***JUDGEMENT SHEET***

IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

**Regular First Appeal No. 321/2020**

Fida Hussain Warraich
*Vs.*
Syed Zarfan Hussain Shah

APPELLANT BY: Mr. Ashfaq Ahmad Khan, Advocate.

RESPONDENT BY: Mr. Babar Saeed Butt, Advocate.

DATE OF HEARING: 22.06.2022.

==========

***BABAR SATTAR, J.***- The appellant has impugned judgment and decree dated 23.09.2020 passed by the learned Civil Court (East), Islamabad, pursuant to which the suit for malicious prosecution was decreed and damages in the amount of Rs.2,295,000/- were awarded to the respondent on account of malicious prosecution, mental agony and professional fees.

2. The appellant had filed a suit for declaration and permanent injunction against the respondent claiming right to passage between the property owned by the appellant and that owned by the respondent. The suit was dismissed by the learned Civil Court on 16.05.2015 and the appeal against the judgment of the learned Civil Court was dismissed by the learned District Court on 29.05.2015. The appellant then filed a Civil Revision Petition before this Court against the aforementioned judgment, which was dismissed on 26.01.2016. The respondent then filed a suit for recovery and claimed damages for malicious prosecution before the learned Civil Court and the learned Civil Court framed the following issues on 28.11.2017:-

1. *Whether the plaintiff is entitled to a decree for recovery of Rs.7,295,000/- (Seventy Two Lac and Ninety Five Thousand Rupees only), including Rs.5,000,000/- (Rupees Five Million only) as damages, Rs.295,000/- (Two Lac Ninety Five Thousand Rupees only) expenditure spend on hiring legal services and travelling, Rs.1,000,000/- (One Million Rupees only) against suffering mental agony and Rs.1,000,000/- (One Million Rupees only on account of defamation as prayed for? OPP*
2. *Whether the plaintiff has come to the court with unclean hands? OPD*
3. *Whether the plaintiff has no cause of action to file instant suit? OPD*
4. *Relief.*

3. After recording evidence, the learned Civil Court in relation to Issue No.1 found that a suit for malicious prosecution could be brought in relation to civil proceedings in view of Sections 9, 35 and 35-A of the Code of the Civil Procedure, 1908 ***("CPC")*** in view of the law laid down by the august Supreme Court in ***Muhammad Akram vs. Mst. Farman Bi*** ***(PLD 1990 SC 28)*** and ***Niaz and others vs. Abdul Sattar and others (PLD 2006 SC 432)***. After appreciating the judgments of the learned Civil Court, the learned appellate Court and the learned High Court in the litigation between the appellant and the respondent, the learned Civil Court found that the appellant had failed to establish his case for declaration and permanent injunction. It observed that the fact that litigation causes financial loss and mental agony is a known reality and needs no proof. On the basis that the litigation initiated by the appellant

against the respondent was found to be meritless by three judicial forums, it decided Issue No.1 in favor of the respondent. In relation to Issue No.2, the learned Civil Court found that there was no evidence that the suit had been filed by the respondent with unclean hands. Likewise, the learned Civil Court found in relation to Issue No.3 that the respondent had cause of action to file a suit. In terms of relief, the learned Civil Court found that there was no evidence in relation to the claim of Rs.5,000,000/- for malicious prosecution and loss of reputation and decreed the suit while granting Rs.1,000,000/- as damages on account of malicious prosecution, Rs.1,000,000/- on account of mental agony and Rs.295,000/- on account of professional fees.

4. The learned counsel for the appellant submitted that the suit filed by the appellant was not malicious and was filed to seek right of passage over land that had traditionally been a passage and used such by his predecessor-in-interest. He submitted that merely because the suit of the appellant was dismissed did not create right in favor of the respondent to bring a fresh suit for malicious prosecution. He submitted that the previous suit filed by the appellant was dismissed on the basis that the mother of the respondent was found to have gifted the parcel of land in question to the respondent (notwithstanding that the gift had been challenged by the brother of the respondent). Further, the appellant had relied on a settlement deed that entitled his predecessor-in-interest to use the said passage, which settlement deed was not read into evidence because it was not duly exhibited. He submitted that the respondent had also acknowledged in his evidence as PW-I that

previously the passage in question did not fall within the boundary wall of the respondent's property and was used for access to the property owned by the appellant's predecessor-in-interest. He submitted that it was on the balance of probabilities that the suit was dismissed and not because the suit was frivolous. He submitted that a cause of action accrued to the appellant when the respondent initiated construction of a wall to obstruct the passage in question and as there was no enmity between the appellant and the respondent, there was no question of the appellant seeking to blackmail the respondent by bringing a suit against him. The appellant was simply seeking to preserve his access to his property through the passage in question. He further submitted that the respondent had adduced no evidence to quantify any damages suffered by the respondent and that there was no evidence too in relation to mental agony or suffering financial loss and without discharging the onus to establish damages, no damages could have been granted to him. He submitted that the learned Civil Court had not appreciated that the ingredients required to be satisfied to establish a claim of malicious prosecution had not been established by the respondent and the judgment and decree were therefore liable to be set-aside.

5. The learned counsel for the respondent submitted that the august Supreme Court in ***Muhammad Akram*** identified the six ingredients that needed to exist for a claim for malicious prosecution to succeed, which have been satisfied in the instant case. He submitted that the appellant brought a frivolous claim against the respondent and continued to pursue his claim in

appeal and through a revision petition, even after it was held by the learned Civil Court that the claim was without merit and the circumstances of the case therefore reflected the malice of the appellant. He further submitted that the appellant was seeking to purchase the passage in question from the respondent and it was for purposes of blackmailing the respondent that the appellant had filed the suit for declaration and permanent injunction against the respondent. He supported the judgment rendered by the learned Civil Court.

6. The questions that arise for consideration of this Court include the following:-

(1) Does an action for malicious prosecution lie in relation to civil action as opposed to criminal proceedings, and if so what are the ingredients that must be satisfied by the claimant to succeed in seeking damages for malicious prosecution?

(2) In view of the evidence, did the respondent establish the ingredients required to be satisfied to succeed in recovering damages on grounds of malicious prosecution?

7. There is some conflicting case law on the question of whether a suit for malicious prosecution can be brought in relation to civil proceedings that a claimant finds vexatious. Let us therefore consider the relevant case law.

8. The learned counsel for the appellant relied on ***Haji Muhammad Shafi vs. Mst. Hamidan (1990 MLD 597)***, where the learned Lahore High Court while relying on the law laid down by the Privy Council in ***Mohammad Amin vs. Jogendra Kumar***

***Bannerjee*** ***(AIR (34) 1947 Privy Council 108)***, held that, *"no action can be brought to recover damages on account of malicious prosecution of a previous instituted civil suit."* The learned Lahore High Court had relied on the rationale in ***Mohammad Amin***, wherein the Privy Council had held that no action lies for falsely or maliciously prosecuting an ordinary civil action as upon dismissal of such action no injury is caused to the reputation of a defendant and such defendant would stand indemnified by the award of costs. It also relied on other judgments from common law and Indian jurisdictions, wherein it had been held that a claimant owed no duty of care to a defendant in civil proceedings and such proceedings did not give rise to an independent cause of action to claim damages. The appellant also relied on ***Malil Wasil vs. Mumtaz-ur-Rehman and others*** ***(2007 CLC 1174 Peshawar)***, where the learned Peshawar High Court while relying on the judgment of the learned Lahore High Court in ***Haji Muhammad Shafi*** held that no suit for recovery of damages was maintainable for malicious institution of a civil suit.

9. In view of the law laid down by the august Supreme Court in ***Muhammad Akram***, the aforementioned judgments rendered by the learned Lahore High Court and learned Peshawar High Court do not appear to be good law. After considering the case law for Pakistan as well as for other jurisdictions, including the judgment by the Privy Council in ***Mohammad Amin***, the august Supreme Court in ***Muhammad Akram*** held that, *"the distinction in our country between criminal prosecution and the 'Civil 'prosecution' for purpose of*

*denying the right to institute the latter for damages in torts, is not at all well founded."* It further held that, *"Section 9 of the CPC provides that 'the Court shall subject to the provisions herein contained have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly barred or impliedly barred.' It has not been denied that suits for damages in tort on account of malicious prosecution are covered by the term 'civil nature'."* ***Muhammad Akram*** thus settled the issue with regard to the right to bring a claim for recovery of damages for malicious prosecution in civil proceedings. It also identified the ingredients of the test for establishing a claim for malicious prosecution, which include the following:-

*(i) That the plaintiff was prosecuted by the defendant;*

*(ii) That the prosecution ended in plaintiffs favour;*

*(iii) That the defendant acted without reasonable and probable cause;*

*(iv) That the defendant was actuated by malice;*

*(v) That the proceedings had interfered with plaintiff's liberty and had also affected her reputation; and finally*

*(vi) That the plaintiff had suffered damage.*

The august Supreme Court also held while relying on ***Mohammad Sharif vs. Nawab Din & another*** ***(PLD 1957 Lahore 283)*** that even if the exact amount of damages could not be proved, damages could be awarded on the basis of rule of thumb, but proof of the exact amount of damages ought not be a reason for dismissal of such suit.

10. The august Supreme Court reiterated in ***Niaz*** the ingredients of the test for malicious prosecution laid down in ***Muhammad Akram***. The apex Court further clarified that in a claim for malicious prosecution the claimant had to establish absence of reasonable and probable cause and also independently establish that the claimant was actuated by malice. While relying on protection afforded by Articles 4 and 14 of the Constitution, the august Supreme Court held that, *"it will in our opinion be more in consonance with the genesis of the Constitution, Articles 4 and 14 in particular, to say that the foundation of the action for damages for malicious prosecution lies, not in the abuse of the process of Court, but in the abuse in the process of law."*

11. A claim in relation to malicious prosecution came before the august Supreme Court in ***Abdul Majeed Khan vs. Tawseen Abdul Haleem and others (2012 CLD 06)*** in which by a majority judgment the august Supreme Court upheld the grant of damages. In a minority judgment Mr. Justice Arif Khilji Hussain reiterated the law laid down by the Privy Council in ***Mohammad Amin*** and found that in civil action the defendant's reputation is restored and he recovers costs on succeeding and therefore an action for malicious prosecution could not ordinarily lie in the aftermath of civil litigation.

12. In ***Muhammad Yousaf vs. Abdul Qayyum (PLD 2016 SC 478)***, while considering a claim for malicious prosecution in the aftermath of criminal proceedings the august Supreme Court held that, *"malicious prosecution is a tort which*

*provides redress to those who have been prosecuted "without reasonable cause" and with "malice". In Pakistan, there is no statute which deals with the law of malicious prosecution in particular; courts in our jurisdiction have in the past have dealt with the cases of malicious prosecution according to the standards set by the Courts in England."* While stating that guidance could be sought in relation to the tort of malicious prosecution from the jurisprudence that evolved in the United Kingdom (UK), the august Supreme Court also relied on its observations in ***Muhammad Yousaf vs. Ghayyur Hussain Shah (1993 SCMR 1185)***.

13. In ***Messrs Mehran Electronics Company through Partner vs. National Bank of Pakistan (2017 CLD 1642 Sindh)*** a Division Bench of the learned Sindh High Court, in relation to a recovery suit that was filed by a bank and was dismissed, while upholding the decision of the Judge-in-Chambers dismissing the suit for malicious prosecution, held that, *"the prosecution of civil action would only provide a cause for damages for malicious prosecution to the opposite side, if the same is based on malice of the complainant and that too, when it is without any reasonable and probable cause."*

14. Dwelling on the essential elements in the test for malicious prosecution the learned Peshawar High Court in ***Nawab Sher vs. Ismaeel (2020 MLD 14)*** reiterated that, *"an abuse of civil proceedings may also afford the right to a Respondent to bring an action for malicious prosecution."* Relying on jurisprudence produced in India the learned Peshawar High

Court observed that malice has been explained as *"some motive other than a desire to vindicate public justice or private right."* The learned Peshawar High Court while citing the law in relation to malice as discussed in ***Afroz Qureshi vs. Muhammad Ikram Siddiqui (1995 CLC 735 Karachi)***, ***Abdul Rauf vs. Abdul Razzaq (PLD 1994 SC 476)*** and ***Muhammad Yousaf vs. Abdul Qayyum (PLD 2016 SC 478)*** observed that malicious in the context of prosecution denoted collateral purposes inspired by personal feelings and not to secure the ends of justice and further that such malice was a state of mind that could be inferred from circumstantial evidence as well. In the context of malicious prosecution in the aftermath of civil proceedings the learned Peshawar High Court observed that the burden of proof to establish malicious intent behind instituting the suit and the sufferance of special damages was on the plaintiff.

15. The learned Sindh High Court in ***Dr. Seema Irfan and 5 others vs. Federation of Pakistan through Secretary and 2 others (2019 PTD Sindh 1678)*** and ***Abbu Hashim and another vs. Federation of Pakistan through Secretary, Ministry of Interior and 2 others (PLD 2021 Sindh 492)*** explained that, *"abuse of process is a tort comprised of two elements: (1) an ulterior purpose and (2) a willful act in the use of process not proper in the regular conduct of the proceeding. Abuse of process is the malicious misuse or misapplication of process in order to accomplish an ulterior purpose. However, the critical aspect of this tort remains the improper use of the process after it has been issued."*

16. Meanwhile, the law in relation to malicious prosecution of civil proceedings has evolved in the UK as well. In ***Willers vs. Joyce and another*** ***(2016 UKSC 43)*** the UK Supreme Court by a five-four majority held that a claim for malicious prosecution of civil proceedings is sustainable under English Law, which was seen as an extension of the traditional boundaries of malicious prosecution of criminal proceedings.

17. The tort of malicious prosecution is seen as routed in the judgment rendered by Holt CJ in ***Savile vs. Roberts [(1698) 12 Mod Rep 208]***, in which the three types of damages supporting a claim for malicious prosecution were identified i.e. damage to the plaintiff's fame or reputation, damage to his person either by assault or by deprivation of his liberty, and damage to his property. In ***Willers*** Lord Toulson observed in his majority opinion that the focus of the court in a claim for malicious prosecution was *"on the nature of the damage suffered rather than the form which the proceedings took."* In the context of the element of reasonable and probable cause it was held that, *"the defendant does not have to believe that the proceedings will succeed. It is enough that, on the material on which he acted, there was a proper case to lay before the Court."* As is the law in Pakistan, it was also held in ***Willers*** that malice is a requirement in addition to establishing that the defendant did not have reasonable and probable cause to initiate civil proceedings. The definition of malice in ***Bromage vs. Prosser [(1825) 4 B&C 247]*** was reiterated: *"malice, in common acceptation, means ill-will against a person, but in its legal sense it means a wrongful act, done intentionally, without*

*just cause or excuse."* The crux of why the majority decided in favor of recognizing the tort of malicious prosecution of civil proceedings was a reference to the judgment in ***De Medina vs. Grove [(1847) 10 QB 172]*** where Wilde CJ observed that, *"the law allows every person to employ its process for the purpose of trying his rights, without subjecting him to any liability, unless he acts maliciously and without probable cause."*

18. The recognition of the tort of malicious prosecution of civil proceedings by the UK Supreme Court in ***Willers*** seems to have ended the contrast between the right to such action as recognized by the august Supreme Court in ***Muhammad Akram*** in 1990 and the law as existed in the UK prior to ***Willers***.

19. The answer to Question No.1 raised in Para-6 is that there does exist the tort of malicious prosecution of civil proceedings and the test to be satisfied for grant of a claim of malicious prosecution is that laid out by the august Supreme Court in ***Muhammad Akram***.

20. The ingredients of the test for allowing the claim for malicious prosecution is the six-part test laid down in ***Muhammad Akram***. Of more relevance for our purposes are the ingredients listed from (iii-vi) of such test i.e. that the defendant acted without reasonable and probable cause; that the defendant was actuated by malice; that the proceedings interfered with the plaintiff's liberty and had adversely affected his/her reputation; and that the plaintiff suffered damages. Other than the fact that the prosecution was initiated by the defendant, which ended in the favor of the plaintiff, the test

requires for the Court to determine in view of evidence adduced before it that not only did the defendant lack reasonable and probable cause but such defendant was also actuated by malice in initiating proceedings against the plaintiff in relation to which a claim for malicious prosecution is being brought. Equally critical is the effect of such proceedings on the defendant. The last two ingredients of the test require that the proceedings must have infringed the defendant's right to liberty and reputation, and should have inflicted damage upon him/her.

21. Let us now address Question No.2 in the context of the facts and circumstance of the instant case. It has been the appellant's contention that his claim for a declaration with regard to the passage between his property and that of the respondent (which passage was declared to fall within the respondent's property in the litigation in relation to which the instant suit has arisen) was based on a family settlement as well as past practice. It was during the trial of the appellant's suit that the court found that the family settlement that the appellant relied on did not bind the respondent and that the respondent was the owner of the land comprising the passage in view of a gift bestowed on the respondent by the respondent's mother.

22. A perusal of the judgments of the learned trial Court, the learned appellate Court and the judgment of this Court in exercise of its review jurisdiction does not suggest that the appellant had no proper case to lay before the Court. Notwithstanding that the case did not succeed, the mere failure of the appellant in relation to a claim decided on the balance of

probabilities will not itself establish that the claimant lacked reasonable and probable cause. The respondent during the trial of the instant suit led no evidence to establish that at the time of institution of the suit for declaration the appellant acted without reasonable and probable cause. Consequently, the third ingredient of the test for malicious prosecution was not satisfied.

23. Likewise, the defendant also led no evidence to establish on a balance of probabilities that the appellant was actuated by malice. If a claimant in a suit for malicious prosecution fails to establish that the contesting party acted without reasonable and probable cause, there is no need to consider the question of malice given that the absence of reasonable and probable cause and the existence of malice are independent requirements in the claim for malicious prosecution. However, for the purpose of completeness in the instant matter all that the respondent said in his testimony as PW-I was that the appellant was attempting to blackmail the respondent in order to purchase the land comprising the passage. The respondent, however, produced no evidence to such effect. The respondent was also at the relevant time a police official and nothing was brought on record to establish that the appellant could exercise disproportionate influence over the respondent in relation to a parcel of land that formed part of the ancestral land of the respondent. It was the appellant who had purchased land from a sibling of the respondent and was therefore a new comer in the locality. The learned Civil Court rendered no finding that the appellant was actuated by malice or that he acted without reasonable and probable cause. And merely on the basis that the

suit for declaration brought by the appellant had failed and the proceedings had ended in the respondent's favor, it assumed that the 3rd and 4th ingredients of the test for malicious prosecution stood satisfied. Such assumption is not in accordance with law as has been explained above.

24. Equally important, in terms of the effect of a previous civil proceeding, the failure of a claim and the litigation costs and inconvenience that a litigation ordinarily inflicts on a contesting party is not sufficient basis to support a claim for malicious prosecution. This is underlined by the 5th and 6th ingredients of the malicious prosecution test and also highlighted in ***Willers***. A claim for malicious prosecution of civil proceedings must emanate from proceedings that undermine the claimant's liberty and/or dignity/reputation and interfere with his/her property rights by inflicting damages on such claimant. In ***Muhammad Akram*** the underlying civil proceedings were for restitution of conjugal rights, wherein the courts found that there existed no matrimonial relationship between the contesting parties. The proceedings thus impugned the reputation of a woman having being made to suffer the inconvenience of defending her reputation in such suit and lack of association with the claimant. Likewise, there can be civil proceedings that undermine the right of liberty at an interlocutory or final stage or the right to property and/or reputation such as in a claim alleging bankruptcy or failure to abide by financial obligations. Such civil claims, which raise questions regarding the probity and honesty of the conduct of a claimant, can have consequences for the reputation of such claimant, which may not be made whole

simply by grant of litigation costs at the end of the proceedings. It is in the context of civil proceedings of such nature (which infringe upon the right to liberty and/or dignity/reputation and property of a party forced to defend his/her conduct in civil proceedings) that inflict damage on the defendant that can lead to a claim for malicious prosecution of civil proceedings.

25. In the instant matter, the dispute between the parties related to right of the appellant to continue to use a parcel of land adjacent to his property that the respondent claimed was his. The nature of the proceedings was not such that could possibly undermine the liberty or reputation of the respondent. Consequently, ingredient No.5 in the test for malicious prosecution was not satisfied in the instant case. To the extent that the respondent incurred financial costs during the civil proceedings in question, the appropriate remedy was for the relevant Court was to grant costs to the respondent under provisions of Sections 35, 35-A and 35-B of the CPC as amended through the Cost of Litigation Act, 2017. For purposes of recovering litigation costs and/or the costs in relation to any inconvenience suffered by the respondent, no independent cause of action for recovery of damages for the tort of malicious prosecution of civil proceedings accrued to the respondent.

26. By assuming that the mere failure of one party to prove a civil claim created an automatic right for the contesting party to bring a suit for malicious prosecution is not in accordance with the law that has been settled in our jurisdiction as has been explained above. To find otherwise could function as a major

deterrent discouraging citizens from employing the process of law to try their rights and could become a fetter on the right of access to justice, apart from creating further litigation even after the matter has been laid to rest in civil proceedings.

27. For the above reasons, the instant appeal is ***allowed***. The impugned judgments and decrees are not sustainable in the eyes of law and are ***set-aside***. The suit of the respondent is dismissed with a cost of Rs.50,000/- payable by the respondent to the appellant within a period of thirty days. The learned counsel for the appellant will file a certificate with the Deputy Registrar (Judicial) of this Court, certifying that the order as to cost has been complied with within such period.

**(BABAR SATTAR)**
**JUDGE**

Announced in the open Court on 31.10.2022

**JUDGE**

Approved for reporting

A. Rahman Abbasi.