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is a substantive sentence of imprisonment. That being so, the Magistrate was not competent to sentence the accused to imprisonment in lieu of whipping for a period which was in excess of the maximum term of two years, for which, under section 32, he could order the imprisonment of the accused. This is clear from the second paragraph of section 395, which declares that under that section a Court is not authorised to inflict imprisonment for a term exceeding that which the said Court is competent to inflict. Section 33, which relates to the powers of a Magistrate to pass a sentence of imprisonment in default of fine, distinctly provides that the imprisonment awarded under that section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under section 32. The absence of a similar provision in section 395 and the provision of the second paragraph of that section, to which I have referred above, leave no room for doubt that the sentence of imprisonment awarded in lieu of whipping cannot be in addition to a substantive sentence of imprisonment for the maximum term which the Magistrate was competent to award. The sentence of additional imprisonment in lieu of whipping passed in this case was therefore clearly illegal and I set it aside. Ram Baran's bail will be discharged.

APPELLATE CIVIL.

1898
August 8.

Before Mr. Justice Banerji.

JADUBAR SINGH AND OTHERS (DEFENDANTS) *v.* SHEO SARAN SINGH (PLAINTIFF).*

Suit for malicious prosecution—Reasonable and probable cause—Evidence—Conviction of plaintiff by a criminal Court.

The fact that the plaintiff in a suit for damages for malicious prosecution has been convicted by a competent Court, although he may subsequently have been acquitted on appeal, is evidence, if unrebutted, of the strongest possible character against the plaintiff's necessary plea of want of reasonable

*Second Appeal No. 454 of 1897 from a decree of Maulvi Muhammad Ismail Khan, Additional Subordinate Judge of Ghazipur, dated the 27th March 1897, modifying a decree of Babu Chandi Prasad, Munsif of Rasra, dated the 28th January 1897.

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and probable cause. *Parimi Bapiraju* v. *Bellamkonda Chinna Venkayya* (1) followed.

THE plaintiff in this case was prosecuted in the criminal Court by the appellants on charges of riot and robbery. He was convicted by the Court of first instance and fined Rs. 10. That conviction was, however, set aside in revision by the High Court, on a reference by the Sessions Judge, who was of opinion that the charge had not been substantiated. The plaintiff, accordingly, instituted the present suit claiming damages to the amount of Rs. 600. The first Court gave him a decree for Rs. 175, which sum was, on appeal, cut down to Rs. 75. The lower appellate Court (Additional Subordinate Judge of Ghazipur) in its judgment said:—"Independently of that judgment (the judgment "of the Sessions Judge) there is a good deal of oral evidence "which satisfactorily proves the innocence of the plaintiff. The "parties are old enemies. The defendants had seen the plaintiff "and his other companions carrying away the crops, and identified them while beating them. Under the circumstances there "can be no question of reasonable and probable cause, as see the "authority noted in the margin. (Weekly Notes, 1889, p. 189). "Now such being my view as to the prosecution being false the "the plaintiff must be held entitled to get damages."

The defendants appealed to the High Court. An issue was referred to the lower appellate Court for a finding as to the existence or non-existence of reasonable and probable cause. On return of the finding of that Court, which was in favour of the plaintiff, the appeal again came up for hearing.

Messrs. *Amiruddin* and *Muhammad Ishaq Khan* for the appellants.

Mr. *E. A. Howard* for the respondent.

BANERJI, J.—The plaintiff respondent was prosecuted in the criminal Court by the appellants on charges of riot and robbery. He was convicted by the Court of first instance and sentenced to a fine of Rs. 10. That conviction was set aside by this Court on revision, the Sessions Judge who reported the case to this Court

(1) 3 Mad., H. C. Rep., 238.

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for revision having been of opinion that the charge had not been substantiated. The plaintiff thereupon instituted this suit claiming Rs. 600 as damages. The lower appellate Court has granted him a decree for Rs. 75. That Court refused to enter into the question of reasonable and probable cause. As it was essential that in a suit of this kind the plaintiff, in order to succeed, must prove not only that the charge was unfounded and was instituted through malice, but also that it was without reasonable and probable cause, I referred an issue to the lower appellate Court for a finding as to the existence or non-existence of reasonable and probable cause. That Court has returned a finding in favour of the plaintiff, to which exception has been taken by the appellants.

The question of the presence or absence of reasonable and probable cause is a mixed question, both of law and fact. In this case, as I have said above, a Magistrate believed in the truth of the complaint brought by the appellants. That alone was sufficient evidence of the existence of reasonable and probable cause. In the case of *Parimi Bapirazu* v. *Bellamkonda Chinna Venkayya* (1) the learned Judges observed :—"We do not know of any instance of a suit of this kind being successfully maintained after a conviction of the plaintiffs by the sentence of one competent tribunal." No doubt, as observed in the said judgment, the judgment of one competent Court against the plaintiff should not in every case be considered a sufficient answer to the suit. But the fact of a Court of competent jurisdiction having believed that the complaint is a true complaint is strong evidence to show that it was not brought without reasonable and probable cause. The conviction by the first Court was no doubt subsequently set aside; but on referring to the judgment of the learned Sessions Judge, dated the 11th of November 1895, which is to be found on the record of the connected suit No. 622, out of which Second Appeal No. 455 has been brought, it appears that he held the charge not to be established because he had doubts in his mind as to the truth of the complainant's story. He did not find that the complaint was an

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utterly false one. On the contrary, it appears from his judgment that a riot did take place that night, for which the complainant's party was convicted by the first Court along with the party of the present plaintiff. We have thus a judgment of a Court of first instance convicting the plaintiff and the judgment of an appellate Court which gave the plaintiff only the benefit of a doubt. Such being the case, it cannot be said that the complaint was totally without probable cause. I have not been referred to any instance in which, under similar circumstances, a decree for damages has been granted. In my judgment the suit ought to have been dismissed. I allow the appeal, and, setting aside the decree of the Courts below, dismiss the suit with costs in all the Courts. The objection under section 561 of the Code of Civil Procedure necessarily fails and is also dismissed.

Appeal decreed.

[The decision in this case was affirmed on appeal under section 10 of the Letters Patent on the 7th of January, 1899.—ED.]

1898
August 8.

Before Mr. Justice Knox and Mr. Justice Banerji.

THE DELHI AND LONDON BANK, LD. (PLAINTIFF) *v.* CHAUDHRI PARTAB BHASKAR AND OTHERS (DEFENDANTS).*

Act No. XIX of 1873 *(N.-W. P. Land Revenue Act), section* 184—*Sale for arrears of Government Revenue—Alleged benami purchase—Suit on a mortgage against the debtor and the certified purchasers alleged to be benamidars of the debtor—Civil Procedure Code, section* 317.

Per KNOX, J.—The operation of section 184 of Act No. XIX of 1873 is not confined to disputes between certified auction purchasers and persons who allege that such auction purchasers purchased on their behalf as their *benamidars*, but extends to cases where the dispute is between the certified purchasers and third persons who allege that the certified purchasers are not the real purchasers. In such a case the claimants cannot succeed without proof of fraud.

Mussumat Buhuns Kowur v. *Lalla Bukooree Lall* (1), *Sohun Lall* v. *Lala Gya Pershad*, (2), *Kanizak Sukina* v. *Monohur Das*, (3), *Chundra Kaminy Debea* v. *Ram Ruttun Pattuck*, (4) and *Tara Soondaree Debee* v. *Oojul Monee Dossee* (5) referred to.

* First appeal No. 72 of 1896, from a decree of Maulvi Anwar Husain Khan, Subordinate Judge of Farrukabad, dated the 26th November, 1895.

(1) 14 Moo. I. A., 496.
(2) N.-W. P. H. C. Rep., 1874, p. 265.
(3) I. L. R., 12 Calc., 204.
(4) I. L. R., 12 Calc., 302.
(5) 14 W. R., C. R., 111.