Shri Ravinder Kumar Sharma vs The State Of Assam And Ors on 14 September, 1999

Equivalent citations: AIR 1999 SUPREME COURT 3571, 1999 (7) SCC 435, 1999 AIR SCW 3578, 1999 (6) KANT LD 726, 1999 (5) SCALE 467, (1999) 6 JT 565 (SC), 1999 (4) LRI 1011, 1999 (7) ADSC 857, 2000 (1) UJ (SC) 126, 2000 UJ(SC) 1 126, 1999 ADSC 7 857, (2000) 2 KER LJ 13, (2000) 2 PUN LR 165, 1999 (9) SRJ 451, 2000 (125) PUN LR 165, 1999 (6) JT 565, (2000) 1 EFR 549, (1999) 4 MAD LJ 86, (2000) 2 MAD LW 58, (1999) 6 ANDHLD 38, (1999) 8 SUPREME 62, (1999) 5 SCALE 467, (1999) 2 ACC 691, (1999) 37 ALL LR 453, (2000) 1 CALLT 22, (1999) 4 CURCC 186, (1999) 81 DLT 795

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Bench: M.J.Rao, M.Srinivasan

PETITIONER:
SHRI RAVINDER KUMAR SHARMA

Vs.

RESPONDENT:
THE STATE OF ASSAM AND ORS.

DATE OF JUDGMENT: 14/09/1999

BENCH:
M.J.Rao, M.Srinivasan

JUDGMENT:

M. JAGANNADHA RAO,J.

The appellant was the plaintiff in title Suit No.40 of 1978, on the file of the Assistant District Judge, Jorhat. He filed the suit for damages for malicious prosecution against three defendants, the State of Assam and two Police Officers for recovery of various amounts shown in Schedules A, B and C. Schedule A of the suit was an amount of Rs.2,53,425/- claimed as damages towards mental pain, social and public humiliation, wrongful confinement and expenses incurred for defending the criminal cases (For convenience we shall describe them as non-pecuniary damages). Schedules B and C comprised the value of paddy and rice of the appellant which was seized and then sold by the police officers, defendants 2 and 3 (For convenience we shall describe them as pecuniary damages).

The trial Court dismissed the suit on 16.7.84. But on appeal, the High Court while holding that the defendants 1 to 3 were guilty of malicious prosecution, abuse of power and unauthorised action, granted relief only in regard to pecuniary damages in the B and C Schedules (value of goods) but dismissed the suit for non-pecuniary damages in A Schedule items(pain, damage to reputation etc.) on the ground that the pleadings and evidence in respect of the said items were vague. The plaintiff has filed this appeal for non-pecuniary damages covered by the A Schedule items. The defendants 1 to 3 have not filed any appeal in regard to amount decreed for pecuniary damages as per the B or C Schedules. The facts in brief are as follows: The defendants 2 and 3 entered the appellant's Mill towards dusk-time on 1.10.1977 and seized the paddy and rice and arrested the appellant for alleged violation of the provisions of the Assam Food Grains (Licensing and Control) Order, 1961. A criminal case was filed against the appellant. On 4.10.1977, the appellant was granted bail but he was released only on 5.10.1977. The paddy and rice were sold and an amount of Rs.44,592.10 was realised. This amount is shown in the B and C schedules. The appellant was discharged by the Criminal Court on 12.4.78, on the ground that the Assam Control Order of 1961 was not in force at the time of search, seizure and arrest of the appellant on 1.10.1977 but that it had expired on 30.9.1997. The appellant contended in the courts below that the search, seizure and arrest were unauthorised as the Central Government had, in fact, removed various restrictions w.e.f. 1.10.1977 and that the news in that behalf was published in various newspapers on 29.9.1977. He also contended that he had personally informed the respondents 2, 3(defendants 2 and 3) on 1.10.1977 at the time of the search operation about the expiry of the Control Order, that the defendants 2 and 3 did not pay any heed and went ahead and arrested the appellant because their demand for a bag of rice was not complied with. It was also contended that the defendants 2 and 3 acted mala fide, that the appellant and the owners of the paddy/rice had permits for milling paddy and the same were produced before these officers but they did not care even to look into them. The sale of goods was also made in haste. These facts, according to the plaintiff, showed that there was no reasonable or probable cause for the prosecution. Therefore, the defendants were liable for damages as stated in plaint Schedules A, B and C. The defence of the State and the police officers was that on 1.10.1977, no order of the Central Government was published in the gazette, that even appellant had no knowledge of the said order because no such fact was stated even in the bail petition filed later and that, in fact, the State of Assam had issued instructions on 30.9.97 by wireless message to its officers that the order of the Central Government would not come in the way of the enforcement of the Assam Control Order of 1961. It was contended that the action of search, seizure and arrest taken on 1.10.1977 pursuant to such instructions of the State Government issued on 30.9.77 was bona fide. The demand for a bag of paddy was denied. It was also stated that no permits for milling paddy were shown either by the appellant or by the owners of the paddy. There was, therefore, reasonable and probable cause for the prosecution and hence the suit was liable to be dismissed. The trial court rejected the evidence of the appellant and held that the action of the defendants was based upon the State Government's wireless message dated 30.9.77 to the effect that the Control Order of Assam could be enforced, that the case of demand of rice bag was false and that the entire claim was imaginary. There was reasonable and probable cause for the prosecution. The suit was dismissed. .pa On appeal in FA 89/84, the High Court of Gauhati reversed the findings and held that the defendants 2 and 3 exceeded their authority inasmuch as the Assam Control Order of 1961 was not in force on 1.10.77 and that the officers abused their powers, that there was no material before the said officers to have reasonable and probable cause to launch prosecution. It held that the written

statement having been signed by Sri D.K. Borthakur, (Additional Dy. Commissioner, Sibasagar) on behalf of all defendants (and not by defendants 2 and 3), it must be deemed that the allegation of demand for a bag of rice was not denied, that the appellant and owners of the paddy showed their permits to the officials but it went unheeded and that the treatment meted out by the defendants 2 and 3 to the appellant was most "atrocious and malicious". On those findings the High Court granted a decree for the pecuniary damages in B and C Schedules i.e. value of paddy and rice sold. However, the High Court refused to grant a decree for the A Schedule, i.e. mental pain, loss of reputation, wrongful confinement etc. on the ground that the appellant "did not adduce any evidence with regard to damages in Schedule A". The plaintiff has filed this appeal for the non-pecuniary damages in A Schedule items. The defendants have, as already stated, accepted the decree for the pecuniary damages in B and C Schedule items and have not chosen to file any appeal in regard to the pecuniary damages in B and C schedules nor any cross-objections in regard to the adverse finding that there was no reasonable or probable cause for the prosecution. In this appeal, the learned counsel for the respondents-defendants contended before us that the finding of the High Court in regard to the prosecution being without reasonable and probable cause or that it was malicious etc. was not correct and that hence no decree could be passed for the non-pecuniary damages in A Schedule. On the other hand, the appellant-plaintiff contended that the decree for pecuniary damages in B and C Schedules was based on the same finding and that neither the decree for pecuniary damages in B & C schedule nor the adverse findings regarding absence of reasonable and probable cause, malice etc. were questioned by the respondents by way of an appeal or by cross-objections and that therefore the said findings could not be attacked by the respondents under Order 41 Rule 22 as amended in 1976. The findings on which decree for pecuniary damages in B and C Schedules was based had become final and operated as res judicata. Alternatively, the appellant-plaintiff contended that the findings regarding absence of reasonable and probable cause malice etc. were based on ample evidence as pointed out by the High Court and that the High Court ought to have passed a decree for the non-pecuniary damages in A Schedule also. On the above pleas, the following points arise for consideration: (1) Whether the respondents, not having filed an appeal or cross-objection in regard to the pecuniary damages in B and C schedules could be permitted to rely on Order 41 Rule 22 CPC(as amended in 1976) and to contend that the findings relating to malice, absence of reasonable and probable cause was not correct and whether the respondents could be permitted to support the dismissal of the suit by the High Court so far as the non-pecuniary damages in A schedule were concerned, on that basis? (2) Whether, in case the respondents are held entitled to attack the said adverse findings under Order 41 Rule 22 CPC, the said findings as to the existence of reasonable and probable cause malice etc. are liable to be set aside? Point 1:

> Under this point, the scope and effect of Order 41 Rule 22 CPC as amended in 1976 falls for consideration. We shall first refer to the position of the law in regard to Order 41 Rule 22(1) CPC as it stood before the 1976 Amendment. Thereafter, we shall refer to the 1976 Amendment and its effect. .pa Order 41 Rule 22 (1), as it stood before the 1976 Amendment, stood as follows:
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> "Order 41 Rule 22(1): Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding

> against him in the Court below in respect of any issue ought to have been in his favour, and may also take any cross objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow".

The Rule is in two parts. The first part deals with what the respondent can do by way of attack of an adverse finding even if he has not filed any appeal or cross-objection. The second part deals with what the respondent has to do if he wants to file cross-objection. To give a very simple example, let us take this very case of a plea of malicious prosecution where damages are sought for pecuniary loss (B & C schedules loss of paddy etc.) and also damages for non-pecuniary loss (A schedule, pain, anguish, loss of reputation). The High Court held that there was malice etc. on the part of the defendants and granted a decree for pecuniary losses in B and C schedules but did not grant any decree for non-pecuniary losses, as no proper evidence was adduced in that behalf. The plaintiff has appealed before this Court for damages seeking a decree for non-pecuniary loss in A schedule. Can the respondent- defendant, even though he has not filed any appeal or cross- objection in regard to the adverse finding as to malice and against the decree for pecuniary loss in plaint B & C schedules, attack the finding as to malice etc. and support the decree of dismissal of suit so far as the A schedule non-pecuniary losses are concerned?

Though in certain earlier cases in the Madras High Court, a view was taken that the defendant-respondent in such situations could not attack such a finding, a Full Bench of the Madras High Court in Venkata Rao and Ors. Vs. Satyanarayana Murthy and Anr. [AIR 1943 Madras 698 = ILR 1944 Madras 147] set the controversy at rest by holding that the respondent could attack a finding upon which, part of the decree against him was based, for the purpose of supporting the other part of the decree which was not against him. In that case, Leach,CJ accepted the view of the referring Judges Wadsworth,J. and Patanjali Sastri,J. (as he then was) to the following effect: "Under Order 41 Rule 22, it is open to a defendant-respondent who has not taken any cross-objection to the partial decree passed against him, to urge in opposition to the appeal of the plaintiff, a contention which if accepted by the trial Court, would have necessitated the total dismissal of the suit". The above judgment of the Full Bench was approved by this Court in Chandre Prabhuji's case [1973 (2) SCC 665 = AIR 1973 SC 2565] by Mathew, J. speaking on behalf of the Bench. That means that under Order 41 Rule 22 CPC, before the 1976 Amendment, it was open to the defendant-respondent who had not taken any cross-objection to the partial decree passed against him, to urge, in opposition to the appeal of the plaintiff, a contention which if accepted by the trial court would have resulted in the total dismissal of the suit. This was the legal position under the unamended Order 41 Rule 22 as accepted by the Madras Full Bench in Venkata Rao's case and as accepted by this Court in Chandre Prabhuji's case.

The next question is as to whether, the law as stated above has been modified by the 1976 Amendment of Order 41 Rule 22. It will be noticed that the Amendment has firstly deleted the words "on any of the grounds decided against him in the Court below, but take any cross-objections" in the main part of Order 41 Rule 22 CPC and added the words "but may also state that the finding

against him in the Court below in respect of any issue ought to have been in his favour" in the main part. The main part of Order 41 Rule 22(1) CPC, (after the 1976 Amendment) reads as follows:

> "O.41 R.22(1): Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the appellate court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow."

The 1976 Amendment has also added an Explanation below Order 41 Rule 22, as follows:

> "Explanation: A respondent aggrieved by a finding of the court in the judgment on which the decree appealed against is based may, under this rule, file cross objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree is, wholly or in part, in favour of that respondent".

In connection with Order 41 Rule 22, CPC after the 1976 Amendment, we may first refer to the judgment of the Calcutta High Court in Nishambhu Jana vs. Sova Guha [(1982) 89 CWN 685]. In that case, Mookerjee,J. referred to the 54th report of the Law Commission (at p.295) (para 41.70) to the effect that Order 41 Rule 22 gave two distinct rights to the respondent in the appeal. The first was the right to uphold the decree of the court of first instance on any of the grounds which that court decided against him. In that case the finding can be questioned by the respondent without filing cross-objections. The Law Commission had accepted the correctness of the Full Bench of Madras High Court in Venkata Rao's case. The Commission had also accepted the view of the Calcutta High Court in Nrisingha Prosad Rakshit vs. The Commissioners of Bhadreswar Muncipality that a cross-objection was wholly unnecessary in case the adverse finding was to be attacked. The Commission observed that the words "support the decree..." appeared to be strange and "what is meant is that he may support it by asserting that the ground decided against him should have been decided in his favour. It is desirable to make this clear". That is why the main part of Order 41 Rule 22 was amended to reflect the principle in Venkata Rao's case as accepted in Chandre Prabhuji's case. So far as the Explanation was concerned, the Law Commission stated (page 298) that it was necessary to "empower" the respondent to file cross-objection against the adverse finding. That would mean that a right to file cross-objections was given but it was not obligatory to file cross-objections. That was why the word `may' was used. That meant that the provision for filing cross-objections against a finding was only an enabling provision. These recommendations of the Law Commission are reflected in the Statement of Objections and Reasons for the Amendment. They read as follows:

> "Rule 22(i.e.as it stood before 1976) gives two distinct rights to the respondent in appeal. The first is the right of upholding the decree of the Court of first instance on

> any of the grounds on which that court decided against him; and the second right is that of taking any cross-objection to the decree which the respondent might have taken by way of appeal. In the first case, the respondent supports the decree and in the second case, he attacks the decree. The language of the rule, however, requires some modifications because a person cannot support a decree on a ground decided against him. What is meant is that he may support the decree by asserting that the matters decided against him should have been decided in his favour. The rule is being amended to make it clear. An Explanation is also being added to Rule 22 empowering the respondent to file cross- objection in respect to a finding adverse to him notwithstanding that the ultimate decision is wholly or partly in his favour."

Mookerjee, J. observed in Nishambhu Jana's case (see p.689) that "the amended Rule 22 of Order 41 of the Code has not brought any substantial change in the settled principles of law" (i.e. as accepted in Venkata Rao's case) and clarified (p.691) that "it would be incorrect to hold that the Explanation now inserted by Act 104 of 1976 has made it obligatory to file cross-objections even when the respondent supports the decree by stating that the findings against him in the court below in respect of any issue ought to have been in his favour". A similar view was expressed by U.N.Bachawat, J. in Tej Kumar vs. Purshottam [AIR 1981 MP 55] that after the 1976 Amendment, it was not obligatory to file cross- objection against an adverse finding. The Explanation merely empowered the respondent to file cross-objections. In our view, the opinion expressed by Mookerjee, J. of the Calcutta High Court on behalf of the Division Bench in Nishambhu Jena's case and the view expressed by U.N.Bachawat, J. in Tej Kumar's case in the Madhya Pradesh High Court reflect the correct legal position after the 1976 Amendment. We hold that the respondent-defendant in an appeal can, without filing cross-objections attack an adverse finding upon which a decree in part has been passed against the respondent, for the purpose sustaining the decree to the extent the lower court had dismissed the suit against the defendants-respondents. The filing of cross-objection, after the 1976 Amendment is purely optional and not mandatory. In other words, the law as stated in Venkata Rao's case by the Madras Full Bench and Chandre Prabhuji's case by this Court is merely clarified by the 1976 Amendment and there is no change in the law after the Amendment.

The respondents before us are, therefore, entitled to contend that the finding of the High court in regard to absence of reasonable and probable cause or malice - (upon which the decree for pecuniary damages in B and C schedules was based) can be attacked by the respondents for the purpose of sustaining the decree of the High Court refusing to pass a decree for non-pecuniary damages as per the A schedule. The filing of cross-objections against the adverse finding was not obligatory. There is no res judicata. Point 1 is decided accordingly in favour of respondents-defendants. Point 2: The question here is whether there is proof of malice and proof of absence of reasonable and probable cause for the search, seizure and arrest of the appellant and for his prosecution. We have been taken through the oral and documentary evidence adduced in the case by both sides. The notification of the Central Government dated 30.9.77 (N.S.O. 696(E)), Ministry of Agriculture & Irrigation (Gazette Part II-Sec.3(II)) dated 30.9.77 (at pp. 2639-40) no doubt states that "in exercise of power conferred by Section 3 of the Essential Commodities Act, 1955 (Act 10/55), the Central Government hereby rescinded the Assam Food Grains (Licensing and Control) Order, 1961 w.e.f. 1.10.77". It was on 1.10.77 that the respondents 2 and 3 conducted the

search, seizure and arrest operations. But, as noticed by the trial court, the Assam Government had issued a wireless message 363773 dated 30.9.77 to all Dy.Commissioners and SDOs that the Government of India's procurement policy dated 29.9.77 did not state that the existing restriction on movement of paddy/rice was withdrawn w.e.f. 1.10.77 as reported in the Press. Moreover, Assam Food Grains(Licensing & Control Order, 1961) had not been repealed and the new procurement policy would commence from 1.11.77. The message stated:

> "...please, therefore, ensure that the provisions of the aforesaid Assam Food Grains (Licensing and Control) Order, 1961, are enforced even after 1st October, 1977, pending further instructions from the Government."

The record also shows that this was communicated to officers lower down on 3.10.77. This aspect was not given due importance by the High Court.

Newspaper reports regarding the Central Government decision could not be any basis for the respondents to stop action under the Assam Control Order of 1961. The paper reports do not specifically refer to the Assam Control Order, 1961. In fact, Government of Assam itself was not prepared to act on the newspaper reports, as stated in its wireless message. Section 81 of the Evidence Act was relied upon for the appellant, in this behalf, to say that the newspaper reports were evidence and conveyed the necessary information to one and all including the respondents 2 and

3. But the presumption of genuineness attached under section 81 to newspaper reports cannot be treated as proof of the facts stated therein. The statements of fact in newspapers are merely hearsay [Laxmi Raj Setty vs. State of Tamil Nadu 1988 (3) SCC 319]. Now if the defendants 2 and 3 as police officers of the Assam Government acted upon the instructions of the Assam Government and proceeded to apply Control order even on 1.10.77, they cannot, in our opinion, be said to be acting without reasonable or probable cause. The remedy of suit for damages for false imprisonment is part of the law of torts in our country (A.D.M. Jabalpur vs. Shivakant Shukla 1976 (2) SCC 521 (at 579)). In Glinski vs. McIver [1962 A.C. 726 (at 776)], Lord Devlin stated:

> "The defendant can claim to be judge not of the real facts but of those which he honestly, and however erroneously, believes; if he acts honestly upon fiction, he can claim to be judged on that."

The question is not whether the plaintiff was ultimately found guilty but the question is whether the prosecutor acted honestly and believed that the plaintiff was guilty. As pointed out by Winfield and Jolowicz on Tort (15th Ed., 1998, p.685) in prosecutions initiated by police officers, the fact that they did so upon advice or instruction of superior officers is one of the relevant facts unless it is proved that the particular police officer did not himself honestly believe that the plaintiff was guilty of an offence. The High Court was, in our opinion, wrong in concluding that there was absence of reasonable and probable cause because the action, in view of the notification of the Central Government, was unauthorised or illegal. Illegality does not by itself lead to such a conclusion. Further there is no truth in the appellant's case that on 1.10.1977 at the time of seizure, he informed

the defendants 2 and 3 about the Gazette notification. The point is that such an assertion was not made even in the bail application moved after arrest. As to the contention that the appellant and the owners of paddy showed permits to the defendants 2 and 3, we do not find sufficient pleading on this aspect. In any case we find that no question was put when 2nd defendant was cross-examined. As pointed out by Sarkar on Evidence (15th Ed., 1999, Vol.2, p.2179) in the context of section 138 of Evidence Act, "generally speaking, when cross-examining, a party's counsel should put to each of his opponent's witnesses, in turn, so much of his own case as concerns that particular witness or in which he had a share."

The 3rd defendant was asked and he denied the suggestion. Therefore, the plea showing permits has not been properly substantiated. The other allegation is that the defendants 2 and 3 entered the Mill and demanded a bag of rice. We are of the view that the evidence of the appellant and his munim was rightly disbelieved by the trial court. No such case was put forward by the appellant in the criminal case. The view of the High Court that the respondents 2 and 3 did not personally sign the written statement appears to us to be too technical once the issues were framed and evidence was led by both sides. We do not also find any warrant for the use of the words "abuse of powers" or "atrocious" etc. by the High Court. For the aforesaid reasons, we are of the view that the finding of the High Court regarding malice or the absence of reasonable and probable cause cannot be accepted, notwithstanding the fact that such a finding was the basis for granting pecuniary damages in B & C schedules which decree has become final. If that be so, the respondents can sustain the dismissal of the suit in regard to the non- pecuniary damages in A schedule. We hold in favour of the respondents and against the plaintiff appellant on the Point 2. For the aforesaid reasons, the appeal filed by the plaintiff seeking damages in respect of the non-pecuniary damages in the A schedule is dismissed and the decree of dismissal of the first appeal in regard to the said A schedule is sustained without going into the question of proof of damage due to pain or loss of reputation etc. The decree for the pecuniary losses in B and C schedule items remains. The appeal is, accordingly, dismissed but in the circumstances without costs.