

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1276 of 2007

Mst. Khushnudi Begum & others **Plaintiffs**

Versus

Abdul Rahim Khan **Defendant**

Mr. Adnan Ahmed Advocate for the Plaintiffs

None present for the Defendant

Date of hearing : 5th September 2024

Date of judgment : 16th October 2024

JUDGMENT

Omar Sial, J. Mst Khushnudi Begum, Waqar Alam, and Israr Alam have filed this suit for malicious prosecution against Abdul Rahim Khan. Khan failed to appear before this Court, and vide Order dated 26.04.2010, the suit was directed to proceed exparte.

2. The facts as narrated in the plaint are as follows. The Plaintiffs claim to own Flat No.113, Marine Drive Department, Block 2, Clifton, Karachi. ("**Disputed Property**"). They say they purchased it from an individual, Muhammad Siddiqui Awan, through a power of attorney. In November 2001, they approached the builder Qamran Constructions for the execution of a sale deed. In April 2002, Abdul Rahim (the Defendant) came to the Disputed Property where the Plaintiffs resided. He claimed that he owned that property and that the Plaintiffs had illegally possessed it through false, forged, and fabricated documents.

3. Abdul Rahim complained to the police, which culminated in the registration of FIR No. 146/2002 on 17.08.2002 under sections

468/469/471/448/454 and 506-B/34 P.P.C. at the Boat Basin Police Station. The Plaintiffs, Muhammad Siddique Awan, Iftikhar Alam, and Sarfaraz Alam (the latter two being brothers of the plaintiffs), were nominated as the accused.

4. Waqar Alam and Israr Alam were arrested and had to undergo a trial before the 3rd Additional Sessions Judge (South) bearing Case No. 619/2002. The charge was framed against them on 06.01.2004. They stood acquitted of the charge on 04.11.2006 under section 265-K Cr.P.C. primarily on two grounds: (i) that some of the offenses with which they were charged were non-cognizable for which the prosecution could not have been initiated without the necessary permission from the magistrate as required under section 155 Cr.P.C., and that (ii) the matter primarily appeared to be one of double allotment by Qamran Constructions and therefore the dispute was of a civil nature. It further noted that the dispute was pending before the civil court as Suit No. 441/2002 before the 10th Senior Civil Judge at Karachi (South). As per the said Order, the suit was filed by Muhammad Siddique Awan against Qamran Constructions and Abdul Rahim Khan. The plaint also mentions this suit but does not mention who the parties were and the eventual outcome of the dispute.

5. During the pendency of the instant suit, Mst. Khushnudi Begum, plaintiff no.1, passed away. As a claim of malicious prosecution is a personal right of action, the same died with the death of the person as espoused in the maxim *action personalis moritur cum persona*.¹ Accordingly, she was deleted as a party under the Order dated 29.02.2024.

6. So far as the claim of the remaining plaintiffs is concerned, the same has to be adjudicated against the test for a claim of malicious prosecution as expounded by the Supreme Court in

¹ Zahid Hussain Awan v. United Bank Limited (2018 MLD 1369)

various judgments, the latest of which is **Abdul Majeed Khan v. Tasweer Abdul Haleem (2012 CLD 60)**. The same provides that for a claim of malicious prosecution to succeed, the claimant has to prove *“(1) that the law was set in motion against him on a criminal charge; (2) that the prosecution was determined in his favor; (3) that it was without reasonable and proper cause; and (4) that it was malicious.”*

7. It is a matter of record that Abdul Rahim did initiate criminal proceedings against the plaintiffs, and the same via Order dated 04.11.2006 stood concluded in their favor, and they were acquitted of the charge. Hence, the first two prongs stand met. However, nothing has been brought forth on the record to demonstrate that the initiation of the criminal proceedings by Abdul Rahim was without reasonable and probable cause. This phrase has been interpreted in **Niaz v. Abdul Sattar (PLD 2006 SC 432)**, as *"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."*

8. In the suit, it has been claimed that the title documents for the Disputed Property were shown to Abdul Rahim to assuage his grievance. However, who held title to the property has not been mentioned, and for some odd reason, the title documents have not been annexed with the plaint, nor have they been brought forth during evidence. As far as the evidence is concerned, no proof of ownership of the Disputed Property was brought on record by the Plaintiffs. No evidence as to how they were in possession of the Disputed Property was also forthcoming. The record (the plaint, specifically) shows that a Suit bearing No. 441/2002 was preferred before the 10th Senior Civil Judge at Karachi (South) for the specific performance of an agreement to sell. However, the memo of the said suit has also not been annexed

to the plaint; neither have the plaintiffs disclosed the ultimate fate of this suit. I also note that the plaint is silent about the contesting parties of the Suit. However, the acquittal Order of 04.11.2006 mentions this suit to have been filed by Muhammad Siddiqui Awan against Qamran Constructions and Abdul Rahim Khan. This gives rise to an assumption that perhaps Muhammad Siddique Awan, from whom the plaintiffs had purchased the Disputed Property in 2001, did not have a clear title and, therefore, in 2002, was constrained to file a suit for specific performance. This finding is further bolstered by the fact that during the criminal trial, Abdul Rahim did bring forth documents to substantiate his title to the Disputed Property, based on which the trial court believed that perhaps the matter pertained to double allotment by Qamran Constructions. I also note that the evidence of only two prosecution witnesses has been brought on the record. Whereas, per the Order dated 04.11.2006, there were three prosecution witnesses, the first being Mr. Malik Muhammad Raees, who had brought forth and exhibited specific documentation concerning the Disputed Property. The reason the testimony has not been annexed to the plaint also creates doubt.

9. The above omissions have been listed because their presence on the record would have helped the Plaintiffs demonstrate that the prosecution was without reasonable and probable cause. Furthermore, the trial Court's finding that the case appears to be one of double allotment by Qamran Constructions also does not favor the Plaintiffs. My finding is that the Plaintiffs failed to demonstrate that the prosecution had been initiated without reasonable probable cause.

10. This brings me to the last prong of the test, which stipulates that the prosecution was motivated by malice. In the case law reported at **Muhammad Yusuf v. Abdul Qayyum (PLD 2016 SC 478)**, the Supreme Court has held that “the *mere absence of reasonable and probable*

cause' has not been held sufficient to establish malice. However, it can be used as evidence for establishing malice. Malice is a state of mind and can be inferred from the circumstantial evidence." Even if Malice can be inferred from circumstantial evidence, which in this case is none, the fact that the plaintiff has failed to demonstrate that the prosecution was without reasonable and probable cause shows that the test for the claim of malicious prosecution to succeed has not been met.

11. Though I am cognizant of the fact that the criminal prosecution did infringe on the liberties of the plaintiff and must have interfered with their goodwill, the fact that no evidence has been brought forth to establish that the prosecution was not motivated by a reasonable and probable cause and due to the many lacunas in the evidence brought forth the claim of the plaintiffs fails. Similarly, a claim for damages has been made, but no evidence was led at trial to substantiate it. At its discretion, the Court may still award damages for mental trauma; however, in the present case, as I have concluded that the Plaintiffs proved neither a reasonable and proper cause nor malice, they are not entitled to any damages.

12. Given the above, the suit is dismissed with no order as to costs.

JUDGE