they have failed on the question of priority of the Bank's mortgage over the plaintiffs' mortgage. Their Lordships therefore are of opinion that the plaintiffs should recover from the defendant firm, Radha Kishen Moti Lal Chamaria, their costs in the Trial Court and in the Chief Court, and two-thirds of their costs of the appeal to His Majesty in Council. The direction of the Chief Court that there should be no order as to costs of the cross-objections filed in that Court will stand.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitors for respondents: *J. J. Edwards & Co.*

MISCELLANEOUS CIVIL.

Before Mr. Justice Gokaran Nath Misra and Mr. Justice A. G. P. Pullan.

MATA PRASAD (APPLICANT) *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL (RESPONDENT.)*

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March, 4.

Secretary of State for India in Council, whether can be sued for acts done by the Government as a sovereign power—Plaintiff convicted of embezzlement and of making a false report—Suit for damages against Secretary of State, whether maintainable—Rule of masters or principals responsibility for torts committed by their servants or agents, whether applicable in the case of Crown—Malicious prosecution—Damages—Suit for damages for malicious prosecution, essentials of—Pauper appeal—Civil Procedure Code (Act V of 1908), *order XLIV, rule* 1.

It is a settled rule of law that the Secretary of State for India in Council can only be sued in respect of those matters for which the East India Company could have been sued, since the Crown in charge of the present Government in

*Civil Miscellaneous Application No. 160 of 1929, against the decree of S. Mohammad Baqar, Additional Subordinate Judge of Sultanpur, dated the 8th of February, 1929, dismissing the plaintiff's case *in toto.*

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India is only the successor to the East India Company. The Company could not be sued for its acts in the exercise of sovereign powers delegated to it by the Crown so the Secretary of State for India in Council cannot be sued in respect of the acts done by the Government as a sovereign power.

Where, therefore, the plaintiff was accused of embezzlement and of having made a false report and was duly tried of the same and was found guilty and was convicted for the said offence by a duly constituted tribunal the plaintiff was not entitled to sue the Secretary of State for India in Council for damages in respect of the act complained of since such act was an act of the Government in exercise of its sovereign power. *Jehangir M. Cursetji* v. *The Secretary of State for India in Council* (1) and *Shivabhajan* v. *The Secretary of State for India in Council* (2), relied on.

The rule which makes masters or principals responsible for the torts committed by their servants or agents in the course of their employment is inapplicable in the case of the Crown. *Ross* v. *The Secretary of State for India in Council* (3), relied on.

A plaintiff suing for damages for malicious prosecution must show that the prosecution was malicious. To do it he must first of all show that he was acquitted of the said charge for if he was found guilty by the court before whom he was prosecuted it cannot be said that he was maliciously prosecuted. *Balbhaddar Singh* v. *Badri Sah* (4), relied on.

MISRA and PULLAN, JJ. :—This is an application under order XLIV, rule 1 of the Code of Civil Procedure for permission to be allowed to appeal as a pauper.

The facts of the case are that a pauper's suit was brought in the Court of the Additional Subordinate Judge of Sultanpur by the plaintiff-applicant, Mata Prasad, for the recovery of a sum of Rs. 11,412-8-0 by way of damages against the Secretary of State for India in Council. The suit was brought on the allegations that the plaintiff was a post master in the sub-post office of Aliganj, district Sultanpur; that on the 1st of Decem-

(1) (1902) I.L.R., 27 Bom., 189.
(2) (1904) I.L.R., 28 Bom., 314.
(3) (1913) I.L.R., 37 Mad., 55.
(4) (1926) I.L.R., 1 Luck., 215: 29 O.C., 163.

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ber, 1921, he had in his charge in the sub-post office a sum of Rs. 1,304-7-4 in cash and some postage stamps and other articles belonging to the post office; that on the night of that date the plaintiff alleged that a dacoity had taken place and that the cash and articles mentioned above had been taken away by the dacoits. The plaintiff further alleged that he reported the matter to the police who made inquiries, but according to the result of their inquiries no dacoity could be traced and that subsequently he was charged by the post office of having made a false report of dacoity and of having himself embezzled the money and articles alleged to have been taken away by the dacoits. The plaintiff was thereupon committed to the Sessions Court and was tried for the said offence and convicted on the 14th of July, 1922, having been found guilty of embezzlement. He was sentenced to undergo imprisonment for four years and to pay of fine of Rs. 500. The plaintiff states that in that case the Sessions Court found that the allegation of dacoity was quite false and that the plaintiff had himself embezzled the money. According to the allegation of the plaintiff he remained in jail for two years and a half and was released on the 11th of February, 1925, on account of his good conduct. The plaintiff also alleges that sometime in the year 1925 there were certain gang cases started in the district of Fyzabad and during the course of the trial of those cases a dacoit who was an accused in those cases and who had been examined as an approver stated that the dacoity had been committed by him in the Aliganj post office in which connection the plaintiff had been punished. On receiving this information the plaintiff states that he appeared before the Superintendent of Police, Fyzabad, who expressed regret at his wrong conviction and directed him to act according to the directions of the Sultanpur police. The plaintiff alleges that when he approached the Sultanpur

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police they asked him to execute an agreement that he would not claim any compensation for his wrongful conviction in which case they would not proceed any further against him; that he did not agree to this and approached the Post Master-General of post offices in the United Provinces for being reinstated to his post but his application was rejected by the postal authorities on the 11th of March, 1926.

The plaintiff, therefore, brings the present suit for recovery of damages to the extent of Rs. 11,412-8-0 as indicated above in the following way:—

	Rs.	as.	p.
(1) On account of loss of pay with annual increment of Rs. 5 ...	5,412	8	0
(2) On account of fine realized from him	500	0	0
(3) On account of cost of criminal trial	500	0	0
(4) On account of mental and physical worries and the loss suffered in reputation	5,000	0	0
Total Rs.	11,412	8	0

The Secretary of State defended the suit and contended in defence that the plaintiff had been rightly convicted and that the evidence in the gang cases had not proved the alleged dacoity at Aliganj. It was further contended on his behalf that the plaintiff had no cause of action for the present suit.

The learned Additional Subordinate Judge took up for disposal the preliminary objection first and after hearing the arguments of the parties on that point has come to the conclusion that the plaint does not show any cause of action against the Secretary of State for

India in Council. The finding of the learned Additional Subordinate Judge is to the effect that the Secretary of State for India in Council cannot be held responsible for the wrongful acts of his subordinates and that no case for malicious prosecution and false imprisonment could be substantiated when the plaintiff had been tried by a court of law and had been found guilty and convicted of the offence charged, as a result of which he had been imprisoned. He, therefore, held that the Secretary of State was not responsible for the damages claimed by the plaintiff and dismissed the plaintiff's suit on the 8th of February, 1929.

The plaintiff, as stated above, has now applied to this Court under order XLIV, rule 1 of the Code of Civil Procedure for permission to appeal as a pauper. According to the said rule we have to peruse the judgment and the decree appealed from and to see whether the decree complained of is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust. We have perused the judgment of the learned Additional Subordinate Judge and have also considered the question whether the decree passed by him is erroneous or is contrary to law.

The applicant appeared before us in person and was unable to give us any help in the determination of this question beyond repeating his allegations entered in the plaint. We had, therefore, to examine for ourselves whether the decision of the learned Additional Subordinate Judge was supported by the authorities.

It is a settled rule of law that the Secretary of State for India in Council can only be sued in respect of those matters for which the East India Company could have been sued, since the Crown in charge of the present Government in India is only the successor to the East India Company. It is a matter of history that the said

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Company exercised different functions. It was partly a trading Company with the rights and liabilities of an ordinary commercial body and it also exercised sovereign powers delegated to it by the Crown. In respect of its acts in the former capacity it could be sued but for its acts in the latter capacity it could not. We know that the East India Company came to an end in 1858 and since then India has been governed directly by the Crown. By statute 21, 22 Vic. Ch. 106, sections 1 and 2 the territories and revenues of India were transferred to the Crown but it was clearly provided in section 65 of that statute that the Secretary of State for India in Council could be sued, as a body corporate and not personally, in a case in which the Company might have been sued. This position has been maintained in the Government of India Acts which were passed subsequently (*vide* the Government of India Act of 1919, 9 and 10 Geo. V, Ch. 101 section 32). It would thus be clear that the Secretary of State for India in Council cannot be sued in respect of acts done by the Government as a sovereign power. One of the functions of the Government in this country as a sovereign power is to take cognizance of offences coming to its knowledge and to order the trial of such persons in accordance with law. If those persons are found to be guilty they are convicted and sentenced to undergo such punishment as may be imposed upon them by the court trying them for such offences. It is clear that in this case the plaintiff was accused of embezzlement and of having made a false report as to dacoity, and was duly tried for the same. He was found guilty and was convicted for the said offence by a duly constituted tribunal. The plaintiff is, therefore, in our opinion not entitled to sue the Secretary of State for India in Council for damages in respect of the act complained of since such act was an act of the Government in exercise of its sovereign power.

The view which we have taken will be found supported by several decisions of the High Courts in this country and we might refer only to some of them—*vide Jehangir M. Cursetji* v. *The Secretary of State for India in Council* (1) and *Shivabhajan* v. *The Secretary of State for India in Council* (2).

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We would further like to observe that the rule which makes masters or principals responsible for the torts committed by their servants or agents in the course of their employment is inapplicable in the case of the Crown. It is stated in section 319 of Story on Agency as follows:—"It is plain that Government itself is not responsible for the misfeasances or wrongs or negligences or omissions of duty of the subordinate officers or agents engaged in the public service; for it does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs since that would involve it in all its operations, in endless embarassments, and difficulties and losses which would be subversive of the public interest." (*Vide* the judgment of WALLIS, J. at pages 63 and 64 in the case of *Ross* v. *The Secretary of State for India in Council* (3).

In conclusion we would like to observe that it appears to be quite clear on the facts as stated in the plaint that the plaintiff is not entitled to any damages on account of his prosecution which resulted in his conviction and consequent punishment. The plaintiff in order to claim damages in such a case has to show that the prosecution was malicious. As pointed out by their Lordships of the Privy Council in a case reported in *Balbhaddar Singh* v. *Badri Sah* (4) the first thing which a plaintiff suing for damages for malicious prosecution must do is to show that he was acquitted of the said charge. If he is found guilty by the court before whom

(1) (1902) I. L. R., 27 Bom., 189. (2) (1904) I. L. R., 28 Bom., 314.
(3) (1913) I. L. R., 37 Mad., 55. (4) (1926) I.L.R., 1 Luck., 215: 29 O. C., 163.

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he was prosecuted, it cannot be said that he was maliciously prosecuted. There can obviously be no ground for imputing to the prosecutor malice in such a case. The very fact that he was tried and found guilty would show *bona fides* on the part of the prosecutor. In the present case the fact of the plaintiff's conviction would directly rebut any idea of malice on the part of the prosecutor. We are, therefore, unable to find any cause of action in favour of the plaintiff on that ground.

We have, therefore, come to the conclusion that the decree passed by the learned Additional Subordinate Judge in this case by which he has dismissed the suit is not based upon any error of law and is not otherwise erroneous or unjust.

We, therefore, refuse to grant permission to the plaintiff to appeal against the decree of the learned Additional Subordinate Judge of Sultanpur, dated the 8th of February, 1929, by means of which the plaintiff's suit was dismissed.

Application dismissed.

MISCELLANEOUS CIVIL.

Before Sir Louis Stuart Knight, Chief Judge and Mr. Justice Wazir Hasan.

1929 *April,* 24.

MAHABIR (DEFENDANT-APPELLANT) *v.* MUSAMMAT MITHAN (PLAINTIFF-RESPONDENT).*

Oudh Courts Act (Local Act IV of 1925), *section* 12—*Civil Procedure Code (Act V of* 1908) *order XLI, rule* 23—*Appeal—Remand order under order XLI, rule* 23 *of the Code of Civil Procedure by a single Judge of the Chief Court of Oudh, whether open to appeal.*

Held, that the words "order against which an appeal is permitted by any law for the time being in force" in section

*Miscellaneous Appeal No. 27 of 1929, against the order of Hon'ble A. G. P. Pullan, Judge of the Chief Court of Oudh, dated the 27th of February, 1929, reversing the decision of M. Humayun Mirza, Subordinate Judge of Lucknow, dated the 16th of July, 1928, upholding the decree of Saiyed Yakub Ali Rizvi, Munsif Havali, Lucknow, dated the 14th of February, 1928.

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12, Local Act IV of 1925 must be read with the previous part of the section and that the Act means that an appeal lies without a declaration, that the case is a fit one for appeal, against an original decree, or against an order passed *otherwise* than on an appeal, if an appeal is permitted against such order by any law for the time being in force.

No appeal, therefore, lies against an order under order XLI, rule 23 of the Code of Civil Procedure passed by a single Judge of the Chief Court of Oudh in exercise of his appellate jurisdiction.

Mr. *Salig Ram* for the appellant.

STUART, C. J. and HASAN, J. :—We are of opinion that the words "order against which an appeal is permitted by any law for the time being in force" in section 12, Local Act IV of 1925 must be read with the previous part of the section and that the Act means that an appeal lies without a declaration, that the case is a fit one for appeal, against an original decree, or against an order passed *otherwise* than on an appeal, if an appeal is permitted against such order by any law for the time being in force. Thus no appeal lies against this order which is an order under order XLI, rule 23, passed by a single Judge of this Court in exercise of his apellate jurisdiction.