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WORT, J.

Sultan Ahmad, as I have already stated, invites us to say that these are merely lies on the part of these petitioners and that he is now entitled to explain them. The learned District Judge has dealt with them by holding that the petition cannot operate in itself as a deed of endowment. That, if I may say so, is perfectly obvious; but we have the statements of two persons who must have known the true state of affairs and the representations were made at a time when no dispute such as the dispute before us now was going on. In my judgment, it seems to me that on the state of the evidence all that we can do is to hold that what the petitioners themselves represented was in fact the true case. That being so, it seems to me that the decision of the learned District Judge on this point is wrong and must be set aside.

The appeal must, therefore, be allowed with costs. The proper order, in my judgment, to make in this case is to send the matter back to the learned District Judge to deal with the compensation of Rs. 1,825 under section 32 of the Land Acquisition Act of 1894.

There is a deficit court-fee of Rs. 150 payable by the appellant. This has been deposited. Let it be accepted.

JAMES, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Fazl Ali and Scroope, JJ.

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Jan. 12.

ZAHIRUDDIN MOHAMMAD

v.

BUDHI BIBI.*

Malicious prosecution—suit for damages—order for issue of process recorded by magistrate—process not actually issued —plaintiff, whether has cause of action.

* Circuit Court, Cuttack. Appeal from Original Decree no. 14 of 1930, from a decision of B. Harihar Charan, Subordinate Judge of Cuttack, dated the 20th August, 1930.

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Where an order for the issue of process under section 204 of the Code of Criminal Procedure, 1898, and of a search warrant was formally recorded by the magistrate but before any process could issue, the accused appeared in court, *held*, that the prosecution of the accused had commenced and, therefore, that on the dismissal of the complaint he had a cause of action for a suit for damages for malicious prosecution.

DeRozario v. *Gulab Chand Anundjee*(1), *Golap Jan* v. *Bhola Nath Khettry*(2), *K. Sheikh Meeran Sahib* v. *C. Ratnavelu Mudali*(3), *A. A. Arunachala Mudaliar* v. *K. Chinnamunusami Chetty*(4) and *Subhag Chamar* v. *Nand Lal Sahu*(5), distinguished.

Per SCROOPE, J.—The stage at which the accused appeared in court may affect the question of the amount of damages, but the fact that he appeared before the processes had actually been issued does not justify his case being thrown out.

Appeal by the plaintiff.

The facts of the case material to this report are stated in the judgment of Fazl Ali, J.

M. Subba Rao, for the appellant.

B. K. Ray, (with him *B. Mahapatra* and *A. S. Khan*), for the respondents.

FAZL ALI, J.—The appellant brought the present suit for recovery of damages for malicious prosecution; but the trial court held that his plaint did not disclose any cause of action and dismissed the suit. Hence this appeal.

On the 15th January, 1929, the defendant no. 2 instituted a criminal case against the plaintiff under section 380 of the Indian Penal Code and certain other sections. The Magistrate ordered summons to be issued upon the plaintiff and also directed the issue of a search warrant against him for the production of

(1) (1910) I. L. R. 37 Cal. 358.
(2) (1911) I. L. R. 38 Cal. 880.
(3) (1912) I. L. R. 37 Mad. 181.
(4) (1926) 97 Ind. Cas. 351.
(5) (1929) A. I. R. (Pat.) 271.

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certain articles. Before, however, any process could issue, the plaintiff appeared through a pleader before the Magistrate and on hearing the pleader the Magistrate cancelled his orders for the issue of summons and the search warrant. He then made over the case to an Honorary Magistrate for enquiry and on the report of the said Honorary Magistrate the case was dismissed under section 203 of the Code of Criminal Procedure. On these facts it was contended on behalf of the defendants before the learned Subordinate Judge that the plaintiff had no cause of action as he had never been placed on trial and a number of decisions were cited to show that no action for malicious prosecution could be maintained unless the prosecution had commenced and that the prosecution did not usually commence until some legal process had been actually issued against the accused. The cases relied on by the defendants were as follows:—*Golap Jan* v. *Bhola Nath Khetry*(1), *K. Sheikh Meeran Sahib* v. *C. Ratnavelu Mudaly*(2), *A. A. Arunachala Mudaliar* v. *K. Chinnamunusami Chetty*(3) and *Subhag Chamar* v. *Nand Lal Sahu*(4).

In all these cases no process had either issued or had been directed to be issued and in some of them an enquiry had been ordered under section 202, Code of Criminal Procedure, and the accused had appeared and taken part in such enquiry. In one of these cases the accused appeared in response to a notice and took part in the enquiry under section 202, Code of Criminal Procedure. Notwithstanding these facts it was held in all these cases that there had been no commencement of the prosecution and that the accused had, therefore, no cause of action for a suit for damages for malicious prosecution. It may be stated here that the Bombay High Court has taken a different view and has held that the mere fact of lodging a complaint

(1) (1911) I. L. R. 38 Cal. 880.
(2) (1912) I. L. R. 37 Mad. 181.
(3) (1926) 97 Ind. Cas. 351.
(4) (1929) A. I. R. (Pat.) 271.

would amount to commencement of prosecution. The balance of authority is, however, in support of the view that unless a process is issued and the accused is brought into Court as a result of such process, he has no cause of action for a suit for damages for malicious prosecution. This is also the view which has been held by a Division Bench of this Court in *Subhag Chamar* v. *Nand Lal Sahu*(1) and we find no good reason to dissent from that view.

The present case, however, is distinguishable from the cases relied upon by the defendants. Here although no process was actually issued or served upon the plaintiff, yet an order for the issue of process under section 204 of the Code of Criminal Procedure and of a search warrant was formally recorded by the Magistrate and, therefore, it cannot be said that the appearance of the accused after such an order had been recorded was altogether voluntary. Technically, therefore, the prosecution had commenced and the plaintiff must be deemed to have a cause of action. That being so, the case will have to be remanded to the court below to be tried on the merits.

Mr. Ray who appears on behalf of the defendants also contended that the plaintiff's suit should fail not only because no prosecution in the real sense of the term had commenced in the case but also because no damage had been sustained by the plaintiff. In support of his proposition he relied upon an observation of Mr. Justice Mookerjee in *Bishun Prasad Narain Singh* v. *Phulman Singh*(2) which is to the effect that in certain cases an action may fail on the mere ground that the plaintiff had sustained no damage. Now there is no doubt that in considering the question of actual damage one cannot lose sight of the fact that the present case cannot in substance be distinguished from those cases in which the person accused actually appears in court and takes part in

(1) (1929) A. I. R. (Pat.) 271.
(2) (1914) 19 Cal. W. N. 935.

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an enquiry under section 202 and ultimately the complaint is dismissed under section 203. It is clear that in the circumstances of the present case if the plaintiff has suffered any damage at all that damage must have been of a very slight or nominal character. As I have already stated, before any summons or search warrant was actually issued in the present case the Magistrate changed his mind and cancelled his previous order. The enquiry that followed was an enquiry under section 202 of the Code of Criminal Procedure and, as has been pointed out in the cases relied upon by the defendants, the plaintiff was under no obligation to take part in such an enquiry. Strictly speaking, therefore, the measure of damage in this case would be the damage suffered by the plaintiff between the order directing the issue of process and the cancellation of that order. Unfortunately, however, the Subordinate Judge decided the case on a preliminary ground without recording any evidence and in the absence of evidence this Court cannot fix even the nominal damages to which the plaintiff might be entitled and the case in these circumstances will have to be remanded to the court below for disposal according to law.

Another point which was brought to our notice was that the plaintiff had not given any particulars of damages in his plaint and that he had mentioned merely a lump sum of Rs. 5,250 which, on the face of it, is a highly exaggerated amount. That circumstance also will have to be considered by the court below in assessing the damages.

The judgment and the decree of the Subordinate Judge are, therefore, set aside and the case is remanded to him for disposal according to law. Each party will bear its own costs in this appeal.

SCROOPE, J.—In my opinion the cases relied on by the learned Subordinate Judge and cited by the learned Advocate for the respondents, namely,

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DeRozario v. *Gulab Chand Anundjee*(1), *Golap Jan* v. *Bhola Nath Khettry*(2) and *K. Sheikh Meeran Sahib* v. *C. Ratnavelu Mudali*(3) are very clearly distinguishable from the present case, in which there was an order for issuing summons on the accused and for search of his house and, in my opinion, it makes no difference that he came to Court before the processes were actually issued. The stage at which he came to Court may affect the question of the amount of damages, but the fact that he came before the summons and the search warrant had actually been issued does not, in my opinion, justify his case being thrown out. In my opinion his prosecution had started and the plaintiff was entitled to have the question of damages investigated. I agree with my learned brother that the case should be remanded and the damages assessed on the lines indicated by him. I entirely agree also that the claim as assessed at Rs. 5,250 about which no details have at all been given is quite fantastic and at best the plaintiff would be entitled to little more than nominal damages.. The case arises out of a family dispute which it was desirable to settle without recourse to the courts, but both sides seem firm in their determination to fight the matter to the end.

Appeal allowed.
Case remanded.

APPELLATE CIVIL.

Before Wort and James, JJ.

MAHADEO LAL JWALA PRASAD
v.
MUSAMMAT BIBI MANIRAN.*

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Dec. 21, 22, 23.
Jan. 13,

Muhammadan Law—Dower—payment postponed until demanded by the wife—whether prompt dower—transfer of

* Appeal from Original Decree no. 22 of 1930, from a decision of Babu Narendra Nath Chakravarti, Special Subordinate Judge of Daltonganj, dated the 5th August 1929.

(1) (1910) I. L. R. 37 Cal. 858.
(2) (1911) I. L. R. 38 Cal. 880.
(3) (1912) I. L. R. 37 Mad. 181.