costs of the redemption suit and of the redemption money. The amounts of both will have to be determined at the time when the plaintiffs come to ask for possession. Subject to this observation we uphold the decree of the lower court. The appeal fails and we dismiss it. We allow costs to the plaintiffs respondents.

Appeal dismissed.

Before Mr. Justice Piggott and Mr. Justice Walsh.

MUHAMMAD NIAZ KHAN (DEFENDANT) *v.* JAI RAM (PLAINTIFF)*

1919 *March*, 5.

Criminal Procedure Code, section 107—Security for keeping the peace—Action for damages for malicious prosecution.

Held, that an action for damages for malicious prosecution may be founded upon the initiation against the plaintiff maliciously and without reasonable and probable cause of proceedings under section 107 of the Code of Criminal Procedure, just as much as upon the institution of a criminal prosecution in the ordinary acceptation of that term.

THE facts of this case are briefly as follows:—

The defendant filed a complaint in the court of a Sub-Divisional Magistrate to the effect that the plaintiff and others were behaving and acting in a manner such as to cause an imminent apprehension of their committing a breach of the peace among Hindus and Muhammadans, and it was prayed that they might be bound over to keep the peace, under section 107 of the Code of Criminal Procedure. The Sub-Divisional Magistrate ordered the plaintiff and some others to furnish security under that section. The plaintiff applied to the District Magistrate under section 125 of the Code of Criminal Procedure for cancellation of the said order; the District Magistrate went into the merits and held that "by no stretch of the imagination could the Hindus be considered the aggressors on this occasion," and that there was no ground for an apprehension of breach of the peace at their instance. He, therefore, cancelled the order that had been passed against the plaintiff. The plaintiff then brought a suit against the defendant for damages for malicious prosecution. Both the lower courts found that there was no reasonable and probable cause for filing the complaint, and that the defendant

* Second Appeal No. 307 of 1917 from a decree of Ganga Sahai, Subordinate Judge of Moradabad, dated the 7th of December, 1916, confirming a decree of Ganga Nath, Munsif of Sambhal, dated the 18th of April, 1916.

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had been actuated by malice; and the plaintiff's suit was decreed. The defendant came in second appeal to the High Court.

Mr. *M. Ishaq Khan*, for the appellant:—

The plaintiff has no cause of action for the suit, inasmuch as there has been no criminal prosecution of the plaintiff by the defendant for an offence. The test of a "prosecution" is that the proceeding should terminate either in a conviction or an acquittal. A proceeding under section 107 of the Code of Criminal Procedure does not satisfy that test. Binding over to keep the peace is not a conviction; the measure is only a preventive one. An application to a Magistrate to take measures under section 107 cannot, therefore, form the basis for a suit for damages for malicious prosecution; *Kandasami Asari* v. *Subramania Pillai* (1). In the case of *Ezid Bakhsh* v. *Harsukh Rai* (2) it was held that an application for sanction to prosecute the plaintiff did not afford a sufficient cause of action for a suit for damages for malicious prosecution, as the proceedings did not amount to a criminal prosecution of the plaintiff. The underlying idea seems to have been that it was only a prosecution for an offence that would afford a cause of action. It was held in that case that the mere fact that the plaintiff underwent the expense of engaging counsel to resist the defendant's application would not afford the plaintiff such cause of action. Secondly, both the courts below have no doubt held that there was no reasonable and probable cause for the defendant's complaint; but, as was pointed out in the case of *Jadubar Singh* v. *Sheo Saran Singh* (3), the question of the presence or absence of reasonable and probable cause is a mixed question of law and fact, and can be gone into in second appeal. On that question it is submitted that the first court, namely, the Sub-Divisional Magistrate, found the complaint was established; and the plaintiff was bound over to keep the peace. No doubt, the order of the Sub-Divisional Magistrate was afterwards cancelled by the District Magistrate; but the fact that one court of competent jurisdiction believed in the truth of the complaint is very strong evidence of the existence of reasonable

(1) (1902) 13 M. L. J., 370. (2) (1886) I. L. R., 9 All., 59.

(3) (1898) I. L. R., 21 All., 26 (28).

and probable cause for making the complaint. Further, the order requiring security was not reversed in appeal, but was cancelled under the powers conferred by section 125 of the Code of Criminal Procedure. That section empowers the District Magistrate, as the officer responsible for the peace of his district, to cancel at any time and for any reasons an order for security passed by a Subordinate Magistrate. Such cancellation does not necessarily mean that the order when passed was unjustified. The powers exercised under section 125 are rather analogous to a prerogative; they are neither appellate nor revisional, but *quasi* executive. Hence, the order passed by the first court was the final order in the matter, and it having been against the plaintiff there is no cause of action for his suit, though he may have been let off in the end by the exercise of a power analogous to a prerogative.

Munshi *Panna Lal*, for the respondent:—

The District Magistrate fully considered the merits of the case, and he emphatically held that there was no foundation for the complaint. It was upon that finding that the order for furnishing security was quashed. The powers exercised by a District Magistrate under section 125 of the Code of Criminal Procedure are not executive, but judicial in character; they are of the nature of a revision and bear no analogy to a prerogative. The order of the Sub-Divisional Magistrate was set aside in a judicial and legal way, and that was the termination of the matter. Both courts have found that the complaint was baseless, that the defendant was actuated by malice and that there was no probable and reasonable cause for the complaint. In the case in *Jadubar Singh* v. *Sheo Saran Singh* (1) relied on by the appellant, the appellate court had acquitted the accused by giving him the benefit of the doubt, it had not found the complaint an utterly false one. In the present case the District Magistrate distinctly held the complaint to be entirely baseless. That case was considered in *Padarath* v. *Dulam* (2), and it was pointed out that what was to be considered in cases of this kind was the conduct of the complainant before and after making the charge, whether the complaint was false to his knowledge, and

(1) (1898) I. L. R., 21 All., 26 (28). (2) (1912) 10 A. L. J., 423.

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the surrounding circumstances of the case. The proposition stated, perhaps too broadly, in the case of *Jadubar Singh* v. *Sheo Saran Singh* (1) could not be made a rule of universal application. As to what constitutes "prosecution" of the plaintiff by the defendant in a suit like the present, and as to the tests to be applied in order to judge whether or not the defendant is liable in damages to the plaintiff for having set the Criminal Court in motion against him, I rely on the following cases:—*Gaya Prasad* v. *Bhagat Singh* (2) *Bandi* v. *Ramadin* (3) and *Bishun Prasad Narayan Singh* v. *Phulman Singh* (4). The last mentioned case is a direct authority for the proposition that a complaint by the defendant to a Magistrate praying him to take action under section 107 of the Code of Criminal Procedure against the plaintiff is a "prosecution" of the plaintiff by the defendant such as to give the plaintiff a cause of action for a suit for malicious prosecution. The case of *Kandasami Asuri* v. *Subramania Pillai* (5) relied on by the appellant, was expressly dissented from in that case. The case of *Ezid Bakhsh* v. *Harsukh Rai* (6) has no application, for an application for sanction to prosecute is clearly not a prosecution; it is a step preliminary to prosecution. Moreover, in that case the court had not taken any action against the plaintiff on the defendant's application.

Mr. *M. Ishaq Khan*, in reply:—

There is a very material distinction between an appeal or a revision and the power exercised under section 125 of the Code of Criminal Procedure. In the former, the court decides whether the order of the trial court was correctly passed with reference to the facts on the record; in the latter, the District Magistrate can take into consideration facts and circumstances which may have arisen later, and cancel the security bond because it is no longer necessary. The jurisdiction is of an administrative character.

PIGGOTT and WALSH, JJ.:—This is an action brought for damages for malicious prosecution by reason of proceedings

(1) (1898) I. L. R., 21 All., 26.
(2) (1908) I. L. R., 30 All., 525 (534).
(3) (1909) 6 A. L. J., 516.
(4) (1914) 20 C. L. J., 518.
(5) (1902) 13 M. L. J., 370.
(6) (1886) I. L. R., 9 All., 59.

instituted by a certain Muhammadan gentleman, now the defendant, against several Hindus, including the present plaintiff, for an order under section 107 of the Code of Criminal Procedure. It is found as a fact that the defendant set the law in motion (of that there is abundant evidence on the record) in the Magistrate' s court, in which these proceedings were broug t It is also found that the proceedings determined in favour of the plaintiff. It is quite true that the Magistrate in whose court the proceeding was brought made an order binding over the present plaintiff in the large sum of Rs. 2,000, in his own security and a further surety of Rs. 1,000. That proceeding is not subject to appeal. But proceedings were brought in order to have it reviewed, which proceedings were described as a revision before the District Magistrate.

For the purpose of this case it is not necessary to discuss the appropriate procedure under section 125 by which a District Magistrate is empowered to cancel a bond taken under section 107. It is sufficient to say that the revision was heard and adjudicated upon without objection by the present defendant. It was heard upon the merits and the order of the Magistrate directing the present plaintiff to furnish security was set aside. The plaintiff has, therefore, established, which it was necessary for him to do in such a suit as this, that the proceedings determined in his favour. Both courts have found that there was an absence of reasonable and probable cause. Accepting the contention of the appellant that this is a mixed finding of law and fact with which we could interfere in second appeal, it is sufficient to say that we see no reason in law for differing from the view taken by both the lower courts and that in fact there was abundant evidence of an absence of reasonable and pro bable cause. There is a concurrent finding of both courts of malice on the part of the defendant and damages have been assessed upon what is clearly a legal basis. The only question, therefore, left is whether the second ground of appeal is a good ground for holding that there is no cause of action. That ground raises the question that proceedings under section 107 of the Code of Criminal Procedure to keep the peace are not criminal, and an action for malicious prosecution will not ie.

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That ground raises two questions which really we think at this time of day are hardly open to argument. An action for malicious prosecution is not necessarily confined to criminal proceedings. It has always been held that strictly civil proceedings cannot be made subject of such an action because the successful party in a civil proceeding is supposed to be indemnified by the order for costs which he gets in the end. But the English authorities have always recognized, and there are instances in India, where the same view has been taken, namely, in cases of attachment whether before or after judgment under the Code of Civil Procedure [See *Palani Kumarasamia Pillai* v. *Udayar Nadan* (1), *Vydinadier* v. *G. Krishnaswami Iyer* (2)], that where such proceedings are brought maliciously and without reasonable and probable cause the person against whom they are brought can, if they determine in his favour, sue the complainant for any damage suffered by him.

It is not necessary to decide what is the character of proceedings under section 107. They are undoubtedly in their nature criminal. It may or may not be an offence, according as people choose to look at it, for a person to be in a condition of mind in which he is likely to disturb the public peace. But the proceeding is one prescribed by and taken under the Code of Criminal Procedure and all the proceedings, the machinery and the result of that section are in their nature penal. It is sufficient to say that in the case of such proceedings the Magistrate may issue a warrant for the arrest of the person against whom a complaint is made and detain him in custody until the completion of the inquiry, and, if the proceeding results unfavourably, the person against whom the complaint is made is liable to be bound down in large sums with or without sureties under circumstances, which may undoubtedly be extremely embarrassing to him and which certainly bring him into discredit and injure his reputation and credit in the neighbourhood. It is, therefore, a *quasi*-criminal proceeding which may involve considerable restriction of the liberty of his person and which must necessarily injure his credit and reputation.

(1) (1908) I.L.R., 32 Mad., 170. (2) (1911) I.L.R., 36 Mad. 375

There are certain authorities, not of this Province, where the question has been considered whether the complainant is responsible, where the proceedings have got no further than a preliminary investigation by a subordinate officer, for the purpose of making a report, so that the Magistrate is really responsible for a decision under the section. We have not to consider here whether we agree or disagree with those authorities. This proceeding resulted in an order being made, which, on the revision application, was eventually quashed, and we see no reason why a person, like the defendant, who brings such a proceeding merely from religious animosity or ill-temper or some spiteful or malicious motive and thereby without any legal justification does a serious injury to the person against whom the allegation is made, should not be responsible in damages in the Civil Court just as any other person is answerable in damages to anybody to whom he does a legal wrong. We think there was a cause of action on the facts found by the two courts below. We dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Piggott and Mr. Justice Walsh.

KALI PRASAD MISIR AND OTHERS (PLAINTIFFS) *v.* HARBANS MISIR AND OTHERS (DEFENDANTS).*

1919 *March*, 5.

Act No. IX of 1908 *(Indian Limitation Act), schedule I, article* 120—*Suit for declaration of title—Cause of action—Limitation.*

In the settlement records of 1887 a certain plot of land was recorded as the separate property of the defendants. In 1914 the defendants applied for partition and claimed that this plot belonged to them in severalty, was in their separate possession and should be assigned to their mahal. The plaintiffs traversed this statement, alleging that the settlement record was wrong and that the plot in question was in fact part of the inhabited site and belonged to all the co-sharers jointly. The court required the plaintiffs to institute a suit in the Civil Court to have the question of title to the plot in dispute decided.

Held that such suit was not barred by limitation. The proceedings taken in the partition court, whereby the plaintiffs found themselves, if their statements of fact were true, for the first time in danger of being actually dispossessed of their joint ownership of the plot, gave rise to a fresh cause of action altogether independent of any cause of action which might have been furnished

* Second Appeal No. 282 of 1917, from a decree of E. Bennett, Additional Judge of Gorakhpur, dated the 11th of December, 1916, reversing a decree of Muhammad Said-ud-din, Munsif of Bansgaon, dated the 25th of August, 1915.