APPELLATE CIVIL.

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

1930
June, 18.

MUHAMMAD SHARIF (DEFENDANT) *v.* NASIR ALI (PLAINTIFF) AND ZAFAR ALI AND ANOTHER (DEFENDANTS).*

Malicious prosecution—Suit for damages against a police officer and others—Civil Procedure Code, section 80*—Act purporting to be done in official capacity—Limitation Act (No. IX of* 1908*), section* 15 (2)*—Benefit of period of notice given to police officer available as against the other defendants also—"Prosecutor."*

Section 80 of the Civil Procedure Code will apply to a case in which damages are claimed against a public officer in respect of any act purporting to be done by him in his official capacity. The motives with which the act was done do not enter into the question at all. So, where a Police Inspector proceeded to the scene of an alleged crime on receipt of a report thereof, and thereafter made a report complaining of assault and obstruction by the accused persons, it was *held* that the acts purported to be done by him in his official capacity, although it was found that both the reports were absolutely false and were the result of a malicious conspiracy between the Police Inspector and the complainants against the accused persons.

If it is necessary or even permissible for a plaintiff to bring a suit claiming relief against several defendants jointly, and if a notice under section 80 of the Civil Procedure Code was necessary against one of the defendants and was in fact given, the period of notice is, under section 15(2) of the Limitation Act, to be excluded in computing the period of limitation for the suit, and not merely so far as the defendant to whom notice was given is concerned.

The report made by the Police Inspector at the thana complaining that the accused persons had committed the offences under sections 332 and 147 of the Indian Penal Code and asking for action being taken against them, taken with his conduct previous to the report, namely that he had entered into a malicious conspiracy against them with the complainants,

* Second Appeal No. 1958 of 1927, from a decree of Ganga Prasad Verma, Subordinate Judge of Bulandshahr, dated the 22nd of August, 1927, reversing a decree of Ratan Lal, Munsif of Khurja, dated the 18th of January, 1927.

was sufficient to establish that he and the other parties to the conspiracy were the prosecutors, against whom a suit for damages for malicious prosecution would lie.

Dr. *K. N. Katju* and Mr. *Mushtaq Ahmad*, for the appellant.

Mr. *M. A. Aziz*, for the respondent.

SEN and NIAMAT-ULLAH, JJ. :—These two appeals arise out of a suit brought by the plaintiff respondent Syed Nasir Ali for recovery of Rs. 1,000 as damages for malicious prosecution. The first defendant, Sharif, was a Police Inspector, stationed at Khurja at the time when the offences for which the plaintiff respondent was prosecuted were alleged to have been committed. Syed Zafar Ali and Aftab Husain, defendants Nos. 2 and 3, who are brothers, are related to the plaintiff. On the 11th of January, 1924, defendant No. 2 made a report at the Khurja police station that his house, which is contiguous to that of the plaintiff, had been raided by the plaintiff and his associates and that he (the defendant No. 2) closed his doors to prevent the raiders getting into his house and made good his escape by jumping down the roof of his house. As the officer in charge of the police station was indisposed, the head *muharrir* forwarded the report to the Circle Inspector, the first defendant, who, accompanied by a few constables, proceeded to the scene of occurrence. Subsequently at about 12 p.m. the Circle Inspector made a report at the thana that while he and the constables were proceeding to the scene of occurrence, the party were waylaid by the plaintiff and a few others and beaten. This was said to have occurred between 6 and 7 p.m. The first defendant was under orders of transfer to Saharanpur and left Khurja next day. The offences with which the plaintiff and his party were charged by the first defendant in the report already mentioned were those under sections 332 and 147 of the Indian Penal Code, i.e.

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voluntarily causing hurt to deter a public servant from his duty, and rioting. The officers in charge of the police station made an investigation which resulted in the plaintiff's prosecution for those offences before the Joint Magistrate, who acquitted the plaintiff and his co-accused on the 27th of March, 1924. The suit which has given rise to these appeals was instituted on the 27th of May, 1925, on the allegation that the defendant No. 1 and Syed Zafar Ali, defendant No. 2, who is an Honorary Magistrate, and defendant No. 3 conspired to bring a groundless charge against the plaintiff without reasonable and probable cause and maliciously. The Munsif, in whose court the suit was brought, dismissed it on the 22nd of March, 1926. On appeal the learned District Judge of Bulandshahr sent back the case to the Munsif on the ground that the latter had improperly refused to examine certain witnesses whom the plaintiff desired to produce, and directed him to submit fresh findings after recording the evidence of such witnesses. In the meantime the Munsif who had dismissed the suit was transferred and was succeeded by another officer, who recorded the evidence which the appellate court had directed to be taken and found in favour of the plaintiff on all the material questions arising in the case. On receipt of the findings, the learned District Judge decreed the plaintiff's claim to the extent of Rs. 700 against all the defendants. Second Appeal No. 1958 of 1927 has been preferred by the first defendant and Second Appeal No. 2260 of 1927 has been preferred by defendants Nos. 2 and 3.

To clear the ground for a consideration of the questions of law which have been argued before us we should state the findings of fact arrived at by the lower appellate court which must be accepted as conclusive on second appeal. It has been found by the learned District Judge, concurrently with the finding of the

court of first instance after remand, that the defendant No. 1 and the defendant No. 2 were on friendly terms; that there was ill-feeling between the plaintiff and defendants Nos. 2 and 3 in consequence of disputes about certain zamindari; that in June, 1923, proceedings under section 145 of the Criminal Procedure Code were taken by the Sub-Divisional Officer, Khurja, against the plaintiff and defendants Nos. 2 and 3; that a report of defendant No. 1 then made was unduly favourable to the defendants Nos. 2 and 3 and that the evidence otherwise proved that the defendant No. 1 had identified himself with the defendants Nos. 2 and 3. It has also been found that the criminal case against the plaintiff and his party was absolutely false and that the plaintiff, who was a school master, was busy with the printing of examination papers in the school building at the time when the offences were said to have been committed. The lower appellate court has gone so far as to hold that the report of the defendant No. 2 made at the thana on the 11th of January, 1924, which was forwarded to the defendant No. 1, was without foundation and that the subsequent report of the first defendant charging the plaintiff and his party with offences under sections 332 and 147 was equally without foundation. The learned District Judge has expressed himself thus :—

"The plaintiff has thus proved that he could not be at the alleged row, nor could he be at the *tiraha* to fight with the defendants. As the plaintiff was innocent and the whole story of the defendants from end to end was false, so not a single person of the mohalla of defendants Nos. 2 and 3 nor any one of the *tiraha* appeared as a witness for them. I agree with Mr. Ratan Lal that the report of the defendants Nos. 2 and 3 to the police that there was a danger of breach of peace, as also the report of the defendant No. 1 that the plaintiff beat him, were all false so far as the plaintiff was concerned. As everything was false and

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imaginary, it is fair to assume that the defendants were actuated by malice in so doing. It seems that all the three defendants acted in a sort of conspiracy to ruin the plaintiff. The defendant No. 1 was going, he was to hand over charge the next day, and so it needed all efforts to concoct a case against the plaintiff and men of his party as early as possible. For want of better grounds, the prosecution was launched on a flimsy story not supported by reliable evidence even."

It may be that this picture is somewhat overdrawn but sitting in second appeal we are bound by the findings of fact, supported as they are by evidence which we are precluded from examining for ourselves. We must, therefore, hold that the plaintiff respondent was prosecuted maliciously without reasonable and probable cause.

The learned advocate for the appellant has argued (1) that the suit should have been brought within three months from the accrual of the cause of action, as required by section 42 of the Police Act, V of 1861; (2) that even if a longer period of one year provided for by article 23 of the second schedule to the Limitation Act be applicable, the plaintiff's suit is barred; and (3) that the defendant No. 1 cannot, under the circumstances of the case, be regarded as the prosecutor and no decree for damages can be passed against him.

The first point may be shortly disposed of. On the passing of the Indian Limitation Act, IX of 1871, that part of section 42 of the Police Act, V of 1861, which provides a period of three months for suits contemplated by it was repealed, with the result that such suits became subject to the general law of limitation contained in the Indian Limitation Act and the special provision of limitation contained in section 42 of the Police Act, V of 1861, ceased to be operative.

Article 23 of the second schedule to the Indian Limitation Act provides a period of one year for suits

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for compensation for a malicious prosecution, to be reckoned from the date the plaintiff is acquitted or the prosecution otherwise terminates. The plaintiff respondent having been acquitted on the 27th of March, 1924, his suit brought on the 27th of May, 1925, is *prima facie* barred unless allowance is made for two months. The plaintiff claims a further period of two months under section 15 of the Indian Limitation Act, which provides *inter alia* that in computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force, the period of notice shall be excluded. The plaintiff served the first defendant with two months' notice under section 80 of the Civil Procedure Code and brought the suit after the expiry of two months from the date of the notice. He, therefore, claimed benefit of section 15 on the ground that such notice was imperative under section 80 of the Civil Procedure Code. If under the circumstances of the present case defendant No. 1 was entitled to a notice prescribed by section 80 of the Civil Procedure Code, there can be no doubt that the suit, so far at any rate as the defendant No. 1 is concerned, was instituted within time. The question remains as to whether it was time-barred against defendants Nos. 2 and 3, as to whom no question of notice can arise.

It was contended on behalf of the defendant No. 1 that no notice under section 80 of the Civil Procedure Code was necessary if the plaintiff's allegation be true that the defendant No. 1 maliciously conspired with the other two defendants to launch a groundless prosecution against the plaintiff, because, in that case, he cannot be deemed to have acted in the discharge of his duty as a police officer. Reference was made in this connection to *Mumtaz Husain* v. *Lewis* (1) which is, however, not a case in point. An Assistant Engineer,

(1) (1910) 7 A. L. J., 301.

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against whom damages were claimed in that case by his subordinate for assault and use of abusive language, was held not to be entitled to a notice under section 80 of the Civil Procedure Code. It cannot be said that a public officer acts in his official capacity in maltreating his subordinate in relation to the discharge of his duties as a public officer. Section 80 will apply to a case in which damages are claimed against a public officer in respect of any act purporting to be done by him in his official capacity. An important test is whether the public officer professed to act in his official capacity. As was ruled in *Abdul Rahim* v. *Abdul Rahman* (1):—"If the act was such as is ordinarily done by the officer in the course of his official duties, and he considered himself to be acting as public officer and desired other persons to consider that he was so acting, the act clearly purports to be done in his official capacity within the ordinary meaning of the term 'purport.' The motives with which the act was done do not enter into the question at all." In the case before us the first defendant proceeded to the scene of occurrence on receipt of the report previously made by the second defendant and forwarded to him by the head *muharrir*. He purported to do so in his capacity as a police Inspector. His subsequent report complaining of assault and obstruction by the plaintiff and his party was likewise made by him in his capacity as a police officer. Indeed one of the offences with which he charged the plaintiff in that report was that under section 332, i.e., voluntarily causing hurt to deter a public servant from his duty. We are clearly of opinion that on the authorities of this Court and the language of section 80 of the Civil Procedure Code defendant No. 1 did purport to act in his official capacity and that it was imperative on the plaintiff to give notice to him of the suit for malicious prosecution.

(1) (1924) I. L. R., 46 All., 884.

The learned advocate for the appellant argued that notice, if at all necessary, was required by section 42 of the Police Act, V of 1861, which provides for one month's notice only. If this contention is sound, the plaintiff's suit should be deemed to have been instituted beyond limitation by one month. We are unable to give effect to this argument. That section refers to actions for "anything done or intended to be done under the provisions of this Act or under the general police powers hereby given". It was not in the discharge of any duty imposed by the Police Act that the first defendant was obstructed or made the subsequent complaint at the police station against the plaintiff. The second defendant's report, which had been forwarded to him by the head *muharrir*, complained of a cognizable offence having been committed by the plaintiff. The defendant No. 1 proceeded to the scene of occurrence to investigate the case initiated by that report. It was, therefore, in his capacity as an investigating police officer in the exercise of powers conferred upon him as such by the Criminal Procedure Code that he acted. His own report which led to the prosecution of the plaintiff respondent was also made in the same capacity. It was held in *Bachcha Singh* v. *Jafar Beg* (1) that "where a suit has to be brought against a police officer for damages for something done in the exercise of his powers under the Code of Criminal Procedure, the provisions of section 42 of the Police Act do not apply and the plaintiff has to give two months' notice as provided by section 80 of the Code of Civil Procedure." Accordingly we hold that section 42 of the Police Act does not apply and that the plaintiff was entitled to a period of two months being excluded in computing limitation. In this way the suit was rightly held by the lower appellate court to be within time.

The suit is in our opinion equally within time as against defendants Nos. 2 and 3. Section 15(2) of the

(1) (1915) 18 A. L. J., 788.

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Indian Limitation Act provides that "in computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force the period of such notice shall be excluded." If it is necessary or even permissible for a plaintiff to bring a suit claiming relief against all the defendants jointly and if a notice under section 80 of the Civil Procedure Code was necessary against one of the defendants and was in fact given, the period of notice is to be excluded in computing the period of limitation for *the suit* and not merely so far as the defendant to whom notice was given is concerned. Any other view will make the provision of section 15(2) nugatory in cases in which it is necessary to implead in one suit private individuals and the public officer against whom there is but one cause of action. All that the section requires is that a notice should have been given in accordance with the requirements of any enactment for the time being in force and, if this condition exists, it declares without any qualification or reservation that the period of notice shall be excluded in computing limitation. The learned Judges of the Patna High Court have taken the same view in *B. & N.-W. Railway Co.* v. *Ramsarup Lal* (1).

The only other question that remains is whether the defendant No. 1 should be considered to have prosecuted the plaintiff. His report at the thana complaining that the plaintiff and his party had committed the offences under section 332 and section 147 of the Indian Penal Code and asking for action being taken against them, taken with his conduct previous to the report as found by the lower appellate court, is sufficient in our opinion to establish that he was the prosecutor of the plaintiff. It is true he did not take any part in the proceedings which followed, except by giving his own evidence, but that fact will not make

(1) (1922) 70 Indian Cases, 199.

him any the less a prosecutor if he can be otherwise considered to be such. In *Gaya Prasad* v. *Bhagat Singh* (1) their Lordships of the Privy Council held that "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. 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 hand of the person immediately aggrieved by the offence, who *pro hac vice*, represents the Crown." In a later case, *Balbhaddar Singh* v. *Badri Sah* (2) their Lordships observed: "Of course there is nothing in the point which seems to have been taken in the courts below but which was not urged before their Lordships, that here *de facto* the appellants were not prosecuted by the respondent. In any country where, as in India, prosecution is not private, an action for malicious prosecution in the most literal sense of the word could not be raised against any private individual. But giving information to the authorities which naturally leads to prosecution is just the same thing. And if that is done and trouble caused, an action will lie." In the case before us the finding is that all the three defendants conspired to prosecute the plaintiff maliciously and without reasonable and probable cause and that in furtherance of their design the

(1) (1908) I. L. R., 30 All., 525. (2) (1926) I. L. R., 1 Luck., 215 (227).

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defendant No. 1 figured as the complainant in a cognizable offence of which information was lodged by him to the police and the latter prosecuted the plaintiff on the faith of such information. In the proceedings which followed before the joint Magistrate all the defendants gave evidence. Defendants Nos. 2 and 3 actively aided the police in prosecuting the plaintiff in other ways. Under these circumstances we entertain no doubt that all the three defendants were rightly considered by the learned District Judge to have prosecuted the plaintiff so as to entitle the latter to sue them for compensation for malicious prosecution.

In view of our findings on all the questions argued in second appeal 1, we uphold the decree appealed from and dismiss the appeals with costs.

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

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JOTI PRASAD AND ANOTHER (DEFENDANTS) *v.* HARDWARI MAL AND ANOTHER (PLAINTIFFS.)*

Public policy—Partnership—Bribes paid by one partner to public servants in connection with partnership business —Whether other partners can be debited with a share of such expenditure—Civil Procedure Code, order XXVI, rules 12 and 16—Commission to examine accounts—Power of court to take evidence on disputed points.

The plaintiffs and the defendants were partners in a contract, taken in the defendants' names, to supply fire-wood to the Military Department at Dehra Dun for one year. In a suit for accounts between the parties it appeared that the defendants had spent certain sums on bribes to servants of the Military Department, that on several occasions they had thereby procured the passing of short weights by the Department, and that such bribery was admittedly a part of the system of the firm. On the question whether in the accounts credit should not be given to the defendants in respect of these sums on the ground of their being opposed to public policy,—*Held*

* Second Appeal No. 2307 of 1927, from a decree of Raj Behari Lal, District Judge of Saharanpur, dated the 24th of August, 1927; modifying a decree of Mirza Kadir Husain, Subordinate Judge of Saharanpur, dated the 25th of June, 1927.