ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Justice, and Mr. Justice Melvill.

1881 December 10.

VENU (PLAINTIFF) *v.* COORYA NARAYAN (DEFENDANT).*

Malicious prosecution, action for—Reasonable and probable cause—Effect of order of discharge of a person accused of an offence before a Magistrate—Presidency Magistrates' Act IV of 1877, Sections 87, 121, 122.

The discharge of an accused person by a Presidency Magistrate, under section 87 of the Presidency Magistrates' Act IV of 1877, is such a termination of the prosecution as entitles the accused to maintain an action for malicious prosecution.

THE following case was stated for the opinion of the High Court, under section 7 of Act XXVI of 1864, by W. E. Hart, First Judge of the Court of Small Causes at Bombay:—

"1. This was an action to recover the sum of Rs. 505 as damages for the malicious prosecution of the plaintiff by the defendant.

"2. The defendant in this case charged the plaintiff, her mother, and sister, with the theft of a golden watch-chain from the room of the defendant, and with theft of nine copper pots, a bed, a sheet and a piece of red cloth from the room of his daughter in the opposite house.

"3. The police after investigating this charge declined to take up the matter themselves, and referred the defendant to the Magistrate, who eventually granted a summons against the plaintiff alone for being in possession of property reasonably suspected of having been stolen and failing to account satisfactorily for her possession of it.

"4. The case was heard by Mr. Cooper, Senior Magistrate of Police, who, after taking the evidence of the defendant and all his witnesses, for the prosecution, ordered the plaintiff to be discharged without calling on her to go into evidence in her defence, or framing a charge against her, in the manner provided in sections 121 and 122 of the Presidency Magistrates' Act IV of 1877.

"5. It does not appear, on the face of the Magistrate's notes (which were put in evidence before me), under what section of the Presidency Magistrates' Act (IV of 1877) the order was made;

* Suit No. 737 of 1881.

but I presume it must have been under section 87, which occurs in Chapter VIII, headed 'Of inquiry into cases triable by the High Court'. Explanation II of this section provides that a 'discharge is not equivalent to an acquittal, and does not bar the revival of a prosecution for the same offence.

"6. The present action was then instituted in the Small Cause Court. I found that there was no reasonable or probable cause for the prosecution of the plaintiff by the defendant, inasmuch as all the articles, which he had accused her first of having stolen and then of having in her possession unlawfully, were her own, and had, in fact, been presented by him to her while she was in his keeping. I also found that there was express malice, as it appeared to me that the prosecution had been instituted in consequence of the plaintiff having left the protection of the defendant on account of a severe beating inflicted on her by him in the course of a quarrel which took place between them shortly after the defendant had brought home his newly-married bride.

"7. The pleader for the defendant, however, contended that no action for malicious prosecution would lie, as the Magistrate's order of discharge had not finally disposed of the prosecution, and could not, therefore, be said to be a determination in the plaintiff's favour of the proceedings before him. I was of opinion that such an order was analogous to the throwing out of a bill by the grand jury in England when an action for malicious prosecution can be maintained, though there is nothing to prevent another indictment being preferred at the next assizes: Roscoe's N. P. Evidence (12th ed.), p. 770. I also considered that such an order was, in fact, a final determination in the plaintiff's favour of *that* prosecution, especially if regard be had to the fact that up to the present time no attempt has been made nor intention alleged to 'revive' the prosecution. The 'revival' contemplated in the explanation above cited could not now take place without the issue of a fresh summons, or of a notice equivalent to a summons to the plaintiff: and no Magistrate who had once discharged a prisoner on the ground that no sort of *prima-facie* case had been made against him on the evidence then adduced for the prosecution, would after so long an interval issue such fresh

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summons or notice without a satisfactory explanation by the prosecutor, detailing the additional evidence he was prepared to adduce, and showing why he was not able to adduce it before. Such a 'revival' would, therefore, be, in fact, another prosecution in which the prosecutor might or might not be successful, but, at any rate, until he succeeded in it, he would still remain liable for having recklessly instituted the former prosecution in which he so signally failed under circumstances that raised a strong presumption that in instituting it he had no reasonable or probable cause, and was actuated by malice. Lastly, it seemed to me that the effect of the contention by the defendant's pleader was virtually this: The more utterly groundless and malicious the criminal charge may be, the less chance shall the person injured thereby have of his civil remedy. According to the argument of the defendant's pleader, there could be such a final determination of the prosecution as would entitle the accused person to maintain an action for malicious prosecution only in one of two cases, viz., on withdrawl of the prosecution by permission of the Magistrate under section 125, or on acquittal under section 126. In the case of a malicious prosecution there would, of course, be no withdrawl. So that, according to the defendant's pleader, it can only be on 'acquittal' under section 126 of a case 'tried' by the Magistrate that an action could be maintained in respect of a prosecution maliciously instituted before him. Section 126 occurs in Chapter X of the Act, which is headed 'Of the trial of cases by Presidency Magistrates'. Section 116 in the same chapter provides that in cases in which the Magistrate has power to impose imprisonment for a term exceeding six months (as he had in this case(1)), there shall be a formal charge to be drawn up in accordance with the terms of Chapter IX; but section 122 seems to justify the postponement

(1) If he proceeded under the Indian Penal Code, section 411, see Presidency Magistrates' Act, section 10. The fact that the summons appears to have originally issued under the Police Act (XIII of 1856), section 35, whereby the Magistrate could only inflict a fine of Rs. 100 or three months' imprisonment, would not apparently deprive him of the power to commit to the High Court or to inflict the greater punishment provided by section 411 of the Indian Penal Code as modified by section 10 of the Presidency Magistrates' Act: see Presidency Magistrates' Act, sections 93 and 117.

of the drawing up of the final charge until the Magistrate is of opinion that a *prima-facie* case has been established against the accused. Until the charge has been drawn up, and the prisoner has pleaded to it, as provided in section 122, it seemed to me no 'trial' could be said to have commenced; and the 'order of acquittal' contemplated in section 126 can only be made in case of a 'trial'. Where, therefore, as in the present instance, the case never reaches the stage of 'trial', because the Magistrate is of opinion that no sufficient *prima-facie* case has been made out to warrant the framing of a 'charge', it seemed to me the Magistrate's only course, after having once granted the summons(1), was to 'discharge' the prisoner. It appeared, then, absurd to say that because he did not frame a 'charge' for which he saw no *prima-facie* ground and go through the farce of 'trying' a 'charge' which in his opinion was unsustainable, for the sake of recording 'an order of acquittal', the person injured by the preferment of a baseless accusation was to have no remedy in the shape of an action for malicious prosecution. On the same principle, a malicious prosecutor might put his victim to all the disgrace, expense and trouble of a criminal prosecution, and then avoid the consequence of his own ill-doing by absenting himself from the Magistrate's Court on the day of an adjourned hearing, when under section 118 or section 124 the complaint would simply be 'dismissed'.

"8. I accordingly passed a verdict in favour of the plaintiff for Rs. 280 and costs, and certified her pleader's costs Rs. 51; but at the request of the defendant's pleader, and on the deposit by the defendant in this Court of the amount of the verdict and costs, and Rs. 50 as costs of the reference, the verdict was made subject to the opinion of the Judges of the High Court on the following question:—

"Was the discharge of the plaintiff by the Magistrate such a termination of the prosecution as entitles her to maintain an action for malicious prosecution?

"9. If the answer to this question is in the affirmative, the present verdict will stand; if in the negative, the verdict for the plaintiff will be set aside and an order for non-suit be entered."

(1) Presidency Magistrates' Act IV of 1877, secs. 32, 33.

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The defendant did not appear in person or by counsel.

SARGENT, J.—We answer the question in this case, viz., was the discharge of the plaintiff by the Magistrate such a termination of the prosecution as entitled her to maintain an action for malicious prosecution, in the affirmative.

APPELLATE CIVIL.

FULL BENCH.

Before Sir M. R. Westropp, Kt., Chief Justice, Mr. Justice Melvill, Mr. Justice West, and Mr. Justice Pinhey.

1882
February 2.

BAISURAJ, WIDOW OF SANMUKRAM (ORIGINAL DEFENDANT), APPELLANT, v. DALPATRAM DAYASHANKAR (ORIGINAL PLAINTIFF), RESPONDENT.*

Vendor and purchaser—Hindu law—Necessity of possession—Vendor without possession—Ejectment—Sale of right of entry—Right of Purchaser—Construction —Intention of parties.

A Hindu, whose estate is in the possession of a trespasser or a mortgagee, may sell his right of entry as such, or his equity of redemption as such, and the purchaser may thereupon sue to eject the trespasser or to redeem the mortgage; but a bill of sale by a Hindu vendor, purporting to convey *the estate itself*, executed by a person who is not in possession, cannot operate as a present conveyance, nor enable the purchaser to sue in ejectment.

Raja Saheb Prahlad Sen v. *Baboo Budhusing* (1) *and Ronu Bhobosundree Daseah* v. *Issurchunder Dutt*(2) followed.

Bikan Singh and others v. *Mussamut Parbutty Kover and others* (3), *Gungahurry Nundee* v. *Raghubram Nundee* (4), *and Lokenath Ghose* v. *Jugobundhoo Roy* (5) referred to.

Cases will often arise in which, though a bill of sale may in terms purport to convey the property itself, yet it is clear upon the face of the instrument that the intention of the parties was to convey the right of entry or the equity of redemption, and nothing more. In such cases the Court should not lay stress on the mere terms of the instrument, but give effect to the intention of the parties, and recognize the purchaser's right of action.

THIS was a special appeal from the decision of A. D. Pollen, Acting Assistant Judge of Surat, reversing the decree of the Second Class Subordinate Judge of Broach.

* Special Appeal, No. 292 of 1874.

(1) 12 Moo. I. Ap. 275, 307; S. C. 2 Beng. L. R. P. C. 111.
(2) 11 Beng. L. R. 36.
(3) 22 Calc. W. R. 99.
(4) 14 Beng. L. R. 307.
(5) I. L. R., 1 Calc. 297.