

# Malicious Prosecution under Law of Tort

## INTRODUCTION

Proceedings instituted maliciously may include not only malicious prosecution and malicious arrest but also malicious bankruptcy and liquidation proceeding (civil proceedings), malicious execution of process against property, and malicious search.<sup>[1]</sup> Malicious prosecution is the malicious intention of unsuccessful criminal or bankruptcy or liquidation proceedings against another without reasonable or probable cause.<sup>[2]</sup> Generally, it can be said that the malicious prosecution is defined as a judicial proceeding instituted by one person against another, from wrongful or improper motive, without any reasonable and probable cause to justify it.<sup>[3]</sup>

In the case of *West Bengal State Electricity Board v. Dilip Kumar Ray*,<sup>[4]</sup> the Court defined the term "malicious prosecution" in the following words:-

"A judicial proceeding instituted by one person against another, from wrongful or improper motive and without probable cause to sustain it is a malicious prosecution."

The Court in the same case laid down the distinction between "an action for malicious prosecution" and "an action for abuse of process" in the following words:-

"A malicious prosecution consists in maliciously causing process to be issued, whereas an abuse of process is the employment of legal process for some

purpose other than that which it was intended by the law to affect the improper use of a regularly issued process.”

## ESSENTIAL ELEMENTS OF MALICIOUS PROSECUTION

Following are the essential elements which the plaintiff is required to prove in a suit for damages for malicious prosecution:-

- Prosecution by the defendant.
- Absence of reasonable and probable cause.
- Defendant acted maliciously.
- Termination of proceedings in the favour of the plaintiff.
- Plaintiff suffered damage as a result of the prosecution.

### 1. Prosecution by the defendant

The first essential element which the plaintiff is required to prove in a suit for damages for malicious prosecution is that he (plaintiff) was prosecuted by the defendant.<sup>[5]</sup> The word “prosecution” carries a wider sense than a trial and includes criminal proceedings by way of appeal, or revision.<sup>[6]</sup> In the case of *Musa Yakum v. Manilal*,<sup>[7]</sup> it was held that it is no excuse for the defendant that he instituted the prosecution under the order of a Court, if the Court was moved by the defendant’s false evidence to give the order.

In the case of *Khagendra Nath v. Jacob Chandra*,<sup>[8]</sup> the Court held that merely bringing the matter before the executive authority did not amount to prosecution and, therefore, the action for malicious prosecution could not be maintained.

It is significant to note that departmental enquiry by disciplinary authority cannot be called prosecution.[\[9\]](#)

## **2. Absence of reasonable and probable cause**

In a suit for damages for malicious prosecution, the plaintiff has also required to prove that the defendant prosecuted him without reasonable and probable cause. The question relating to want of reasonable and probable cause in a suit for malicious prosecution should be decided on all facts before the Court.[\[10\]](#) In the case of *Antarajami Sharma v. Padma Bewa*,[\[11\]](#) it has been said that law is settled that in a case of damages for malicious prosecution, onus of proof of absence of reasonable and probable clause rests on the plaintiff.

The existence of reasonable and probable cause is of no avail if the prosecutor prosecuted in ignorance of it. The dismissal of a prosecution or acquittal of the accused does not create any presumption of the absence of reasonable and probable cause. If a man prefers an indictment containing several charges, whereof for some there is, and for others there is not, probable cause, his liability for malicious prosecution is complete.[\[12\]](#)

## **3. Defendant acted maliciously:-**

In a suit for damages for malicious prosecution, it is another essential element which the plaintiff is required to prove that the defendant acted maliciously in prosecuting him and not with a mere intention of carrying the law into effect. Malice need not be a feeling of enmity, spite or ill will or spirit of vengeance but it can be any improper purpose which motivates the prosecutor, such as to gain a private collateral advantage.

In the case of *Bank of India v. Lekshmi Das*,[\[13\]](#) the Court reiterated the Indian position that in malice absence of a *probable and reasonable cause* must be proved. The proceedings complained of by the plaintiff must be initiated in a

malicious spirit that is from an indirect and improper motive and not in furtherance of justice.[\[14\]](#) Malice may be inferred upon proof of absence of honest belief in the accusation and consequent want of reasonable and probable cause for instituting the prosecution complained of.[\[15\]](#)

It is not necessary that the defendant should be acting maliciously right from the moment the prosecution was launched. If the prosecutor is innocent in the beginning but becomes malicious subsequently, an action for malicious prosecution can lie. If during the pendency of criminal prosecution, the defendant gets positive knowledge of the innocence of the accused, from that moment onwards the continuance of the prosecution is malicious.[\[16\]](#)

#### **4. Termination of proceedings in the favour of the plaintiff:-**

In a suit for damages for malicious prosecution, it is essential to show that the proceedings complained of terminated in favour of the plaintiff. Termination in favour of the plaintiff does not mean judicial determination of his innocence; it means absence of judicial determination of his guilt.[\[17\]](#) Malice need not be a feeling of enmity, spite or ill will or spirit of vengeance but it can be any improper purpose which motivates the prosecutor, such as to gain a private collateral advantage.

No action can be brought when the prosecution or the proceedings are still pending. It is a rule of law that no one shall be allowed to allege of a still pending suit that it is unjust. [\[18\]](#)

#### **5. Plaintiff suffered damage as a result of the prosecution:-**

In a suit for damages for malicious prosecution, it is another essential element which the plaintiff is required to prove that The plaintiff suffered damage as a

result of the prosecution. In a claim for prosecution, the plaintiff can thus claim damages on the following three counts<sup>[19]</sup>:-

- Damage to the plaintiff's reputation,
- Damage to the plaintiff's person,
- Damage to the plaintiff's property.

## MALICIOUS CIVIL PROCEEDINGS

In the case of *Darbhangi Thakur v. Mahabir Prasad*,<sup>[20]</sup> it was held that unlike malicious criminal prosecution, no action can be brought, as a general rule, in the case of civil proceedings even though the same are malicious and have been brought without any reasonable cause.

In the case of *Genu Ganapati v. Bhalchand Jivraj*,<sup>[21]</sup> it was held that following are the essentials to establish malicious abuse of civil proceedings:-

- Malice must be proved.
- The plaintiff must allege and prove that the defendant acted without reasonable and probable cause and the entire proceedings against him have either terminated in his favour or the process complained of has been superseded or discharged.
- The plaintiff must also prove that such civil proceedings have interfered with his liberty or property or that such civil proceedings have affected or likely to affect his reputation.

## CONCLUSION

It can be said that the malicious proceedings are that proceedings which are initiated with malicious intent. The elements (i.e. prosecution by the defendant, absence of reasonable and probable cause, defendant acted maliciously,

termination of proceedings in the favour of the plaintiff and plaintiff suffered damage as a result of the prosecution) which are necessary to the plaintiff to prove in a suit for damages for malicious prosecution must be fulfilled. However, on the basis the facts and circumstances, the Court should decide whether the suit is filed maliciously or not.