to the creditor of a right to proceed against the surety in either class of cases prevents the discharge of the surety, as with the reservation the surety's right of recourse against the principal debtor also is preserved. In this case we cannot find, when we examine the matter carefully, that Konammal was released by the consent order of the 10th September 1926; and, even if part of the wording of the order had implied that, the provision regarding execution against the security would make the release ineffective. That very probably explains why this particular point was not urged with any persistence before the learned District Judge.

But the other point remains, that time was given to Konammal and thereby the surety was discharged.

I agree that this appeal should be dismissed with costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Curgenven and Mr. Justice Sundaram Chetti.

PEDDA VENKATAPATHI (FIRST PLAINTIFF), APPELLANT,

v.

GANAGUNTA BALAPPA AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

1933, January 18.

Malicious prosecution—Suit for damages for—Absence of reasonable and probable cause—Enquiry in respect of—Duty of Civil Court—Judgment of Criminal Court acquitting plaintiff—Effect and value of.

In a suit for damages for malicious prosecution the Civil Court should undertake an independent enquiry before satisfying itself of the absence of reasonable and probable cause,

* Appeal No. 40 of 1927.

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and the judgment of the Criminal Court acquitting the plaintiff can be used only to establish the fact that an acquittal has taken place as a fact in issue in the civil suit and not to ascertain the grounds upon which the acquittal proceeded or the views of the trying Magistrate upon the evidence.

Mohammad Daud Khan v. *Jia Lal*, (1929) 116 I.C. 852, considered. *Gulabchand Gopaldas* v. *Chunnilal Jagjivandas*, (1907) 9 Bom. L.R. 1134, and *Shubrati* v. *Shams-ud-din*, (1928) I.L.R. 50 All. 713, followed.

APPEAL against the decree of the District Court of Anantapur in Original Suit No. 15 of 1924.

K. Srinivasa Rao for appellant.

T. R. Arunachalam for respondents.

JUDGMENT.

CURGENVEN J.

CURGENVEN J.—The first plaintiff appeals against the dismissal of his suit filed for damages for malicious prosecution against the first defendant, now respondent, and two others. The case arose out of a disturbance which took place on the 12th September 1922 at Malyavantham village, Dharmavaram Taluk, Anantapur District. Consequent upon that disturbance the first defendant filed a complaint, Exhibit V, before the police on the 13th September. The purport of that complaint was that the village Madigas were holding a festival on that evening and that in consequence of certain conduct of the complainant's which had caused annoyance to them they came in a body to his house and made trouble there. The first plaintiff is himself the son-in-law of the first defendant and, it was alleged, identified himself with the action of the Madigas and while the disturbance was proceeding fired a shot with a revolver which injured one Venkaramappa, examined in the present case as the third witness for the defendant. Accordingly, the first plaintiff was made the first accused and other persons to the number of seventeen

were also included. The police took up the case and presented a charge sheet, alleging that acts of rioting and an attempt to murder were committed in the course of the occurrence, and the case was tried by the Deputy Magistrate of Gooty. That officer discharged a number of the accused but framed a charge against the first plaintiff and one other of the accused. By way of defence the former then set up an *alibi* which he sought to establish by examining a number of witnesses. The version which these witnesses supported was that on the day of the occurrence the first plaintiff left the village about the middle of the day to go to Dharmavaram, visited the Taluk office, where he did some business in his capacity as Village Munsif, and then went on to the railway station where he met his brother who came from Anantapur by the mail train and himself proceeded to Anantapur by the opposite mail train, leaving Dharmavaram at about 2-30 a.m. He had some legal business in Anantapur and accordingly went as early as 5 a.m. to the house of his pleader Mr. Adimurthi Rao. The learned Deputy Magistrate accepted this evidence and acquitted the plaintiff, whereupon this suit for damages was filed.

There has been some discussion in this case as to what lies on the plaintiff to prove and what use can be made of the judgment of the Criminal Court. The Privy Council have in *Balbhaddar Singh* v. *Badri Sah*(1) now made it clear what the several elements are which in a case of this description have to be satisfied. Besides the fact of the prosecution and of its termination in favour of the plaintiff it has to be shown that the prosecution was instituted against him without any reasonable and probable cause and that it was due to a malicious

(1) (1926) 51 M.L.J. 42 (P.C.).

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CURGENVEN J.

intention. This pronouncement has been somewhat curiously construed in the judgment of a single Judge of the Allahabad High Court which has been drawn to our attention, *Mohammad Daud Khan* v. *Jia Lal*(1). The learned Judge would appear to think that some presumption arises from the mere fact that the plaintiff has been acquitted by the Criminal Court in cases where there is no scope for surmise and where evidence was given by the defendant of what he actually saw. I think that this case goes a good deal further than the usually accepted position, which is not affected by the Privy Council judgment, that it lies upon the Civil Court itself to undertake an entirely independent enquiry before satisfying itself of the absence of reasonable and probable cause. Indeed I am unable to agree that our Evidence Act justifies an examination of the judgment of the Criminal Court in order to ascertain the grounds upon which the acquittal proceeded and the views taken by the trying Magistrate of the evidence. Under section 43 of the Evidence Act it appears to me that that judgment can be used only to establish the fact that an acquittal has taken place as a fact in issue in the civil suit. I know of no provision of the Act which will justify the Civil Court in taking into consideration the grounds upon which that acquittal was based, and upon this point I am in agreement with *Gulabchand* v. *Chunilal*(2) and *Shubrati* v. *Shams-ud-din*(3) in the view that there is no such provision. The clear and straight issue in the present case, which must be decided before we can find absence of reasonable and probable cause, is whether the respondent was deliberately making a complaint which was in substance false when he alleged that the appellant took part in

(1) (1923) 11 A.I.C. 852.
(2) (1907) 9 Bom. L.R. 1134. (3) (1928) I.L.R. 50 All. 713.

the disturbance and fired the shot which injured the third witness for the defendant, and the appellant must establish the falsity of this complaint by disproving it before he can be entitled to damages.

[His Lordship discussed the evidence and proceeded as follows:—]

It is not as though the statements of these witnesses who speak to the first plaintiff's movements stood by themselves and can be estimated independently of the other features of the case. We have to bear in mind that a very serious charge involving the accusation of an attempt to murder had been made against the plaintiff and he evidently regarded it as so serious, whether it were true or false, that he took the extreme measure of evading arrest by flight. In such circumstances there must always be the greatest temptation to procure false evidence of absence from the scene, and experience unfortunately tends to show that apparently respectable persons can be induced to come forward for this purpose. The question I have asked myself in listening to this case is whether the evidence is of such unexceptionable quality as to render wholly unacceptable the explanation that its origin was due to this cause, and I can only say that I am not convinced that the answer must be in the negative. It is certainly singular that so much evidence should have been available to prove precisely what the plaintiff was doing at the exact time of the alleged occurrence; and another consideration is this, whether if he had available at hand such a considerable body of true evidence to prove his absence from the scene he would have persuaded himself to abscond from arrest and not have in some manner disclosed the fact that he was in a position to adduce this evidence. On this general ground I am satisfied that it would be quite unsafe to base a decree

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for damages for malicious prosecution upon the circumstances of a case of this nature and I would accordingly confirm the decree and dismiss the appeal with costs.

SUNDARAM CHETTI J.

SUNDARAM CHETTI J.—I agree with the judgment of my learned brother and I have nothing more to add.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Jackson.

1933, January 25.

KOPPULA KOTAYYA NAIDU AND TWO OTHERS (DEFENDANTS ONE TO THREE), APPELLANTS,

v.

CHITRAPU MAHALAKSHMAMMA (PLAINTIFF), RESPONDENT.*

Fraud—Benami transfer for effecting—Fraud carried out—Party to fraud, if can take advantage of fraud in defence and disclose the real nature of the transfer—Test to be applied—In pari delicto potior est conditio possidentis—*Scope of the maxim.*

A person who has conveyed property benami to another for the purpose of effecting a fraud on his creditors cannot, when the fraud has been effected, set up the benami character of the transaction by way of defence in a suit by the transferee for possession under the conveyance.

The above dictum laid down in *Kamayya* v. *Mamayya*, (1916) 32 M.L.J. 484, approved on the principle of *stare decicis*.

APPEAL against the decree of the District Court of Kistna at Masulipatam in Original Suit No. 4 of 1926.

P. Somasundaram for appellants.

Ch. Raghava Rao for respondent.

Cur. adv. vult.

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* Appeal No. 7 of 1927.