Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

JUDICIAL DEPARTMENT

R.S.A No. 11 of 2017

Abdul Khameed

Vs

Muhammad Shabbir, etc.

APPELLANT BY:	Raja Basharat Hussain Abbasi, Advocate.
RESPONDENTS BY:	Syed Muhammad Ali Bokhari, Advocate
DATE OF HEARING:	22-02-2021.

BABAR SATTAR, J.- The appellant is aggrieved by judgments and decrees dated 30.07.2016 and 21.02.2017 passed by the learned by the learned trial court and the learned appellate court, respectively.

2. The brief facts of the case are that an FIR No. 146/2003 was registered by the appellant against the respondents pursuant to which an allegation was made that the respondents were involved in theft of the gate of the appellants and in the FIR the female relatives of the respondents were named. During the investigation of the case, based on the said FIR, the respondents were arrested and remained behind bars for the period of 22 days. Subsequently, the FIR lodged was discharged and the order of the learned Illaqa Magistrate attained finality. The appellant also filed a private compliant which was dismissed. Against the dismissal order, W.P.3136/2004 was filed before the Hon'ble Lahore High Court, which was also dismissed and subsequently

CPLA No.1663/2019 was filed before the august Supreme Court which was also dismissed.

3. After discharge of the FIR, the respondents filed a suit for damages that has resulted in the instant appeal. On 16.09.2004 the suit was decreed by the learned trial Court to the extent of Rs.500,000/- on the ground that the appellant had filed a false FIR that led to the arrest and loss of reputation for the respondents and damages in the amount of Rs.500,000/- were granted. Against the said order the appellant filed an appeal which was decided by order dated 21.02.2017, whereby the amount of damages awarded for loss of reputation was reduced to Rs.200,000/-. Against the said order, the instant second appeal has been filed.

4. Learned counsel for the appellant states that there was misreading and non-reading of evidence as through cross-examination of PW-1 the appellant brought on record an admission that the gate in question was in his possession; that the learned trial Court and Appellate Court did not appreciate that the power of attorney on the basis of which the suit of recovery was filed was not authorized and further that the FIR had been discharged due to complicity between the respondents and the police and the respondents should have actually been convicted for the offence for which they were charged. Learned counsel relies upon PLD 1994 SC 476 for the preposition that proof of lack of reasonable and probable cause is an essential feature in a suit for malicious prosecution and submits that such element was not established in the present case.

5. Learned counsel for the respondents, on the other hand, states that the question of the FIR being frivolous has been decided all up to the august Supreme Court and has attained finality and it is not for this Court to determine the truth of the

allegations made in the FIR. He further states that the conduct of the appellant also establishes malice on part of the appellant and has detailed history of the litigation and has also stated that the suit filed on 16.09.2004, from which the present appeal has arisen, was adjourned *sine die* while the dismissal of private complaint filed by the appellant was pending adjudication before the Hon'ble Lahore High Court and the august Supreme Court; that the suit was revived through an application on 10.03.2011 and the appellants appeared for the first time on 20.12.2013. That after three or four opportunities being granted to them, the right to file written statement was struck off. A revision petition against said order was dismissed on 27.10.2014 and W.P. No.1083/2015 was then filed before this Court and through an order of this Court the appellant was allowed to file written statement subject to a payment of Rs.30,000 as cost. That the appellant did not avail the said opportunity and an order to proceed against the appellant ex-parte was once again passed on 10.10.2015 after which the suit was decreed. That there is no infirmity in the order of the learned trial Court and the learned Appellate Court in reducing the damages granted by the learned trial Court did not act in a just and proper manner. That the question of authorization of the power of attorney is irrelevant. And there is no misreading or non-reading of evidence as the record on the basis of which the learned trial Court and the learned Appellant Court have rendered their judgments comprises public documents i.e. the FIR and the judgments passed by judicial authorities all the way to the august Supreme Court.

6. With the assistance of the learned counsels for the parties, I have perused the record.

7. The principles on basis of which jurisdiction has to be exercised under section 100 of CPC are well settled. Under

Section 100 of CPC a High Court can exercise its jurisdiction on any of the following gorund:

> *(a) the decision being contrary to law or to some usage having the force of law;*
>
> *(b) the decision having failed to determine some material issue of law or usage having the force of law;*
>
> *(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.*

8. It is thus settled that the High Court cannot upset findings of fact of subordinate courts and an appraisal of facts and evidence is also to be undertaken to determine a question of law i.e. whether there has been misreading or non-reading of evidence resulting in failure to determine some material issue of law or whether there is a jurisdictional error in the decision reached due to extraneous considerations or the decision being informed by reasons that are perverse.

9. It was held in Muhammad Feroze and others vs. Muhammad Jammat Ali (2006 SCMR 1304) that "in regular second appeal, the jurisdiction of the High Court is limited to the extent of reference of question of law and not of facts." In Bashir Ahmed vs. Mst. Taja Begum and others (PLD 2010 SC 906) the august Supreme Court held that "it is failure of the trial court or the first appellate court to decide a material issue, which if decided who lead the court to a different conclusion that creates not a ground for exercise of jurisdiction under section 100 of CPC. It noted the following:

> *"We may note at this stage, that not all instances of a Court's failure to decide an issue will suffer for the purpose of allowing an*

> *appeal. It is only a failure to decide material issues which will enable an aggrieved party to invoke the jurisdiction of an appellate Court. The question of materiality, that is, whether or not an issue is of a material nature, will depend upon whether the ultimate decision of the Court of first appeal would have been different, if the omitted issue had been determined by it. Thus, in order to succeed in second appeal on ground (b) of subsection (1) of section 100, C.P.C., an appellant would have to show that the Court of first appeal would have reached a different conclusion, had it not failed to decide the issue of law or usage specified in ground (b) ibid."*

10. In the instant case, the learned counsel for the appellant has not identified (i) any material question of law that has remained undecided, (ii) any wrongful application of a principle of law or (iii) a substantial defect in the proceedings followed by the courts leading to the impugned decisions. Learned counsel for the appellant has also furthered no argument as to how the reasoning of the learned trial court and the learned first appellate court suffer from infirmities. The learned counsel for the respondent, on the other hand, has argued that the evidence reasonably supports findings of the learned trial court. And that the decision of the first appellate court, which agreed that the findings of fact of the learned trial court but reduced the quantum of damages awarded, while ordering reduction in grant of damages acted on the basis of legal reasoning that was perverse.

11. In its order dated 21.02.2017, the learned appellate court held the following:

> *"It is also proved on record before the learned trial court that the respondents were maliciously prosecuted by the appellants by involving them in a fake, bogus and concocted case. However, recovery of Rs.5 lacs as compensation to illiterate villager is*

excessive. The respondents also failed to place any proof of actual damage and also failed to place prescription to prove mental agony and also failed to place any receipt etc. to prove any actual loss, thus only for damages Rs.2 lacs are sufficient and there is no need for awarding any markup, therefore, upto the extent of compensation as damages and markup, the impugned judgment/decree is modified and a decree for damages to the tune of Rs.2 lacs only is awarded.".

12. The learned trial court in its order dated 30.07.2016 had held the following:

"As evident from the record, the claim of plaintiff was that due to FIR No. 146/2003 of P.S Bhara Kahu, which was falsely lodged by the defendants, the plaintiffs suffered heavily. According to plaintiffs, they suffered from both physical and mental agony owing to the aforementioned FIR, and their reputation was badly damaged as they remained in custody for more than three weeks.

The judicial record produced before the court sufficiently transpires that the plaintiffs, on account of the aforementioned FIR lodged by defendants, not only got arrested, but also remained confined in judicial custody. As such, they would have consumed considerable amount on account of legal expenses by engaging counsels. Arrest of a person, irrespective of the fact as to whether he has committed any crime or not, brings a bad name to him, and loss of reputation on account of arrest as well as confinement in prison would have definitely affected the reputation of plaintiffs. The evidence as well as judicial record brought in support of the claim of damages by the plaintiffs side are, however, sufficient to award general damages."

13. The law on the basis of malicious prosecution has also fairly settled and excerpts of given judgments in this regard are reproduced below:

(i). In Pandit Gaya Parshad Tewari V. Sardar Bhagat Singh and another (Privy Council, 1908 (35) L.R.-I.A. 189), it is ruled as under:-

"In India the police have special powers in regard to the investigation of criminal charges, and it depends very much on the result of their investigation whether or not further proceedings are taken against the person accused. If, therefore, a complainant does not go beyond giving what he believes to be correct information to the police, and the police, without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge is false to the knowledge of the complaint if he misleads the police by brining suborned witnesses to support it, if he influences the police to assist him in sending an innocent man for trial before the magistrate, it would be equally improper to allow him to escape liability because the prosecution has not, technically, been conducted by him."

(ii). The Privy Council again in AIR 1947 PC 108 examined the issue of proceedings of malicious prosecution and held as under:

"The action for damages for malicious prosecution is part of the common law of England, administered by the High Court at Calcutta under its letter patent. The foundation of action lies in abuse of the process of the Court by wrongfully setting the law in motion and it is designed to discourage the perversion of the machinery of justice for an improper purpose. The plaintiff must prove that the proceedings instituted against him were malicious, without reasonable and probable cause, that they terminated in his favour (if that be possible), and that he has suffered damage. As long ago as 1698 it was held by Holt C. J. in 1 Ld. Raym. 374 that damages might be claimed in such an action under three heads, (1) damage to the person (2)

damage to property, and (3) damage to reputation, and that rule has prevailed ever since. That the word "prosecution" in the title of the action is not used in the technical sense which it bears in criminal law is shown by the fact that the action lies for the malicious prosecution of certain classes of civil proceedings, for instance falsely and maliciously presenting a petition in bankruptcy or a petition to wind up a company: (1883) 11 Q.B.D 674. The reason why the action does not lie for falsely and maliciously prosecuting an ordinary civil action is, as explained by Bowen L. J. in the last-mentioned case, that such a case does not necessarily and naturally involve damage to the party sued. A civil action which is false will be dismissed at the hearing. The defendant' reputation will be cleared of any imputations made against him, and he will be indemnified against his expenses by the award of costs against his opponent. The law does not award damages for mental anxiety, or for extra costs incurred beyond those imposed on the unsuccessful party. But a criminal charge involving scandal to reputation or the possible loss of life or liberty to the party charged does necessarily and naturally involve damage and in such a case damage to reputation will be presumed".

(iii). The august Supreme Court in case titled Muhammad Yousuf vs. Syed Ghayyur Hussain Shah and 5 others (1993 SCMR 1185) approved and endorsed the argument of the counsel that "in Muslim society prosecuting innocent persons maliciously is not permitted and, in consequence, the aggrieved person can have recourse to Courts in Pakistan who were not only Courts of law but justice, equity and good conscience as well." And then held as follows:

"All the three Courts below have come to the conclusion as a fact that the prosecution of the plaintiff was without any foundation and intentionally initiated to persecute and harass him to harm his reputation and to subject him to mental agony and torture and lower him down in the eyes of public. In the presence of these factual findings, we have no other option but to hold that he was rightly awarded damages by the trial Court, maintained by the High Court and their decisions are not exceptionable."

(iv). In Azizullah vs. Jawaid A. Bajwa and 3 others (2005 SCMR 1950), the august Supreme Court observed that "the illegal and wrongful prosecution in absence of specific proof of good faith, would definitely fall within the purview of malicious and mental torture was the natural consequences, therefore, the petitioner would also be entitled to reasonable compensation for loss of profit and mental torture."

(v). The august Supreme Court in Niaz and others vs. Abdul Sattar and others (PLD 2006 SC 432) held as follows:

9. By Article 4 of the Constitution, it is the inalienable right of every citizen to enjoy the protection of law and to be treated in accordance with law and in particular no action detrimental to the life, land, liberty, body, reputation or property of any person shall be taken except in accordance with law. Article 14 of the Constitution also guarantees the dignity of man and subject to law, the privacy of home. In the context of the Constitution, it is no more necessary to hedge in an action for damages for malicious prosecution by the condition that the action was an abuse of the "process of the Court". 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. For, if we bear in mind the ground realities of life existing in our country, it should appear plainly that proceedings before the police afford a stronger ground for an action for malicious prosecution than proceedings in a Court of law, for it is an unfortunate fact that, as things are, human dignity suffers or is likely to suffer more at the hands of the police than in a Court of law. One of the modes to achieve this goal is to file a suit for damages against the offenders by the aggrieved persons. It is the duty of the members of the Bar Associations and Bar Council to educate the people and to file suits for damages against the offenders apart from the criminal proceedings.

10. We have also re-examined the evidence in the interest of justice and fairplay. We are of the view that both the courts below were justified to award nominal damages to the petitioners. It is 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 the competent forum has declared the accused persons as innocent acquitted/discharged by the competent court so that prosecution must lodge genuine cases.

11. In view of the what has been discussed above, we are not inclined to interfere in the concurrent conclusions arrived at by the courts below while exercising power under Article 185 (3) of the Constitution. The petition has no merits and the same is dismissed. Leave to appeal is refused accordingly.

(vi). In Abdul Majeed Khan vs. Tawseen Abdul Haleem and others (2012 CLC 6) the august Supreme Court observed the following:

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 result in liability under tort as when the claimant loses the suit, the defendant's reputation is restored and he recovers his cost spent on defending the action. However, for malicious proceedings in bankruptcy and winding up, which may wreck the claimant's business, destroy confidence in his competence and integrity and in his company's goodwill, a remedy in the Tort will lie.

21. It is well-known that a person who is maliciously prosecuted on a criminal charge can sue in tort for damages if the prosecution ends in his acquittal and the prosecution was malicious in the sense that it was without any reasonable cause. To ground a claim for malicious prosecution a plaintiff must prove (1) that the law was set in motion against him on a criminal charge; (2) that the prosecution was determined in his favour; (3) that it was without reasonable and proper cause; and (4) that it was malicious.

(vii). In Muhammad Yousuf vs. Abdul Qayyum (PLD 216 SC 478) held as follows:

9. This has meant that the plaintiff has had to establish, inter alia, malice as well as absence of reasonable and probable cause to succeed in a claim for malicious prosecution. Mere 'absence of reasonable and probable cause' has not been held to be sufficient to establish malice, although it can be used as evidence for establishing malice.

Malice is a state of mind and can be inferred from the circumstantial evidence. We can take judicial notice of our societal norms which appears to be at variance on norms of English society. The mere lodging of an FIR creates a public perception adverse to the reputation of the accused. Where the FIR is proved either to be false or to have been lodged without reasonable and probable cause, the circumstances of any given case may be sufficient to show that the lodging of the criminal case was malicious. For instance, in certain cases a prior enmity or a family dispute or differences between the families of two spouses can lead to the lodging of a criminal case and initiation of a prosecution based on allegations of a factual nature which are motivated by the aforesaid circumstances rather than a truthful assertion of fact to bring an accused to book through the criminal legal process. In the present case, the falsity of the allegation made against the respondent/plaintiff is established from the fact that the only basis stated by him for lodging the FIR was some information received by him from a person named Sadiq, after the FIR had been registered. Since the said Sadiq was not summoned and produced as a witness by the petitioner/defendant the element of malice on the part of the petitioner can be inferred.

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.

(vii). In Rana Shaukat Ali Khan, etc. vs. Fayyaz Ahmed, etc. (2017 MLD 120 Lahore), the learned Lahore High Court held as follows:

> *From the above narrated facts it is established on record that the act of respondents to involve the appellants in the incident of dacoity was malafide. The charge against the appellants was wrong to the knowledge of the complainant, he misled the police by brining engineered witnesses in support of his assertion, the complainant tried to influence the police to send the innocent appellants to jail. It is a settled law that if the following elements are available the court can grant damages for malicious prosecution:-*
>
> *(a) The prosecution of the plaintiff by the defendant.*
>
> *(b) There must be a want of reasonable and probable cause for that prosecution.*
>
> *(c) The defendant must have acted maliciously i.e. with improbable motive and not to further the ends of justice.*
>
> *(d) The prosecution must have ended in favour of the person proceeded against.*
>
> *(e) It must have caused damage to the party proceeded against.*

The Hon'ble Supreme Court of Pakistan defined the "Reasonable and Probable cause" in Niaz and others case supra as under:-

(i) "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 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".*

Learned trial court has dismissed the suit relying on the statement of PWs when they admitted that the act of registration of FIR was bonafide, the appellants' statement is correct as the appellants were not nominated in the FIR so all the PWs have rightly deposed that the act of registration of FIR was bonafide as an incident took place in the respondent's house. In fact the appellants' grievance started when the respondents nominated the appellants through supplementary statement, the respondents' explanation why they named appellants in supplementary statement was proved incorrect from the statement of DW-2 and record, it is proved that the culprits were the relatives of convicted person Rana Wahid and they wanted a compromise between the respondents and Rana Wahid. The said facts were in the knowledge of respondents but they suppressed these facts and lodged wrong FIR against the appellants, hence the malice on the part of respondents is proved.

14. The rational for conferring equitable jurisdiction upon courts is rooted in the maxim "*Ubi jus, ibi remedium*" (where there is a right, there is a remedy). As is evident from the principles settled in relation to malicious prosecution, damages are imposed on the one who abuses the process of

law and to produce consequences for another and settle past scores. Subjecting a person to malicious prosecution can interfere with the right to liberty guaranteed under Article 9, the right to dignity under Article 14 and the right to be treated in accordance with law guaranteed under Article 4 of the Constitution. Such prosecution inflicts financial hardship, litigation cost, mental anguish as well as loss of reputation on the person who is on its receiving ends having been falsely implicated in a matter.

15. In any just society such loss cannot be allowed to lie where it falls. A person who is the immediate cause of inflicting such loss and hardship on a fellow citizen ought to be held accountable for his actions. While the plaintiffs in a suit for malicious prosecution cannot recover on the basis of humiliation suffered at the hands of police or prison authorities or inmates, but he has a right to be compensated by the person whose false accusation resulted in him being incarcerated and made him suffer the debasing experience that comes along. The judgments mentioned above have held that even where no damages are quantified by the plaintiff a court has discretionary jurisdiction to grant damages for loss of liberty, dignity and mental anguish that is reasonably proportionate to what the plaintiff can be presumed to have suffered.

16. There can be no objective standards for estimating such injuries but an inference can be drawn that someone who has been subjected to malicious prosecution has suffered loss of time, litigation expenses, mental suffering due to being subjected to legal challenge that can produce penal consequences for him and in the case of being arrested and put behind bars, loss of his right to liberty and dignity and

consequent reputational harm. The superior courts have upheld imposition of damages in case of malicious prosecution on the basis the rule of thumb which aims to quantify damages such that they are reasonably proportionate to the loss suffered.

17. The loss of a person's liberty and dignity cannot be measured in money terms. But our Constitution – in fact all human rights charters – guarantee such rights. The Constitution has established the judicature and mandated it to act as a guardian of fundamental rights. And it is an obligation of the courts to ensure that irrespective of a person's station in the society and prevalent social and economic inequality, the principle of legal equality between citizens is upheld and no one is allowed to wield the law as a weapon to settle scores with another by abusing legal processes. The courts of law therefore cannot be nonchalant when seized of a matter involving malicious prosecution of one citizen at the hands of another.

18. After giving its findings of fact that the respondents were subjected to malicious prosecution by the appellant, the learned trial court put a tag of Rs.500,000/- on the loss of liberty, dignity and reputation of the respondents. The respondents had spent 22 days behind bars. They remained embroiled in a criminal case initiated on the basis of an FIR and continued subsequently through a private complaint filed by the appellant in 2004, which trudged along from 2004 till 2011 and culminated with the august Supreme Court finding no merit in it. The quantum of damages awarded by the learned trial court appears to fall below any rational baseline for the value that must attach to the liberty, dignity and reputation of each and every citizen. But the

determination of such damage was not appealed by the respondents and this court is not vested with jurisdiction to re-quantify damages on its own accord in exercise of powers under section 100 of CPC.

19. The learned Additional District Judge, however, reduced the quantum of damages to Rs.200,000/- on the basis that the value that must attach to life, liberty and reputation of village dwellers, which the respondents are, ought to be less than that quantified by the learned trial court. The reasoning of the learned Additional District Judge is perverse as the value of a citizen's liberty, dignity and reputation does not rest on whether such person is the resident of a village or an urban area. The reasoning is invidious, smacks of discrimination of the sort abhorred by the Constitution, protection against which has been guaranteed by Article 25 of the Constitution. As the learned appellate court has agreed with the findings of the fact given by the learned trial court i.e. that respondents were subjected to malicious prosecution, the part of the learned Additional District Judge's order reducing damages granted by the learned trial court is set aside.

20. In view of the principles and case law cited above the following can be concluded:

(1). In order to establish a case of malicious prosecution the following four elements need to be established.

(a) a plaintiff has been prosecuted by the defendant despite the absence of reasonable and probable cause for such prosecution;

(b) the defendant acted maliciously and not to further the ends of justice;

(c) the prosecution ended in favour of the plaintiff; and

(d). it caused damage to the plaintiff.

(2). It is not sufficient to establish malice alone, but malice must be accompanied by the absence of reasonable and probable cause to trigger the process of law.

(3). Even when the prosecution is not entirely malafide at the time of its initiation, its continuation after a disclosure that facts upon which it was based are not true may give rise a claim for damages for malicious prosecution.

(4). The last element in a claim for malicious prosecution i.e. damages suffered, need not be specifically proved or quantified in the event that the claim includes damages for loss of liberty, dignity, reputation and mental anguish and can be awarded by the court in its discretion in view of the circumstances of the case, starting from a reasonable baseline given that rights to liberty and dignity are inalienable rights and can only be interfered with in accordance with law.

(5). The courts are under an obligation to ensure that lack of social or economic equality in the society does not culminate into legal inequality. Granting of damages for malicious prosecution is a means to hold to account a person who abuses the process of law against another and to offer recompense to the person on the receiving end of such abuse. Even though restitution is not possible in a claim involving loss of liberty and dignity, the court must aim to award damages that are reasonably proportionate to the harm inflicted.

21. The learned trial court and the learned appellate court have both inferred malice on part of the appellant in view of facts and circumstances of the case and the evidence presented before them. This Court under section 100 of CPC cannot re-evaluate the evidence to reach a factual conclusion different from that reached by the subordinate courts. No evidence has been identified by the learned counsel for the appellant which due to non-reading or misreading led the

learned trial court and the learned first appellate court to a erroneous conclusion. This appeal is consequently **dismissed** and the order of the learned first appellate court is reversed to the extent of reduction of damages in the award made by the learned trial court. Consequently, the appellant is liable to pay damages awarded by the learned trial court.

22. While **dismissing** this appeal this Court also orders the appellant to pay a cost in the amount of Rs.200,000/- under section 35(1)(iii) of CPC. Section 35 has been amended and restated by the Costs of Litigation Act, 2017 and states the following.

> "35. Costs.- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force,-
>
> (i) a party to any proceedings shall, before the announcement of final order, judgment or decree, file in the prescribed Form, details of actual costs of litigation, including but not limited to court fee, stamp fee, fee paid to counsel and all other ancillary or incidental expenses thereto;
>
> (ii) the Court shall award the actual costs of litigation under clause (i) to the successful party with markup not exceeding the prescribed limit per annum, as notified by the State Bank of Pakistan, at the time of passing the order, judgment or decree;
>
> (iii) the costs other than those mentioned in clause (i) shall be in the discretion of the Court; and
>
> (iv) the Court shall have full power to determine out of what property such costs are to be paid and recovered and to give all necessary directions for the purposes aforesaid.

> (2) The fact that the Court has no jurisdiction in respect of the proceedings shall be no bar to the exercise of such powers under this section.

23. The legislative intent in promulgating this provision is to deter frivolous ligation and to impose the cost of litigation in a just and reasonable manner on the party whose conduct inflicts such cost on the another. In our justice system, adjudication of disputes take place within an adversarial system. Every person has the freedom to decide how to pursue a perceived grievance against another. But when he does initiate litigation against another, such action has costs for the party on the receiving end. Likewise, each time a party chooses to appeal an order to the next tier in the adjudicatory hierarchy, it results in costs for the other party. It is only fair that the losing party whose claim is adjudicated and found to be without merit bears the cost of litigation of the other party. For such purpose, the Parliament has promulgated the revised section 35 of CPC and it is the duty of this court to give effect to its provisions in accordance with the legislative intent.

24. The cost incurred by the parties to litigation does not take into consideration the cost borne by the public exchequer. Due to frivolous litigation all components of criminal justice system are clogged and consumed i.e. investigation, prosecution, courts and prisons. This impedes access to justice for everyone by delaying adjudication of genuine grievances as well as depleting public resources that would otherwise be available to all components of the justice system for processing and adjudication genuine disputes. The cost incurred by the public exchequer due to frivolous litigation cannot be objectively estimated by a court, but such cost is certainly a consideration to be born in mind by the court while awarding costs under section 35 and 35B.

25. In the instant case, the respondents have been at the receiving end of appellant's action since 2004. The criminal charges initiated by the appellant were determined all the way up to the august Supreme Court. The respondents subsequently filed a suit for malicious prosecution wherein the appellant's right to file a written statement was closed. The appellant filed a writ petition before this Court to seek the grant of another opportunity to file the written statement. Such opportunity was granted subject to payment of cost in the amount of Rs.30,000/-. The appellant, however, did not avail itself to the opportunity in order to avoid paying such cost. The suit was eventually decreed against the appellant. The appellant then filed an appeal against such decision. The learned appellate court reduced the quantum of damages. Still unsatisfied, the appellant then filed the instant second appeal, stretching litigation between the parties to a period of almost seventeen years. The respondent in the instant appeal details of actual cost of litigation for purposes of section 35(1)(i) of CPC. The actual cost can thus not be awarded by this Court. However, in view of the legislative intent of section 35 and the conduct of the appellant as described above, this Court, while taking a lenient view, has only awarded general cost under section 35(1)(iii) of CPC in the amount of Rs.200,000/-. The appellant shall pay the cost to the respondent within a period of thirty (30) days and deposit a certificate confirming the discharge of such liability with Deputy Registrar (Judicial) of this Court for proposes of section 35(1)(iv) of CPC.

(BABAR SATTAR)
JUDGE

Approved for reporting.

Saeed*