1908

KALYAN PRASAD v. MATHURA PRASAD.

that the Sarai is joint property. No evidence is given to contradict that of Raghunath Prasad and Kalka Prasad as to the persons amongst whom the share of Partab Mal in the Sarai is distributed.

It was argued by Mr. Ross, on behalf of the defendants, that the fair conclusion to be drawn from the evidence was that Maharaj Bahadur was either not born in 1872, or was then of such tender years that he could not have drawn up the first pedigree, as deposed to by Kalka Prasad. No doubt there is much force in this argument, but, even if it prevailed, there remains the second pedigree, that of 1892, corroborated as it has been in the manner pointed out.

Their Lordships think that it is impossible to put aside all this evidence, as was done by the Court of the Judicial Commissioner. They are, therefore, of opinion that the conclusion at which the Subordinate Judge arrived is that to which the evidence properly admissible, on the whole, most reasonably leads, and that the decision of the former tribunal was erroneous and that its decrees should therefore be reversed with costs, and this appeal allowed. They will humbly advise His Majesty accordingly. The respondents must pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellants:—*Young, Jackson, Beard and King.*

Solicitors for the 1st and 2nd respondents:—*T. L. Wilson & Co.*

J. V. W.

GAYA PRASAD (PLAINTIFF) *v.* BHAGAT SINGH (DEFENDANT.)*

P. C. 1908 *June* 17, *July* 31.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Malicious prosecution—Information given to police—Prosecution by police after investigation—Acquittal of accused—Liability of informant where information is found to be false—"Prosecutor" in criminal case—Malice—Criminal Procedure Code, section 495.

It is not a principle of universal application that if the police or Magistrate act on information given by a private individual without a formal complaint or application for process the Crown and not the individual becomes the prosecutor.

Present:—Lord ROBERTSON, Lord ATKINSON, Lord COLLINS, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

1908

AYA PRASAD v. BHAGAT SINGH.

Narasinga Row v. *Muthaya Pillai* (1) distinguished.

The answer to the question who is the "prosecutor" must depend upon the whole circumstances of the case. The mere setting the law in motion is not the criterion; the conduct of the complainant before and after making the charge must also be taken into consideration. Nor is it enough to say the prosecution was instituted and conducted by the police; that is again a question of fact. Theoretically all prosecutions are conducted, in the name and in behalf of the Crown, but in practice this duty is often left in the hands of the person immediately aggrieved by the offence, who, *pro hac vice*, represents the Crown. In India under section 495 of the Criminal Procedure Code (Act V of 1898) a private person may be allowed to conduct a prosecution, and "any person conducting it may do so personally or by pleader"; and where it is permitted this is obviously an element to be taken into consideration in judging who is the prosecutor and what are his means of information and motives.

The foundation of the action for malicious prosecution is malice, which may be shown at any time in the course of the inquiry.

Fitzjohn v. *Mackinder* (2) referred to.

Where the defendants, though their names did not appear on the face of the proceedings, except as witnesses, were directly responsible for a charge of rioting being made against the plaintiff, had produced false witnesses to support the charge at the investigation by the police; had taken the principal part in the conduct of the case before the police and in the Magistrate's Court; had instructed the counsel who appeared for the prosecution at the trial that the plaintiff "had joined the riot," and had done all they could to procure the conviction of the plaintiff, who was acquitted, being found not to have been present at the rioting.

Held that they were rightly found liable for damages in an action for malicious prosecution.

APPEAL from a decree (14th December 1905) of the Court of the Judicial Commissioner of Oudh, which reversed a decree (31st July 1905) of the Subordinate Judge of Bahraich, who had decreed the appellant's suit.

The principal question for determination in this appeal was whether on the facts found, the respondents were liable in law to an action for damages for malicious prosecution.

The facts were as follows:—Between the two villages of Shukulpurwa in the Kapurthala estate and Keora in the Rampur Mathura estate the river Ghoora flowed. The respondent Sardar Bhagat Singh was the munsarim, and the respondent Imam-ud-din Shah was the kanungo of the Boundi division of the Kapurthala estate in which the village of Shukulpurwa was

(1) (1902) I. L. R., 26 Mad., 362.

(2) (1861) 9 C. B. N. S., 505 (522, 531).

situate. The appellant in 1902 was naib or manager of the Rampur Mathura estate.

On 28th October 1902 Imam-ud-din Shah reported to the Inspector of Police at Boundi that on that day 700 or 800 men of the Rampur Mathura estate had entered the village of Shukulpurwa, cut and carried away the crops on certain lands, and stolen other crops and property belonging to the tenants.

On 29th October the Inspector made an order for Bhagat Singh to inquire and report. On 30th October 1902 Bhagat Singh submitted a report upon which orders were passed that proceedings should be taken under section 145 of the Code of Criminal Procedure.

On 2nd November 1902 an application was made on behalf of the Kapurthala estate under section 107 of the Criminal Procedure Code to the Deputy Collector of Bahraich who sent the application for inquiry by the Inspector of Police at Fakhrpur. Certain persons who were named in the petition were charged, and the appellant's name was not mentioned. Before the police Bhagat Singh and Imam-ud-din conducted the prosecution. They then procured evidence that a riot was committed and that the appellant had personally taken part in the riot. By producing this evidence they induced the Inspector of Police to send the appellant and the other accused persons for trial before the Deputy Collector of Bahraich. The prosecution was conducted by a barrister instructed by Bhagat Singh and Imam-ud-din Shah, and pressed under their instructions against the appellant. These proceedings came to an end by an order made by the Magistrate on 15th July 1903, acquitting the appellant and all the other accused persons, and expressing the opinion that the charges had been concocted by the respondents.

On the 14th July 1904 the appellant brought the suit out of which this appeal arose against Bhagat Singh and Imam-ud-din Shah claiming damages Rs. 7,000 from them for malicious prosecution.

The defence was that the defendants did not institute any criminal prosecution, but were merely witnesses for the prosecution: that as witnesses they were justified in making the

1908

GAYA PRASAD v. BHAGAT SINGH.

statements they did in the Criminal Court, and no suit could legally be brought against them; and that the prosecution was not malicious nor without reasonable and probable cuse, nor did it arise from any illegitimate motive.

The most material issue was the first "was any report made to the police, or any complaint lodged by the defendants against the plaintiff, and did the defendants or either of them prosecute him on the charge of riot?" Others raised the question of whether there was malice, or want of reasonable and probable cause.

On the evidence the Subordinate Judge held that there was no doubt as to the two defendants being the chief cause of the plaintiff's having been accused of rioting; and although their names did not appear on the face of the criminal proceedings, yet they were in fact the prosecutors, and had concocted and fabricated false evidence to get the plaintiff charged with rioting; that there was no reasonable and probable cause for the prosecution and that the defendants had acted maliciously. A decree was accordingly made in favour of the plaintiff, for Rs. 6,082-8 and costs of the suit.

On appeal by the defendants to the Judicial Commissioner of Oudh that Court (W. F. WELLS, 2ad Additional Judicial Commissioner) held, on the authority of the cases of *Narasinga Row* v. *Muthaya Pillai* (1), and *Dudhnath Kandu* v. *Mathura Prasad* (2) that no one but a person who has made a formal complaint or application for process to a Court could be sued for damages for malicious prosecution, and in the result he dismissed the suit, but without costs. The material portion of his judgment was as follows :—

"It has been urged in this Court that the prosecution was a police prosecution, and that though the defendants may have been in Court assisting counsel, and though some of his fees may have been paid through them, yet the fees were paid actually by the estate and the defendants were merely acting under the instructions of the superior officers in the estate, which therefore, must be considered to be the real prosecutor.

"Now it is admitted that no formal complaint was made to a Court against the plaintiff, and it is alleged that he was sent for trial under section 147, Indian Penal Code, on information given to the police by the defendants, who produced evidence before the police and took an active part in the case by instructing Counsel in the Courts.

(1) (1902) I. L. R., 26 Mad, 362. (2) (1902) I L. R. 24, All. 8

"The first question to the considered is, whether, if this allegation be true, the defendants are liable in this action.

"The learned counsel for the defendants has relied greatly on the case of *Narasinga Row* v. *Muthaya Pillai* (1), in which it was held that the only person who can be sued in an action for malicious prosecution is the person who prosecutes. The defendant in that case gave information to the police of an offence cognizable by them, and the police after investigation thought fit to prosecute and the plaintiff was acquitted. It was held that, though the defendant may have instituted the criminal proceedings before the police, he certainly did not prosecute the plaintiff and was not responsible for the act of the police. The learned Judges appear to have followed another unreported decision of the same Court. It does not appear from the decision reported if the defendant in that case brought witnesses before the police or if he afterwards took an active part in the conduct of the case.

"The learned counsel for the defendants has relied also on the case of *Rai Jang Bahadur* v. *Rai Gudor Sahai* (2). In that case the plaintiffs were said to have been prosecuted in the Criminal Courts in consequence of information given to the police. It does not appear definitely if the police sent the accused up for trial, but it is clear that in addition to the information given to the police a complaint was filed in the Criminal Courts by two of the defendants' servants, which did not occur in the present case; and this would have probably prevented the learned Judges adopting the view of the Madras High Court, even if the plaintiff was sent up to trial by the police. They held that the defendant having admittedly paid the costs of the prosecution, must be held liable; and the learned counsel for the defendants has therefore argued that the Maharaja of Kapurthala, and not his clients should be held liable. I should not however be disposed to accept this view in the present case, having regard to its peculiar circumstances, which differ entirely from those of *Rai Jang Bahadur* v. *Rai Gudor Sahai*.

"I was also referred to the case of *Dudhnath Kandu* v. *Mathura Prasad* (3). In that case the plaintiff was prosecuted by a Magistrate on information given by the defendant, who had, however, not mentioned him in the formal complaint. Here too, it does not appear what part the defendant took in the subsequent proceedings.

"In the case of *Musa Yakub Mody* v. *Manilal Ajitrai* (4), the defendant had started the prosecution by a complaint laid in court; proceedings were taken by Government for extradition, and the plea was set up that the defendant was not liable in respect of those proceedings because of the action of Government. This plea was overruled, as the defendant had actually conducted the case for extradition; and moreover he had clearly started the prosecution by a formal complaint. In that judgment there is a reference to the case of *Fitzjohn* v. *Mackinder* (5), in which it was held that a person was responsible for starting or continuing a prosecution even when he had been ordered by a Court to prosecute. But in that case the Court order was

(1) (1902) I. L. R., 26 Mad., 362.
(2) (1897) 1 C. W. N., 537.
(3) (1902) I. L. R., 24 All. 317.
(4) (1904) I. L. R., 29 Bom., 368.
(5) (1861) 9 C. B. N. S., 505 : 30 L. J. C. P. 156.

1908

GAYA PRASAD v. BHAGAT SINGH.

the result of perjury on the part of the defendant himself. No authority has been quoted to me which really conflicts with the view taken by the Madras High Court, and the Allahabad decision to some extent supports their view.

"The principle followed appears to be this. If the police or magistracy decide to act on information given by a private individual without a formal complaint or application for process, the Crown becomes the prosecutor and not the individual. It may be said that if any person is aggrieved thereby, his remedy would lie in a prosecution under section 182 of the Penal Code, or for perjury, both of which would require sanction under section 195 of the Criminal Procedure Code, and so there can be no action against the individual for malicious prosecution. But a false charge made in a complaint would be punishable under section 211, Penal Code, and prosecution in respect of it would also require sanction under section 195, Criminal Procedure Code, yet it would undoubtedly afford a ground for an action for malicious prosecution. It is difficult to see why a person who has had to defend himself against a serious false charge which has been set on foot by another, should have a civil remedy when the charge is made in one way and not when the charge is made in another way. In a country where the police have a doubtful reputation, deserved or not, it seems unreasonable that a man should be able to secure himself against a civil action simply because his charge is supported by the *imprimatur* of a police officer, to whom he may have given a gratification. But although I entertain these doubts, I hesitate to differ from the views of several of the learned Judges of the Madras and Allahabad High Courts, who appear to hold that in order to afford ground for an action for malicious prosecution there must be some formal complaint or application for process to a Court.

"It is contended that the defendants adduced evidence before the police. But if the fact that the police took up the case affords any privilege to the defendants in respect of the information they gave, it would also, I think, protect them in the matter of the production of evidence. In the Madras case I can hardly doubt that the complainant gave assistance to the police in the matter of procuring evidence.

"It is further urged that the defendants having assisted counsel for the prosecution in Court makes them liable as prosecutors. But I am unable to accept this view. The case was one of considerable importance to the Kapurthala estate and the subordinate officials who were acquainted with the circumstances, would naturally be directed to look after the case, and see that what was necessary was elicited from the witnesses. If no liability attaches to the defendants from the information said to have been given to the police, I do not think any would, under the circumstances, attach from what they did subsequently in Court.

"Holding the view set forth above, I do not think it necessary to enter into details of the facts and determine whether or not the police acted on information given by the defendants and whether the charge of rioting was false or not.

"But I may say that having studied the documentary evidence to which my attention was drawn and read most of the voluminous oral evidence

recorded by the Subordinate Judge, I am disposed to believe that the Sub-Inspector did institute a charge under section 147, at the instigation of Bhagat Singh and not of his own motion; that the charge was found false by the Magistrate who tried the case; and that the evidence on the record produced by the defendants is not such as to incline me to believe it to have been proved. The evidence of Bhagat Singh was anything but straightforward.

"Under these circumstances, though I must allow the appeal on the legal grounds set forth above, I consider that the parties should pay their own costs."

From that decision special leave to appeal was granted to the appellant by two Judges of the Judicial Commissioner's Court (L. G. EVANS and E. CHAMIER) under section 595, clause (*c*) of the Civil Procedure Code, on the ground of the importance of the question of law raised, and on the ground that the question of law had been wrongly decided, and that the decision was opposed to the ruling of the Bombay High Court in *Musa Yakub Mody* v. *Manilal Ajitrai* (1).

On this appeal, which was heard *ex parte*, *De Gruyther, K. C.*, and *S. A. Kyffin* for the appellant contended that the finding of law by the appellate Court that no action would lie for damages for malicious prosecution against any person who has not made a formal complaint for process to a Court was erroneous. The Court came to that finding on the authority of the cases of *Narasinga Row* v. *Muthaya Pillai* (2); and *Dudhnath Kandu* v. *Mathura Prasad* (3), which he considered he was bound to follow, though his real opinion of the facts of the case (see the conclusion of his judgment) was substantially the same as that of the Subordinate Judge, who said that there was no doubt as to the two defendants being the chief cause of the appellant's having been accused of rioting, and that, although their names did not appear on the face of the proceedings, yet they were in fact the prosecutors and had concocted and fabricated false evidence to get the appellant charged with that offence. It was submitted that the liability of the defendants in each case should be determined on the facts. Where, as here, the defendants not only gave false information to the police on which the charge under section 147 of the Penal Code was made against the appellant, but took an active part in the conduct of

(1) (1904) I. L. R., 29 Bom., 368. (2) (1902) I. L. R., 26 Mad., 362.
(3) (1861) 9 C. B. N. S., 505, 22.

1908

GAYA PRASAD v. BHAGAT SINGH.

the proceedings in the courts and instructed counsel to press the charge against him, all the time knowing that the appellant was innocent, they should not be allowed to evade responsibility merely because they did not initiate the complaint in court. Reference was made to *Fitzjohn* v. *Mackinder* (1); Criminal Procedure Code (Act V of 1898), section 4 as to the definition of "cognizable offence," section 145 as to disputes likely to cause a breach of the peace, section 156 as to the investigation by police officers of a "cognizable offence," schedule II "offence under section 147 of the Penal Code (Act XLV of 1860)," section 190 as to "conditions requisite for initiation of proceedings," and section 495 as to "permission to conduct prosecution." The decision of the Subordinate Judge was correct and should be restored. The two Judges of the Judicial Commissioner's Court who granted special leave to appeal appear to have doubted the correctness of the judgment now under appeal.

1908, *July* 31*st*:—The judgment of their Lordships was delivered by SIR ANDREW SCOBLE:—

This is an action for damages for malicious prosecution. The parties are officials of adjoining estates, the plaintiff being manager of the Rampur Mathura estate, and the defendants being respectively munsarim and kanungo of the Boundi division of the Kapurthala estate. The case arose out of a dispute regarding the ownership of some alluvial land lying between the two estates; and the charge was that the plaintiff had taken part in a riot connected with this dispute. The case was sent for trial on the 22nd November 1902, but was not disposed of until the 15th July 1903, when the Magistrate dismissed it, holding that "there was no riot at all," and adding:

> "I consider Kapurthala estate entirely to blame in this case, and hold that Sardar Bhagat Singh (assisted by Imam-ud-din Shah) is responsible for concocting up these riot and theft cases with all the minor complaints."

The plaintiff thereupon brought this action, claiming Rs. 7,000 damages. The Subordinate Judge held that "it was found during the trial of the criminal proceedings, and proved before me by the evidence in the case, that the two defendants have concocted and produced false evidence to get the plaintiff charged with the crime," and he gave the plaintiff a decree for

(1) (1861) 9 C. B., N. S., 505.

Rs. 6,082-8 damages and the costs of the suit. The Judicial Commissioner on appeal, on the authority of the case of *Narasinga Row* v. *Muthaya Pillai* (1) dismissed the suit, holding that "if the police or magistracy decide to act on information given by a private individual without a formal complaint or application for process, the Crown becomes the prosecutor and not the individual;" but he added :

"I may say that, having studied the documentary evidence to which my attention was drawn, and read most of the voluminous oral evidence recorded by the Subordinate Judge, I am disposed to believe that the Sub-Inspector did institute a charge under section 147 at the instigation of Bhagat Singh and not of his own motion; that the charge was found false by the Magistrate who tried the case; and that the evidence on the record produced by the appellants is not such as to incline me to believe it to have been proved."

It will be convenient to refer at once to the decision of the Madras High Court (*ubi supra*) which the learned Judicial Commissioner appears to have followed with some reluctance. The judgment is in these terms :—

"The only person who can be sued in an action for malicious prosecution is the person who prosecutes. In this case, though the first defendant may have instituted criminal proceedings before the police, he certainly did not prosecute the plaintiff. He merely gave information to the police, and the police, after investigation, appear to have thought fit to prosecute the plaintiff. The defendant is not responsible for their act, and no action lies against him for malicious prosecution."

The principle here laid down is sound enough if properly understood, and its application to the particular case was no doubt justified; but in the opinion of their Lordships, it is not of universal application. In India the police have special powers in regard to the investigation of criminal charges, and it depends very much on the result of their investigation whether or not further proceedings are taken against the person accused. If, therefore, a complainant does not go beyond giving what he believes to be correct information to the police, and the police without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge is false to the knowledge of the complainant; if he misleads the police by bringing suborned

(1) (1902) I. L. R., 26 Mad., 362.

1908

GAYA PRASAD v. BHAGAT SINGH.

witnesses to support it; if he influences the police to assist him in sending an innocent man for trial before the magistrate —it would be equally improper to allow him to escape liability because the prosecution has not, technically, been conducted by him. The question in all cases of this kind must be—Who was the prosecutor?—and the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion is not the criterion; the conduct of the complainant before and after making the charge, must also be taken into consideration. Nor is it enough to say, the prosecution was instituted and conducted by the police. That again is a question of fact. Theoretically all prosecutions are conducted in the name and on behalf of the Crown, but in practice this duty is often left in the hands of the person immediately aggrieved by the offence, who *pro hac vice* represents the Crown. In India a private person may be allowed to conduct a prosecution under section 495 of the Criminal Procedure Code, which provides that "any magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person other than an officer of police . . . . Any person conducting the prosecution may do so personally or by a pleader." When this is permitted, it is obviously an element to be taken into consideration in judging who is the prosecutor and what are his means of information and motives. The foundation of the action is malice, and malice may be shown at any time in the course of the inquiry. As Bramwell, B. observes in *Fitzjohn* v. *Mackinder* (1):—

"This action is not for damages in respect of the preferring of the indictment only, but also for the residue of the prosecution, and the damage consequent upon it. . . . Where an action is maintainable in respect of the whole prosecution, including the preferring of the bill, it is in part maintainable for the subsequent stages and conduct of it."

And in the same case, Cockburn, C.J., says (at p. 531):

"A prosecution, though in the outset not malicious, as having been undertaken at the dictation of a Judge or Magistrate, or, if spontaneously undertaken, from having been commenced under a *bonâ fide* belief in the guilt of the accused, may nevertheless become malicious in any of the stages through which it has to pass, if the prosecutor, having acquired positive knowledge of the innocence of the accused, perseveres *malo animo* in the

(1) (1861) 9 C. B., N. S., 505; at p. 522.

prosecution, with the intention of procuring *per nefas* a conviction of the accused."

Turning to the facts of the present case, it appears that on the 2nd November 1902 an application was made to the Deputy Collector of Bahraich for an investigation by the police of a charge of unlawful assembly against eight persons, of whom the plaintiff was not one. The investigation was entrusted to Izhar-ul-haq, a Sub-Inspector of Police, who says:

"I summoned the plaintiff because Bhagat Singh gave me a list of accused persons containing plaintiff's name. . . . When Bhagat Singh produced that list, I said to him that the complaint filed in Court did not contain Gaya Prasad's name. How was it that the defendant had mentioned his name . . ? And then Bhagat Singh [said] that the chief cause of riot was the plaintiff; so he gave the plaintiff's name in the list, and that he would be summoned."

This makes it clear that Bhagat Singh was directly responsible for any charge at all being made against the plaintiff. Imam-ud-din was the person who made the original report of an unlawful assembly, upon which the prosecution for riot was ultimately based, and the two men appear to have acted together throughout the subsequent proceedings. They took the principal part in the conduct of the case both before the police and in the Magistrate's Court, and the learned counsel who appeared for the prosecution at the trial before the Magistrate expressly says that they instructed him that Gaya Prasad "joined the riot." As already mentioned, the Magistrate found that there was no riot at all, and that on the day on which it was alleged to have occurred, the appellant was ill at Lucknow. The charge was a false one to the knowledge of the respondents, and they must abide the consequences of their misconduct.

In granting leave to appeal to his Majesty in Council, the learned Judicial Commissioners say:

"It is difficult to overestimate the importance of the question raised in this case, namely, whether a person may be sued for damages for malicious prosecution who makes a false report which results in a prosecution, or who instigates the police to send persons up for trial under section 170 of the Code of Criminal Procedure, or who conducts the case against those persons when sent up for trial."

And they add:

1908

GAYA PRASAD v. BHAGAT SINGH.

"All these are circumstances which occur perhaps daily in every district in India, and having regard to the immense number of false charges made, (we) think it most desirable that there should be no doubt as to the law on the subject."

In the opinion of their Lordships, it would be a scandal if the remedy provided by this form of action were not available to innocent persons aggrieved by such unfounded charges, and they will humbly advise His Majesty that the appeal ought to be allowed and the decree of the Judicial Commissioner set aside, with costs, and that of the Subordinate Judge confirmed. The respondents must pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant:—*Sanderson, Adkin, Lee and Eddis.*

J. V. W.

1908
June 5.

APPELLATE CIVIL.

Before Mr. Justice Aikman and Mr. Justice Karamat Husain.

JUMAI KANJAR (DECREE-HOLDER) *v.* ABDUL KARIM KHAN (JUDGMENT-DEBTOR).*

Execution of decree—Limitation—Act No. XV of 1877 *(Indian Limitation Act), schedule II, article* 179 (5)*—Civil Procedure Code, section* 248*—Date of issuing notice.*

Held that the expression "the date of issuing notice under the Code of Civil Procedure, section 248," as used in article 179 (5) of the second schedule to the Indian Limitation Act, 1877, means the date upon which the Court passes an order for issue of a notice under section 248, not the date upon which such order actually issues.

THIS was an appeal arising out of proceedings for the execution of a decree. The decree-holders applied for execution, within time, on the 15th of January 1904. On the 21st of January 1904, the Court passed an order that notice should issue to the judgment-debtor under section 248 of the Code of Civil Procedure. The notice actually was issued on the 25th of January 1904. The next application for execution was presented on the 24th of January 1907, and it was then objected to as being barred

*Second Appeal No. 1180 of 1907 from a decree of Muhammad Ali, District Judge of Mirzapur, dated the 9th of July 1907, confirming a decree of Behari Lal Mehra, Munsif of Mirzapur, dated the 4th of May 1907.