APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

1894. January 11. October 22.

MINAKSHISUNDRUM PILLAI (DEFENDANT No. 4), APPELLANT,

v.

AYYATHORAI (PLAINTIFF), RESPONDENT.*

Malicious prosecution—Prosecution by a Police Constable—Whether acting in his official capacity or not—Malice.

A Police Constable, who is in effect the prosecutor and not acting merely in his official capacity, who does not take reasonable care to inform himself of the truth of the case and who does not honestly believe in the charge preferred by him and is actuated by an indirect motive is preferring it, is liable in a suit for damages for malicious prosecution.

SECOND APPEAL against the decree of J. W. F. Dumergue, District Judge of Madura, in appeal suit No. 416 of 1892, reversing the decree of A. David Pillai, District Munsif of Tirumangalam, in original suit No. 256 of 1891.

The facts of the case appear sufficiently for the purpose of this report from the finding returned by the District Judge.

Mr. *K. Brown*, *Subramania Ayyar* and *Sundara Ayyar*, for appellant.

Sankaran Nayar, for respondent.

ORDER.—"The first question, which does not seem to be pro-"minently brought to the notice of the District Judge, is whether "the appellant, the Constable, was in effect the prosecutor in the "case or whether he was only acting in his official capacity. The "first branch of the first issue was evidently based on this ques-"tion. But the District Judge only notices it in the introductory "part of his judgment. We must observe that in considering this "question as also the other questions arising, the District Judge "must confine himself to the evidence before him, and must not "be influenced by the Magistrate's opinion or depositions taken "before him and not made evidence in this case.

* Second Appeal No. 863 of 1893.

"In respect of the other questions arising in the case the issues "as framed do not raise them in the proper form. The proper "issues are those stated in the summing up in *Abrath* v. *North-*"*Eastern Railway Company*(1). Assuming that the District "Judge finds the first-mentioned issue in the affirmative, we must "request him to return findings on the other three issues as stated "in the case cited.

"The findings are to be returned within one month from the "date of the receipt of this order, and seven days will be allowed "for filing objections after the findings have been posted up in "this Court."

In compliance with the above order, the District Judge submitted the following finding :—

FINDING.—"The leading facts of the case are that the house "of one Shanmuga Velayudam Pillay in Tirumangalam was "broken into on the night of the 28th April 1889, when jewels "valued at Rs. 500 were stolen. The plaintiff in the suit and "two others were arrested by the fourth defendant, who is the "Station-house officer of Tirumangalam, on the 10th May 1890. "The plaintiff was charged with abetment of the offences of "house-breaking and theft, and was discharged by the Second-"class Magistrate of Tirumangalam in Calendar Case No. 55 of "1890. The plaintiff then sued to recover damages from the "fourth defendant among others for malicious prosecution.

"2. The first question on which I am directed to return a "finding is whether the fourth defendant, the Station-house "officer, was in effect the prosecutor or whether he was acting in "his official capacity. With regard to the first branch of this "question, I think the record leaves no doubt that the fourth "defendant was really the prosecutor. No accusation had been "laid against the plaintiff specifically by the complainant; the "plaintiff was arrested by the fourth defendant on information "said to have been given by one Andravana Chetty (eighth "witness for plaintiff) more than a year after the commission of "the alleged offences and five months after the fourth defendant "had recommended that the case should be struck off, as it was "useless taking any further steps in the matter; and when the "plaintiff applied for bail the application was opposed by the

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"fourth defendant, not by the complainant. The complainant "was made the first defendant in the suit and was examined "as the first witness for the defence. He opposed an applica- "tion made by the plaintiff for a transfer of the criminal case "to the file of another Magistrate, but on the other points he "makes the following statements: 'I never implicated the "'plaintiff in the case nor did I even suspect him. I never com- "'plained to the Police or the Magistrate that the plaintiff was "'one of the thieves or that I suspected him. . . . I never op- "'posed the application for bail presented on behalf of the plain- "'tiff.' The charge sheet (exhibit E) was prepared by the fourth "defendant on the 11th May 1890, and with the exception of the "occurrence report of the 10th May 1890 (exhibit D) also pre- "pared by the fourth defendant, this was the first time that the "plaintiff was accused. Under these circumstances I find on this "part of the first question that the fourth defendant was in effect "the prosecutor.

"3. It follows from this finding that in my opinion the fourth "defendant was not acting only in his official capacity. No "doubt the fourth defendant was bound, as a Police officer, to "detect offenders and bring them to justice, and hence it is now "argued that he was really acting in his official capacity. But in "the first place it seems to me that Police officers are protected "against suits brought against them for acts done in their official "capacity only by section 43 of Act V of 1861, which provides "that a Police officer is entitled to a decree if he shows that any "act in respect of which he is sued was done under the authority "of a warrant issued by a Magistrate. In this case the fourth "defendant was certainly not acting under such authority. Then "in the next place it is expressly declared by section 23 of Act V "of 1861 that it is the duty of a Police officer to apprehend "persons 'for whose apprehension sufficient ground exists.' Un- "less sufficient ground does exist, then it appears to me that a "Police officer cannot be said to be acting in his official capacity, "but under colour of his official capacity. Hence I would submit "that unless the findings on the remaining issues show that the "fourth defendant had or in good faith believed he had sufficient "ground for arresting and prosecuting the plaintiff, he was not "acting in his official capacity.

"4. The next question on which I have to return a finding is

"the first propounded in *Abrath* v. *North-Eastern Railway Com-*
"*pany*(1). Did the fourth defendant take reasonable care to
"inform himself of the true state of the case? On this issue the
"plaintiff has proved that the fourth defendant himself reported
"on the 9th December 1890 (exhibit G), after months said to
"have been occupied in investigation, that he had failed to detect
"the real culprits and that it was useless to take further steps.
"Notwithstanding this fact, the fourth defendant might have
"obtained trustworthy information subsequently to his report.
"But, according to his own case, the only person from whom he
"could have obtained any information justifying the arrest and
"prosecution of the plaintiff was Andravana Chetty, and An-
"dravana Chetty examined as the plaintiff's eighth witness,
"swears that he never gave the fourth defendant any infor-
"mation on the subject. This evidence is contradicted by an
"acting Head Constable, who is the second witness for the
"defence, and the fourth defendant has proved that Andravana
"Chetty is a thief. If he had acted solely on information given
"him by a disreputable and discreditable individual, he cannot be
"said to have taken reasonable care, but it would be a fair argu-
"ment that he verified the statements made and actually found
"the plaintiff dealing with the stolen property. The story of the
"plaintiff's arrest must therefore be examined. According to
"the second witness for the defence Andravana Chetty came to
"the police station at 3 P.M. on the 10th May and said he had
"seen the plaintiff and others dividing the stolen jewels in a
"certain mantapam, 3½ miles distant from the police station.
"The fourth defendant and the second witness for the defence
"and others reached the mantapam at 5 P.M. and found the plain-
"tiff and his confederates still in the act of weighing and dividing
"the jewels. There were admittedly only nine articles of jewellery,
"and it is represented that more than 2 hours were occupied in
"weighing and dividing those articles. This story is, in my opinion,
"altogether incredible, and I think it also incredible that the
"plaintiff, a village officer, was found making a division of stolen
"property, a year after it had been stolen, in a place which must
"have been open to public view or the transaction could not have
"been observed by Andravana Chetty. Besides the inherent

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"incredibility of this account, the plaintiff's second, third and "fourth witnesses depose that the plaintiff was arrested near the "Sub-Registrar's office, which is also known as Poochy Nadan's "Chavadi, in Tirumangalam. Since then, the statements made by "and on behalf of the fourth defendant as to the plaintiff's arrest "are, in my opinion, false, and since the plaintiff was not arrested at "a mantapam 3½ miles from Tirumangalam, I think the statements "that Andravana Chetty gave information which led to the arrest "at the mantapam is also false. Hence I find that the fourth "defendant so far from taking reasonable care to inform himself "of the true state of the case made no enquiry and did not act on "any information, but *acted with a total want of reasonable and* "probable cause.

"5. The third question is—Did the fourth defendant honestly "believe the case which he laid before the Magistrate? (*Abrath* v. "*North-Eastern Railway Company*(1).) In respect of this issue it is "proved in evidence that no suspicion was entertained against the "plaintiff until the 10th May 1890, the day he was arrested. But "the fourth defendant's report of the 9th December 1890 (exhibit "G) filed by the plaintiff proves more. It shows that the result "of the enquiries made by the fourth defendant from the date "of the offences (28th April) to the date of the report was that "the greater portion of the stolen property had been recovered "through one Shonia Pillay, the father-in-law of the complainant, "and that the complainant himself was conniving at the acts of "his father-in-law and suppressing information. Clearly, there-"fore, it was not the plaintiff that the fourth defendant then "suspected of abetment and he was guilty of falsehood in attempt-"ing to repudiate his report. I have already found that he acted "without reasonable or probable cause, and that the reasons he has "assigned for prosecuting the plaintiff are false. The only infer-"ence which can, in my opinion, be drawn from the circumstances "is that he did not honestly believe the case he laid before the "Magistrate to be true, but knew it to be groundless.

"6. The last question is—Was the fourth defendant actuated "by any indirect motive in preferring the charge (*Abrath* v. *North-*"*Eastern Railway Company*(1)) or, as the same question is stated "on page 443 of the case cited,—Was he actuated by malice, that

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"is to say, was he actuated by some motive other than an honest "desire to bring a man whom he believed to have offended against "the Criminal law to justice. Here it is argued that no malice "was alleged and none proved. But the action itself was an "action for malicious prosecution. As to proof there is certainly "no direct evidence of any weight, but according to the Indian "Evidence Act (section 4) a fact is said to be proved if the exist-"ence is so probable from matters under consideration, that a "prudent man ought, under the circumstances of the particular "case, to act upon the supposition that it exists. It must, there-"fore, be seen whether this probability exists in the circum-"stances of this case. According to the second form of the present "issue quoted above, malice consists, in such a case as this, of some "motive other than an honest desire to bring a man, who is "believed to have offended against the Criminal law, to justice, "and Brett, M. R. (same case, page 448) defined a malicious inten-"tion as 'not the mere intention of carrying the law into "'effect, but an intention which was wrongful in point of fact.' If, "as it seems to me, the fourth defendant acted without reasonable "or probable cause, and if, as it seems to me, he did not honestly "believe the case which he laid before the Magistrate, then he "could not have believed that the plaintiff had offended against "the Criminal law and he could not have been actuated by an "honest desire to bring the plaintiff to justice, but must have been "actuated by some indirect motive, that is to say, in the words "of Cave, J., already quoted, by malice. To institute a ground-"less prosecution, knowing that it is groundless, is acting not in "furtherance of justice, but with an intention wrongful in point of "fact. Therefore, the answer I would submit to the last question "is that the fourth defendant was actuated by an indirect motive, "that is to say, malice.

"7. To sum up these findings they are—

"(1) That the fourth defendant was in effect the prosecutor and not only acting in his official capacity.

"(2) That he did not take reasonable care to inform himself of the true state of the case.

"(3) That he did not honestly believe the case he laid before the Magistrate.

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"(4) That he was actuated by an indirect motive in preferring the charge."

This second appeal came on for final disposal, and the Court delivered the following judgment:—

JUDGMENT.—We must accept the finding. We cannot say that the Judge dealing with the whole evidence has omitted to take into account that the burden of proof was on the plaintiff.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

1894. August 7. December 5.

NAGAMONEY MUDALIAR (DEFENDANT), APPELLANT,

v.

JANAKIRAM MUDALIAR (PLAINTIFF), RESPONDENT.*

Letters Patent—Clause 12—Whether an order under this clause may form the subject of an issue for trial in the suit.

The legality of an order granting permission to institute a suit under clause 12 of the Letters Patent may form the subject of an issue for trial in the suit so instituted.

APPEAL from the decree of Shephard, J., sitting on the original side of the High Court in civil suit No. 391 of 1892.

This was a suit for redemption of a mortgage. Leave to sue under clause 12, Letters Patent, was granted, but a preliminary issue was taken as to whether the Court had jurisdiction in the case, the mortgage property being alleged to be beyond the Court's local jurisdiction. This issue was decided against the defendant on the ground that the leave to sue stood uncancelled. The defendant preferred this appeal.

Sivagnana Mudaliar for appellant.

Subramanya Ayyar for respondent.

BEST, J.—This is an appeal against the order of Mr. Justice Shephard, deciding against the defendant, the preliminary issue "whether this Court has jurisdiction in the case, the mortgaged

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* Original side appeal No. 34 of 1893.