APPELLATE JURISDICTION (a)

Regular Appeal No. 20 *of* 1870.

THE HONORABLE GODAY NARRAIN GAJPATHI RÁU..... } *Appellant.*

SRI ANKITAM VENKATA NARSING RÁU GÁRU..... } *Respondent.*

Action for malicious prosecution. The defendant had charged the plaintiff with cheating by personation in falsely pretending that his (plaintiff's) wife had been delivered of a son, and procuring a child and passing him off as the son so born. The case was dismissed by the Magistrate, and the plaintiff brought the present suit. The defendant alleged reasonable and probable cause and the absence of malice. The Civil Judge awarded Rs. 50,000 damages to the plaintiff. Upon appeal, it was contended that the charge was not malicious, though the facts upon which it was based were allowed to be false. *Held*, that this depended upon the question of the absence of reasonable and probable cause, and in case of the absence, upon the cogency of the inference derivable from it. The test which has received the most approbation is partly abstract and partly concrete. Was it reasonable and probable cause for any discreet man? Was it so to the maker of the charge? Upon the facts of this case, *Held*, that if defendant's conduct was mere negligence, it was 'dissoluta negligentia'. That the facts alleged in support of the charge were such as, if believed at all, could only be believed and acted upon through such negligence that the inference of malice was irresistible.

In a suit for malicious prosecution, the expense of counsel is not a proper element in the calculation of damages awardable to a successful plaintiff.

The damages were reduced to Rs. 10,000.

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THIS was a Regular Appeal against the decision of J. G. Thompson, the Civil Judge of Vizagapatam, in Original Suit No. 19 of 1866.

The suit was brought to recover Rupees 50,000 as damages for malicious prosecution.

The plaintiff married the daughter of one Jagga Ráu, a divided step-brother of the defendant; and at the time of such marriage, he executed a document, whereby he agreed that in the event of there being no issue of the marriage, his wife should adopt a son.

Jagga Ráu died on the 31st day of January 1856, leaving his widow and his daughter, the wife of the plaintiff, his sole heirs and legal representatives; and thereupon his said widow succeeded to a life-interest in his property.

The widow died on the 31st day of July 1864, and thereupon the plaintiff's wife succeeded as heir to the

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property of the said Jagga Rán, and a certificate of heirship was issud to her.

On the 4th day of February 1866, the plaintiff's wife was delivered of a son.

On the 13th day of April, the defendant charged the plaintiff with cheating by personation in falsely pretending that his wife had been pregnant and delivered of a son on the 4th February 1866, and procuring a child and passing him off as the son so born.

This charge was dismissed by the Magistrate, and thereupon plaintiff brought the present suit.

The defendant answered admitting that he charged the plaintiff before the Magistrate as in the plaint alleged, in that he had procured a child born of other persons and had put it forward as the child to which he alleged his wife had given birth. But that charge was made in good faith from information defendant had received, and which defendant believed to be true, and defendant submitted that he had reasonable and probable cause—that he would be heir and entitled to succeed to the property of the said G. Jagga Rán, come to the possession of plaintiff's wife, in case she should die without male issue of her body. The charge made against the plaintiff, therefore, in the magistrate's Court, was preferred in good faith, and for the purpose of protecting the honor of defendant's caste and family, and his reversionary right to a large property.

The defendant further submitted that he had instituted a suit in the Civil Court for the purpose of obtaining a decree declaratory of his reversionary right to the property so come to the possession of the plaintiff's wife.

The Civil Judge decided that the charge was made falsely, maliciously, and without reasonable and probable cause ; and he awarded Rupees 50,000 to plaintiff as damages.

The defendant appealed to the High Court on the grounds, amongst others—

That there was no valid judgment delivered by the Civil Court.

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That the damages were excessive.

That there was no evidence of malice, and ample evidence of reasonable and probable cause.

The *Advocate General*, *Miller*, *Scharlieb* and *Sloan*, for the appellant, the defendant.

Mayne, for the respondent, the plaintiff.

The Court delivered the following judgment :—

HOLLOWAY, ACTING C. J. :—The first objection made was that the decree is a nullity, because a written judgment and the decree were not contemporaneous. So far as we can see, this objection applies rather to the declaration suit from which there is no appeal, than to this. Here, a short judgment referring to the result of that suit, is contained in the record. Even if applicable, it is, however, an error of procedure, resulting from the practice of short hand, not affecting the merits, and such an objection therefore as we are bound to disregard.

My observations are much shortened by the prudent admission of the Advocate-General, that the facts upon which the prosecution was based are altogether false. They are proved so by the judgment of a competent Court against which no appeal has been ventured. The pillows, the painful disease, the barrenness, the supposition, are all false.

The charge was false, was it also malicious ? This depends upon the question of the absence of reasonable and probable cause, and, in case of the absence, upon the cogency of the inference derivable from it. *Lister* v. *Prettyman* (IV. L. R. H. L., 521) in an example of the curious state of the English law upon this matter. The test which has received the most approbation is partly abstract and partly concrete. Was it reasonable and probable cause for any discreet man ? Was it so to the maker of the charge ? Now the foisting of a Mussulman's bastard by an outcaste into a man's family is almost incredible. The story absolutely proved false was, on its face, to the last degree, improbable.

It is unnecessary to consider the evidence of Andrews and Cox, because this was matter subsequent. We have

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only another instance in this case of the extreme distrust with which opinion evidence should be received. The most honest man manages to see what he thinks that he shall see, and the alleged capabilities of the child at the first examination are greater than it possessed months afterwards. The woman was young, and, unless the barrenness was true, need not despair of issue. Further, she might have adopted. It is a story proved to be false, and it is to the last decree improbable.

Then with respect to the belief by the defendant—a near relative of plaintiff through the lady whose imaginary infirmities were its main basis.

He takes the advice of counsel as to the large sum of money, about &80,000, which he believes dependent upon this lady not having issue. He neither by himself nor his female relatives takes a single step to ascertain the firmness of the ground upon which he is to drag his own relative as a criminal before a Magistrate, and make the infirmities of a woman, his own near relative, the sport of nauseous curiosity. I can entertain no doubt that, if his conduct was mere negligence it was " dissoluta negligentia." Then, as throwing light upon the question of damages, and upon the motives by which he was actuated, it is impossible not to regard his subsequent conduct. He carries on a suit in which, as is usual in such cases, we have the whole " posse comitatus" of infamy, the discarded chamber maid and her evidence as to the pillows, the servants who knew of the importation of the bastard and the sprinkling of blood to simulate delivery, the manifestly false story of ostentatious publishing of the intent to get a child into the family, the allegation of a disease which rendered pregnancy impossible, although she was actually pregnant, and had to his knowledge been so before. This he certainly did not believe himself. I can entertain no doubt that this monstrous series of fictions, if believed at all, could only be believed and acted upon through such negligence that the inference of malice is irresistable. As to the damages—if the greatness of the ethical wrong were the only element upon which they were to be calculated, and if punishment were

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the sole aim, I should not in the position of the parties consider them excessive. The wound of the slanderous tongue is often deeper and more malignant than that of the sword, but Courts of Justice cannot act upon this, truth though it be. If the Civil Judge had put his judgment upon the extent of the injury and the wealth of the defendant, I should still, perhaps, have thought the damages excessive, but I cannot allow the expenses of counsel to be a proper element in the calculation. There should, however, be exemplary damages. In its inception, in its progress, and in its details, it is as bad a case as it is possible to conceive. In view, however, of all the considerations which should, in our opinion, influence us, we have reduced the damages to Rupees 10,000.

I have not gone minutely into the whole of the evidence, because in the state of the case it seemed unnecessary; but, of course, I reserve my right, in accordance with the rules of the Judicial Committee, of doing so, should this case be carried beyond this Court. The appeal must be dismissed with costs.

INNES, J.—I concur in dismissing this appeal, with a modification as to the amount of damages. I entertain no doubt that the mass of evidence brought forward to prove the spuriousness of the child by showing overtures and other endeavours made to obtain possession of children, a feigned pregnancy and a feigned delivery, was entirely false. Neither Narsing Rán, nor his wife, had the smallest interest in acting in the manner they were charged with doing, and it is absurd to suppose that, without the most overwhelming necessity, they would have attempted to pass off a bastard Mussulman boy as their own son. And this opinion is further confirmed, if confirmation were required, by the conduct of the case in appeal. For it was almost conceded that the evidence was false, and that the appellant's case must rest upon his means of showing that he had reasonable ground for believing the truth of the evidence.

The subsequent pregnancies and birth of children show clearly that the wife could not have been labouring under

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the absolute incapacity for conception which the evidence for this defendant endeavoured to establish, and that this evidence was not the result of mere ignorance, but was absolutely and wilfully false, is shown by the medical evidence to the miscarriages which took place at the very same period as the evidence of the witnesses is directed to. In regard to the evidence of the two Medical Officers and Mr. Carmichael as to their observations of the child at the time of the complaint before the Magistrate, the tendency of it, if accurate, is undoubtedly to show that the child must have been considerably older than its alleged age, and so to support the allegation of its spuriousness; but that those observations must have been inaccurate seems to be clearly established by the subsequent observations of Medical men as to the size and strength of the child; and as the truth of the evidence to the spuriousness of the child is no longer attempted to be insisted upon, this evidence would only be of importance in so far as it tended to show that defendant had grounds for belief in the truth of the charge. But, in fact, it has no such tendency because observations of this kind formed no part of the basis of information upon which defendant is said to have acted. It is contrary to reason to suppose that all the evidence for defendant (appellant) to what took place prior to the birth of the child, if false, could have had any other promoter than the defendant himself, who was the only person interested in obtaining it. To come to any other conclusion would be to suppose that these false witnesses, without any particular motive except the pleasure of perjuring themselves, came forward spontaneously and independently of each other to speak to facts, which, when put together, present all the features of an elaborately planned scheme for bringing disgrace on the family of the respondent. The prosecution was, emphatically, a malicious prosecution, and the charges have been persistently maintained, but I think 50,000 Rupees an excessive amount of damages, and we have agreed on 10,000 Rupees as sufficient.

With this modification the appeal will be dismissed, and with costs.