

APPELLATE JURISDICTION (a)

*Referred Case No. 39 of 1867.*RÁMASÁMI ÁYYAN.....*Plaintiff.*RÁMU MUPAN.....*Defendant.*

Where a plaint alleges the cause of action to be the prosecution of a false charge of forgery, and the statement of the subject-matter imports that the charge was false to the knowledge of the defendant, the omission to allege expressly malice and the absence of reasonable and probable cause is no good ground of objection to the hearing of the suit.

Magistrates are not incapacitated to give evidence of matters which have come before them in the course of a preliminary inquiry into a criminal charge. *Held*, that in a suit for a malicious prosecution the defendant had a right to the evidence of the Subordinate Magistrate, who held a preliminary inquiry into a charge of forgery preferred by the defendant against the plaintiff.

Semble, a defect which appears on the face of the plaint, which would have rendered it inadmissible, is not a matter for amendment at the final hearing of the suit.

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THIS was a case referred for the opinion of the High Court by W. S. Lilly, the Acting Judge of the Small Cause Court of Combaconum, in Suit No. 336 of 1867.

The Suit was brought to recover damages, the plaintiff alleging that the defendant had falsely charged the plaintiff with forgery before the Sub-Magistrate of Trivadu. The plaint contained no allegation of malice nor of the absence of reasonable and probable cause. When the case came on for hearing, the objection was taken by the defendant that the plaint disclosed no cause of action, whereupon the plaintiff applied for leave to amend the plaint by making the necessary allegations.

The Judge thought the plaint ought not to have been received, but that it should have been returned under Section 32 of the Civil Procedure Code, with permission to amend by adding the necessary allegations of malice and the absence of reasonable and probable cause, if the plaintiff thought he could sustain them. He thought however the amendment ought to be allowed, inasmuch as the plaintiff ought not to be prejudiced because the Court had allowed the plaint to be placed on the Register without sufficient examination, but his decision was subject to the opinion of the High Court. He added that in the Com-

(a) Present : Scotland, C. J. and Holloway, J.

baconum Small Cause Court, and he believed the practice to be the same in most Mofussil Courts, complaints were not, as a rule, perused by the Court until the cause came on for hearing, the examination prescribed by Sections 29 to 34 of the Civil Procedure Code being made with no great strictness by the Chief Ministerial Officer of the Court, and not by the Judge whose time was fully taken up with other duties.

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A second question submitted was, whether the Sub-Magistrate, who had held the preliminary inquiry into the charge in respect of which the suit was brought, could be called as a witness for the defendant to give evidence on the matters which came before him during the inquiry.

No Counsel were instructed.

The Court delivered the following

JUDGMENT :—As to the first question :—

The plaintiff states the cause of action to be the prosecution of a false charge of forgery to the inquiry of the plaintiff, and the statement of the subject-matter imports, no doubt, that the charge was false to the knowledge of the defendant. If so, we are of opinion that the omission to allege expressly malice and the absence of reasonable and probable cause was no good ground of objection to the hearing of the suit, and consequently that an amendment was not necessary. Section 32 of the Code of Civil Procedure provides for the rejection or amendment of the plaintiff when, upon its face, or after questioning the plaintiff, it appears that the subject-matter stated *does not* constitute a cause of action. The suit, therefore, should have been determined on the plaintiff as it originally stood.

It becomes unnecessary to give our opinion as to the power of amendment at the final hearing. But, looking at Sections 38 and 41 of the Code, our present impression is, that a defect appearing on the face of the plaintiff, which would have rendered it inadmissible, is not a matter for amendment at the final hearing of the suit. The validity or invalidity of the alleged cause of action and the right to the relief prayed must, then, it seems to us, be determined on the evidence, or the withdrawal of the suit may be allowed under Section 97. It is therefore of importance that the

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Judge of the Court should give proper attention to **plaints** before they are registered.

Then as to the second question :—

It has been held in England, on grounds of public policy that Judges of Courts of Record ought not to be *compelled* to give evidence of matters which have come to their knowledge judicially, and the same may be considered a sound rule in regard to the Judges of some Courts in the Mofussil. But, clearly, Magistrates are not incapacitated to give evidence of matters which have come before them in the course of a preliminary inquiry into a criminal charge, and which are otherwise admissible. In an action of the nature of the suit in this case the Magistrate who heard the charge is sometimes a witness in England. A reported case in which that occurred (*Freeman v. Arkell*) will be found in 2 Barn. and Cres. 494.

Our answer to the second question is, that the defendant had a right to the evidence of the Subordinate Magistrate.

APPELLATE JURISDICTION (a)

Referred Case No. 12 of 1867.

RUNGIAH PILLAI.....*Plaintiff.*

CHINNASÁMI PILLAI and another.....*Defendants.*

A suit for debt against two defendants whose liability was joint, but one of whom at the time of filing the plaint is neither resident nor personally working for gain within the limits of the jurisdiction, may be tried by a Small Cause Court within whose jurisdiction the other defendant is resident at the time of the commencement of the suit, provided an order is obtained from the High Court under Section 4 of Act XXIII of 1861.

1867.
November 18.
R. C. No. 12
of 1867.

THIS was a case referred for the opinion of the High Court by Captain C. J. Richards, Judge of the Small Cause Court of Wellington in the Zillah of Coimbatore, in Suit No. 17 of 1867.

The suit was for recovery of Rupees 95-13-0 principal and interest upon a loan of money made by plaintiff to defendants at Wellington.

(a) Present : Scotland, C. J. and Ellis, J.