

1928.

All the appellants except Chamari Gope and Faujdar Gope are to be released on bail to the satisfaction of the District Magistrate to appear when required. Chamari Gope and Faujdar Gope, who are on bail at present, will execute fresh bail bonds to the satisfaction of the District Magistrate to ensure their attendance when required.

JHARI GOPe  
v.  
KING-  
EMPEROR.  
FAZL ALI, J.

TERRELL, C.J.—I agree.

*Re-trial ordered.*

### APPELLATE CIVIL.

*Before Das and Wort, J.J.*

SUBHAG CHAMAR

v.

NAND LAL SAHU.\*

1928.

*August, 14.*

*Malicious prosecution—suit for damages—complaint against plaintiff dismissed—process not issued—suit, maintainability of.*

A suit for damages for malicious prosecution cannot proceed when the proceeding alleged to give rise to the cause of action had ended in the dismissal of the complaint under section 203 of the Code of Criminal Procedure, 1898, and no process had been issued against the plaintiff; and the mere fact that the plaintiff had cross-examined the witnesses for the complainant cannot alter the character of the proceedings.

*Golap Jan v. Bhola Nath Khetry*(1), followed.

*Crowdy v. Reilly*(2), distinguished.

*Yates v. Queen*(3), referred to.

\*Appeal from Appellate Order no. 285 of 1927, from an order of A. C. Davies, Esq., r.c.s., District Judge, Shahabad, dated the 24th September, 1927, reversing a decision of Babu Umakant Prasad Sinha, Munsif, Sasaram, dated the 11th March, 1927.

(1) (1910-11) 15 Cal. W. N. 917.

(2) (1912-13) 17 Cal. W. N. 554.

(3) (1884-85) 14 Q. B. D. 648.

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Appeal by the defendant.

SUBHAG  
CHAMAR  
v.  
NAND LAL  
SAHU.

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

*D. N. Varma*, for the appellant.

*T. N. Sahay*, for the respondent.

WORT, J.—This is an appeal from the remand order made by the learned District Judge in a suit for damages for malicious prosecution. The trial court had come to the conclusion on a preliminary point, the decision being that no action lay as the proceedings which were the subject matter of the suit had not reached the stage of a prosecution. Amongst other arguments which have been advanced to this Court is that the suit must be considered to be one also for libel and even if the proceedings are not such as would entitle the plaintiff to sue for damages for malicious prosecution the plaintiff ought to have the liberty to proceed with his case as to the libel. The answer to that point appears to be that no one, until this Court urged, had ever suggested that there was a claim for damages for libel. The defendants as also both the Courts below treated the matter as one of malicious prosecution and I am quite clearly of opinion that the complaint as framed does not even suggest that the cause of action even in the alternative is one of libel. The learned District Judge has come to the conclusion that this suit is maintainable in spite of the fact that no process was issued against the plaintiff and on this point he has differed from the learned Munsif.

The facts appear to be as follows: a complaint was filed against the plaintiff by the defendant before the Subdivisional Officer accusing him of certain offences under sections 448 and 322 of the Indian Penal Code. It was sent for local enquiry but the Subdivisional Officer eventually revised the order and held the judicial enquiry himself and examined five witnesses. The accused, although he was not bound to

do so, appeared in the judicial enquiry by a mukhtar who cross-examined the witnesses. The complaint was ultimately dismissed under section 203 of the Criminal Procedure Code. The plaintiff argues that, although no proceedings were commenced against him, yet there was a prosecution, and, the prosecution having ended in his favour, and he having suffered damages, he was entitled to bring a suit for malicious prosecution. The case really depends upon a consideration of the authority of *Golap Jan v. Bhol Nath Khetry*<sup>(1)</sup>. The complaint there was made to the Presidency Magistrate, and under section 202 of the Criminal Procedure Code he referred the matter to the police for enquiry. The enquiry was held and as a result the Magistrate refused to issue process against the plaintiff. A suit was then filed for malicious prosecution. Pugh, J., rejected the complaint as showing no cause of action and on appeal to the Divisional Court Sir Lawrence Jenkins, C.J., who delivered the judgment of the Court, upheld that view and decided that the English authorities on this question could throw no light on the provisions of the Criminal Procedure Code. But he did mention the case of *Yates v. Queen*<sup>(2)</sup> where it is remarked by Cotton, L.J., "How can it be said that the prosecution commenced before a person is summoned to answer the complaint". The basis of the decision is that no process had been issued against the plaintiff and consequently no prosecution can be said to have commenced. We have had our attention called to the latter part of the judgment of Sir Lawrence Jenkins in which he stated that in the circumstances of the case he did not think that defamation being the cause of action the complainant would have been entitled to set up a plea of absolute privilege. But with those observations, of the Chief Justice we have nothing to do as I have already disposed of the question of libel. The authority of Sir Lawrence Jenkins, C.J., is

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WORT, J.

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undoubted and it is only upon the clearest considerations I would attempt to differ from him. The only fact in this case which is not present in the case quoted is that there was a judicial enquiry at which the plaintiff appellant and the witnesses were both examined and cross-examined. But it is immaterial as it is evident that the presence of the plaintiff was not under compulsion of law but was voluntary. Therefore the mere fact that he was present and cross-examined the witnesses on behalf of the complainant does not alter the character of the proceeding. The suggestion which was made in the course of the argument was that the decision of Sir Lawrence Jenkins, at any rate by inference, was overruled particularly with regard to the decision which related to the question of libel by the case of *Crowdy v. Reilly*<sup>(1)</sup>. This was a case in which the suit had been dismissed in the lower Court on a preliminary point. The defendant had made certain accusations against the plaintiff praying that the Magistrate might order proceedings under section 145 of the Criminal Procedure Code. Notice was issued by the Magistrate under section 145 and the attachment of certain statement by the plaintiff he directed the proceedings under section 145 and the attachment of certain land meanwhile. In the ultimate result the Magistrate before whom the matter came held that, as there was no danger of a breach of the peace, he had no jurisdiction to continue the enquiry. Whereupon the plaintiff brought the suit the subject matter of the appeal. The contention there was that proceedings under sections 144 and 145 did not constitute a prosecution. This contention succeeded before the Subordinate Judge but was overruled by the Calcutta High Court. The plea of absolute privilege regarding the statements made in the judicial proceedings was argued and discussed in the judgment at considerable length. The final conclusion arrived was that it became unnecessary to decide that question as the plaintiff was

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entitled to maintain his action as one for damages for a malicious prosecution or malicious abuse of judicial process. I do not think that this case in any way detracts from the authority of the case before mentioned and in any event it cannot be held to have overruled it as it would have been necessary for that purpose to have had the decision of a Full Bench. In any event the substance of the decision is that proceeding under sections 144 and 145 is a prosecution within the meaning of the expression 'malicious prosecution'. In the case before us, in my judgment, the question of libel does not arise, as I have already stated. It is quite clear that the suit was obviously for malicious prosecution and the statements in the plaint were not apt for the purpose of making a claim for damages of libel.

In the view which I have taken and bound as I feel I am by the authority of the decision in the case of *Crowdy v. Reilly*<sup>(1)</sup> I am in agreement with the decision of the learned Munsif. I am of opinion that the decision of the learned District Judge is wrong in law and must be set aside, the appeal being allowed with costs.

DAS, J.—I agree.

*Appeal allowed.*

### APPELLATE CRIMINAL.

*Before Terrell C. J. and Fazl Ali, J.*

KUNJA SUBUDHI

*v.*

KING-EMPEROR.\*

1928.

August, 16.

*Evidence Act, 1872 (Act I of 1872), section 24—accused, statement of, before village panch—evidence of inducement—confession whether admissible—subsequent confession before magistrate but retracted—admissibility of—corroboration,*

\*Death Reference no. 19 of 1928 with Criminal Appeal no. 1 of 1928. Reference made by H. R. Meredith, Esq., i.c.s., Sessions Judge, Cuttack, dated the 18th of July, 1928.

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