APPELLATE CIVIL.

Before Mr. Justice White and Mr. Justice Tottenham.

RAJ CHUNDER ROY (DEFENDANT) *v.* SHAMA SOONDARI DEBI (PLAINTIFF).* 1879 *Feb.* 13.

Damages for Arrest—Reasonable and Probable Cause—Act VIII of 1859, s. 201.

A suit to recover damages on account of injuries caused by an arrest in accordance with a decree of a competent Court can only be maintained under special circumstances,—*viz.*, the plaintiff must show (i) that the original action, out of which the alleged injury arose, was decided in her favor; (ii) that the arrest was procured without reasonable and probable cause; (iii) that the injury sustained was something other than an injury which has been or might have been compensated for by an award of the costs of the suit,—*e. g.*, that he has suffered "some collateral wrong."

Under s. 201 of Act VIII of 1859, a judgment-creditor has the option of enforcing his decree against the person or property of the judgment-debtor, and the fact that such decree is an *ex parte* one makes no difference.

Where a plaintiff must show an absence of reasonable and probable cause, malice is not alone sufficient to entitle him to a verdict.

THIS was a suit brought by one Shama Soondari, a purdanashin lady, to recover a sum of Rs. 5,000 as damages resulting from her arrest in execution of an *ex parte* decree obtained against her by the defendant No. 1.

The plaintiff stated that, in the year 1873, one Raj Chunder Roy (defendant No. 1) brought a suit against her in the Munsif's Court of Shahazadpur, on a "roka," securing the sum of Rs. 200, and obtained an *ex parte* decree, notwithstanding that she had never been summoned to appear; that, in execution of that decree, Raj Chunder caused her to be arrested by a peon of the Court (defendant No. 2), although she was possessed of considerable property and was willing to pay the amount of the decree to

* Appeal from an Appellate Decree, No. 497 of 1878, against the decree of J. R Hallett, Esq., Officiating Additional Judge of Rajshahye, dated the 5th January 1878, reversing the decree of Baboo Jodunath Mullick, First Subordinate Judge of that District, dated the 15th May 1875.

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save herself from arrest; that, subsequently, the offer of payment was accepted, when she immediately applied for a review of the Munsif's judgment, and, on a rehearing of the case, the claim of Raj Chunder was found to be false, and his suit was dismissed both in the lower Court and on appeal. She, therefore, brought this suit against Raj Chunder and the peon to recover damages for the injury done to her reputation and honor consequent on the arrest. The defendants contended that the plaintiff was arrested under a decree of Court whereof execution was really taken out, the plaintiff at the time being possessedof no property; that the plaintiff had not specified any particular damage done to her by the arrest; that she had no cause of action against them; and, further, that the plaintiff was not a woman of any position amongst the class of people with whom she lived, and that, on receiving payment of his judgment-debt, he at once released the plaintiff from arrest.

The First Subordinate Judge found that the defendant Raj Chunder had reasonable and probable cause for taking the steps he did, and that he was not actuated by malice in so doing; that the plaintiff having no property against which the defendant Raj Chunder could execute the decree granted to him in the Munsif's Court, he was justified in arresting his judgment-debtor on the authority of the case of *Maharani of Burdwan* v. *S. M. Barada Sundari Debi* (1); and, moreover, he was of opinion that the plaintiff had greatly exaggerated the extent of the injury which she said she had sustained, and on the authority of the case of *Thakoor Lulleet Narain Deo* v. *Juggurnath Misser* (2) he dismissed her suit.

The plaintiff appealed to the Officiating Additional Judge of Rajshahye, who found that there had been enmity existing between the plaintiff and defendant Raj Chunder for some time; that the plaintiff was possessed of some property at the time of the arrest, and that, therefore, the defendant Raj Chunder was not justified in arresting her; that he had done so without reasonable and probable cause, and the Judge therefore allowed the appeal, giving the plaintiff Rs. 1,000 as damages.

The defendant Raj Chunder appealed to the High Court.

(1) 1 B. L. R., F B., 31; S. C., 10 W. R., F. B., 21. (2) 8 W. R., 476.

Baboo *Srinath Dass* and Baboo *Turini Kant Bhuttacharjee*, for the appellant, contended, that there was no evidence of malice on the part of the defendant, and that having acted *bonâ fide* all through the execution-proceedings of the original decree, no damages ought to have been given to the plaintiff.

Baboo *Mohiney Mohun Roy* and Baboo *Issur Chunder Chuckerbutty* for the respondent.

The judgment of the High Court was delivered by

WHITE, J. (TOTTENHAM, J., concurring).—The appellant, who was the principal defendant in the first Court, appeals against a decree of the lower Appellate Court, reversing a judgment in his favor passed by the first Court.

The respondent, who was the plaintiff in the first Court, and states herself to be a pardanashin woman, has sued the appellant and another defendant, who is a Court-peon, to recover compensation for causing her to be arrested in execution of an *ex parte* decree which the appellant had obtained against her in the Court of the Munsif of Shahazadpur.

The suit in which the *ex parte* decree had been pronounced was brought by the appellant to recover from the respondent Rs. 200, alleged to be lent to her for the marriage expenses of her son, and was based upon a "roka" alleged to be executed by her. In the plaint in the present suit she charges that the *ex parte* decree was obtained by the appellant secretly and collusively, and without the service of a summons upon her; that the decree was subsequently set aside at her instance; and that on a new trial the first Court dismissed the appellant's suit pronouncing the roka to be false, and that the Appellate Court confirmed the decision.

This suit is one of an unusual character, and I had some doubts at first whether, under any circumstances, such a suit would lie. But having examined the authorities, and amongst them *Wren* v. *Weild* (1) and the cases there cited, I think that such a suit is maintainable, but only under special

(1) 38 L. J., Q. B., 327.

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circumstances. The plaintiff must, in order to succeed, show—*first*, that the original civil action out of which the alleged injury arose has been decided in her favor; *secondly*, that the appellant maliciously and without reasonable and probable cause procured the respondent to be arrested; and *thirdly*, that the injury or damage which she has sustained was something other than that which has or might have been compensated for by an award of the costs of suit; that in fact she has suffered what Lord Holt calls in *Savile* v. *Roberts* (1)—"some collateral wrong."

In the present case the respondent has satisfied the first requisite by showing that the *ex parte* decree was set aside, and that a new trial was had which resulted in the dismissal of the appellant's action, and which dismissal was upheld on appeal. We also think that the damage alleged and proved,—*viz.*, the arrest of the respondent,—was a collateral wrong, and of such a nature as satisfies the third requisite. But as regards the remaining requisite, we are of opinion that the lower Appellate Court had no ground for holding that the appellant maliciously and without reasonable or probable cause procured the respondent to be arrested.

The greater part of the judgment consists of a statement of the allegations and arguments of the respective litigants. The reasons for the decision are to be found in the last paragraph, and are in these words: "With regard to the enmities between the parties, there can be no doubt of that, and the findings of the two Courts in the roka suit go far to indicate malice on the part of the respondent (the now appellant). Though there is no clear evidence as to the extent of the appellant's (*i. e.*, now respondent's) means, it seems plain that she is possessed of some property. Respondent then was not justified in immediately arresting her, even after a fairly contested suit, and that he did so in this instance quite without reasonable and probable cause I am satisfied." The judgment thus proceeds upon two grounds:—*First*, that malice existed between the parties; and *secondly*, that as the respondent had some property, the appellant was not justified in arresting her. As regards the latter ground, the possession of property by the judgment-debtor does not make

(1) 1 Ld. Raymond, 374.

it wrongful in the creditor to arrest his debtor in execution of a decree. Section 201 of Act VIII of 1859, the Code in force at the time of the arrest, gives an option to the creditor of enforcing the decree either against the person or the property of the debtor, and the fact that the decree is an *ex parte* decree makes no difference. As regards the former ground, it has been long ago, and over and over again, ruled, that in suits like the present one, where the plaintiff must show an absence of probable cause, that malice alone is not sufficient to entitle the plaintiff to a verdict. Amongst the numerous authorities on this point, I may refer to *Willans* v. *Taylor* (1): if a person has a reasonable and probable cause for asserting a legal right, he cannot be sued for setting the law in motion to enforce that right, however vindictive may be his feelings against his adversary. The Court, therefore, was not warranted in inferring the absence of probable cause from the fact that enmities or malice existed between the parties. What amounts to an absence of reasonable and probable cause is a question of law arising upon the facts found, and as the only facts found by the lower Appellate Court are, for the reasons stated, insufficient to support the conclusion at which it arrived, we must reverse the decree.

We have been pressed to remand the suit to the lower Appellate Court for re-trial, or to frame certain issues, and direct the Court to pass a fresh decision after finding on those issues. There is no ground for a remand in the sense in which the word is used in the Code: and as to the alternative proceeding, we do not think that this is a proper case for its application. The respondent gave no evidence that, when the appellant caused her to be arrested, he was aware that she had not been served with the summons, whilst, as regards the alleged falsity of the roka, the evidence, to say the least of it, was extremely conflicting. It does not appear from the judgments of the lower Courts that the respondent, in proof of the latter allegation, did more than produce the two judgments of the Courts in the roka suit; but whether she did or not, it is clear that she did not herself come forward and give evidence on the point; whilst, on the other hand, the appellant, and several witnesses on his behalf, deposed that

(1) 6 Bingham, 186.

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the respondent had borrowed the money and given the roka. The onus of proof lay upon the respondent; it was for her to satisfy the Judge that her allegation was true. In this state of the case and of the evidence, we think that it would be wrong to send down fresh issues to the lower Court with directions to find on them, and the more so, as the judgment of the lower Court was in reversal of that of the first Court, which had the opportunity of seeing the witnesses and their demeanour, and the better means of judging of their credibility.

The appeal is allowed with costs. The appellant will also have his costs in the lower Appellate Court.

Appeal allowed.

Before Mr. Justice R. C. Mitter and Mr. Justice Maclean.

1878
Aug. 2.

FURZUND HOSSEIN (PLAINTIFF) *v.* JANU BIBEE AND OTHERS (DEFENDANTS).*

Mahomedan Law—Divorce.

The mere pronunciation of the word "talak" three times by the husband, without its being addressed to any person, is not sufficient to constitute a valid divorce by Mahomedan law.

Semble.—That a divorce pronounced in due form by a man against a woman who is in fact his wife, dissolves the marriage, though he pronounces it under a belief that she is not his wife.

THE facts of the case sufficiently appear from the judgment.

Moonshee *Serajul Islam* for the appellant.

Baboo *Joy Gobind Shome* for the respondents.

MITTER, J. (MACLEAN, J., concurring).—This is a suit for restitution of conjugal rights; the defence raised is that of divorce. The Court of first instance overruled this plea, and

* Special Appeal, No. 2206 of 1877, against the decree of Captain M. O. Boyd, Officiating Deputy Commissioner of Zilla Kachar, dated the 18th of July 1877, reversing the decree of Baboo Jogesh Chunder Chatterjee, Additional Assistant Commissioner of that place, dated the 28th of May 1877.