

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

SRI NATH SAHAI (DEFENDANT) *v.* RAM RATAN LAL (PLAINTIFF).*

Civil Procedure Code, section 583—Decree reversed on appeal after possession obtained thereunder—Application for possession and mesne profits—Disallowance of application—Separate suit for mesne profits.

S. N. obtained a decree for foreclosure on a mortgage against R. R. Against this decree R. R. appealed to the High Court; but pending the appeal S. N. obtained an order absolute for foreclosure, and got possession of the mortgaged property. Subsequently the High Court set aside the order for foreclosure and modified the decree of the first Court. R. R. paid up the amount found by the decree of the High Court to be due by him. He then applied to the Court for restoration of possession of the mortgaged property under section 583 of the Code of Civil Procedure, and for mesne profits for the time during which he had been out of possession. His application for mesne profits was rejected, and he thereupon filed a separate suit for mesne profits.

Held that such a suit would not lie, the plaintiff not having appealed from the order refusing his application for mesne profits. *Raja Singh v. Koolday Singh* (1) referred to.

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

Pandit *Moti Lal Nehru* and *Babu Durga Charan Banerji*, for the appellants.

Munshi *Gobind Prasad*, for the respondent.

STANLEY, C.J. and BURKITT, J.—This is an appeal from a decree of the Additional Subordinate Judge of Ghazipur allowing the plaintiff's claim for mesne profits.

The circumstances out of which this appeal has arisen are shortly as follows:—The plaintiff Ram Ratan Lal on the 6th of June, 1884, executed in favour of one Bindeshri Prasad a mortgage of his share in certain property to secure the principal sum of Rs. 4,000 and interest. Bindeshri Prasad subsequently, in the year 1887, transferred his interest in this mortgage to Mahadeo Dat Singh, the father of the defendant Sri Nath Sahai. On his father's death the defendant Sri Nath Sahai brought a suit on foot of his mortgage, and obtained a decree on the 21st of June, 1892. On the 12th of November, 1892, the plaintiff filed an appeal from this decree to the High Court, and whilst this

1902
April 24.

* First Appeal No. 154 of 1899 from a decree of Munshi Achal Behari, Officiating Subordinate Judge of Ghazipur, dated the 23rd June, 1899.

(1) (1894) I. L. R., 21 Cal., 989.

1902

SRI NATH
SAHAI
v.
RAM RATAN
LAL.

appeal was pending the defendant, on the 6th of February, 1893, obtained an absolute order for foreclosure under section 87 of the Transfer of Property Act, and on the 2nd of March, 1893, obtained possession of the mortgaged property. The High Court set aside the absolute order of the 6th February, 1893, and modified the decree of the 21st of June, 1892, and the plaintiff thereupon deposited in Court the amount found to be due on foot of the mortgage, except a small sum in respect of interest, which was subsequently paid. On the 16th of February, 1895, the plaintiff applied to the Court for restoration of possession of the property under section 583, Civil Procedure Code, and also claimed mesne profits for the time during which the defendant held possession. The Subordinate Judge held that the plaintiff could not in execution proceedings recover mesne profits because the decree did not provide for mesne profits; that the proper course for the judgment-debtor was to institute a suit for mesne profits, and he dismissed the plaintiff's claim in respect of mesne profits. It is now admitted that the decision of the Subordinate Judge was wrong, and that he had power under section 583 of the Code of Civil Procedure to make an order for mesne profits. The plaintiff, however, acquiesced in the decision and instituted the present suit, with the result that by the decree of the Additional Subordinate Judge his claim has been in part allowed. Against this decree the defendant has appealed to this Court on the ground, among others, that the respondent having claimed mesne profits in his application for restitution, and the Subordinate Judge having disallowed the claim, the remedy of the respondent was an appeal against the order of the Subordinate Judge under section 244 of the Code of Civil Procedure, and that the present suit was not maintainable.

We are of opinion that the contention of the appellant is well-founded. The decree of reversal passed by the High Court on the 21st of June, 1894, carried with it the right of the defendant in the suit to restitution of all that had been taken under the erroneous decree, and authorized the lower Court to cause restitution to be made accordingly. This was so held in the case of *Raja Singh v. Kooldip Singh* (1), which followed other decisions to the like

(1) (1894) I. L. R., 21 Cal., 989.

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

SRI NATH
SAHAI
v.
RAM RATAN
DAL.

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

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

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

1902

April 24.

"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 Achaal 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., 695.