

Before Mr. Justice Mukerji and Mr. Justice Bennet.

ALI MUHAMMAD (DEFENDANT) v. ZAKIR ALI
(PLAINTIFF)*

1931
March, 19.

*Malicious prosecution—Suit for damages—“Prosecution”—
Complaint filed but no process issued—No damage sus-
tained—Cause of action.*

A suit for damages for malicious prosecution will not lie where a complaint was filed but no process was issued for the accused to appear. “Prosecution” is not synonymous with the institution of a criminal proceeding and it does not take place, so far as the accused is concerned, until process issues. Although the mere institution of a criminal proceeding may affect a court of justice or the mode of dispensing justice, so that it may be punishable under the criminal law, it does not by itself furnish a cause of action for a suit for damages. No damage can be said to have been suffered by the accused, except possibly by way of defamation, but no suit is maintainable on that basis.

Dr. M. H. Faruqi, for the appellant.

Dr. M. Wali-ullah, for the respondent.

BENNET, J.:—This second appeal by the defendant has been referred to a Bench of two Judges by a learned single Judge because a difficult question of law is involved. The facts which have been found in the present case are that the defendant made a complaint in the criminal court against the plaintiff under sections 449 and 506 of the Indian Penal Code, and also asked for security to keep the peace to be taken under section 107 of the Criminal Procedure Code. The Sub-Divisional Magistrate did not issue any summons or other process to the accused, but he called under section 202 of the Criminal Procedure Code for a report from the police, and the sub-inspector made an inquiry and sent a report and after receiving that report the Sub-Divisional Magistrate went to the village of the parties himself and went to the house

*Second Appeal No. 1170 of 1928. from a decree of Raja Ram, First Subordinate Judge of Cawnpore, dated the 31st of March, 1928, reversing a decree of Niaz Ahmad, Munsif of Akbarpur, dated the 9th of June, 1927.

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of the accused and held an inquiry. He came to the conclusion that the complaint lodged by the defendant was false, and he dismissed this complaint under section 203 of the Criminal Procedure Code. The accused then filed the present plaint.

Bennet, J.

The question which has arisen in second appeal is whether a suit for damages for malicious prosecution will lie where no process has been issued by the Magistrate for the attendance of the person accused. On this point there are a number of conflicting rulings, but the weight of authority of the courts in India is that no such suit for damages lies. This view has been taken in the following rulings: *DeRozario v. Gulab Chand Anundjee* (1), *Golap Jan v. Bholanath Khettry* (2), *Sheikh Meeran Sahib v. Ratnavelu Mudali* (3) and *Subhag Chamar v. Nand Lal Sahu* (4). On the other hand the plaintiff respondent relied on the following rulings: *Bishun Persad Narain Singh v. Phulman Singh* (5), *Bishan Singh v. Ram Bahal Roy* (6) *Gur Saran Dass v. Israr Haider* (7), *Ahmedbhai v. Framji Edulji* (8) and *Imperatrix v. Lakshman Sakharam* (9).

Now in some of the rulings on which the plaintiff relies the proposition enunciated by the plaintiff does not find full support. Thus in *Bishun Persad Narain Singh v. Phulman Singh* (5), at page 939 it is stated: "The prosecution might be infructuous, if, for instance, no notice was served upon the accused. In such a contingency, the action for damages for malicious prosecution would fail, not because there was no prosecution commenced, but because there was no damage done to the plaintiff." The view of damages taken by the Calcutta High Court in this case is that the damages should be material, that is that the

(1) (1910) I.L.R., 37 Cal., 353.

(3) (1912) I.L.R., 37 Mad., 181.

(5) (1914) 19 C.W.N., 935.

(7) (1927) I.L.R., 2 Lunck., 746.

(2) (1911) I.L.R., 38 Cal., 880.

(4) (1928) I.L.R., 8 Pat., 285.

(6) (1920) 64 Indian Cases, 741.

(8) (1903) I.L.R., 28 Bom., 226.

(9) (1877) I.L.R., 2 Bom., 481.

plaintiff should show that he suffered damages by having to defend himself in the criminal courts. It is true that under English law the case is apparently otherwise. In Halsbury's Laws of England, volume 19, paragraph 1443 it is stated: "To succeed in an action for malicious prosecution a plaintiff must prove . . . (v) that the plaintiff has suffered damage; unless, indeed, the proceedings necessarily import damage to his fame or person." And in paragraph 1470 it is stated: "To support an action for malicious prosecution or other malicious legal proceedings, one of three heads of damage must be proved, if not implied by law:

- (i) Damage to a man's fame, as where the matter of which he is accused is scandalous;
- (ii) Damage done to the person, as where his life, limb, or liberty is endangered; or
- (iii) Damage to his property, as where he is put to the expense of acquitting himself of the crime with which he is charged."

Now in India it is only damage under the second and third heads which has been considered sufficient to start an action for malicious prosecution. If damage to a man's reputation was considered sufficient to start a suit for malicious prosecution, then the position would arise that damage to reputation could be the basis of a suit for malicious prosecution although such damage could not be the basis of a suit for defamation. It has been held in a Full Bench case of this High Court, *Chunni Lal v. Narsingh Das* (1), that where a person presents a petition to a criminal court he is not liable in a civil suit for damages in respect of statements made therein which may be defamatory of the person complained against. The Full Bench case of this High Court has laid down that there is an absolute privilege for a complaint to

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a criminal court so far as a civil court is concerned, and that no suit will lie for damages for defamation. It would therefore be contrary to the spirit of this ruling if we were to hold that such damage could form the basis of a suit for malicious prosecution. We note that in the particular ruling on which the plaintiff relies, *Bishan Singh v. Ram Bahal Roy* (1), the accused was directed by a sub-inspector to appear before the Magistrate, and in the case of *Bishun Persad Narain Singh v. Phulman Singh* (2) a notice was issued to the accused and he was present at the inquiry on the criminal complaint which was under section 107 of the Criminal Procedure Code, although that was apparently a preliminary inquiry and not after a notice had been issued to the accused to show cause why he should not furnish the security demanded. After considering the various rulings produced in this case we are of opinion that the criminal prosecution does not take place so far as the accused is concerned until process issues for the accused to be present, and on that view we consider that in the present case a suit for damages for malicious prosecution will not lie. We further think that in the circumstances no damage can be said to have been suffered by the plaintiff. On both these grounds we consider that the present suit of the plaintiff will fail.

Some further argument was made by the learned counsel for the appellant to the effect that the dismissal of a complaint under section 203 of the Criminal Procedure Code is not a termination of the criminal proceedings in favour of the accused, because such a complaint might be revived by the Magistrate. If this doctrine were extended, then there could be no suit for damages for malicious prosecution, for even in the case of an acquittal, the acquittal could be set aside by an appeal of the Local Government under

(1) (1920) 64 Indian Cases, 741.

(2) (1914) 19 C.W.N., 935.

section 417 of the Criminal Procedure Code. But all that is required for the plaintiff to show on this point in a suit for malicious prosecution is that the criminal proceedings terminated in favour of the plaintiff, and we consider that if the plaintiff shows that the Magistrate passed an order in his favour and the defendant fails to show that the proceedings were revived, then the plaintiff has shown all that is necessary for the suit.

In this case the question was also argued in second appeal as to whether the plaintiff would be entitled to damages for defamation on account of the defamatory statements contained in the complaint made by the defendant to the Magistrate. But the Full Bench ruling of *Chunni Lal v. Narsingh Das* (1) has definitely held that the criminal complaint is absolutely privileged so far as the civil court is concerned.

I allow this appeal and dismiss the suit of the plaintiff with costs in all courts.

MUKERJI, J. :—My learned brother has discussed all the cases that have been cited before us, and I entirely agree with him that the suit must fail. I wish to add just a few words as to the principle which must underlie a suit like this.

This is a suit for “malicious prosecution”. There must be a prosecution before the plaintiff can succeed. The question therefore arises, what is “prosecution”? Is it synonymous with “institution of a criminal proceeding” as has been held indictable under section 211 of the Indian Penal Code as an offence against justice, or is it something beyond the institution of a criminal proceeding? A mere institution of a criminal proceeding may not affect the plaintiff at all, although it may affect a court of justice or the mode of dispensing justice and it may be punishable under the criminal law. The plaintiff, to succeed, must show that he has a cause

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(1) (1917) I.L.R., 40 All., 341.

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of action. Now what can be his cause of action if he was never called upon by the court, before which the complaint was filed, to appear and answer a charge, or even to appear and attend the proceedings? A complaint may be filed and the accused person may not even hear of it, although behind his back an inquiry may be ordered under section 202 of the Criminal Procedure Code and some witnesses may be examined. The plaintiff in the civil suit is not at all hurt. He may not have, as I have said, heard of the fact that a complaint had been filed against him. Can it be said that the plaintiff has a cause of action? The answer should be, in my opinion, in the negative.

A suit in the circumstances of the present case must, again, fail on the ground that no damage has occurred. Tort has been defined as "wrong independent of contract." A wrong, therefore, is essential in order that a suit based on tort may be maintained. Now if the plaintiff has not been asked to appear in a court of law, or if he appears, as in the case of *Subhaq Chamar v. Nand Lal Sahu* (1), of his own motion, it cannot be said that he has suffered any damage.

On principle, therefore, the suit cannot be maintained, if notice has not been issued to the plaintiff to appear and answer a criminal charge.

Before Mr. Justice Pullan and Mr. Justice Niamat-ullah.

SHEOBANS RAI (PLAINTIFF) v. MADHO LAL
 (DEFENDANT)*

Usurious Loans Act (X of 1918), section 2(3)—Negotiable Instruments Act (XXVI of 1881), section 79—Promissory note—Interest—Power of court to reduce contractual rate of interest.

The Negotiable Instruments Act must be read with other enactments passed subsequent thereto, and section 79 of the

*First Appeal No. 524 of 1927, from a decree of Lachman Prasad, Additional Subordinate Judge of Agra, dated the 9th of May, 1927.

(1) (1928) I.L.R., 8 Pat., 285.