

1905.

BALARAM
v.
RAMKRISHNA.

Rao Bahadur *V. J. Kirtikar* (Government Pleader) appeared for the Government of Bombay.

JENKINS, C. J. :—I am of opinion that a decree passed under section 396 of the Civil Procedure Code in accordance with a Commissioner's report is a final order for effecting a partition passed by a Civil Court and must therefore be stamped as an instrument of partition : see section 2 (15) of the Indian Stamp Act, 1899.

RUSSELL, J.—I concur.

ASTON, J.—I also concur.

Order accordingly.

G. B. R.

ORIGINAL CIVIL.

Before Mr. Justice Tyabji.

1904.
November 19.

MUSA YAKUB MODY, PLAINTIFF, v. MANILAL AJITRAI, DEFENDANT.*

*Cause of action—Malicious prosecution—Letters Patent clause 12—
Leave—Liability of prosecutor when prosecution ordered by Court.*

'Cause of action' means that bundle of essential facts which it is necessary for a plaintiff to prove before he can succeed in the case.

A person is responsible not merely for starting a prosecution but also for continuing the same and he is so responsible whether such prosecution was ordered by the Court or was initiated by the party himself.

The plaintiff, a resident in British India, was charged with a criminal offence by the defendant in the Magistrate's Court at Rajkot. In order to secure his attendance the defendant moved the Bombay Government to initiate extradition proceedings against the plaintiff before the Chief Presidency Magistrate in Bombay who however held that a case for extradition had not been made out.

The plaintiff obtained leave from the High Court to file a suit against the defendant in Bombay for malicious prosecution. On an application by the defendant to have the leave rescinded,

* Suit No. 453 of 1904.

Held, that a material part of the cause of action accrued in Bombay and that the High Court had jurisdiction to entertain the suit.

Fitzjohn v. Mackinder⁽¹⁾ applied.

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SUMMONS in Chambers adjourned into Court.

The facts of this case will be found set out at length in the judgment.

Lowndes with *Talyarkhan* for the plaintiff.

Raikes with *Davar* and *Sitalvad* for the defendant.

TYABJI, J. :—This is a summons which was adjourned by me into Court.

The facts leading up to the issue of summons are as follows.

It appears that the defendant Mr. Manilal is the Dewan of the State of Porebandar. He considered himself defamed by certain applications which the plaintiff Mody Musa Yakub had addressed to the Government of India in which he charged Manilal substantially with corruption and extortion.

Dewan Manilal filed a complaint in the Court of the Prant Magistrate of Hálár in Káthiáwár on the 4th March 1903: this is Exhibit A in the case. The Prant Magistrate Mr. Watson after hearing evidence delivered judgment on the 28th April 1903 and discharged the plaintiff under section 253, Criminal Procedure Code. The defendant Manilal in June 1903 applied to the Judicial Assistant to the Political Agent for revision of the Magistrate's order under section 437 of the Criminal Procedure Code. The Judicial Assistant after considering the application came to the conclusion that further enquiry in the matter was necessary and he accordingly passed his order dated 8th July 1903. The matter then went back to the Magistrate at Rájkot but the plaintiff Mody Musa Yakub did not appear before the Magistrate being a resident within British India living either at Mátherán or in Bombay.

It was considered at one time that a warrant for his arrest might be issued, but it was not issued as it could not operate within British India. Then it was suggested by the Pleader of the defendant that a proclamation might be issued to compel him to

(1) (1861) 9 C. B. N. S. 505 at p. 528.

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appear in the Magistrate's Court, but that was also found impracticable because the plaintiff had no property within the jurisdiction of the Magistrate which could be attached in execution of the proclamation. Ultimately a summons was issued but that also has not been served on the plaintiff. So practically there was an *impasse*. The plaintiff Musa declined to appear before the Magistrate at Rájkot. The Magistrate found himself powerless by any weapon in his hands to compel the plaintiff to appear for his trial.

Ultimately it was considered that some proceedings might be taken under the Extradition Act for the extradition of the plaintiff from British India into Káthiáwár, so that he might be put on his trial. Accordingly Mr. Hotson, the Political Officer of the Prant, wrote to the Political Agent [he is, I believe, now designated Agent to the Governor of Bombay] a letter dated 16th September 1903, suggesting that Government might be moved to take extradition proceedings against the plaintiff. This letter was supported by the Agent to the Governor of Bombay, who, in his letter dated the 18th September 1903, moved the Government of Bombay that extradition proceedings should be taken. Then some correspondence seems to have passed which is not before me and ultimately the Agent wrote to the Government of Bombay a letter dated the 21st October 1903, suggesting that the Government of Bombay might start an enquiry under section 14 of the Extradition Act XXI of 1879. The Bombay Government thought that such proceeding should be taken and accordingly passed a Resolution, directing that enquiry under that section should be held, either by the Chief Presidency Magistrate, if the plaintiff was found to be living in Bombay, or by the Magistrate of Kolába, if he should happen to be at Mátherán. This order of Government is dated 30th October 1903. Then on the 20th November 1903, the Magistrate of Kolába wrote to Government suggesting that he should be relieved from the enquiry and Government passed a Resolution on the 10th December 1903, directing that Mr. Slater, the Chief Presidency Magistrate, Bombay, should hold the enquiry under the Act. Accordingly Mr. Slater held an enquiry which lasted for several days and ultimately he made a report to Government and sent it to Government with

a letter dated the 11th April 1904, in which he showed that in his opinion there was no foundation for the charge of defamation brought by the defendant against the plaintiff and that the plaintiff should be acquitted and that he should not be extradited from British territory. Accordingly Government passed a Resolution dated the 9th May 1904 stopping the extradition proceedings. Upon this Resolution of the 9th May 1904 the Magistrate at Rájkot passed an order dated the 4th July 1904 discharging the plaintiff (accused).

The plaintiff immediately after his discharge by the Magistrate at Rájkot filed this suit on the 7th July 1904 suing the defendant for damages for malicious prosecution. He obtained leave from me in Chambers to file this suit and I granted him leave on the ground that at least a material part of the cause of action had occurred within the jurisdiction of this Court.

Then the defendant Manilal applied to the Judicial Assistant, Káthiáwár, to set aside the order of the Magistrate of Rájkot discharging the plaintiff (accused) on the ground that the finding of the Magistrate in Bombay should not of itself be taken as a finding in the case and that the Magistrate at Rájkot could not accept the finding of the Magistrate in Bombay. The Judicial Assistant took that view and set aside the order of the Magistrate at Rájkot by his own order dated the 5th November 1904. But inasmuch as there was no power in the Court at Rájkot to compel the plaintiff to appear before that Court, and inasmuch as Government had refused to extradite the plaintiff, the Magistrate at Rájkot has put this prosecution on what he calls the "dormant file."

Then on the 10th October 1904 the defendant took out this summons in Chambers calling upon the plaintiff to show cause why the leave granted by me should not be cancelled, on the ground that no part of the cause of action had occurred within the jurisdiction of this Court and that leave had been granted erroneously.

There were affidavits of a contradictory and conflicting nature; I therefore considered it best to adjourn the matter into Court and directed that the matter should be heard in Court. The matter was heard by consent and came on for hearing before me

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the other day when oral and documentary evidence was put in before me.

The questions I have to consider are : firstly, whether any and what material part of the cause of action has accrued within the jurisdiction of this Court, and, secondly, whether such part as did occur within the jurisdiction of this Court justifies my granting leave to the plaintiff to sue in this Court : or whether such leave already granted should be cancelled.

Now on a fair and full consideration of the facts and evidence in this case, I have come to the conclusion that a material part of the cause of action has occurred within the jurisdiction of this Court : and that the leave was properly granted and that no cause has been shown why it should be cancelled.

It is clear in the first place, that all the extradition proceedings were taken within the jurisdiction of this Court, *viz.*, all the proceedings were before Mr. Slater, the Chief Presidency Magistrate, under the Extradition Act. The question then is, whether they form a part of the cause of action. 'Cause of action' has been defined as meaning "that bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the case." This is a case of malicious prosecution and what the plaintiff would have to prove in the case in order to succeed is the starting of the proceedings against him by the defendant, the conduct of the prosecution by the defendant, and the animus, the intention, and motives of the defendant in prosecuting him, the absence of reasonable and probable cause, the damages sustained by the plaintiff by reason of the prosecution, and the termination of the proceedings favourably to the plaintiff.

Now it does seem to me that the extradition proceedings taken in Bombay were a part of the prosecution and form a very material part of the prosecution, and they would materially affect the question of damages—that is, the expenses which were incurred by the plaintiff in defending himself from being transported from Bombay to a foreign territory. They also affect the termination of the prosecution so far as the case made in the plaint is concerned, because rightly or wrongly the plaintiff's suit was filed immediately after his discharge in consequence of the report of the Presidency Magistrate. These are shortly the points which are material to his case.

But it was argued for the defendant, that although these proceedings under the Extradition Act were a part of the proceedings taken against the plaintiff, yet they were not proceedings taken at the instance of the defendant or for which the defendant could be held responsible, and therefore they are not a material part of the cause of action so far as the defendant is concerned. In other words, it was contended that the defendant was not responsible for the extradition proceedings, because it was argued that he had not applied for the extradition of the plaintiff, that he had made and sent no petition to any of the Political Officers in Káthiáwár or to Government. It was further argued that it was a proceeding taken by the Political Agent or the subordinates of Government or by the Government itself without the intervention of the defendant and therefore the defendant was not liable for these proceedings or any damage or harm resulting in consequence of these proceedings.

I am, however, of opinion, that whether the defendant did or did not actively suggest these proceedings by Government that he must in law be held responsible for them inasmuch as they are the direct consequence of the proceedings which he himself took against the plaintiff in the Magistrate's Court in Káthiáwár. The case of *Fitzjohn v. Mackinder*⁽¹⁾ shows that a person is responsible not merely for starting a prosecution but also for continuing a prosecution, and that he is so responsible whether the prosecution was ordered by the Court or whether it was an independent prosecution started by the party himself. That was a case where a party was ordered by the Court to be prosecuted for perjury, and the defendant in that case was bound over to prosecute plaintiff in that case and he did prosecute the plaintiff in that case and afterwards the plaintiff in that case brought an action for damages for malicious prosecution, and the defendant in that case pleaded that what he did was merely in pursuance of the order of the Court. The majority of the Court, one of them being Cockburn, C. J., held that the defendant in that case must be held responsible for the prosecution: and that he could not shelter himself under the plea that he was bound over to prose-

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cute and that the Judge had ordered the prosecution. It was considered, he having been guilty of perjury, that perjury was the first and primary cause of the prosecution in that case and the order which the Judge made for the prosecution was the direct result of the perjury.

Applying the above observations, I have no hesitation in coming to the conclusion that the extradition proceedings in this case must similarly be taken to be the direct and natural result of the proceedings instituted in the Magistrate's Court at Rájkot. But the defendant did not here merely take a passive part in the extradition proceedings. He actively prosecuted those proceedings. He appeared before the Presidency Magistrate by his pleader. He cross-examined the witnesses. He put in the depositions of his own witnesses. He argued for the extradition of the plaintiff under the Act. In fact it is not too much to say that his conduct here was simply a continuation of the same prosecution which he had started in the Magistrate's Court in Káthiáwár. Although there is no evidence that he positively applied for extradition of the plaintiff and although he denies that he was instrumental in setting the extradition proceedings in motion, still I must hold that these proceedings were the direct consequence of the refusal of the Magistrate to grant the warrant or to issue the proclamation for which the defendant had applied and which would have been more to the taste of the defendant.

Extradition seems to me to be a milder form of the more violent step he wanted the Court to take by issuing a warrant for the arrest of the plaintiff.

Therefore with regard to the extradition proceedings that took place in Bombay, I hold that the defendant is responsible for the proceedings, and that they form a material part of the cause of action in this suit; that they show the termination of the prosecution and the conduct, the intention, and the animus of the defendant; and that they affect the damages to which the plaintiff would be entitled, if he succeeds in this suit.

Therefore I come to the conclusion that I was justified in granting the leave to the plaintiff under clause 12 of the Letters

Patent: and hold that there is no case for rescinding the leave so granted.

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Summons dismissed.

Attorney for the plaintiff: *Mr. Hiralal Dayabhai.*

Attorneys for the defendant: *Messrs. Bhaishankar, Kanga, and Girdharlal.*

W. L. W.

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

THE ADVOCATE GENERAL OF BOMBAY (ORIGINAL PLAINTIFF), APPELLANT, v. HORMUSJI NOSHIRWANJI VAKIL AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1905.

February 3.

*Indenture—Construction of indenture—“Absolutely,” interpretation of—
Construction of deeds—Construction of wills—Repugnancy in words.*

A deed of indenture contained, among other things, a provision which ran: “upon trust and for the use of the said trustees absolutely to be expended and used by them for such charitable purposes as they might think fit.” On a construction of this provision:—

Held, that having regard to the words that follow the phrase in the indenture in question, the word “absolutely” cannot be taken as conferring an unfettered and unlimited interest on the persons designed as trustees; and that the words used created a valid trust for charitable purposes in the events which had happened.

The rule that if there be a repugnancy the first in a deed and the last in a will shall prevail, has no application when the supposed inconsistencies are found in one and the same provision.

APPEAL from the decision of Russell, J.

The property in dispute belonged originally to Haji Dawood Bucker who died leaving him surviving two sons—Abdulla Haji Dawood and Haji Rahimtulla Haji Dawood—and a daughter named Khatizabai. In consequence of certain disputes between the two brothers and their sister with regard to the property, the brothers agreed to settle part of the property upon trust for the benefit of Khatizabai and her children.

* Appeal No. 1369; O. C. J., Suit No. 488 of 1904, O. S.,