who was *acquitted* by the trial Court; that due to false implication of the appellant, he suffered immense damages mentally as well as he had to face rigors of trial; that the learned appellate Court has also *misconstrued* that the appellant was not **acquitted** honourably which finding is alien to the Criminal Procedure Code, 1898 as honourable *acquittal* is not provided in Code; He maintained that it is held by the apex Court that an acquittal through benefit of doubt amounting to honourable acquittal. In support of his submissions, reliance is placed upon the cases reported as **Mumtaz Ali Shah vs. Chairman PTCL, H.Q Islamabad and 6 others** (PLD 2002 S.C 1060), **Tariq Pervez vs. The State** (1995 SCMR 1345), **Muhammad Nawaz and others vs. The State** (1994 SCMR 1614), **Muhammad Yousaf vs. Abdul Qayyum** (PLD 2016 SC 478) and **11** (2012 CLD 6 [Supreme Court]).

5. Heard and perused the record.

6. Before going into the merit of the case in hand, I would like to *examine* the **scope** of the **2nd Appeal** in the matter of *conflicting* findings of the **courts** below.

7. The scope of the 2nd appeal is *narrow* and it could be exercised *only* if the decision is being contrary to law; failure to determine some material issue of law, and substantial error or defect in the procedure provided by the Code or law for the time being in force which may possibly have emanated an error or slip-up in the determination or decisiveness of the case on merits, in **Gulzar Ahmad**¹ the Apex Court has held that:

"7. Compliant with section 100, C.P.C., the second appeal only lies in the High Court on the grounds that the decision is being contrary to law;

¹ Gulzar Ahmad and others vs. Ammad Aslam and others (2022 SCMR 1433)

failure to determine some material issue of law, and substantial error or defect in the procedure provided by the Code or law for the time being in force which may possibly have emanated an error or slip-up in the determination or decisiveness of the case on merits. Meaning thereby, it does not lie to question the findings on facts. In the case of Madan Gopal v. Maran Bepari (PLD 1969 SC 617), this court held that if the finding of fact reached by the first appellate court is at variance with that of trial court, such a finding by the lower appellate court will be immune from interference in second appeal only if it is found to be substantiated by evidence on the record and is supported by logical reasoning, duly taking note of the reasons adduced by the first court which have been disfavored in the contrary finding. It was further held that interference would be justified if the decision of the lower courts is found to be contrary to law or some usage having the force of law has failed to determine some material issue of law. Whereas in another case reported as Amjad Ikram v. Mst. Asiya Kausar (2015 SCMR 1), the court held that in case of inconsistency between the trial court and the appellate court, the findings of the latter must be given preference in the absence of any cogent reason to the contrary as has been held by this court in the judgments reported, as Madan Gopal and 4 others v. Maran Bepari and 3 others (PLD 1969 SC 617) and Muhammad Nawaz through LRs. v. Haji Muhammad Baran Khan through LRs. and others (2013 SCMR 1300)."

[Emphasis supplied]

8. The above legal position, prima facie, makes it clear and obvious that to succeed in second appeal, the appellant must establish that the finding of fact arrived at by the first appellate court is not found to be *substantiated* by evidence on the record and is result of its failure in determining the material issue or that conclusions, so drawn, are contrary to settled principles of law.

9. It is pertinent to mention here, that every case, which ends in acquittal, would entitle the guiltless accused to sue for damages, as in that case, the damage caused would be beyond repair and the criminal justice system would come to a halt. As by doing so, the aggrieved parson would suffer at the hands of the incompetent investigation and the people would lose the courage to register their claims and the same would in turn lead to a chaos. The burden is and would be on the person, claiming damages 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, whether it was due to ill will or any indirect or improper motive, see **Subedar (Retd.) Fazale Rahim**² case wherein held that:

"Mere fact that prosecution instituted by the defendant against the plaintiff ultimately failed, cannot expose the former to the charge of malicious prosecution unless it is proved by the plaintiff that the

² Subedar (Retd.) Fazale Rahim v. Rab Nawaz (1999 SCMR 700)

prosecution was instituted without any reasonable or probable cause and it was due to malicious intention of the defendant and not with a mere intention of carrying the law into effect."

10. It is pertinent to mention that the proceedings initiated under this law requires that the original proceedings must have been **malicious** and without any reasonable and probable cause. Every person in the society has a right to seek protection of his rights, but while doing so, such person should not infringe the corresponding rights of others by instituting improper legal proceedings in order to harass them by **unjustifiable litigations**. For a claimant to succeed in an action for malicious prosecution, must plead and prove the following ingredients:

- i. That plaintiff was prosecuted by the defendant;
- ii. That the prosecution ended in favour of the plaintiff;
- iii. That the defendant acted without reasonable and probable cause;
- iv. That the defendant was actuated by malice with improbable motive and not to further the ends of justice; and
- v. That the proceedings had interfered with the plaintiff's liberty and had also affected his reputation and the plaintiff had suffered damages.

11. In another case **Niaz V. Abdul Sattar**³ it has discussed '**reasonable and probable cause**' and further in respect of filing and lodging of false FIRs. The relevant observations are that:

"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

³ Niaz and others v. Abdul Sattar and others (PLD 2006 Supreme Court 432)

the competent forum has declared the accused persons as innocent acquitted/discharged by the competent court so that prosecution must lodge genuine cases."

12. Reverting back to the case in hand it appears that respondent No.1 lodged FIR bearing Crime No. 143/2016 at PS FIA, AHT Circle, Karachi for offences under section 17(2), 22(6) of Immigration Ordinance 1979. According to the appellant due to such criminal case, he lost his *reputation* in the eyes of general public as well as friends and he was detained in jail also for a sufficient period till he was bailed out by the Court. It is further stated that after full-dressed trial, he was acquitted. However, the learned Appellate Court observed that as the appellant was *not acquitted honourably* by the trial Court, therefore, the case of the appellant did not fall within the ambit of malicious prosecution, such observation of learned Appellate Court is not tenable for the reason that the word "*Honourable acquittal*" is alien to the Criminal Procedure Code, 1898 and such word is *nowhere* provided in the Code. Acquittal is an acquittal *simpliciter* and must entail upon all consequences of pure acquittal. Clean acquittal and acquittal through benefit of doubt amounting to honourable acquittal. Rightly reliance has been placed upon the case of **Mumtaz Ali Shah** (*supra*). However, the Apex Court has held in the case of **Abdul Majeed Khan**⁴ that when claimant is subjected to criminal prosecution and as a consequence of which he loses or risks of losing his liberty and/or his reputation, a remedy in the tort of malicious prosecution will lie. Relevant portion of the judgment of the apex Court passed which reads as:

"20. Where the claimant has been subjected to a criminal prosecution, as a consequence of which he loses or risks of losing his liberty and /or his reputation, a remedy in the tort of malicious prosecution will lie. The institution of a civil action should exceptionally, results in liability under tort, when the claimant loses the suit, the defendant's reputation is restored and he recovers his cost spent on defending the action....."

Underlining is provided for emphasis

⁴ Abdul Majeed Khan vs. Tawseen Abdul Haleem and others (2012 CLD 06)

13. In the Case of **Dr. Muhammad Islam**⁵ it was held by the Apex Court that:

“Even in the cases where benefit of doubt has been given to the accused, it cannot be said that the charge has been established by the prosecution. The accused are to be treated as innocent unless it is proved on the basis of best possible evidence that they are connected with the Commission of the crime and as such, deserve to be convicted to meet the ends of justice. The doubt itself shall destroy the very basis of the prosecution case. In this view of the matter, the accused shall be deemed to have honourably been acquitted even where the benefit of doubt has been extended to them”.

14. It is observed that at times, while lodging of the criminal cases, wide net is cast to implicate an accused including their other family members to ensure that none of them left free to pursue their case in Court. After trial in many cases the accused who are nominated are acquitted. However, in number of the cases the complainant of the case walks away freely without facing the consequences of a false accusation. The societal propensity towards false accusations in FIRs can potentially be curbed through civil suits for malicious prosecution. In the case reported as **Muhammad Yousaf**⁶ it has been observed by Supreme Court as under:-

“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.”

[Emphasis Supplied]

15. In order to find an action for damages for malicious prosecution based upon criminal proceedings, the test would not be whether the criminal proceedings instituted on false and frivolous allegations had reached the court rather would be that such proceedings had reached a stage at which damage to the plaintiff resulted. In the case of **Muhammad Yousaf id**, it has been observed that "a tort which provides redress to those who have been prosecuted without reasonable cause and with malice".

⁵ **Dr. Muhammad Islam v. Government of N.-W.F.P. through Secretary, Food, Agriculture, Livestock and Cooperative Department, Peshawar and 2 others (1998 SCMR 1993)**

⁶ **Muhammad Yousaf v. Abdul Qayyum (PLD 2016 S.C 478),**

16. This Court has perused the averment of plaint, the impugned orders, as also the judgment of acquittal and is clearly of the opinion that at this stage it would not be possible to say that the plaint does not have any proof of the four elements required in a suit for malicious prosecution. The basic contentions of the Appellant/Plaintiff are clearly contained in the plaint. The question of proof would arise only after issues are framed and the opportunity to lead evidence is given to the parties. The plaint is to contain the facts, which it clearly contains. The manner in which the same would be proved is up to the Appellant/Plaintiff. This is not a case where on a plain reading of the plaints no **cause of action exists** for malicious prosecution, especially owing to the FIR which was lodged, the Appellant/Plaintiff faced full-dressed trial, the subsequent acquittal and the nature of allegations in the Plaints. Thus, the plaint is not liable to be rejected in a summary manner under Order VII Rule 11 C.P.C. As per provisions of Order VI Rule 2, C.P.C., every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved..... In view of the provisions of Order VI Rule 2, C.P.C., the pleading is not a substitute of the evidence. In such circumstances, without providing opportunity to the Plaintiff to prove his pleadings through evidence, it will not be just and proper to reject the plaint. In the case of **Saleem Malik**⁷, it has been held by the Supreme Court of Pakistan that:

“Subject to the certain exception to the general principle, the plaint in the suit cannot be rejected on the basis of defence plea or material supplied by the opposite party with the written statement. This is settled law that in case of controversial questions of fact or law, the provision of Order VII, Rule 11, C.P.C. cannot be invoked rather the proper course for the Court in such cases is to frame issue on such question and decide the same on merits in the light of evidence in accordance with law. The rejection of plaint on technical grounds would amount to deprive a person from his legitimate right of availing the legal remedy for undoing the wrong done in respect of his legitimate right, therefore, the Court may in exceptional cases, consider the legal objection in the light of averment of the written statement but the pleading as a whole cannot be taken into consideration for rejection of plaint under Order VII, Rule 11, C.P.C.”

[Emphasis supplied]

⁷ Saleem Malik v. Pakistan Cricket Board (PCB) and 2 others (PLD 2008 Supreme Court 650)

17. In the Case of **Jewan**⁸ it has been observed by the apex Court that courts may not consider the defence brought by the opponent in the following words:

“We are, therefore, of the view that in the above referred cases though the observation was made by the Court that Order VII, Rule 11, C.P.C. is not exhaustive of all situations, but it did not lay down the law that the Court while rejecting the plaint under Order VII, Rule 11, C.P.C. could take into consideration the plea of Defendant though disputed and denied by the Plaintiff.”

18. Under these circumstances, the instant **appeal** is **allowed**, impugned judgment passed by the Appellate Court as well as order passed by the trial Court are **set-aside** and the case is **remanded back** to the trial Court with direction to **decide** the **suit afresh** after recording evidence of the parties in accordance with law.

Sajid

JUDGE

⁸ **Jewan & 7 Others vs. Federation Of Pakistan through Secretary, Revenue, Islamabad and 2 others (1994 SCMR 826)**