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superiors cannot be held to have been actuated by any malicious motive when the evidence before us is equally consistent with the view that, honestly believing the plaintiff to be an intriguer, and having regard to the search of his house in connection with the Chadchan robbery, the defendant thought that it was his duty to inform the District Superintendent of Police of the opinion he had formed as to his character. "Communications of this kind," to borrow the language of Alderson B. in *Todd v. Hawkins* ⁽¹⁾, "should be viewed liberally," and unless it is proved clearly that they were made with the malicious intention of defaming the plaintiff, the verdict must be for the defendant. What is relied upon as evidence of malicious intention is evidence of occurrences and the mutual relations of the parties which led the defendant to entertain a bad opinion about the plaintiff and to report it to his superior officers in the discharge of his duty. The evidence of malice in fact is not, in our opinion, so clear and unequivocal as to destroy the privilege. We must confirm the decree with costs.

Decree confirmed.

(1) (1837) 8 C. & P. 88.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

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August 4.

NARASIMHA SHANKAR DESHPANDE (ORIGINAL PLAINTIFF), APPELLANT,
v. IMAM VALAD MAHAMAD (ORIGINAL DEFENDANT), RESPONDENT.*

Malicious search—Police Officer searching a house under orders for arms under a cancelled license—Acting in the discharge of duty—Dishonesty—Action.

On the 1st October, 1900, the plaintiff applied to the District Magistrate to renew his existing license for arms and for the issue of an additional license for fresh arms. The District Magistrate, however, cancelled the plaintiff's existing license and declined to grant him a license for fresh arms. This order was sent on to the defendant, the officer in charge of the Police Station at the village where plaintiff lived, with a direction that it should be communicated to the plaintiff and that such arms as there might be in his possession should be attached. The defendant accompanied by a Panch went to the plaintiff's house, communicated to him the contents of the order passed by the District Magistrate

* First Appeal No. 87 of 1902.

and called upon him to give up the gun which he held under the cancelled license. The plaintiff produced a gun; but the defendant suspecting that that was not the gun in respect of which the cancelled license had been granted, searched the plaintiff's house, but no gun was found. The plaintiff thereupon sued the defendant for maliciously searching his house.

Held, that the defendant was not liable (1) as he was acting in the discharge of a duty recognized by law when he searched the house, and (2) as it was not proved by the plaintiff that the defendant acted dishonestly and was prompted by a desire to injure the plaintiff.

APPEAL from the decision of B. C. Kennedy, District Judge of Sholapur-Bijapur, at Sholapur.

Suit to recover damages for maliciously searching a house.

On the 1st October, 1900, plaintiff applied to the District Magistrate for a renewal of his license for arms and for an additional license for fresh arms. The District Magistrate declined to grant a license for fresh arms and ordered that his license should be cancelled. This order was sent to the defendant, the officer in charge of the Police Station at the village where plaintiff lived, with a direction that it should be communicated to the plaintiff and that such arms as there might be in his possession should be attached.

The defendant on the 30th December, 1900, accompanied by a Panch, went to the house of the plaintiff, communicated to him the order passed by the District Magistrate and asked him to deliver up the arms in his possession. The plaintiff tendered to him a gun; but the defendant, alleging that the gun tendered was not the gun referred to in the license, searched the plaintiff's house. At that time the house was full of guests and ladies. No other gun was found.

Plaintiff then filed a suit against the defendant to recover damages for maliciously and without authority searching his house and thereby causing him annoyance and injuring his reputation.

Defendant contended, (*inter alia*) that he was not acting maliciously or in excess of his authority and that he was carrying out the orders of his superior.

The lower Court held that the defendant having searched the plaintiff's house under legal authority and without malice had done the plaintiff no wrong.

Plaintiff appealed to the High Court.

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Branson (with him *D. A. Khare*), for the appellant (plaintiff):—

The defendant claims protection under section 51 of the Bombay District Police Act (Bombay Act IV of 1890). That section, however, has no application to the present case. The chapter containing section 51 refers to departmental discipline. It cannot override the provisions of the Indian Arms Act (XI of 1878) which requires a warrant from a competent authority to institute a search for guns, &c. In the present case no such warrant was issued and therefore section 51 of the Bombay District Police Act (Bombay Act IV of 1890) could afford no protection to the defendant. Section 80 of the Act also would not protect him.

The *Government Pleader* for the respondent (defendant):—
The defendant claims protection under section 51 of the Bombay District Police Act (Bombay Act IV of 1890). Assuming that he acted in excess of his authority, then section 80 of the Act would protect him: see also *Raghavendra v. Kashinathbhat*⁽¹⁾; *Harish Chunder v. Nishi Kanta*⁽²⁾ and *Ramayya v. Sivayya*.⁽³⁾

CHANDAVARKAR, J.—We think that the District Judge is right in the view he has taken as to the legality of the act of the defendant complained of as wrongful by the plaintiff. The plaintiff held a license for a gun under the Arms Act, which was to expire on the 31st of December, 1900. Some time before that date, *i.e.*, on the 1st October, 1900, the plaintiff applied to the District Magistrate for a renewal of the license and for an additional license for fresh arms. The application was forwarded for enquiry by the Police and the result of it was that the Police recommended that the license already held by the petitioner should be cancelled and that his application for a fresh license should be refused. Acting upon that recommendation, the District Magistrate passed an order cancelling the plaintiff's license and declining to grant a license for fresh arms. This order was forwarded to the District Superintendent of Police with a direction that it should be communicated to the plaintiff and that the gun he held under the cancelled license should be attached. The District Superintendent sent the order on to the

(1) (1894) 19 Bom. 717.

(2) (1901) 28 Cal. 591.

(3) (1900) 24 Mad. 594.

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Chief Constable with a direction that it should be communicated to the plaintiff and *that such arms as there might be should be attached*. The Chief Constable forwarded the order to the defendant, who was the officer in charge of the Police Station with jurisdiction over the place where the plaintiff lived, and instructed him to carry out its terms. Accordingly on the 30th of December, 1900, the defendant, accompanied by a Panch whom he had collected for the purpose, went to the plaintiff's house and communicated to him the contents of the District Magistrate's order and called upon him to give up the gun which he held under the cancelled license. The plaintiff immediately produced a gun. What happened afterwards is deposed to as follows by the plaintiff:—"Imam, defendant, said: 'Though you have tendered this gun I have yet to search your house.' At the time my house was searched I had some guests from Mohili, &c., and some Gosha women." The defendant's version is this:—"He," *i.e.*, the plaintiff, "produced a gun as soon as I went to his house. He said 'This is my gun.' I at once suspected that he had another gun. I immediately made a search.....I did not find a gun. I thought the order of the District Superintendent of Police was sufficient. The gun he delivered to me was not the gun I had seen him carrying before. That was quite different with brass ornaments and in good condition with ivory inlaying; I told him to produce his proper gun. He said he had none." In his cross-examination the defendant states that he searched because he suspected the plaintiff's real gun was in the house, and that he concealed the order of the District Superintendent of Police to authorize a search.

The order of the District Superintendent of Police does not in terms authorize a search, but his direction that "such guns as there may be should be attached" may be taken as implying that the defendant should do all that might be necessary for the purposes of the attachment and that is substantially the defendant's case. His defence is that he made the search of the plaintiff's house in obedience to a duty imposed on him by law and prescribed by the orders of his superiors and that, therefore he is protected. The law applicable to such a case is explained by Lord Watson in

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Allen v. Flood ⁽¹⁾, where he says :—“There is a class of cases which have sometimes been referred to as evidencing that a bad motive may be an element in the composition of civil wrong : but in these cases the wrong must have its root in an act which the law generally regards as illegal but excuses its perpetration in certain exceptional circumstances from considerations of public policy. These are well known as cases of privilege, in which the protection which the law gives to an individual who is within the scope of these considerations consists in this, that he may with immunity commit an act which is a legal wrong and but for his privilege would afford a good cause of action against him, all that is required in order to raise the privilege and entitle him to protection being that he shall act honestly in the discharge of some duty which the law recognises and shall not be prompted by a desire to injure the person who is affected by his act. Accordingly in a suit brought by that person, it is usual for him to allege and necessary for him to prove an intent to injure in order to destroy the privilege of the defendant.” The decision then of the present case turns upon two questions : *first*, was the defendant acting in the discharge of some duty which the law recognised when he searched the plaintiff's house ; *second*, if he was, is it proved by the plaintiff that he acted *dishonestly* and was prompted by a desire to injure the plaintiff ?

The solution of the first of these two questions depends not merely on the fact that the defendant was acting under the orders of his superiors which he was bound to obey, but also on the law in accordance with which those orders were given. Section 50 of the Bombay Police Act, which was cited by the learned Government Pleader in support of the defendant's action, speaks of orders lawfully issued by a superior Police officer to a subordinate. On the facts here it is clear that the plaintiff's license was cancelled, and that on learning of its cancellation the plaintiff was bound, under section 16 of the Arms Act, to deposit his gun “without unnecessary delay” with the defendant who was the officer in charge of the nearest police station. The defendant had a right to demand the gun, the license of which had been cancelled, and it is not contended for the plaintiff that

(1) (1898) A. C. L., pp. 92, 93.

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when it was demanded the plaintiff could not produce it and give it up to the defendant. Nor could such contention avail the plaintiff, having regard to the fact that when he was called upon to give up his gun, the license of which had been cancelled, he did produce one. So far then the defendant was acting in the discharge of a duty recognised by law; and it is not alleged that there was anything wrongful in that. The gun produced by the plaintiff was admittedly useless; and the defendant's case is that suspecting that the plaintiff was not producing the real gun for which he had held a license, he caused a search of the house to be made. Under section 165 of the Criminal Procedure Code a Police officer in charge of a police station is authorized to make a search during an investigation when he considers that the production of a thing is necessary to the conduct of an investigation into any offence which he is authorized to investigate, and there is reason to believe that a person to whom a summons or order under section 94 of the Code might be issued will not produce the thing. The District Judge has held that it was under this section that the defendant acted in searching the plaintiff's house. That section requires, before it can be brought into operation, that there must be an offence which the Police officer is authorized to investigate. According to the District Judge, as soon as the defendant suspected that the plaintiff was not producing the real gun, there was, in the defendant's opinion, an offence committed, and he could act under section 165 of the Criminal Procedure Code. We agree with the District Judge in that view. A public functionary, authorized by a statute to make a search, must, in exercising that authority, act within the limits allowed by the statute itself. If a Police officer suspects that an offence has been committed which he is authorized to investigate he can make a search under section 165. It cannot be contended that he is to exercise no judgment, no discretion whatever; if it were not allowed "he could not discharge his duty without great peril and apprehension, if in consequence of a mistake, he became liable to an action" (per Lord Tenterden in *Cullen v. Morris* ⁽¹⁾). But the suspicion that there is an offence to investigate and therefore a search to make must be formed

(1) (1819) 2 Stark, 577.

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honestly. While it must be left to the judgment of the Police officer making a search under section 165 to decide whether there is such an offence calling for a search, if, instead of a mere mistake in forming his judgment, it is shown that that judgment was not formed *honestly* but with an intent to injure the party subjected to the search, he cannot invoke the protection of that section, and it must follow that he was using his authority unlawfully.

The onus of proving that the defendant did not act honestly but with intent to injure lies on the plaintiff. In other words, the plaintiff must show that in purporting to act under section 165, Criminal Procedure Code, the defendant acted *intentionally without just cause or excuse*. It is contended this is shown by the evidence proving that the plaintiff's relations with the Police were strained; that the defendant had reported that the plaintiff was not a fit person to hold a license under the Arms Act; that the defendant marched to the plaintiff's house with a Panch and made the search soon after he had communicated to the plaintiff the fact of the cancellation of his license; that he concealed from the plaintiff the order of the District Superintendent of Police, and that he made the search at a time when the plaintiff had guests and Gosha women in his house. These facts, it is urged, indicate malevolence on the defendant's part and prove that the search was made more with a view to annoy the plaintiff and out of spite than with an honest desire to procure the gun, the license of which had been cancelled. But the defendant was acting in obedience to the lawful order of his superiors that the gun in question should be attached. It is not alleged that the defendant personally bore any malice towards the plaintiff. On the other hand, it is admitted that he was a new arrival in the village where the plaintiff lived. The gun produced by the plaintiff was old and useless—a circumstance which might well have led the defendant to suspect that the plaintiff was not producing the real gun. On the evidence, therefore, as a whole, we cannot hold that the defendant is proved to have acted with an intent to injure the plaintiff. We must, therefore, confirm the decree with costs.

Decree confirmed.