APPEAL FROM ORIGINAL CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Woodroffe.

1911
June 23.

GOLAP JAN
v.
BHOLANATH KHETTRY.*

Malicious Prosecution—Action on the case—Cause of action—Complaint laid, but no process issued—Criminal Procedure Code (Act V of 1898) ss. 202, 203—Defamation—Privilege.

Where a complaint had been laid before a Magistrate by the defendant against the plaintiff for criminal breach of trust, and the Magistrate had referred the matter to the Police under section 202 of the Criminal Procedure Code, for enquiry and report and finally dismissed the complaint under section 203 of the Criminal Procedure Code, without issuing process:—

Held, that the prosecution had not commenced, and no suit for malicious prosecution was maintainable.

Yates v. *The Queen* (1) and *Clarke* v. *Postan* (2) referred to.

Nor would there lie any action on the case analagous to malicious prosecution.

Held, further, that the complaint, even if defamatory, was absolutely privileged.

APPEAL by Golap Jan, the plaintiff, from the judgment of Pugh J.

This appeal arose out of a suit for malicious prosecution, the main issue being whether the criminal proceedings had reached the stage when a "prosecution" could be said to have commenced. Failing a suit for malicious prosecution it was contended the plaintiff was entitled to relief, inasmuch as he disclosed injury and damage resulting from the wrongful conduct of the defendant.

It appears that Golap Jan and Bholanath Khettry joined in a venture to conduct a wrestling entertainment for profit, the former being entitled to a ten-annas' share, and the lat-

*Appeal from Original Civil, No. 71 of 1910.

(1) (1885) L. R. 14 Q. B. D. 648. (2) (1834) 6 C. & P. 423.

ter to a six-annas' share of the profits. The duty of the former was to procure wrestlers, and that of the latter, to finance the undertaking, and to have charge of all moneys in connection therewith.

It was alleged in the plaint that the undertaking yielded a profit of Rs. 30,000, that on the 25th March, 1909, the plaintiff caused a letter of demand to be written to the defendant claiming a proportionate share, and that on the 29th March, 1909, Bholanath laid a false complaint against him before the Chief Presidency Magistrate, charging him with criminal breach of trust in respect of three sums of money aggregating Rs. 1,700, and that on the 15th April, 1909, the defendant was examined by the Magistrate and his complaint dismissed. The plaintiff charged the defendant with having acted maliciously and without reasonable and probable cause, and alleged that he had been injured in his reputation and incurred certain expenses in defending himself. He assessed his damage at Rs. 10,000.

In his written statement, the defendant denied that any profit had accrued, and alleged that the undertaking had resulted in a loss of Rs. 12,000, towards which the plaintiff had failed to contribute. He denied that the complaint was false or that he had acted maliciously or without reasonable or probable cause, and alleged he was acting *bona fide* and with the object of protecting his own interests. It was further alleged that the complaint was dismissed by the Magistrate, on the ground that the dispute between the parties was of a civil nature, and damage to the defendant was denied. The defendant finally submitted that the complaint and examination did not amount to a prosecution and that the plaint disclosed no cause of action.

Pugh J., before whom the suit came on for hearing in the Court of first instance, refers to what occurred in the Police Court as follows:—

"What is alleged to have occurred in the Police Court was this: On an application to the Presidency Magistrate he, following a practice very common in the Police Court founded on section 202 of the Criminal Procedure Code, referred the matter to the Police for en-

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quiry. An enquiry was held and as the result of that enquiry the Magistrate after hearing the report refused to issue process on the ground that the case was a civil one."

The complaint was dismissed by the Magistrate under section 203 of the Criminal Procedure Code.

In the Court of first instance, it was desired by both parties that judgment should be given on the issue whether the action was maintainable, without any evidence being offered, and Pugh J., in his judgment, made the following reference to this procedure:--

"I have given the parties an opportunity of placing their evidence before the Court with a view to enable the Appeal Court to deal with the whole matter, but both parties agree that this course would not be a convenient one for them. A considerable amount of evidence might be taken which would be wasted and both parties are desirous that I should simply give my judgment at this stage without taking any evidence on the point raised. If the matter goes to the Court of Appeal, and my judgment is corrected the case will come back and evidence can then be brought forward. Having regard to the circumstances it seems that this course will be the one most convenient for all parties, and as both parties desire that evidence should not be offered, I see no objection to that course."

On the 18th July, 1910, Pugh J., dismissed the suit. After reciting the facts, his Lordship continued:—

"By Mr. Chaudhury, it is argued that a prosecution under the Criminal Procedure Code commences when the complaint is filed. In support of that contention he has in his favour two decisions of the Bombay High Court. On the other hand Fletcher, J. has held following *Yates* v. *Queen* (1), that the prosecution does not commence till process is issued. *De Rozario* v. *Golab Chand Aundjee* (2). The Bombay decisions are both of them to some extent *obiter dicta*, *Imperatrix* v. *Lakshman Sakharam*, *Vaman Hari and Balaji Krishna* (3), being in connection with a criminal prosecution and involving a discussion as to the sanction necessary before prosecution could take place. In the later Bombay case, *Ahmedbhai* v. *Framji Edulji* (4), it is stated in the judgment that a prosecution commences from the filing of the complaint and an action for malicious prosecution will lie even if the Court does not entertain the complaint. But though there is this statement in the judgment in fact that Court had entertained the complaint and proceeded with regard to some at any rate, of the charges. I am asked in this state of the authorities to dissent from Fletcher, J.'s decision and concur with that of the Bombay Court. In a case of this

(1) (1885) L. R. 14 Q. B. D. 648. (3) (1877) I. L. R. 2 Bom. 481, 487.
(2) (1910) I. L. R. 37 Calc. 358. (4) (1903) I. L. R. 28 Bom. 226.

kind where the matter has been recently decided by a Judge sitting on the Original Side I do not think it is for me to go further into the matter. There is no doubt some force in what Mr. Chowdhury says that if a complaint is lodged and a police enquiry directed under Section 202 of the Criminal Procedure Code there is to all intents and purposes, or may be, a trial before the Police Officer or Inspector. He points out that in this particular case evidence was given. An attorney appeared and witnesses were examined and one knows that as a matter of fact in these cases of Police enquiries people are often put to a considerable amount of trouble and no little expense for which they have some claim to be compensated if the complaint is groundless and malicious. On the other hand an action for malicious prosecution is, if I may so describe it, an imported action from English Law and it is recognised that by that action a man has certain remedies by way of a suit for malicious prosecution provided his adversary has succeeded in initiating a prosecution against him by getting a Magistrate to issue process but not otherwise. It is stated in Addision on Torts that the proceedings commence when the complaint is filed but this as pointed out by Fletcher, J. is not correct on the English authorities. It may be that there is a wrong for which a party has a remedy if process is actually issued against him. It may be on the other hand that he is without remedy and suffers no wrong provided a man simply lodges a complaint against him before a Magistrate on which no action is taken.

This may be one of the things which though unpleasant and possibly expensive is a *damnum sine injuria* such as accidental injury. It may be that the law considers the Magistrate is a sufficient protection and that the complainant is only liable if he in effect misleads the Magistrate not otherwise.

The point is not certainly so clear in favour of Mr. Chowdhury's present contention that I feel myself in any way called upon to express an opinion one way or the other. If the matter was *res integra* and to be dealt with on first principles it would be an arguable question with a good deal to be said on both sides as to whether in India an action of malicious prosecution or an action analogous thereto ought not to be under the circumstances of this case and that before Fletcher, J. But the question having once been decided on the Original Side of this Court in my opinion the only place where the matter can be properly further agitated is the Court of Appeal.

From this judgment the plaintiff appealed.

Mr. S. P. Sinha (*Mr. A. N. Chaudhuri* with him), for the appellant. The gist of the action for malicious prosecution is setting the criminal law in motion without reasonable and probable cause, and does not contemplate the issue of process. The object is that a person who is put in risk of loss of liberty or reputation, should have a remedy. Prosecution com-

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mences when the charge is laid. *De Rozario* v. *Gulab Chand Anundjee* (1), which Pugh J. followed, has been wrongly decided. In that case, Fletcher J. misread *Yates* v. *The Queen* (2), and was wrong in holding that the passage in Addison on Torts, 8th edition, p. 249, "that it was not necessary that the charge should be acted upon by the Magistrate," was unsupported by authority. *Clarke* v. *Postan* (3), and *Thorpe* v. *Priestnall* (4) cover the point.

[WOODROFFE J. If there is a prosecution the commencement is the laying of the complaint: but it does not follow, that that would be the commencement if the prosecution falls through.]

It was pointed out by Wilson J. in *Karim Buksh* v. *Queen-Empress* (5) that in this country a prosecution may commence in one of two ways, *viz.*, under section 154 or section 191 of the Criminal Procedure Code. In either case, a civil action for malicious prosecution would lie. The Indian authorities are *Imperatrix* v. *Lakhsman Sakharam* (6), and *Ahmedbhai* v. *Framji Edulji* (7).

Failing malicious prosecution an action on the case would lie in common law: *Atwood* v. *Monger* (8). If the charge is false, and injury is occasioned, an action will lie. The plaintiff has been caused harrassment and risk, and the damage is the expenditure reasonably and properly incurred in defending himself. It cannot be said the plaintiff was acting voluntarily in appearing to defend himself at the Police enquiry. The laying of the charge is an indictable offence under section 211 of the Indian Penal Code; hence it is a wrong. The combination of wrongful action and loss, must be actionable. The laying the charge puts the plaintiff in jeopardy.

[JENKINS, C.J. referred to *Girish Chunder Mitter* v. *Jatadhari Sadukhan* (9)].

(1) (1910) I. L. R. 37 Calc. 358.
(2) (1885) L. R. 14 Q. B. D. 648.
(3) (1834) 6 C. & P. 423.
(4) [1897] 1 Q. B. 159.
(5) (1888) I.L.R. 17 Calc. 574, 577.
(6) (1877) I. L. R. 2 Bom. 481.
(7) (1903) I. L. R. 28 Bom. 220.
(8) (1653) Sty. 378.
(9) (1899) I. L. R. 26 Calc. 653.

Mr. B. C. Mitter, for the respondent. The main question in issue is whether there has been a "prosecution." From sections 202, 203, and 204 of the Criminal Procedure Code, it is clear that the proceedings had not reached the stage when a prosecution could be said to have commenced: see authorities cited in the notes to Swaminadhan's Code of Criminal Procedure, sections 202, 203 and 160. See also *In re Tukaram Udaram* (1). In a prosecution, the accused must be present: at the police enquiry under section 202, he need not be present or incur any expense in his defence. The object of holding the enquiry would be to prevent a prosecution if possible. At the enquiry the position of the plaintiff was not that of an "accused": *Mohesh Chunder Kopali* v. *Mohesh Chunder Dass* (2). In *De Rozario* v. *Gulab Chand Anundjee* (3), Fletcher J. based his judgment on the provisions of the Criminal Procedure Code. As regards English authorities, it is submitted they are also in respondent's favour. *Yates* v. *The Queen* (4) may not be directly in point, but the observations in that case are worthy of great consideration. See also *Gregory* v. *Derby* (5), *Hope* v. *Evered* (6), *Elsee* v. *Smith* (7), Clerk and Lindsell on Torts, 3rd edition, p. 609, and Bullen and Leake's Precedents, 3rd edition, p. 355, which has been followed in No. 31 of Appendix A of the Frist Schedule of the Civil Procedure Code. A prosecution actually commences when process is executed: in the case of a warrant, when arrest has been affected; in the case of a summons when the summons has been served. The wrong in malicious prosecution is analogous to the abuse of privileged occasions in the law of defamation: see Pollock's Law of Torts, 8th edition, p. 315, citing *Allen* v. *Flood* (8). If the argument for the appellant is sound, the plaintiff would not be required to prove want of reasonable and probable cause. To succeed in an action on the case, the plaintiff must bring himself

(1) (1904) 6 Bom. L. R. 91.
(2) (1882) 10 C. L. R. 553.
(3) (1910) I. L. R. 37 Calc. 358.
(4) (1885) L. R. 14 Q. B. D. 648.
(5) (1839) 8 C. & P. 749.
(6) (1886) L. R. 17 Q.B.D. 338.
(7) (1882) 1 Dow. & R. 97.
(8) [1898] A. C. 1, 125.

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within the words of Lord Macnaghten in *Quinn* v. *Leathem* (1), "that a violation of legal right committed knowingly is a cause of action."

Cur. adv. vult.

JENKINS C.J. The suit which has given rise to this appeal is described by the plaintiff as one for malicious prosecution or failing that as a suit disclosing injury and damage to him and so entitling him to relief.

The suit came in the first instance before Pugh J., who gave the parties an opportunity of placing their evidence before the Court, but both sides agreed that it would not be convenient to call evidence until it was determined whether the plaint, supplemented by certain facts as to which the parties were agreed, disclosed a cause of action. To this the learned Judge assented and in the result he has dismissed the suit. From this judgment the present appeal has been preferred.

So far as the suit purports to be one for malicious prosecution the material facts on which our decision is invited, are briefly these. On the 29th of March 1909, the defendant Bholanath Khettry laid a complaint in the Calcutta Police Court against the plaintiff for criminal breach of trust. The Magistrate under section 202 of the Criminal Procedure Code referred the matter to the Police for enquiry and finally dismissed the complaint. The question is whether assuming malice and lack of probable cause, there was such a prosecution as is necessary for the maintenance of a suit for malicious prosecution.

To determine whether or not there was a prosecution regard must be had to the Criminal Procedure Code.

Chapter XV treats of the jurisdiction of the Criminal Courts in inquiries and trials and by section 191 it is provided (among other things) that a Magistrate may take cognizance of any offence upon receiving a complaint of facts which constitute such offence. Chapter XVI deals with complaints

(1) [1901] A. C. 495, 510.

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to Magistrates, and by the first section of this chapter, (section 200) it is provided that a Magistrate taking cognizance of an offence upon complaint shall at once examine the complainant upon oath.

Section 202 empowers a Magistrate, if he sees reason to distrust the truth of a complaint of an offence, to postpone the issue of process for compelling the attendance of the person complained against and to direct a previous local investigation to be be made by a Police officer for the purpose of ascertaining the truth or falsehood of the complainant.

And then comes Chapter XVII which is headed "of the commencement of proceedings before Magistrates." Section 204 provides that if in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding and the case appears to be one in which a summons should issue in the first instance, he shall issue his summons for the attendance of the accused.

Now, in this case the stage indicated in Chapter XVII, "the commencement of proceedings before the Magistrate," was never reached: the Magistrate dismissed the complaint under section 203. A series of decisions on the Code further shows that as process was not issued the plaintiff Golap Jan never became an accused; he was not a party to the investigation held under section 202 of the Criminal Procedure Code; nor was he entitled to claim under section 304 the right to be represented by a pleader at that investigation. If, as is said, he was present and was represented by a pleader, that was not by compulsion of law but of his own free will. In my opinion therefore Pugh J. rightly decided that matters had not advanced to the stage necessary to support a suit for malicious prosecution.

I have not thought it necessary to refer to the English authorities as they can throw no certain light on the effect of the provisions of the Criminal Procedure Code by which (as it seems to me), we must be guided in determining whether or not there was in the circumstances of this case a prosecution. Still as a matter of general comment it may be noticed that

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Cotton L. J. in *Yates* v. *The Queen* (1) remarked, "how can it be said that a prosecution is commenced before a person is summoned to answer a complaint." And when he made this remark he obviously had in mind *Clarke* v. *Postan* (2), on which reliance has been placed by the plaintiff on this appeal.

But if the conditions requisite to a suit for malicious prosecution have not been established, does the plaint disclose facts otherwise entitling him to relief?

It has been suggested before us that the facts are such as disclose injury and loss and therefore relief should be awarded.

There are, it is true, certain wrongs akin to malicious prosecution which entitle the person aggrieved to sue, as for instance malicious abuse of the process of the Court, malicious arrest, malicious search, and malicious execution. But none of them are applicable to the facts of this case.

What then is the plaintiff's grievance? There was no interference with his property, he did not become an accused, and his freedom was not directly in jeopardy. The utmost that he can aver is that he was defamed.

Now apart from certain qualifying conditions defamation is a good cause of action; but even if the complaint to the Magistrate was defamatory still the complainant was entitled to protection from suit, and this protection was the absolute privilege accorded in the public interest to those who make statements to the Courts in the course of, and in relation to, judicial proceedings. I therefore hold that the plaint does not disclose facts entitling the plaintiff to relief.

The result then is, that in my opinion, this appeal must be dismissed with costs.

WOODROFFE J. I agree.

J. C. *Appeal dismissed.*

Attorneys for the appellant: *S. D. Dutt & Ghosh.*

Attorneys for the respondent: *Roy & Chowdhry.*

(1) (1885) L.R. 14 Q.B.D. 648, 661. (2) (1834) 6 C. & P. 423.