

ORIGINAL CIVIL.

*Before Mr. Justice Fletcher.*1910
Feb. 11.DEROZARIO
v.
GULAB CHAND ANUNDJEE.**Malicious Prosecution—Cause of Action—Complaint laid but no Process issued.*

Where in a suit for malicious prosecution, it was averred that a complaint had been laid by the defendant before a Magistrate who thereupon sent the case to the police for enquiry and report, but there was no averment that the Magistrate had ever issued process:—

Held, that the plaint disclosed no cause of action.

Yates v. The Queen (1), followed.

Clarke v. Postan (2) and *Ahmedbhai v. Framji Edulji* (3) not followed.

Thorpe v. Priestnall (4), referred to.

ORIGINAL SUIT.

This was a suit for malicious prosecution. The plaintiff, Charlotte DeRozario, who was a boarding-house keeper, was the tenant of one Mooljee Virjee at No. 70, Elliot Road in Calcutta. The defendant was a nephew and partner of Mooljee Virjee.

It appears that certain disputes arose between the parties in respect of the tenancy, which culminated in the institution of a suit, which, however, was subsequently compromised.

The plaintiff's case was that on the 16th June 1909 the defendant falsely and maliciously and without any reasonable and probable cause laid a complaint against her, under section 380 of the Indian Penal Code, before the Chief Presidency Magistrate of Calcutta, and also asked for a search warrant against her; that the Magistrate sent the case to the police for enquiry and report; that the defendant thereafter informed the Police Inspector that he did not desire the enquiry to be proceeded with nor the premises of the plaintiff searched; that the defendant failed to appear when the case was called on before

*Original Civil Suit No. 97 of 1909.

(1) (1885) L. R. 14 Q. B. D. 648.

(2) (1834) 6 C. & P. 423.

(3) (1903) I. L. R. 28 Bom. 226.

(4) [1897] 1 Q. B. 159.

the Magistrate, who thereupon dismissed the complaint; that the defendant caused a fresh complaint under section 380 of the Indian Penal Code to be lodged against her, which complaint was also dismissed; and that the plaintiff had thereby suffered damage which she estimated at Rs. 6,000.

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The pleas taken in defence were, *first*, that no cause of action had been disclosed in the plaint; *secondly*, that the first complaint had been made *bonâ fide*, but that on further enquiry the defendant had abandoned the complaint before the issue of process; and, *thirdly*, that the second complaint had not been laid at the instance of the defendant. The damages were also denied.

It was admitted by both parties that the Magistrate had never issued process. The only step taken, after the complaint had been laid, was that the matter was sent to the Police for enquiry and report.

Mr. N. Chatterjee (with him *Mr. A. K. Ghose*), for the plaintiff. The cause of action was complete. It was not necessary, in order to maintain an action for malicious prosecution, to show that the charge was acted upon by the Magistrate, or that process had issued. The prosecution commenced when the complaint was made: *Clarke v. Postan* (1), *Imperatrix v. Lakshman Sakharam, Vaman Hari and Balaji Krishna* (2), *Ahmedbhai v. Framji Edulji* (3); Addison on Torts, 8th Edition, page 249.

Mr. A. N. Chaudhuri (with him *Mr. Sircar*), for the defendant. The plaint did not disclose a cause of action. To found an action for malicious prosecution, it was not enough that a complaint should have been laid before a Magistrate. It was essential that the defendant should have set the Magistrate in motion and that process should have issued. Until the issue of a summons or warrant the prosecution could not be said to have commenced: *Gregory v. Derby* (4), *Yates v. The Queen* (5); Clerk and Lindsell on Torts, 3rd Edition, page 608.

(1) (1834) 6 C. & P. 423.

(3) (1903) I. L. R. 28 Bom. 226.

(2) (1877) I. L. R. 2 Bom. 481, 487.

(4) (1839) 8 C. & P. 749.

(5) (1885) L. R. 14 Q. B. D. 648, 661.

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 FLETCHER J.

The averment of issue of process is required under form No. 31, Appendix A, First Schedule, Code of Civil Procedure.

FLETCHER J. This is a suit for malicious prosecution.

The plaintiff alleges in the plaint that on the 16th June 1909 the defendant falsely, maliciously, and without any reasonable and proper cause, laid a complaint under section 380 of the Indian Penal Code against the plaintiff before the Chief Presidency Magistrate, and also asked for a search warrant against her.

The 7th paragraph of the plaint alleges that the Magistrate sent the case to the Police for enquiry and report, but the defendant thereafter wrote to the Police Inspector stating that he did not want to proceed with the case or the house of the plaintiff to be searched. Paragraph 10 of the plaint alleges that a fresh complaint was made against the plaintiff through one Bissonath Dubay, but the said complaint was also dismissed.

The point argued is whether, on these allegations, a suit for malicious prosecution can lie. Mr. Chatterjee admits that the evidence is not enough to carry the case higher, but says that the plaintiff can on these allegations maintain the suit for damages for malicious prosecution.

The case on which Mr. Chatterjee relies is the decision of Chandavarkar and Jacob JJ. in *Ahmedbhai v. Framji Edulji* (1), and there is no doubt that in that case the learned Judge did say that a prosecution commences when a complaint is made, and it is enough if the charge is made to the Magistrate. This statement is made on the authority of a statement taken from Addison on Torts, 8th edition, page 249. The case referred to in Addison is *Clarke v. Postan* (2), which has been considered by Lord Justice Cotton in the case of *Yates v. The Queen* (3).

The case of *Clarke v. Postan* (2) was a mere *dictum* of the Judge at Nisi Prius, and the case of *Yates v. The Queen* (3) is a considered judgment of the Court of Appeal.

(1) (1903) I. L. R. 28 Bom. 226.

(2) (1834) 6 C. & P. 423.

(3) (1885) L. R. 14 Q. B. D. 648, 661.

My opinion is that the decision of Lord Esher and Lord Justice Cotton in *Yates v. The Queen* (1) is to be preferred on this point to the ruling in *Clarke v. Postan* (2).

Looking to the provisions of the Criminal Procedure Code, it is obvious that process never issued at all. Section 200 is the first section in Chapter 16. Section 200 says what should be done on a complaint. In section 202 the marginal note is postponement of issue of process, and states what is to be done in a case when the Magistrate, instead of issuing process, sent the matter to the Police to enquire and report. Then comes Chapter XVII, and the first section of which has the marginal note "Issue of Process," and the Chapter is headed "The commencement of Proceedings."

In this case the Magistrate never issued process. The plaintiff was not prosecuted. The only step taken was that the matter was sent to the Police for enquiry and report.

I think that the case of *Ahmedbhai v. Framjee Edulji* (3), which relies on the statement in Addison on Torts, that the prosecution commences from the date of complaint, is sufficiently explained by the case of *Thorpe v. Priestnall* (4). This case shows that once summons is issued the commencement of prosecution relates back to the laying of the information or making of the complaint. It is to be noticed that the learned Judges in the Bombay High Court did not refer to the case of *Yates v. The Queen* (1), nor was such case cited to them in the course of the argument.

In these circumstances, I prefer to follow the decision of *Yates v. The Queen* (1) rather than the decision of *Ahmedbhai v. Framjee Edulji* (3). I hold, therefore, that the plaint discloses no cause of action, and the suit must therefore be dismissed with costs on scale No. 2.

Suit dismissed.

Attorney for the plaintiff: *M. N. Ganguly*

Attorneys for the defendant: *Manuel & Agarwalla.*

J. C.

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