

APPELLATE CIVIL

Before Justice Sir Edward Bennet and Mr. Justice Ganga Nath

1939

DHARAM NATH (PLAINTIFF) v. MUHAMMAD UMAR
KHAN (DEFENDANT)*

Malicious prosecution—"Prosecution"—Proceeding under section 476, Criminal Procedure Code, initiated by one party against another—Notice issued to opposite party, who appeared and defended—Proceeding initiated without reasonable and probable cause—Suit for damages lies—Question of absence of reasonable and probable cause—Finding of fact—No second appeal lies.

Proceedings under section 476 of the Criminal Procedure Code initiated and conducted by one person against another, to whom notice is issued and who therefore appears and defends himself, constitute a "prosecution", in respect of which a suit for damages for malicious prosecution can lie.

The case may be different where no notice of a proceeding initiated by an applicant is issued to the opposite party and the proceeding terminates against the applicant, without the opposite party having appeared in pursuance of a notice to do so.

So, a suit for damages for malicious prosecution lies where, upon an application by the defendant to the Magistrate for prosecution of the plaintiff for an offence under section 211 of the Indian Penal Code, an inquiry under section 476 of the Criminal Procedure Code was held by the Magistrate, notice was issued to the plaintiff who in accordance therewith appeared and defended himself, the proceeding terminated with the refusal by the Magistrate to make any criminal complaint against the plaintiff, and the defendant's application had been made without reasonable and probable cause.

In a suit for damages for malicious prosecution the question of absence of reasonable and probable cause is a question of fact, and a finding thereon cannot be called in question in second appeal.

Mr. *Harnandan Prasad*, for the appellant.

Dr. M. *Wali-ullah* and Mr. *Mansur Alam*, for the respondent.

BENNET and GANGA NATH, JJ.:—This is a second appeal by the plaintiff against a decree of the lower

*Second Appeal No. 398 of 1936, from a decree of V. Prakash, Additional Civil Judge of Basti, dated the 24th of August, 1935, reversing a decree of Chhail Behari Lal Mathur, Munsif of Basti, dated the 14th of October, 1933.

appellate court dismissing his suit for damages for malicious prosecution. The trial court decreed the suit for damages amounting to Rs.102, with costs, on the finding that the prosecution was without reasonable and probable cause. The lower appellate court confirmed this finding, but on a technical point held that the defendant could not be said to have prosecuted the plaintiff in the sense required for a suit for damages for malicious prosecution. The facts of the case are that the plaintiff is one of the members of the Notified Area Committee and this Notified Area Committee prosecuted the defendant under section 185 of the U. P. Municipalities Act for a house which he had built. That case was dismissed for want of prosecution. Subsequently the defendant made an application to the Magistrate who had tried that suit, for prosecution of one B. Daulat Ram, the Chairman of the Notified Area Committee, under section 211 of the Indian Penal Code and the court below has held: "The name of the plaintiff was added afterwards and no particular ground of any convincing worth is shown why he alone was singled out from among the members of the Committee." The Magistrate held an inquiry under section 476 of the Criminal Procedure Code and issued a notice to the plaintiff, and in accordance with that notice the plaintiff appeared before the Magistrate and the inquiry was conducted by the defendant against the plaintiff. At the conclusion of that inquiry the Magistrate refused to make a criminal complaint against the plaintiff and the proceedings terminated. The point before us is whether these proceedings conducted by the defendant against the plaintiff in the court of the Magistrate do or do not constitute a prosecution within the meaning of "damages for malicious prosecution". At first the argument of learned counsel for the defendant was that "prosecution" related only to a criminal trial. He was, however, forced to admit that the inquiry before a Magistrate in a case cognizable only by the court of session would also

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amount to a prosecution. Learned counsel was quite unable to distinguish between an inquiry of that nature before a Magistrate and an inquiry before a Magistrate under section 476 of the Criminal Procedure Code, and none of the rulings which he produced gave him any assistance on this subject. He relied and the court below relied on an old ruling in *Ezid Bakhsh v. Har-sukh Rai* (1). That was a case in which a suit was brought for damages for malicious prosecution not in regard to the actual trial of the plaintiff, as that matter was time barred, but in regard to a subsequent application within the period of limitation which had been made for sanction to prosecute under section 195 of the Criminal Procedure Code as it stood before amendment. Sanction was refused by the Magistrate and also by the Sessions Judge. No notice was issued to the plaintiff. Learned counsel considers that the court indicates in its judgment that even if the plaintiff had been present in those proceedings as a party before the Magistrate and before the Sessions Judge there would have been no prosecution of the plaintiff. The ruling, however, does not say so and the language in the ruling must be taken to apply to the case actually before the court. In that case the court considered that there was no prosecution, and it appears to us that the ruling based that opinion on the fact that the plaintiff was not present before the Magistrate or the Judge in pursuance of any notice issued by the court at the instance of the defendant. The ruling states on page 61 that the plaintiff did appear at his own request. But obviously where a person appears before a criminal court at his own request the case is not similar to that in which he appears in consequence of a notice issued to him by the court. Under section 195 of the Criminal Procedure Code as enacted in 1898 there was no procedure for an inquiry by the court where the court was asked to grant sanction. On the other hand in that Code and in the Code as it stands amended today there

(1) (1886) I.L.R. 9 All. 59.

is provision for an inquiry by the court under section 476. In the present case the court did hold such an inquiry and the plaintiff was present before the court in consequence of a notice issued by the court for the plaintiff to attend that inquiry in the capacity of a person who was accused of a criminal offence under section 211 of the Indian Penal Code. The procedure of granting sanction under section 195 was abolished by Act XVIII of 1923. The ruling in question deals with the procedure under the unamended section 195 of the Criminal Procedure Code where the court granted sanction, but had no power to issue notice to an accused person to attend an inquiry as an accused person. The case in the ruling therefore was, in our opinion, absolutely different from the present case and probably this explains the difficulty which courts have experienced in applying the principle of this ruling to cases under section 476 of the Criminal Procedure Code. The next cases to which reference has been made are *Muhammad Niaz Khan v. Jai Ram* (1) and *Chiranji Singh v. Dharam Singh* (2). These were both cases where there had been an application by the defendant for the court to require security from the plaintiff under section 107 of the Criminal Procedure Code. In each of those cases the Court held that where those proceedings had been initiated by the defendant maliciously and without reasonable and probable cause an action for damages for malicious prosecution would lie. In *Muhammad Niaz Khan v. Jai Ram* on page 508 it was laid down: "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 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

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(1) (1919) I.L.R. 41 All. 503.

(2) (1921) I.L.R. 43 All. 402.

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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 Nandan* (1), *Vyadinadier v. 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." In *Chiranjji Singh v. Dharam Singh* (3) the Bench of this Court followed the earlier ruling of *Muhammad Niaz Khan v. Jai Ram* (4) and also quoted the decision of the Calcutta High Court in *Crowdy v. Reilly* (5). In this ruling it was laid down that the maintainability of a suit for damages for malicious prosecution does not depend on there having been a prosecution in the sense in which the term is used in the Code of Criminal Procedure. This was an application for proceedings to be instituted under section 145 of the Code of Criminal Procedure for security and recognizance bond to be taken from the plaintiff under section 107 of the Criminal Procedure Code. In *Narendra Nath De v. Jyotish Chandra Pal* (6) the defendant had made an application to the Munsif for sanction to prosecute the plaintiff and it was held by a Bench of the Calcutta High Court that this furnished ground for an action for damages for malicious prosecution. The court pointed out that in the case before it a process had issued to the plaintiff and it based the distinction between the case before it and certain other rulings on the point that in those rulings no process was issued to the plaintiff (page 1039). Similarly in the present case there was a notice issued by the court at the instance of the defendant to the plaintiff, and in consequence of that notice the plaintiff had to appear in the criminal court and defend himself when he was accused of an offence for which the defendant asked that the plaintiff

(1) (1908) I.L.R. 32 Mad. 170.

(3) (1921) I.L.R. 43 All. 402.

(5) (1912) 17 C.W.N. 554.

(2) (1911) I.L.R. 36 Mad. 375.

(4) (1919) I.L.R. 41 All. 503.

(6) (1922) I.L.R. 49 Cal. 1035.

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should be put on trial. In *Nityanand Mathur v. Babu Ram* (1) a learned single Judge of this Court has considered the law on the point and English rulings at very considerable length. The application in that case had been made to the High Court by the defendants for proceedings to be taken against the plaintiff under section 13 of the Legal Practitioners Act. The Court held that a suit for damages for malicious prosecution would lie in regard to such a proceeding. In *Johnson v. Emerson* (2) it was held that an action would lie for maliciously and without reasonable and probable cause procuring an adjudication under the Bankruptcy Act of 1869. In *Quartz Hill Gold Mining Company v. Eyre* (3) the defendant had presented a petition under the Companies Act of 1862 and 1867 to wind up a trading company, and it was alleged that the petition was without reasonable and probable cause and false and malicious. It was held that a civil action would lie for damages on this account. Learned counsel for the respondent relied on a ruling of a learned single Judge of the Madras High Court in *Sheik Meeran Sahib v. Ratnavelu Mudali* (4). This was a case where the defendant had made a criminal complaint of the offence of defamation against the plaintiff and the Magistrate did not issue a summons or warrant to the plaintiff for the trial of the offence, but issued a notice to the plaintiff informing him that a preliminary inquiry would be held at a certain time under section 202 of the Criminal Procedure Code into the complaint, and the plaintiff appeared by counsel on that occasion. The court held that there was no authorisation in law for the appearance of the accused as a party at an inquiry under section 202 of the Criminal Procedure Code and that therefore the appearance of the plaintiff at such an inquiry could not be said to be his appearance by virtue of a prosecution by the defendant. For this reason the court considered that a suit for damages for malicious prose-

(1) [1937] A.L.J. 528.

(3) (1883) 11 Q.B.D. 674.

(2) (1871) L.R. 6 Ex. 329.

(4) (1912) I.L.R. 37 Mad. 181.

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cution would not lie, as there had been no prosecution of the plaintiff by the defendant. This case is very similar to that of *Ezid Bakhsh v. Harsukh Rai* (1), as in both these cases the plaintiff appeared when he was not required to appear by any rule of procedure. We consider that no parallel can be drawn from these cases to the case before us because in the case before us the plaintiff did appear as a party to an inquiry which was authorised by the Code of Criminal Procedure under section 476.

We consider that the lower appellate court was not correct in holding that there was no prosecution of the plaintiff by the defendant. This was the sole ground on which that court set aside the decree of the trial court in favour of the plaintiff.

Both courts had come to a finding of fact that the defendant had no reasonable and probable cause for making the application under section 476 of the Criminal Procedure Code. Learned counsel for the defendant desired to argue this ground again and alleged that it could be argued in second appeal. In *Pestonji Mody v. The Queen Insurance Company* (2) their Lordships of the Privy Council have laid down that the certificate granted for the Privy Council appeal on the question of malice and the absence of reasonable and probable cause in an action for damages for malicious prosecution was granted by error as the only question involved was a question of fact on which there were concurrent findings of fact. This case will govern also the question of a second appeal. In their Lordships' view the finding of the lower appellate court on this question of the absence of reasonable and probable cause is a finding on a question of fact, and therefore it is not open for the respondent to argue this question before us in second appeal. In the present case therefore, the findings of fact on this question of the lower appellate court are in favour of the plaintiff and the sole legal ground on which the lower appellate court had

(1) (1886) I.L.R. 9 All. 59.

(2) (1900) I.L.R. 25 Bom. 332.

reversed the decree of the trial court which was in favour of the plaintiff has been held by us to be incorrect. We therefore allow this second appeal and we restore the decree of the trial court with costs throughout in favour of the plaintiff.

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Before Mr. Justice Iqbal Ahmad and Mr. Justice Bajpai

BANGALI MAL (PLAINTIFF) v. BANSIDHAR AND ANOTHER
(DEFENDANTS)*

1939

January, 4

U. P. Agriculturists' Relief Act (Local Act XXVII of 1934), section 2(2), proviso third, explanation II; sections 3 and 30—“Agriculturist”—Joint Hindu family—Decree against joint Hindu family—Karta, being recorded owner, can apply for benefit of sections 3 and 30—Such benefit can extend to all members of the family—Members whose names are not recorded in the revenue papers are not “non-agriculturists” for purposes of the proviso.

A mortgage of zamindari property was executed by a father and his son, who were members of a joint Hindu family. The name of the father alone was recorded in the revenue papers as owner. As the revenue did not exceed Rs.1,000, the father came within the definition of “agriculturist” in section 2(2) of the U. P. Agriculturists' Relief Act. In a suit upon the mortgage both the defendants prayed for relief under sections 3 and 30 of the Act, for fixing of instalments and reduction of interest:

Held, that in view of explanation II to section 2(2) of the Act the father alone, being the person recorded as owner paying revenue, but not the son, was the person who could apply under section 3 or section 30. But that did not mean that a decree for the whole amount and without any instalments must be passed against the son. On the application being made by the father the court was competent to extend the benefits of sections 3 and 30 to both the defendants who were members of a joint Hindu family.

Held, also, that the third proviso to section 2(2) of the Act applies only to those cases where an agriculturist joins a non-agriculturist in any transaction of loan; and although in view of explanation II to section 2(2) the son might be regarded as a

*Second Appeal No. 752 of 1936, from a decree of Z. Islam Khan, Additional Civil Judge of Agra, dated the 14th of January, 1936, confirming a decree of R. K. Choudhari, Munsif of Agra, dated the 17th of October, 1935.