

an agreement unenforceable by law, and therefore void under section 2 of the Indian Contract Act, and until it was discovered to be void on the evidence, because one of the parties was a minor, it purported to be a perfectly good contract. But their Lordships of the Privy Council distinctly say that section 65 starts from the basis of there being an agreement or contract between competent parties; and has no application to a case in which there never was, and never could have been any contract, and though according to the argument of the applicant's pleader that decision conflicts with the words of the section, still as long as it stands it is binding on us. The rule, therefore, must be discharged with costs.

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Rule discharged.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

JAMNADAS SHIVRAM BARI (ORIGINAL PLAINTIFF No. 1), APPELLANT v. CHUNILAL HAMBIRMAL MARWADI (ORIGINAL DEFENDANT), RESPONDENT^c.

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June 24.

Malicious prosecution—Institution of criminal proceedings—Reasonable and probable cause—Malice—Inference of malice—Damages.

One V had obtained on lease a piece of land from Government. Under an arrangement made with V, plaintiff No. 3 raised crop on the land. The crop was sold by plaintiff No. 3 to plaintiff No. 1. The defendant claimed to be a purchaser of the crop from V and began to reap it. On being obstructed by the plaintiffs, the defendant filed a complaint against them for theft. They were convicted by the Magistrate, but on appeal the conviction was set aside on the ground that the probabilities were strongly in favour of plaintiff No. 3's assertion that under the arrangement he made with V he had a right to the crop. The plaintiffs thereupon sued the defendant for damages for malicious prosecution.

^c First Appeal No. 139 of 1918.

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Held, that the plaintiffs were entitled to damages as on the facts of the case there was no reasonable and probable cause for instituting the prosecution, and malice could safely be inferred from the circumstances.

FIRST appeal against the decision of R. B. Gogate, First Class Subordinate Judge of Nasik.

Suit for damages for malicious prosecution.

On Vithu Mahadu had obtained some disforested land from Government on new terms of lease in April 1915.

Vithu let the land to plaintiff No. 3. Plaintiff No. 3 raised crop on the land and sold it to plaintiff No. 1 in November 1915. The defendant alleged that the crop was sold to him by Vithu in October 1915. He was obstructed by the plaintiffs in the reaping of the crop. He, therefore, instituted criminal proceedings against the plaintiffs charging them with theft of the crop. The trial Magistrate convicted the plaintiffs of the offence of theft, but on appeal the conviction was quashed by the District Magistrate.

The plaintiffs thereupon filed the present suit to recover Rs. 6,200 as damages for malicious prosecution.

The defendant contended that the suit was not maintainable on account of misjoinder of causes of action : that defendant had never any malicious intention in prosecuting plaintiffs and that there were reasonable grounds in prosecuting them.

The Subordinate Judge held that the plaintiffs had failed to prove that the prosecution was instituted against them by the defendant without any reasonable and probable cause and that it was done with a malicious intention. He, therefore, dismissed the plaintiffs' suit.

The plaintiffs appealed to the High Court.

Bahadurji with *J. R. Gharpure*, for the appellant.

Sir Thomas Strangman with *D. C. Virkar*, for the respondent.

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MACLEOD, C. J.:—This is a first appeal from the decision of the First Class Subordinate Judge of Nasik who rejected the plaintiffs' claim for damages against the defendant for malicious prosecution. It appears that one Vithu had obtained some disforested land from Government on new terms in April 1915. In October he sold the crop to the defendant. When the defendant wished to reap the crop, a claim was made on the first occasion by plaintiffs Nos. 2 and 4, and two days later the claim was renewed with the addition of plaintiff No. 1 who purported to have bought the crop from plaintiff No. 3. The defendant alleged that he had been assaulted by the servants of the plaintiffs, and had left the ground under the honest belief that the plaintiffs had no right whatever to reap the crop, and had been guilty of a criminal offence. He thereupon lodged a complaint of theft against the plaintiffs. In the first Court the plaintiffs were convicted but on appeal the conviction was reversed.

The question now arises whether the 1st plaintiff who alone appeals is entitled to a decree for damages. In these cases the first thing is to ascertain the facts; the next step is to ascertain whether on those facts there was a reasonable and probable cause for instituting the prosecution; and finally whether there is malice. In a trial before a Judge and Jury, the Jury have first to ascertain the facts; then it is a matter for the Judge to decide whether there is a reasonable and probable cause; and then the question of malice will be one for the Jury. The learned trial Judge has rightly laid down what the plaintiffs had to prove in order to succeed. He came to the conclusion that they had not proved that the defendant had no reasonable and probable cause for instituting the prosecution against them; that he came to an honest belief in the guilt of the accused based on a full conviction founded

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upon reasonable grounds, and there was a state of circumstances existing which, assuming them to be true, would lead any ordinary and cautious person to the conclusion that the person charged was probably guilty of the crime imputed.

The facts, however, are far from clear from the record. Undoubtedly Vithu had leased the ground from Government, and undoubtedly Rama had raised the crop which was ready to be reaped in October. But in what circumstances Rama had raised the crop is by no means certain. It is alleged that he raised the crop on behalf of Vithu on payment of a specific sum, and therefore, he had no title to reap the crop, and therefore, no title to dispose of the crop in favour of the 1st plaintiff. But this is by no means clear on the evidence. We are perfectly entitled to assume that Rama thought that he had got a good title to the crop and had a right to dispose of it to the 1st plaintiff. Undoubtedly Vithu disposed of the crop to the defendant. But on the day when the defendant was dispossessed the 1st plaintiff produced a receipt for the amount that he paid to Rama. It was therefore a case of a purchaser of a crop finding that there was some ground for thinking that his vendor had not played fair with him. The defendant had no particular reason for knowing who had raised the crop until he was confronted with a person who asserted a title to reap the crop. Taking those as the facts in the case, could it be said that the defendant had reasonable and probable cause for instituting the prosecution? Had he an honest belief in the guilt of the accused or rather was not the desire to prosecute the accused one which arose from the disappointment he experienced when he found that he would not be able to reap the fruits of his purchase from Vithu without a contest? And it is a common experience in this country that persons in that position are far too

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apt to rush off to a criminal Court as the speediest method of establishing their case. On a due consideration of the evidence, I have come to the conclusion that the facts did not warrant any reasonable and probable cause for instituting the prosecution. I must mention that placed in the position of a Jury directed by the Judge that there was no reasonable and probable cause for instituting the prosecution, this would be a case in which one might safely infer malice for the purpose of giving the plaintiff a decree. The result must be then that the decree of the lower Court dismissing the plaintiff's claim must be reversed, and there must be a decree in favour of the 1st plaintiff for Rs. 500 damages and costs throughout.

FAWCETT, J.:—I concur. In the defendant's deposition in the suit he admits that, when the obstruction of the plaintiffs to the reaping of the crop occurred, he did not ask the plaintiffs as to why they were obstructing him. He also says he did not inquire as to what right the plaintiff Jamnadas or others had to the crops. Now the fact that plaintiff No. 3 Rama had cultivated the land and raised the crop in question is undisputed. The question whether Rama had a right to take the whole crop, as he alleges, or whether the right to the crop remained in the lessee Vithu, is no doubt one that is open to dispute. Personally I agree with the view which the District Magistrate took in his judgment in the criminal case that the probabilities are strongly in favour of Rama's assertion that under the arrangement he made with Vithu he had a right to the crop. I think that the Subordinate Judge is not justified in his conclusion that the probabilities are in favour of Vithu's assertion of a right to the crop, and that he erred in holding it was quite impossible that Vithu should have arranged to let this land to Rama in February or March 1915 as the plaintiffs stated he did. It is no doubt the

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case that the actual Kabulayat and possession did not take place until later on in April and May. But undoubtedly correspondence must have been going on in connection with the disposal of the disforested lands, and it is to my mind quite possible that Vithu may have known in February that he was going to be given a particular piece of this disforested land. However that may be, still as Rama, plaintiff No. 3, had actually raised the crop, the defendant when he found him or his alleged assignees, claiming the crop, should as a prudent person have made inquiry into the claim ; and I do not think he could honestly have thought that that claim was necessarily an untrue one, and that plaintiff No. 3 and those who assisted him were mere thieves who were taking the crop without any right to do so. I take the law to be that the prosecutor's belief in the guilt of the accused must be based on grounds which, or some of which, are reasonable and arrived at after due inquiry. That is how it is summarised in Halsbury's Laws of England, Vol. XIX, p. 681, Article 1451. Here the defendant admittedly did not make due inquiry, and the facts are such as to contradict his plea that he had an honest belief in the guilt of the plaintiffs. No doubt it very likely was a case of plaintiff No. 1 and the defendant each trying to get hold of the crop in order that his particular debt might be satisfied out of it. In the one case Rama, plaintiff No. 3, was a debtor of plaintiff No. 1, and in the other case Vithu was a debtor of the defendant. But this does not affect the fact that plaintiff No. 3 had at any rate some *prima facie* justification for asserting a title to the crop ; and the fact that, as appears from the evidence, the defendant had been dunning Vithu for his debt may explain why Vithu assigned the crop to the defendant in spite of his having already transferred his title to it to plaintiff No. 3. It is a form of dishonesty which is not of

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an uncommon character. I think, therefore, that the plaintiffs have succeeded in showing that the defendant had no reasonable and probable cause for this prosecution of the plaintiff, and having regard to the frequency of such cases, it is in my opinion very desirable that when a prosecution is shown to have been without such reasonable and probable cause the Court should assist the persons who have suffered thereby in recovering damages for the malicious prosecution. The judgment of the lower Court to my mind is a very one-sided one, and after going carefully through the evidence I think the view there taken is one entirely against the weight of the evidence.

On the question of malice, I think that, in addition to the inference arising from the want of reasonable and probable cause, there are clear indications that the defendant's main object was to get the plaintiffs in any case imprisoned and so cause them injury. As is pointed out in the judgment of the District Magistrate in the appeal that he heard, the defendant did not go to the Police to report the theft, but preferred to file a complaint, and in doing this he did not go to the Second Class Magistrate but to the Third Class Magistrate. Further the complaint was made on a holiday when there would be difficulties about the plaintiffs' obtaining bail. The result was that they were two days in the lock-up, and after their conviction four days in jail. The circumstances, I think, therefore show that the defendant was actuated by spite or ill-will towards the plaintiffs, and by improper motives in bringing the prosecution. I accordingly concur that the plaintiffs are entitled to recover damages.

Decree reversed.

J. G. R.

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