

## APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

RA'GHAVENDRA (ORIGINAL DEFENDANT), APPELLANT, v. KA'SHINA'TH-  
BHAT (ORIGINAL PLAINTIFF), RESPONDENT.\*

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October 8.

*Defamation—Suit for malicious prosecution—Evidence—Burden of proof—Want of reasonable and probable cause—Malice—Information given to police—Privilege—Penal Code (Act XLV of 1860), Secs. 182, 211, 499.*

Certain property belonging to the defendant having been stolen, he informed the chief police constable entrusted with the inquiry that he suspected the stolen property to be concealed in plaintiff's house. Accordingly the plaintiff's house was searched, and its floor dug up, and the plaintiff was placed in confinement for an hour or so. No property was, however, found. Thereupon the plaintiff sued the defendant to recover damages for loss of character suffered by him in consequence. Both the lower Courts decreed the plaintiff's claim, holding that it lay on the defendant to prove reasonable and probable cause for the suspicion communicated to the police and the search of the plaintiff's house. On second appeal the High Court reversed the decrees and dismissed the suit.

*Held (per JARDINE, J.)* that the rule as to the burden of proof in suits for malicious prosecution should be extended to a case like the present. The *onus*, therefore, lay on the plaintiff not only to allege in the plaint, but also to prove against the defendant malice and absence of reasonable and probable cause for the information given by him to the police. The plaintiff, however, had given no evidence of his own innocence, nor that the suspicion of the defendant was groundless, nor that the defendant had any malice.

*Per RA'NADE, J.:*—The present case was governed by the principles which govern suits for defamation, and under the circumstances the action of the defendant fell within the exception which protects information given to a person in authority in the discharge of a public or private duty, where no malice in fact is shown to exist. See *Mohendro Chundro v. Surbo Kokhya*(1).

There is a distinction between the case of a false charge falling under section 211 of the Penal Code (Act XLV of 1860) and that of false information given to the police under section 182. A person prosecuting another for an offence under the latter section need not prove malice and want of reasonable and probable cause except so far as they are implied in the act of giving information known to the police with the knowledge or likelihood that such information would lead a public servant to use his power to the injury or annoyance of the complainant. In an inquiry under section 211, on the other hand, the absence of just and lawful ground for making the charge is an important element.

*Baboo Ganesh v. Mugneerám* (2) distinguished.

SECOND appeal from the decision of J. L. Johnston, District Judge of Dhárwár, in Appeal No. 300 of 1891.

\* Second Appeal, No. 147 of 1897.

(1) 11 Cal. W. R., 534. (2) 11 Ben. L. R., 321; S. C., 19 Cal. W. R., 283.

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The facts of this case were these : The defendant Rághavendra accused one Someshvarbhat of theft. During the course of the police investigation he gave information to the chief police constable that as Someshvarbhat often visited the house of the plaintiff, who was his son-in-law, he suspected that the stolen property was concealed in the plaintiff's house. This house was accordingly searched, and its floor dug up, and the plaintiff was placed in confinement for an hour or so. No property was, however, found.

Thereupon the plaintiff filed the present suit to recover Rs. 100 as damages for loss of character, alleging that the defendant had, without any reasonable and probable cause, and with malicious intent, caused the plaintiff's house to be searched by the police.

The defendant pleaded that he had no motive to damage the plaintiff's character; that having reasonable suspicion against the plaintiff, he had caused the house to be searched, and that the plaintiff had no cause of action.

The Court of first instance held that the burden of proving the existence of a reasonable and probable cause for the search lay on the defendant, and that he had entirely failed to discharge this burden, and that though no pecuniary damage was either alleged or proved, the plaintiff was entitled to recover Rs. 25 as damages for loss of character. The Judge accordingly passed a decree in plaintiff's favour.

This decree was confirmed, on appeal, by the District Judge. His judgment was as follows :—

“ Plaintiff is a priest whose reputation must have suffered among his clients from his house being dug up on a complaint of theft or receipt of stolen property. Defendant does not deny that he suspected plaintiff, and caused his house to be searched. The burden was on defendant to show that he had reasonable and probable cause for this suspicion. \* \* \* \* \* No man has a right to groundlessly accuse a respectable member of society of the degrading offence of receiving stolen property.”

Against this decision defendant preferred a second appeal to the High Court, contending that it lay on the plaintiff to prove malice and want of reasonable and probable cause, and that no proof of this had been given.

*N. G. Chandávarkar* for appellant (defendant) :—The verdict against the defendant is wrong. Both the lower Courts have laid the burden of proof on the wrong party. The *onus* lies on the plaintiff to allege and prove that we had no reasonable and probable cause for setting the police in motion. He has not discharged this burden. It is not proved that defendant was actuated by malice. All that he did was to inform the police that he suspected the stolen property to be in plaintiff's house. No suit can lie for merely giving information of this sort to the police, unless the criminal law is set in motion. This is really a suit for malicious prosecution, and in such suits it is for the plaintiff both to allege and to prove absence of reasonable and probable cause, and also a malicious motive for the prosecution—*Hall v. Venkata Krishna* <sup>(1)</sup>; *Fowler v. Homer* <sup>(2)</sup>; *Abrath v. North-Eastern Railway Company* <sup>(3)</sup>; *Ashby v. White* <sup>(4)</sup>. A plaint which does not allege malice and want of reasonable and probable cause does not disclose any cause of action—*Chejmal v. Gambhirmal* <sup>(5)</sup>. In the present case the plaintiff gave no evidence to prove that our suspicions were groundless. His suit should, therefore, be dismissed.

*B. A. Bhágwat* for respondent (plaintiff) :—This is a suit to recover damages for loss of character, and not an action for malicious prosecution. The information given by the defendant to the police did not charge us with theft or any other offence. There was no complaint and no prosecution before a Magistrate. This, therefore, is not a suit for malicious prosecution, and the rule relating to the burden of proof in such suits does not apply. The rule in suits for defamation applies. The plaintiff has only to prove the falsity of the statement made to the police, and then the burden shifts on to the defendant. The lower Courts have, therefore, rightly placed the *onus* on the defendant, on whose information the police searched our house, and placed us in confinement for a time. The defendant is, therefore, justly held liable for the injury done to our reputation by his reckless act.

(1) I. L. R., 13 Mad., 394.

(3) L. R. 11 Ap. Ca., 247.

(2) 3 Campbell, 291.

(4) Sm. L. C., 9th Ed., 304.

(5) P. J. for 1876, 159.

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*N. G. Chandávarkar* in reply :—I admit that, if this suit be treated as a suit for defamation, the *onus* will lie on the defendant. But, in that case, no suit will lie, and no damages can be awarded, as the alleged defamatory statement is privileged.

JARDINE, J. :—The plaintiff sued to recover Rs. 100 as damages for loss of character, alleging that the defendant spoke to the chief constable of Bankápur that he had a suspicion against the plaintiff in respect of some of the defendant's property that had been stolen, and that in order to get a search made, and without reasonable and probable cause for the suspicion, he with malicious intent to injure the plaintiff's character caused the plaintiff's house to be searched by means of the chief constable.

The defendant answered that he had no enmity or cause of enmity against the plaintiff and no motive to damage his character; that having reasonable suspicion, upon information, against the plaintiff he caused the house to be searched; that he was not acquainted with the plaintiff before; that the suit was without cause and intended to injure the defendant.

The search of the house by the police being admitted, the Subordinate Judge, although he found that no actual damage was either alleged or proved, held that the plaintiff's character could not but have been injured, and he awarded Rs. 25 as damages. The District Judge on appeal by the defendant confirmed the decree. Both Courts held that the *onus* lay on the defendant of showing the existence of reasonable and probable cause "for the search" as the Subordinate Judge expresses it—"for the suspicion" as the District Judge expresses it.

The defendant appeals here against this ruling and because malice was not proved. On examining the evidence, no mention of malice is found. No authorities are cited in the judgments of the Courts below, and no case of damage to fame or otherwise resulting from the action of a police officer on a complaint made has been cited from the Indian Reports. Under section 157 of the Code of Criminal Procedure (Act X of 1882) the police officer may investigate, on the information received, if he has reason to suspect the commission of the offence. But he shall not do so

if it appear to him that there is no sufficient ground. He may make a search at his discretion under section 165.

If the statement, whereof the plaintiff complains, had been made to a Magistrate, it is clear that it would have lain on the plaintiff, not only to aver in his plaint (*Girdharlál v. Jagannáth* <sup>(1)</sup>), but also to show that there was an absence of reasonable and probable cause, and that there was malice or some indirect and illegitimate motive for the prosecution (*Hall v. Venkatakrishna* <sup>(2)</sup>), following the decision of the House of Lords in *Abrath v. North-Eastern Railway Company* <sup>(3)</sup>. The Privy Council had in *Baboo Ganesh v. Mugneerám* <sup>(4)</sup> taken much the same view in a suit for damages for defamation of character which their Lordships dealt with as an action for malicious prosecution. See also *Ganga v. Rámphul* <sup>(5)</sup>. If the police officer had referred the defendant to a Magistrate for a search warrant, this rule will apply, *Wyatt v. White* <sup>(6)</sup>, so far as regards reasonable and probable cause. See also *Hope v. Evered* <sup>(7)</sup> where there was *bona fides* in moving for the search warrant. We have been referred to the Notes on *Ashby v. White* <sup>(8)</sup> (see also *Skinner v. Gunton* <sup>(9)</sup>) for the authorities in support of the general proposition there laid down as regards legal proceedings instituted for the *bona fide* purpose of asserting some supposed right, or prosecuting a criminal charge, which, however, in the event proves groundless. "In such cases, in order, it should seem, to facilitate the administration of justice, it is established that unless there be both malice and an absence of reasonable and probable cause, the person against whom the proceedings are taken has no legal ground of action." *De Medina v. Grove* <sup>(10)</sup> is one of these authorities. There a judgment-debtor was taken in execution for more than was due on the judgment. In *Fowler v. Homer* <sup>(11)</sup> Lord Ellenborough said about an accusation and detention: "The accusation though unfounded was not malicious. No doubt it may prove very detrimental to the object of it; but this is one of many in-

(1) 10 Bom. H. C. Rep., 182.

(2) I. L. R., 13 Mad., 394.

(3) L. R., 11 Ap. Ca., 247.

(4) 11 Ben. L. R., 321; S. C. 17 C. W. R., 283.

(5) 20 Cal. W. R., 177.

(6) 29 L. J. (Ex.) 193.

(7) L. R., 17 Q. B. D., 338.

(8) 1 Sm. L. C. (9th Ed.), 304.

(9) 1 W. Saunders, 273, note.

(10) L. R., 10 Q. B., 152.

(11) 3 Campbell, 294.

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stances where there being a loss without an injury, the sufferer must consider himself not wronged, but unfortunate." A later case, *Padmore v. Lawrence*<sup>(1)</sup>, much like the above, was, however, dealt with as depending on privilege.

The same principles have been applied by the Indian Courts as in *Raj Chunder v. Shama Soondari Debi*<sup>(2)</sup>, a suit for damages for the injury done to reputation and honour by an improper arrest in an *ex-parte* decree. In *Mohendro v. Surbo*<sup>(3)</sup>, a suit for defamation in a statement to the police that he the defendant had heard that the plaintiff had been guilty of a criminal offence, the learned Judges held that the plaintiff must first start her case by proving that she was not guilty, and that it would lie on the defendant to show that the imputation was made in good faith and for the public good. In a case in the note to *Mohant Gaur v. Hayagrīb*<sup>(4)</sup> these terms are treated as tantamount to good cause. Probably the Court meant the same thing, as the Privy Council laid down later in 1872 in *Baboo Ganesk v. Mugneerām* and again in 1876 in *Rām Coomār v. Chunder Canto*<sup>(5)</sup>, where the principle stated in *Cotterell v. Jones*<sup>(6)</sup> is approved as to what must be alleged and proved by the plaintiff suing a third person for improperly setting the law in motion, which case had been followed by the High Court of Bengal—*Chunderkant v. Rāmcoomār*<sup>(7)</sup>.

The pleader for the respondent sought to exclude the present case from the rules of pleading and evidence in suits for malicious prosecution by arguing that the statement made by the defendant to the police officer did not accuse the plaintiff of any offence. He means probably that what was said was mere defamation and did not amount to a false charge. But this distinction was not taken in *Sheikh Roshān v. Nabin*<sup>(8)</sup>, and no authority for it has been cited. The plaint describes it as a mere expression of suspicion. The fact that it was made to a policeman, not to a Magistrate, has not been urged; and in *Fowler v. Homer Lord Ellenborough* made no such distinction. Nor is any such sug-

(1) 11 Adol. and E., 380.

(2) I. L. R., 4 Cal., 583.

(3) 11 Cal. W. R., 534.

(4) 6 Ben. L. R., 371.

(5) L. R., 4 I. A., 23, p. 38. S. C. I. L. R.

2 Cal., 233. L. R., 2 App. Cas., 186.

(6) 11 C. B., 713.

(7) 13 Ben. L. R., 547.

(8) 6 Ben. L. R., 377.

gested in *Sheikh Roshan v. Nabin*<sup>(1)</sup> or in the allusion to the same in *Mohant Gaur v. Hayagrib*<sup>(2)</sup>.

If by labelling a suit like the present as one for defamation it is to be taken out of the rules applied to suits for malicious prosecution, then all similar suits will be so named and, as pointed out in *Sheikh Roshan v. Nabin*, people will not risk giving information to the police, and the ends of justice will be frustrated. The question is really, as observed by the Privy Council in *Baboo Ganesh v. Mugneerám*, one of substance rather than of form. In *Fowler v. Homer*, a suit for defamation, the rule requiring proof of malice and want of good cause was applied. So also in *Sheikh Roshan's* case and *Mohendro v. Surbo*, as well as in some, where the proceedings had been before Magistrates and suit was brought for defamation, e.g., *Kazee v. Motee*<sup>(3)</sup>. On consideration of these authorities I see no difficulty in extending to cases like the present the rule as to burden of proof laid down in *Abrath v. North-Eastern Railway Company*<sup>(4)</sup>.

But, whether we go the whole length or only as far as their Lordships in *Baboo Ganesh v. Mugneerám* went as to the burden of proof, the plaintiff cannot succeed. It has been argued that the effect will be to encourage false and malicious informations. No such inconvenience has been felt in England; and section 182 of the Indian Penal Code (Act XLV of 1860) has a discouraging operation: see *Queen-Empress v. Ganesh*<sup>(5)</sup>, approved in *Queen-Empress v. Soshi*<sup>(6)</sup>. The protection against criminal prosecution and a suit for defamation in such circumstances is not absolute, as has been adjudged in favour of a witness—*Baboo Ganesh v. Mugneerám*<sup>(7)</sup>; *Luckumsey v. Hurbun*<sup>(8)</sup>; *Náthji v. Lálbhai*<sup>(9)</sup>; *Queen-Empress v. Bákrishna*<sup>(10)</sup>. It must also be remembered that the detection of crime is made easier when people give information of their suspicions; and that under sections 44 and 45 of the Code of Criminal Procedure, the giving of certain information in many matters of actual, intended, or suspected crime,

(1) 6 Ben. L. R., 377.

(2) 6 Ben. L. R., 371.

(3) 13 Cal. W. R., 276.

(4) L. R. 11 App. Cas.

(5) I. L. R., 13 Bom., 506.

(6) I. L. R., 15 All., 218.

(7) 11 Beng. L. R. 329, P. C.

(8) I. L. R., 5 Bom., 580.

(9) I. L. R., 14 Bom., 97.

(10) I. L. R., 17 Bom., 573.

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becomes an imperative duty, failure to perform which is punishable.

The plaint does not aver that the defendant was the cause of the arrest or the digging up of the premises by the police at the search, nor that after the arrest the plaintiff was discharged by a Magistrate on a report made under section 169 of the Criminal Procedure Code (Act X of 1882) or by special order under section 63. As no final discharge could be given by the chief constable, it is doubtful if the present suit will lie. See *Venu v. Coorja*<sup>(1)</sup>. Moreover, the plaintiff has given no evidence of his own innocence, nor that the suspicion expressed was groundless, nor that the defendant had any malice. He did not even tender evidence of malice, or attempt even to prove the terms in which the defendant had expressed his suspicions. The mere fact that no stolen property was found, does not suggest anything against the defendant, as stolen property often passes through many hands, and is often removed from fear of search.

For the above reasons I would reverse both decrees and dismiss the suit with all costs on the respondent.

RÁNÁDE, J.:—I agree with Mr. Justice Jardine in his final decision, but my reasons for so doing are somewhat different from those which have been set forth in his judgment.

Both the lower Courts have treated the original claim in this case as a suit for damages for loss of character. The appellant's pleader admitted that, if the claim be regarded as a suit for loss of character, the lower Courts were right in placing the burden of proof on the appellant (defendant). It was, however, contended that the claim was really a suit for malicious prosecution, and as such the burden of proving malice and want of probable and reasonable cause should have been placed on the respondent (plaintiff).

It appears from the record that the appellant accused one Someshwar Bhat of a theft of his property, and as this Someshwar was respondent's father-in-law, and used to visit respondent's house, appellant informed the police constable entrusted with the inquiry that he suspected that the stolen property was concealed

(1) I. L. R., 6 Bom., 376.

in respondent's (plaintiff's) house, and this house was accordingly searched, and its floor dug up, and respondent and his wife were placed in confinement for an hour or so. No property was found, and thereupon the respondent brought his suit for the loss of character suffered by him in consequence of this imputation. The question for consideration is, whether a claim brought under such circumstances can be regarded as a suit for malicious prosecution.

There was admittedly no prosecution in this case, and no complaint made to the Magistrate. In many of the cases cited by appellant's pleader in support of his contention, there had been either complaint, or a prosecution before a Magistrate, or both. In the case of *Baboo Ganesh v. Mugneerám*<sup>(1)</sup>, the plaintiff had been brought before a Magistrate, who had dismissed the charge for want of proof. This element was also present in the cases of *Hall v. Venkatakrishna*<sup>(2)</sup> and *Chejmal v. Gambhirmál*<sup>(3)</sup>, both which authorities were relied upon by the appellant's pleader in support of his contention. It is true that their Lordships of the Privy Council have in their judgment in *Baboo Ganesh v. Mugneerám*<sup>(4)</sup> stated that the evidence in that suit, which was ostensibly for loss of character, raised the same questions which would be raised in an action for malicious prosecution in England. However, for the reasons given above, that case, and the other cases cited before furnish no analogy to the present case where there has been no prosecution, and no complaint before a Magistrate, and I do not think that it will be proper to extend the protection given to an honest complainant before a Magistrate to cases of false information supplied to the police. The criminal law makes a clear distinction between a false charge which falls under section 211 of the Penal Code, and false information given to the police, in which latter case the offence falls under section 182 of the same Code. If plaintiff in the present case had chosen to prosecute the offender under section 182, it would not have been necessary for him to prove malice and want of probable or reasonable cause, except so far as they were implied in the act of giving information known to be false, with the knowledge or likelihood that such information would lead a public servant to use his power to the

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(1) 11 Ben. L. R., 321.

(3) P. J. for 1876, p. 159.

(2) I. L. R., 13 Mad., 394.

(4) 11 Ben. L. R., 321 at p. 329.

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injury or annoyance of the complainant. In an inquiry under section 211, on the other hand, proof of the absence of just and lawful ground for making the charge is an important element. There is good reason for this distinction. People in this country, as elsewhere, think twice before bringing a regular complaint before a Magistrate. No such precautions are taken or deemed necessary in the case of information given to the police. It is no doubt necessary in the public interests that people should be encouraged to give true information, but it serves no public interest to protect persons who, without thought of consequences, set the police in motion on random suspicions. If every injured person has to prove the presence of malice in fact as an operative motive in the false informer, and he is further required to prove absence of reasonable cause, the results will be certainly detrimental to the interests of the public generally.

It may indeed be urged that the criminal remedy under section 182 is open to such injured persons. Proceedings under that section cannot, however, be taken without the sanction of the public servant, and that is not always easy to obtain. I do not see any reason why the injured party whose house is searched and the floor dug up on the strength of false information, and who with his wife are kept under confinement in the presence of a Panch for a time, should not be permitted to sue for loss of character, and why when he brings such a suit, he should be required to prove not merely the falsehood of the imputation, but also the presence of malice, and the absence of probable and reasonable cause in the complainant.

At any rate, both the lower Courts have treated the suit in the present case as a claim for damages for loss of character, and I think in second appeal the rights of the parties must be judged accordingly. The principles which govern suits for defamation must, in my opinion, govern the decision of the present case. These principles are clearly laid down in *Mohendro Chunder v. Surbo Kokhya*<sup>(1)</sup> where the defendant had informed the police that he had heard that plaintiff had been guilty of a criminal offence. It was laid down in that case that plaintiff must only show the falsity of the information, and it would then be for the

(1) 11 Calc. W. R., 534.

defendant to prove that the charge was made in good faith, and for the public good,—in other words, that his act was protected by one or other of the exceptions of privilege recognized by both civil and criminal law. Applying these rules in the present case, it has to be noted that the theft was of defendant's own property, and he accused a near relation of the plaintiff, who used to visit plaintiff's house. The information given was confined to a suspicion that the property might be concealed in plaintiff's house. The search and the digging up of the floor was the act of the police constable, apparently not taken by him at the instance of the defendant. The defendant did not inform anybody else but the police, and admittedly no special damages were claimed or alleged. Under these circumstances, the action of the defendant falls under the exception which protects information given to a person in authority, and in the discharge of a public or private duty, where no malice in fact is shown to exist. "If fairly warranted by any reasonable occasion or exigency, and it is honestly made, such communications are protected for the common convenience and welfare of society (Addison on Torts, page 165, 5th Ed.). Lord Campbell in *Harrison v. Bush*<sup>(1)</sup> and *Whitely v. Adams*<sup>(2)</sup> has laid down that a communication made *bonâ fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although without such privilege the communication would be actionable." The appellant had a duty and interest in communicating his suspicions to the police constable, who also had a duty in the matter. The appellant was not responsible for the subsequent annoyance caused by the search. The suspicion was not wholly without ground, seeing that there were the alleged relationship and the visits. Under these circumstances, I must hold that the defendant was protected by the privilege. It was not a case of a wanton, reckless, or inconsiderate charge.

On this ground I concur with Mr. Justice Jardine in holding that the decrees of the lower Courts must be reversed, and the claim dismissed with costs.

*Decree reversed.*

(1) 25 L. J., Q. B., 25.

(2) 33 L. J., C. P., p. 89.

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