

PETITIONER:
BANK OF INDIA

Vs.

RESPONDENT:
LAKSHIMANI DASS & ORS.

DATE OF JUDGMENT: 10/03/2000

BENCH:
S.S.Ahmad, S.R.Babu

JUDGMENT:

RAJENDRA BABU, J. :

For purposes of convenience, we refer to the parties as arrayed in the original suit out of which this appeal arises. Shital Chandra Das and Karmadhar Das filed Title Suit No. 77/59 in the court of Subordinate Judge at Alipore against Madhuri Choudhary, daughter-in-law of the original lessee of a godown bearing No. 103/1B Raja Dipendra Street, Calcutta. The sub-tenants Brij Kishore Bhagat, Nawal Kishore Bhagat and Durga Devi Bhagat were also impleaded in the said suit as defendants. The said suit was decreed on September 30, 1963 against all the defendants, including Brij Kishore Bhagat, Nawal Kishore Bhagat and Durga Devi Bhagat. The plaintiffs in that suit levied execution in Case No. 18/63 in which warrant for delivery of possession of the disputed premises was issued. In the disputed godown there were racks on which oil seeds were stacked. Inasmuch as the said oil seeds could not be immediately removed, the plaintiffs therein obtained delivery of possession of the godown along with oil seeds stacked in several bags. The said oil seeds were kept in the custody of Sitaram Roy, an officer of the plaintiffs by the process-server of the court. Thereafter the Bank of India, defendant No. 1 in the suit, filed an application under Order XXI Rule 101 of the Civil Procedure Code (C.P.C.) claiming that the Bank was in possession of the godown as pledgee of the goods from an alleged partnership firm, namely, M/s Bansidhar Baijnath and Brij Kishore Bhagat, Durga Devi Bhagat and Nawal Kishore Bhagat, who are stated to be the partners of the said firm. M/s Bansidhar Baijnath, the firm, also filed an application under Order XXI Rules 100 and 101 C.P.C. claiming to be in possession of the godown on the date of the delivery of the possession. These applications were registered as Miscellaneous Case No. 1/72 and Miscellaneous Case No. 3/72 in the court of Subordinate Judge, Alipore. The plaintiffs contended that the present defendants were bound by the decree and the claim of possession of M/s Bansidhar Baijnath or the Bank as pledgee were all baseless. It was also contended that Bhagat group were in possession of the godown on the date of the delivery of the possession. The defendants filed two separate applications in those two miscellaneous cases for restraining the decree holders from removing the stacks of oil seeds from the godown. The ad-interim injunction was made absolute on the understanding

that the miscellaneous cases would be expeditiously disposed of and an inventory of the oil seeds was made by a Commissioner appointed by the court. Miscellaneous Case No. 1/72 was filed seeking for a direction upon the defendant No. 1, the Bank, to remove the said oil seeds on the ground that the plaintiffs were suffering substantial loss daily and the goods were perishable. The Subordinate Judge, Alipore, granted leave to the Bank to remove the said goods. Defendant No. 1-Bank, however, applied for modification of the order dated June 27, 1972. A revision petition was filed in the High Court. Before the High Court defendant No. 1 withdrew the petition for removal of the said goods and the order of the Subordinate Judge passed on June 27, 1972 was set aside. In view of the indifference by the defendants, the plaintiffs had suffered loss by way of rent and by not delivering the vacant possession to the Bank by obtaining an order of injunction wrongfully and by not removing the goods in spite of the offers made by the plaintiffs and having kept the goods in spite of the offers made by the plaintiffs, the defendants have become liable to pay compensation. A separate suit was also filed for ascertaining the mesne profits and in the suit out of which these proceedings arise, the plaintiffs claimed damages for wrongfully keeping the said alleged oil seeds from January 15, 1972.

Defendant No. 1-Bank, contested the suit. It is pleaded that M/s Bansidhar Baijnath is a partnership firm and a constituent of the Bank which carried on the business of sale and purchase of oil seeds and had its godown in the premises aforesaid. Defendant No. 1 as pledgee had taken possession of the godown together with the goods laying thereon. There were a stock of 3409 bags of Kusum oil seeds in the said godown pledged in favour of defendant No. 1. The godown was kept locked by defendant No. 1 with the locks of superior quality put upon the doors of the said godown with the name of the defendant No. 1 engraved thereon and defendant No. 1 had also affixed a name plate and sign board on the said godown. On January 14, 1972 at about 4 p.m. an employee of the Bank was informed through telephone that padlocks were being broken upon and certain locks were being placed thereon. The agent of the defendant-Bank went to the spot to find that the padlocks fixed to the godown had been removed and they had been replaced by other locks. The name plates of the defendant also had been removed. The agent of the Bank was prevented from entering into the godown and making inspection of the pledged goods. A report was also made to the police station on January 14, 1972. It is claimed that defendant No. 1 as pledge had absolute physical and peaceful possession of the pledged goods in the said godown within the full knowledge of the plaintiffs and thereafter they filed an application under Order XXI Rules 100 and 101 C.P.C. for ascertaining of its legal rights and restoration of possession. The defendant-Bank also claimed no knowledge of the decree in the Title Suit No. 77/59 nor of the proceedings in the Execution Case No. 18/63. Order dated June 27, 1972 in Miscellaneous Case No. 1/72 was made subject to the condition that rights of M/s Bansidhar Baijnath to be restituted to their original position at the cost of the Bank. In view of the said onerous condition and the said order was likely to create complication leading to multiplicity of proceedings, an application was filed for reconsideration of the said order and on a revision petition being filed against the said order the same was set aside

and it is claimed that revision petition had not been withdrawn by the defendant and they had not obtained any order of injunction wrongfully or illegally and so the plaintiffs were not entitled to any damages or compensation. The other defendants admitted that the plaintiffs had obtained khas possession of the godown and the goods along with oil seeds which were kept by the bailiff of the court in the custody of the Sitaram Roy, an officer of the plaintiffs. Those oil seeds belonged to the firm M/s Bansidhar Baijnath and the defendants Nos. 1 to 4 did not conduct business and, therefore, they were not liable to remove the goods which did not belong to them and the Bank is the pledgee of those goods. The defendants did not act for those persons and they did not interfere with the execution of the decree at all. The order of injunction was not obtained illegally. The defendants never prevented the plaintiffs from utilising the godowns and, therefore, they were not liable to pay compensation or damages at all. The plaintiffs having retained the goods in their custody through their officer cannot claim or charge against these defendants any damage. The defendants are, therefore, not, in any way, liable for damages and the claim for compensation made is also highly inflated and the suit deserves to fail.

On these pleadings 12 issues were raised by the trial court. The trial court came to the conclusion the suit was not bad for mis-joinder and non-joinder of parties and the suit was within period of limitation and the plaintiffs had obtained delivery of the disputed godown through court and there was overwhelming material to that effect. On the question as to who was in possession of the goods and oil seeds in godown kept by the bailiff of the court in the custody of Sitaram Roy after obtaining the aforesaid delivery of possession of the godown by the plaintiffs, the trial court answered the same in favour of the plaintiffs to the effect that there can be no dispute on the point that goods and the oil seeds in the godown were kept by the bailiff of the court in custody of Sitaram Roy, an officer of the plaintiffs, at the time of delivery of possession of the godown. On the question whether these oil seeds belonged to M/s Bansidhar Baijnath and the partners of the firm, it is held that the goods had been hypothecated to the Bank by M/s Bansidhar Baijnath which is a partnership firm consisting of partners Brij Kishore Bhagat and Smt. Durga Devi Bhagat and the goods belonged to the Bank of India as holder of security and pledged through the ownership which remained with the partnership firm. The Bank of India as pledgee cannot have any claim on the pledged articles more than money advanced by it. Therefore, the trial court came to the conclusion that the pledged articles belonged to the partnership firm M/s Bansidhar Baijnath and the Bank of India is a mere pledgee of those articles. On the question whether the defendants interfered with the plaintiffs' possession of the disputed godown, the conclusion reached by the trial court is that the goods were continued to be kept inside the godown and though the plaintiffs obtained possession in the execution proceedings and the goods had been given to the custody Sitaram Roy and, therefore, by no stretch of imagination it can be said that at any point of time defendants interfered with the possession of the plaintiffs of the disputed godown. The application filed for injunction for removing the goods, etc. were precautionary measures taken by the defendants so that the goods were not wasted or damaged and when the injunction was

subsequently vacated, they let out the godown to somebody else. Thus the possession of the plaintiffs in the disputed godown was never interfered with by the defendants. The trial court on these findings came to the conclusion that the suit filed by the plaintiffs could not be maintained at all and it also noticed that the plaintiffs consented to the order of injunction being made absolute preventing the defendants from removing the goods from their godown, it is not open to the plaintiffs to claim damage for use and occupation of the godown by the defendants. Compensation in the form of damage can be allowed if it appears that the injunction was made on insufficient ground and, therefore, the plaintiffs are not entitled to any damage as the defendants obtained an injunction order against them in the miscellaneous cases. Compensation in the form of damage can also be allowed if the suit fails on the ground that there was no reasonable and probable cause for it. From the Judgment Exhibit 10, it cannot be stated that the said suit had been filed without any reasonable and probable cause. On that basis the suit was dismissed with costs.

The matter was carried in appeal to the Court of the Additional District Judge, Alipore. The learned Additional District Judge found that there was no dispute that the plaintiffs were the owners of the godown in question and they obtained a decree for khas possession of the same against defendants Nos. 2 to 4 and others pursuant to decree in Title Suit No. 77/79 and Execution Case No. 18/63 filed thereof the plaintiffs obtained possession of the godown through court on January 14, 1972 and the problems started because of stocking of a large number of bags containing oil seeds in the said godown and those oil seeds actually belonged to the partnership firm M/s Bansidhar Baijnath which was a sub-lessee of the said firm. The plaintiffs had impleaded the partners of the said firm in the said suit and those partners are defendants Nos. 2 to 4 in the present suit and they were bound by the decree passed in Title Suit No. 77/59. Their contention that they were not the partners of the said firm had been rejected and they had not come forward to challenge that finding. Though the plaintiffs took khas possession of the godown there were oil seeds in the godown at the time of delivery of possession, the plaintiffs were hardly given any time for the purpose of disposal of the oil seeds because on January 15, 1972, the very next day after the delivery of the possession M/s Bansidhar Baijnath filed an application under Order XXI Rule 100 C.P.C. for adjudication of their claim to the oil seeds and on the very same day they obtained an injunction restraining the plaintiffs from removing the oil seeds from the godown in question and that interim injunction was made absolute and thus the plaintiffs were prevented from disposing of the oil seeds. Thereafter, a lot of litigation started. In such contest the plaintiffs' claim for damages on account of use or occupation of the godown by the defendants could not be resisted. The plaintiffs could not let out the godown to others and this was on account of acts of defendants Nos. 1 to 4 and, therefore, they cannot disown their liability for the damages sustained by the plaintiffs on account of the storage of oil seeds belonging to defendants Nos. 2 to 4 who pledged the same with the defendant No. 1 as security of loans. The learned Judge took the view that the plaintiffs could claim damages from the Bank as well as other defendants for making good the loss sustained by the plaintiffs on account of occupation of their respective

extent of liability. He, therefore, set aside the judgment and decreed the suit and further made it clear that the assessment of damages had not been made for the purpose and for that purpose the matter was remanded.

The matter was carried in the second appeal in the High Court. In the High Court the view taken is that no independent title has been found in favour of M/s Bansidhar Baijnath and/or its partners, that is, defendants Nos. 2 to 4, in respect of the said godown by the courts below and apart from Section 95 C.P.C. the plaintiffs are entitled to bring an action for recovery of damages for wrongful use and occupation of the godown by the defendants Nos. 1 to 4. The High Court is of the view that defendant No. 1, Bank of India, was only a pledgee of the goods, namely the oil seeds stored in the godown in question and the same belonged to the firm M/s Bansidhar Baijnath of which firm defendants Nos. 2 to 4 are partners being pledgee of the said goods. The defendant-Bank possessed the said goods and as such was in actual physical possession of the godown at the time of execution of the decree passed in Title Suit No. 77/59. Excepting a claim on the oil seeds as a pledgee, the defendant-Bank had no other right in respect of the said godown and the Bank had also not claimed any right of tenancy or license in respect of the said godown. The firm M/s Bansidhar Baijnath and/or its partners could not establish any right, title or interest in the said godown and as such the defendants had no right to possess the said godown either actually or constructively by keeping their goods therein. In the Title Suit No. 77/59 M/s Bhagat Oil Mills was impleaded as defendant No. 3 being sub-lessee of the disputed premises and Baijnath Bhagat appeared in the said suit as Proprietor of M/s Bhagat Oil Mills and during the pendency of the said suit, Baijnath Bhagat having died, the defendants Nos. 3 and 4 were substituted in place of the said Baijnath Bhagat. The decree for recovery of possession of the disputed premises was passed in that suit. In those circumstances, defendants Nos. 2 to 4 were bound by the decree of the execution of which the recovery of possession was delivered to the plaintiffs-respondents by the bailiff of the court. Defendants Nos. 2 to 4 could not claim any right independent of Bansidhar Baijnath and even apart from Section 95 C.P.C. the plaintiffs are entitled to bring an action for recovery of damages for wrongful use and occupation of the godown in question by defendants Nos. 1 to 4. Section 95 C.P.C. is a specific provision to meet the situation stated therein and it is open to a party to institute an independent suit for damages for unlawful use and occupation of an immovable property if the concerned party can establish such unlawful action of another resulting loss and damages. The scope and ambit of such suit for damages are necessarily wider than the limited scope envisaged by Section 95(1) C.P.C. In the instant case, defendants Nos. 2 to 4 were owners of the said oil seeds and defendant-Bank was only a pledgee of the same. The decree holder plaintiffs had no claim whatsoever over the said oil seeds nor did they make any claim at any stage. It is defendants who made an application under Order XXI Rules 100 and 101 C.P.C. restraining the plaintiffs from removing the oil seeds and sought for permission of access to the said oil seeds under the custody of Sitaram Roy, which was also granted by the court. In those circumstances, it is a quite apparent that by virtue of the said interim orders obtained by the defendants, the plaintiffs and Sitaram Roy could not remove the said oil

seeds from the said godown and the interim orders were made absolute in the presence of the parties and it was appeared to have been passed with the consent of the parties. Defendants Nos. 1 to 4 were not restricted to remove the oil seeds in respect of which no claim had ever been made by the plaintiffs at no point of time. Defendants were not the custodian of the goods. The goods were kept in the custody of Sitaram Roy, an employee of the plaintiffs. In the facts of the case, therefore, the High Court took the view that the plaintiffs obtained possession of the godown in execution of the decree not in a vacant condition but with the oil seeds stored therein and the bailiff made the employee of the plaintiffs decree-holders, custodian of the said goods. By restraining the plaintiffs decree-holders and the said custodian from removing the oil seeds and by not removing the oil seeds on their own, the defendants became liable to damages. On that account the plaintiffs have not been able to utilise the said godown effectively in a gainful manner and, therefore, the plaintiffs' case for damages on account of storage of the oil seeds in the said godown against the defendants can be decided without considering the case of malice of the defendants in obtaining the said orders of injunction. Hence the question of specific pleading of malice by evidence by the plaintiffs is not germane for disposing of the suit for damages claimed by the plaintiffs if the plaintiffs can establish that the defendants had no lawful right to use and occupy the said godown and store the oil seeds therein and for such storage of the oil seeds, the plaintiffs have suffered pecuniary loss and damages. After distinguishing the decisions in *Bhupendra Nath Chatterjee & Ors. Vs. Sm. Trinayani Devi*, AIR 1944 Calcutta 289, and *Albert Bonnan v. Imperial Tobacco Co. of India Ltd.*, AIR 1929 Privy Council 222, the High Court agreed with the view expressed by the Karnataka High Court in *Basamma & Ors. V. Peerappa*, AIR 1982 Karnataka 9. On that basis the appeals were dismissed. Hence these appeals - one by the Bank and the other by the original lessee of the sub-tenant of the premises in question who were defendants in the original suit.

Two contentions are put forth before us; firstly that Section 95 CPC is a complete code and no suit outside the said provision could be filed for claiming compensation or damages arising out of an order for temporary injunction obtained on insufficient grounds. The second ground urged is that if the claim of the plaintiff in the suit is based on a cause of action for trespass that inasmuch as the defendants were clothed with a decree of the court the plaintiff had to plead and prove malice and unless the same is established he could not get any relief. It is elaborated that there cannot be a suit simplicitor for damages based on trespass because of an order made by the court when the defendants had obtained an order of the court it must be presumed that the court is not an agent acting on their behalf and, therefore, the plaintiff had to establish that such an order was not only obtained on insufficient grounds but with malice.

Section 95 CPC provides for a summary remedy to get compensation where a temporary injunction has been granted if such injunction was applied for on insufficient grounds or there were no reasonable or probable grounds for instituting the claim for injunction. The defendant in such a proceeding is simply to present a petition to the court and the court subject to its pecuniary jurisdiction can give

compensation upto Rs.1,000/-. The remedy under the Code is optional and an injured party can file a regular suit against the applicant for injunction for compensation if he has not already sought relief under the aforesaid provision. Thus this section is an alternative remedy in cases of wrongful obtainment of an injunction and it does not in any way interfere with the principles regulating suits for damages for tort of malicious legal process. There has been a series of decisions which have explained this position. It is sufficient if we refer to five decisions for the present purpose : Bhupendra Nath Chatterjee & Ors. Vs. Sm. Trinayani Devi [supra]; Inder Singh Nihal Singh vs. Chief Commissioner, Delhi & Anr., AIR 1963 Punjab 158; K.Syamalambal v. N. Namberumal Chettiar, [1957] I Mad.L.J.118; Albert Bonnah v. Imperial Tobacco Co. of India Ltd. [supra] and Basamma & Ors. v. Peerappa [supra].

As a general principle where two remedies are available under law one of them should not be taken as operating in derogation of the other. A regular suit will not be barred by a summary and a concurrent remedy being also provided therefor, but if a party has elected to pursue one remedy he is bound by it and cannot on his failing therein proceed under another provision. A regular suit for compensation is not barred by the omission to proceed under summary procedure provided under Section 95 C.P.C., but if an application is made and disposed of, such disposal would operate as a bar to regular suit whatever may be the result of the application. There is, however, a difference between conditions necessary for the maintainability of an application under Section 95 C.P.C. and those necessary to maintain a suit. The regular suit is based on tort for abusing the process of court. Under the law of torts in a suit for compensation for the tort the plaintiff must not only prove want of reasonable or probable cause of obtaining injunction but also that the defendant was attracted by malice which is an improper motive.

In justifying a claim for damages apart from Section 95 C.P.C., a distinction has to be drawn between acts done without judicial sanction and the acts done under judicial sanction improperly obtained. Proof of malice is not necessary when the property to a stranger, not a party to the suit, is taken in execution but if the plaintiff bringing a suit for malicious legal process is a party to a suit, proof of malice is necessary. The plaintiff must prove special damage. The claim of a person for damages for wrongful attachment of property can fall under two heads - (1) trespass and (2) malicious legal process. Where property belonging to a person, not a party to the suit, is wrongly attached, the action is really one grounded on trespass. But where the act of attachment complained of was done under judicial sanction, though at the instance of a party, the remedy is an action for malicious legal process. In the case of malicious legal process of Court, the plaintiff has to prove absence of probable and reasonable cause. In cases of trespass the plaintiff has only to prove the trespass and it is for the defendant to prove a good cause or excuse. In the former case plaintiff has to prove malice on the part of the defendant while in the latter case it is not necessary. This position has been succinctly brought out by the decision in K.Syamalambal v. N. Namberumal Chettiar [supra].

In the present case, the facts ascertained are absolutely clear that the godown had been let out and the firm M/s Bansidhar Baijnath or its partners could not establish any title, right or interest in the said godown after the decree was passed in the ejectment suit and, therefore, they had no right to possess the said godown either actually or constructively by keeping their goods therein. M/s Bhagat Oil Mills which was impleaded as a defendant in the suit was the sub-lessee of the disputed premises and Baijnath Bhagat had appeared in the said suit as proprietor and on his death other defendants were substituted in his place. In those circumstances, all defendants were bound by the decree of the execution of which the recovery of possession was delivered to the plaintiffs- respondents by the bailiff of the court. Defendants Nos. 2 to 4 could not claim any right independent of Banshidhar Baijnath and, therefore, even apart from Section 95 C.P.C. the plaintiffs could institute an independent suit for damages for wrongful use and occupation of the godown in question by defendants Nos. 1 to 4. The decree-holders plaintiffs had no claim whatsoever over the said oil seeds nor did they make any claim at any stage. There was no dispute regarding the fact that the bailiff had kept the goods in the custody of one of the employees of the plaintiffs and it is the defendants who had made an application on the very next day for an injunction and obtained the same.

In the background in which the injunction was obtained and the manner in which the defendants prevented the plaintiffs from utilising their premises, it is clear that the same had been obtained on insufficient and improbable grounds. The intention of the parties is very clear that it is only to deprive the defendants of the possession of the premises that such an order was obtained. The Bank was pledgee of the goods and could not claim an independent right in respect of the said premises. The suit premises was not in their possession either under licence or by way of lease. They should not only have ascertained whether the goods belong to the pledgor but also should have known as to whether the premises where the goods were kept belonged to them at the time they obtained the pledge. In those circumstances, even the Bank cannot absolve itself of malice arising in the case. Want of pleadings or raising an issue in a suit would arise where any party is put to prejudice. In a case where the facts are writ large and the parties go to trial on the basis that the claim of the other side is clearly known to them, we fail to understand as to how lack of pleadings would prejudice them.

In that view of the matter, we think that the High Court was justified in dismissing the appeals. We, therefore, affirm the order made by the High Court and dismiss these appeals with costs throughout.