1902

SRI NATH SAHAI v. RAM RATAN LAL.

effect of the same High Court, and is not, so far as we are aware, in conflict with any ruling of this Court. It is contended, however, on the part of the respondent that, admitting that the lower Court was empowered to grant mesne profits in the execution proceedings, this fact did not preclude the plaintiff-respondent from bringing a suit to establish his claim to such profits. The answer to this contention is that, admitting that the plaintiff could have brought such suit, he did not do so in the first instance, but elected to put forward his claim to mesne profits in the execution proceedings, and when the claim was dismissed acquiesced in the dismissal of it and has not appealed. So long as the order of dismissal remains unreversed, it is a bar to any further proceeding in respect of the same claim. The matter has been decided by a Court competent to decide it, and has become in fact *res judicata*.

This, we think, furnishes a complete answer to this contention and also to the plaintiff's suit. For the foregoing reasons we are of opinion that the appeal should be allowed, and we accordingly allow it, set aside the decree of the lower Court, and dismiss the suit with costs in both Courts.

Appeal decreed.

1902

April 24.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

BHIM SEN (DEFENDANT) v. SITA RAM (PLAINTIFF).*

Suit for damages for malicious prosecution—"Malice"—"Reasonable and probable cause."

"Reasonable and probable cause" in connection with actions for damages for malicious prosecution may be defined to be an honest belief in the guilt of the accused, based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed. *Hicks* v. *Faulkner* (1) referred to.

"Malice" in a similar connection is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives. *Mitchell* v. *Jenkins* (2) referred to.

The mere absence of reasonable and probable cause does not of itself justify the conclusion as a matter of law that an act is malicious. It is not

* First Appeal No. 123 of 1901 from an order of Munshi Achal Behari, Additional Subordinate Judge of Aligarh, dated the 17th July 1901.

(1) (1878) L. R., 8 Q. B. D., 167. (2) (1833) 5 B. and Ad., 595.

1902

BHIM SEN v. SITA RAM.

identical with malice, but malice may, having regard to the circumstances of the case, be inferred from it. *Gajpathi Rau* v. *Narsing Rau Garu* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Sital Prasad Ghosh*, for the appellant.

The Hon'ble Mr. *Conlan*, for the respondent.

STANLEY, C.J. and BURKITT, J.—This is an appeal by the defendant from an order of the Additional Subordinate Judge of Aligarh, reversing the decision of the Munsif upon certain questions of fact, and remanding the case for the trial of the remaining issue in the case under section 562 of the Code of Civil Procedure. The suit was brought to recover damages for alleged malicious prosecution. It appears that the defendant Bhim Sen lodged a complaint against the plaintiff, Sita Ram, of an offence under section 215 of the Indian Penal Code, in the Court of the Magistrate of Bulandshahr, the charge being that the plaintiff stole cattle, and then restored the cattle to the owners on receipt of rewards. The complaint was heard and dismissed on the 21st of December, 1900. Thereupon, on the 21st of January, 1901, the present suit was instituted. In his plaint the plaintiff alleges that there was enmity between him and the defendant arising out of a dispute about a plot of land which was formerly under the cultivation of the father of the defendant, and was then in the possession of the plaintiff and his brothers, and that the false complaint was lodged against him in consequence of this enmity, that the charge was malicious and made without reasonable or probable cause. In his written statement the defendant denied that there was any enmity existing between him and the plaintiff, and he alleges that the charge made against the plaintiff was well-founded. The third paragraph of the written statement of the defendant runs as follows:—"The plaintiff is a cattle-thief. He receives a share in stolen cattle. The criminal case was not groundless. On the other hand, it was a *bonâ fide* case, and was instituted for public good."

In the Court of first instance (the Munsif) found that the defendant did not institute the prosecution of the plaintiff, but

(1) (1871) 6 Mad., H. C. Rep., 85.

merely laid an information of certain facts before the District Magistrate, and that the prosecution was therefore not instituted by the defendant. No attempt has been made before us to support this portion of the judgment. It is clearly erroneous. The Munsif also found that there was reasonable and probable cause for the prosecution, if there was a prosecution by the defendant, and that malice had not been proved, and accordingly he dismissed the suit. On appeal the Additional Subordinate Judge reversed the finding of the lower Court, holding upon the evidence that the defendant did prosecute the plaintiff, and that he did so maliciously and without reasonable or probable cause.

It has not been contended before us, as we have said, that the finding of the lower appellate Court that the defendant did prosecute the plaintiff is wrong. The appellant's learned pleader confined his argument to two grounds of appeal, namely, that the plaintiff did not prove, as he was bound to do, the want of reasonable and probable cause for the prosecution, and also malice on the part of the defendant. The Additional Subordinate Judge found that "there was no evidence whatever to show that the plaintiff restored to the owners the stolen cattle when they paid for them," that the allegation of the defendant that the stolen cattle had been restored to their owners by the plaintiff in his presence was absolutely false. He finds, in fact, that the charge was false, and that it was false to the knowledge of the defendant inasmuch as he purported to make it of his own personal knowledge, and not from information obtained from others, or from inferences reasonably drawn from matters which were brought under his notice. In the criminal Court the defendant, he says, admitted that he only had heard of the plaintiff's bad reputation, and that the theft of the cattle and their restoration had not taken place before him; while at the trial the defendant swore that the cattle had been restored to two persons in his presence. It is clear from his judgment that the Additional Subordinate Judge found, not merely that the charge brought against the plaintiff was a false charge, but that it was false to the knowledge of the defendant. Under these circumstances he held that there was no reasonable or probable cause for the prosecution, and from the absence of such reasonable and probable cause, he inferred malice

1902

BHIM SEN v. SITA RAM.

on the part of the defendant. In the course of his judgment the Subordinate Judge makes use of some loose and ill-considered language, which has no doubt led to this appeal. For example, he says, that the defendant failed to prove that the charge was true. "Want of reasonable and probable cause should therefore be presumed, and malice will also be inferred from the fact that the charge was recklessly made."

Read independently of the context this statement of the law is clearly incorrect. It is not correct to say that the want of reasonable and probable cause should be presumed from the failure on the part of a defendant to prove that a charge was true. No presumption of the absence of probable cause necessarily arises from failure to prove the truth of the charge. Reading this passage, however, in connection with the earlier portion of the judgment, it becomes apparent that what the Judge intended to convey was that where a false charge is made, and such charge is false to the knowledge of the party making it, the necessary inference is that there was no reasonable or probable cause for the making of the charge. The phrase "reasonable and probable cause" has been elaborately defined in the case of *Hicks* v. *Faulkner* (1) by Hawkins, J., in the following terms:—"Now I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed. There must be—(1) an honest belief of the accuser in the guilt of the accused; (2) such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; (3) such secondly mentioned belief must be based upon reasonable grounds; by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe; (4) the circumstances so believed and relied on by the accuser must be such as would amount to reasonable ground for belief in the guilt of the accused."

(1) (1878) L. R., 8 Q. B. D., 167.

The defendant in the present case could not have had any belief, much less an honest belief, in the guilt of the plaintiff, according to the finding of the lower appellate Court, for there was no foundation for the charge so soon as the allegation of the defendant that he was present when the plaintiff restored to the owners the stolen cattle was disbelieved, and his evidence was discredited. The basis of the charge was found to have, in fact, no existence, and this to the knowledge of the defendant. The Court, therefore, rightly found that there was no reasonable or probable cause for the prosecution.

Now the mere absence of reasonable and probable cause does not of itself justify the conclusion, as a matter of law, that an act is malicious. It is not identical with malice; but malice may, having regard to the circumstances of the case, be inferred from it. Whether malice should be inferred from the want of reasonable and probable cause or not, is a question which depends upon the circumstances of each case. In most cases of the kind the whole question will turn, as was said by the Madras High Court in *Gajpathi Rau* v. *Narsingh Rau Garu* (1), "on the cogency of the inference to be derived from the absence of reasonable and probable cause, the best test for which is partly abstract and partly concrete. Was it reasonable or probable cause for any discreet man? Was it so to the doer of the act? If these questions are answered in the negative, the inference of malice would appear to be irresistible." Now malice, as used in this cause of action, is not to be considered in the sense of spite or hatred, but in its wider sense as denoting any wrong or indirect motive. It can be proved by showing what the actual wrongful motive was, or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some improper or indirect motive to the prosecutor. Park, J., in the well-known case of *Mitchell* v. *Jenkins* (2) thus defines it:—"The term 'malice' in this form of action is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives." Whether or not the motive for the prosecution which has been attributed by the plaintiff to the defendant in this case

(1) (1871) 6 Mad., H. C. Rep., 85. (2) (1833) 5 B. and A. D., 595.

1902

BHIM SEN v. SITA RAM.

was the motive which really actuated the defendant to bring a false charge, the learned Subordinate Judge was, in our opinion, justified in the circumstances of this case in inferring malice. He says in his judgment that the charge was recklessly made, and he finds that it was made falsely and without any foundation of truth. Under these circumstances we are of opinion that there are no grounds for this appeal on the merits.

The Subordinate Judge has, however, we think improperly, remanded the case to the Court of first instance for the trial of the remaining issues in the suit. The only issue which was left undetermined by the lower Court was the question of damages. This question the Subordinate Judge should have himself decided, and not have remanded the case to the Munsif. We accordingly affirm the judgment of the lower appellate Court on the merits with costs; but while we reject the appeal on the merits, we set aside the order of remand, and direct the lower appellate Court to restore the case to its original number in the file of pending appeals, and proceed to try the issue as to the quantum of damages to which the plaintiff is entitled and give a decree accordingly. The Subordinate Judge will of course be at liberty (should he think it necessary) to remit an issue for trial under section 566 of the Code of Civil Procedure to the Court of first instance.

Appeal decreed.

1902
April 30.

Before Mr. Justice Banerji and Mr. Justice Aikman.

ISHRI *alias* HATIM ALI (DEFENDANT) v. MUHAMMAD HADI (PLAINTIFF).*

Act No. XV of 1877 *(Indian Limitation Act), sch. ii, arts.* 23, 24, 25, 36—*Limitation—Suit to recover damages on account of injury caused by a false report made to the Police—Suit for damages for malicious prosecution.*

The defendant laid information at a Police station against the plaintiff, alleging that the plaintiff and several other persons entered the female apartments of the defendant, broke open locks, plundered his goods, and caused hurt to his wife. Thereupon an inquiry was made by the Police, with the result that the information was found to be false. The defendant was prosecuted under section 182 of the Indian Penal Code, convicted and sentenced to six

* First Appeal No. 211 of 1899, from a decree of Lala Shankar Lal, District Judge of Mirzapur, dated the 11th September 1899.