1903.

BABAJIRAO v. LAXMANDAS.

The whole question resolves itself into this; in the former suit Laxmandas was held not to have established private and personal ownership in himself.

In this suit he is merely the appointed machinery whereby the rights of the math to possession are being enforced, and no order has been made respecting that possession. Apart, therefore, from the question whether it can be said that the plaintiff was bound by any order respecting possession it is apparent that the two positions are essentially distinct and in no way inter-dependent. I need hardly point out that an order in a Mámlatdár's suit does not give rise to the bar to which explanation II of section 13, Civil Procedure Code, relates.

The considerations which I have applied to article 47 would be equally applicable to section 21 of the Mámlatdárs' Act.

It has been suggested that the case should go back for determination of the question whether Laxmandas is the manager of the math, but in our opinion that point has been sufficiently determined for the purposes of this suit by the Lower Courts.

For these reasons I think the decree should be confirmed with costs, and as my colleagues agree in this conclusion that will be the decree of the Court.

CHANDAVARKAR and JACOB, JJ.—We concur.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Jacob.

1903. *September 29.*

AHMEDBHAI VALAD HABIBBHAI (ORIGINAL DEFENDANTS 2 TO 6), APPELLANTS, *v.* FRAMJI EDULJI BAMBOAT (ORIGINAL PLAINTIFF), RESPONDENT.*

Malicious prosecution—Partner and firm—Liability of firm for torts of one partner—Indictment containing several charges whereof for some there is, and for others there is not, probable cause—Reasonable and probable cause—Circumstances of suspicion—Prosecution, commencement of.

* First Appeal No. 37 of 1903.

1903.

AHMEDBHAI v. FRAMJI EDULJI.

A malicious prosecution by the managing partner of a firm does not render the other members of the firm liable in damages, unless it is shown that the firm was in some way or other concerned in the prosecution and had instigated it.

Where a person prefers an indictment containing several charges, whereof for some there is, and for others there is not, probable cause, he becomes liable for preferring that indictment without reasonable and probable cause.

Reed v. *Taylor*(1) followed.

Mere circumstances of suspicion cannot be relied on as evidence of reasonable and probable cause as a defence to an action for malicious prosecution.

Busst v. *Gibbons*(2) followed.

A prosecution commences when a complaint is made. It is not necessary, in order to maintain an action for malicious prosecution, that the charge was acted upon by the Magistrate: it is enough if the charge was made to the Magistrate with a view of inducing him to entertain it.

APPEAL from the decision of A. G. Bhave, First Class Subordinate Judge at Sholápur.

Suit for damages for malicious prosecution.

Plaintiff was in the employ of defendants 2—6, as an Engineer and Manager of the Ahmedbhai Habibbhai Ginning and Pressing Factory at Bágalkot from November, 1894, to the 31st March, 1898.

Defendant 2 was the managing partner of the firm consisting of defendants 2—6; and he managed the factory at Bágalkot.

Plaintiff did not pull on well with defendant 2; and so after a long correspondence with his employers, he resigned his post on the 31st March, 1898. The defendants 2 to 6, thereupon appointed defendant 1 on the 13th April, 1898, to look after the management of the factory: and he continued to work under the directions of defendant 2, the managing partner.

The plaintiff on resigning his post came to Bombay and as he was not able to recover arrears of pay from defendants 2—6, he filed a suit against them to recover the arrears, in the Court of Small Causes at Bombay. On the 4th June, 1898, a decree for Rs. 575 was passed in his favour.

Meanwhile, defendant 1 acting under instructions from defendant 2, filed, on the 26th December, 1898, a complaint in the First Class Magistrate's Court at Bágalkot. The burden of the complaint was that the plaintiff had falsely entered on the debit side of the factory account book an item of Rs. 10 under date the 11th

(1) (1812) 4 Taun. 616. (2) (1861) 30 L. J. Ex. 75.

1903.

AHMEDBHAI v. FRAMJI EDULJI.

June, 1897, for purchasing signary or nut coals, and that Rs. 58 out of the total amount of Rs. 168 shown as having been spent in purchasing fuel were not really so spent, and that both these sums had been fraudulently misappropriated by the plaintiff to his own use. He was also charged with having removed from Bágalkot to Bombay, with fraudulent intention of misappropriating, valves, a quantity of cotton, account books and other papers belonging to his masters. The plaintiff was called upon to answer these charges; and the First Class Magistrate after investigation found that the facts and circumstances admitted or proved did not establish any criminal intention on the part of the plaintiff to misappropriate the disputed items, and he thought that at the most the wrongs complained of might be civilly actionable. He strongly suspected that the charge in respect of the valves was a trumped up one and that an attempt was made to support it by false and fabricated evidence. He therefore discharged the plaintiff under section 253 of the Code of Criminal Procedure (Act V of 1898), on the 3rd April, 1899.

The plaintiff then caused a warrant to be issued for the arrest of defendant 2, in execution of the decree which he (plaintiff) obtained in the Court of Small Causes at Bombay.

On the 25th November, 1899, defendant 1 again, at the instance of defendant 2, lodged a second complaint before another Magistrate, charging the plaintiff with criminal misappropriation in respect of five other items. This complaint was, on the 12th February, 1900, summarily dismissed by the Magistrate under section 203 of the Code of Criminal Procedure (Act V of 1898).

The plaintiff thereupon filed a suit against defendants 2—6 for damages on account of the two malicious prosecutions.

The Subordinate Judge found that so far as the first complaint was concerned, the plaintiff was not able to prove want of reasonable and probable cause as regards the first two counts; but "the charge made against the plaintiff in respect of the valves was wholly groundless and was trumped up maliciously with the view of avenging the plaintiff's conduct in having resigned the service against the will of his employers and successively sued them for arrears of pay;" and "the accusations made against the plaintiff in respect of the account books, &c., and the cotton were also

unfounded, and the defendants had no reasonable and probable cause to prefer the charge of criminal misappropriation or breach of trust in respect of either of them." As to the second complaint, the Subordinate Judge was of opinion that of the charges brought one was not proved to have been without reasonable and probable cause; but that as regards the other respecting the remaining four items, the complaint was preferred in a reckless and vindictive spirit. The Subordinate Judge therefore passed a decree in favour of the plaintiff and against all the defendants.

The defendants appealed to the High Court.

D. A. Khare, for appellants (defendants 2 to 6):—We contend that the Subordinate Judge erred in passing a decree against us. The plaintiff may have shown at the most want of reasonable and probable cause for the malicious prosecution, but he has not shown any malice in us, which is an essential ingredient to support an action for malicious prosecution. Looking at the case as one of principal and agent, here the agent (defendant 1) may have been actuated by malice; but this fact alone is not sufficient to render the principal (defendants 2 to 6) liable, unless it is proved that the principal also is actuated by malice. See *Hall* v. *Venkata Krishna*[1]; *Abrath* v. *North Eastern Railway Company*[2].

N. M. Samarth, for appellant No. 3 (defendant 3):—We are joined in this suit simply because we are partners. There is no allegation much less proof of any malice on our part. It is a well established doctrine that where one partner maliciously prosecutes a person, such person has no cause of action against the other partners unless such partners are privy to the action. See *Arbuckle* v. *Taylor*[3]; and Lindley on Partnership, pp. 149, 150.

H. C. Coyaji, for the respondent (plaintiff):—We contend that the appellants are all liable for the malicious prosecution instituted by their agent (defendant 1) at the instance of their managing partner since even corporations are held liable for malicious prosecution by their agents. See Addison on Torts, p. 231 (3rd Edition); Pollock on Torts, p. 309 (6th Edition).

(1) (1889) 13 Mad. 394. (2) (1883) 11 Q. B. D. 440.
(3) (1815) 3 Dow. 160.

1903.

AHMEDBHAI v. FRAMJI EDULJI.

We next contend that the charges preferred against us in the two complaints are such that an action for malicious prosecution will lie. It is not necessary that the charge should have been taken down in writing and acted upon by the Magistrate. It must be shown that it was made to the Magistrate with a view to induce him to entertain it as a charge of felony. See *Clarke* v. *Postan*(1) and *Quartz Hill Gold Mining Co.* v. *Eyre*(2). And what amounts to a false charge has been considered in *Ashrof Ali* v. *The Empress*(3); *Empress* v. *Salik Roy*(4), and *Ramasami* v. *Queen-Empress*(5).

Again the wilful torts of a partner render even his co-partners liable for it. See *Hamlyn* v. *John Houston & Co.*(6).

The question whether the want of reasonable and probable cause is established is one for the Courts to decide. It is a sort of negative proof and very slight evidence is necessary: see *Cotton* v. *James*(7).

Lastly, where some charges are made before a Magistrate, for some of which there is, while for others there is not, a reasonable and probable cause an action for malicious prosecution will lie: *Reed* v. *Taylor*(8).

CHANDAVARKAR, J.:—The Subordinate Judge has held defendants 2 to 6 liable in this action for malicious prosecution solely on the ground that they are "partners in the Bágalkot Press and Ginning Factory in which the plaintiff was employed by them as Engineer and Manager, and that the prosecutions were instituted by defendant 1 on behalf of their firm, being clothed with a power-of-attorney to do so." All that appears, however, upon the evidence is, and indeed the plaintiff admits, that so far as defendants 3 to 6 are concerned, they had no hand in the prosecution, directly or indirectly, and that it was instituted by defendant 1 with the permission of defendant 2. This latter defendant was no doubt the managing partner, but the evidence clearly establishes that there was some misunderstanding between him and his partners, and that these partners were rather inclined

(1) (1884) 6 C. & P. 423.
(2) (1883) 11 Q. B. D. 674.
(3) (1879) 5 Cal. 281.
(4) (1881) 6 Cal. 582.
(5) (1884) 7 Mad. 292.
(6) (1903) 1 K. B. 81.
(7) (1839) 1 P. & Ad. 128, p. 133.
(8) (1812) 4 Taun. 616, p. 617.

to support the plaintiff while defendant No. 2 was opposed to him. The mere fact that defendant No. 1 in instituting the prosecution described himself as the agent of the partnership, acting in the matter of the criminal complaint against the plaintiff on behalf of the firm, is not sufficient to render the firm or all the partners liable in damages to the plaintiff. There must be evidence to show that the firm was in some way or other concerned in the prosecution and had instigated it. There is no such evidence in the case; and we cannot hold defendants 3 to 6 liable merely because defendant 2, who directed defendant No. 1 to prosecute the plaintiff, was the managing partner. The prosecution is not shown to have been within the scope of defendant 2's authority.

The case as to defendant No. 2 stands upon a different footing. He authorised the prosecution and the evidence proves that all that was done in the matter of the two criminal complaints against the plaintiff was done by defendant 1 in consultation with him. In the first complaint, which was lodged on the 26th December, 1898, there were three charges and the Subordinate Judge has found that whereas as to two of them, the plaintiff has not been able to prove want of reasonable and probable cause, the third of these was distinctly a trumped up charge, supported by fabricated evidence. This third charge in the first complaint related to certain valves, which the plaintiff was alleged in the complaint to have removed to Bombay and misappropriated. The valves, however, were found buried underground in the small garden before the bungalow occupied by defendant 1 who was the complainant, and one slide valve was found in the compound of his bungalow. As to the second complaint, it related to five items alleged to have been misappropriated by the plaintiff. The Subordinate Judge finds that one of these five charges is not proved to have been without reasonable and probable cause; but he holds that in respect of the remaining four items, the complaint was preferred in a reckless and vindictive spirit.

Defendant No. 2 cannot escape from liability on the ground that some of the charges have not been proved to have been without reasonable and probable cause. In *Reed* v. *Taylor* [1], Mansfield, C. J., said:—"The question is, whether, if a man pre-

(1) (1812) 4 Taun. 616 p. 617.

1903.

AHMEDBHAI v. FRAMJI EDULJI.

fers an indictment containing several charges, whereof for some there is, and for others there is not, probable cause, this does not support a count for preferring that indictment without probable cause, I am of opinion that it does:" see also *Ellis* v. *Abrahams*[1].

The question, therefore, which we have to consider is whether defendant No. 2 is proved to have acted without reasonable and probable cause and maliciously in authorising defendant No. 1 to prosecute the plaintiff. It is urged for him before us that, firstly, defendant No. 2 merely acted on information supplied to him by defendant No. 1, and that 2ndly, the plaintiff's conduct was such as to give reasonable ground to defendant No. 2 for believing that he was not acting honestly. As to the first of these two arguments, it is to be remarked that though it is true that defendant No. 2 acted on information supplied to him by defendant No. 1, as is shown by the letters received by defendant No. 2 from defendant No. 1 annexed to Ex. 258, those letters also show that defendant 2 must have known that defendant No. 1 was trying to get up false charges with the object of annoying the plaintiff because he had filed a suit for arrears of pay against the firm of defendants 2 to 6. The Subordinate Judge has discussed the evidence on this subject at length and it is not necessary for us to discuss it here, as we agree with him. The Subordinate Judge's finding is not only borne out by the evidence to which he has referred in his judgment but also by one of the letters (Ex. $\frac{258}{8}$) to which he has not referred but which was written by defendant No. 1 to defendant No. 2. This letter was dated the 26th May, 1898, whereas the first complaint against the plaintiff was lodged on the 26th December, 1898. In the letter in question, defendant 1 wrote to defendant 2, asking the latter to give a notice to the plaintiff to hand over certain property of the factory or else that he would be prosecuted criminally, and then defendant 2 asked defendant 1 "if possible send me this information from a different party that he" (*i.e.*, the plaintiff), "is on the point of going away somewhere else and then it will be very easy to proceed against him." There is no evidence in the case to show that defendant No. 2 sent the false information in the

(1) (1846) 8 A. & E. (N. S.) 709.

manner suggested by defendant 1 in this letter; all that appears is that a notice was given by defendant 2 to the plaintiff as suggested in the letter. But the letter proves that defendant No. 2 knew that defendant 1 was trying to get up a criminal charge against the plaintiff by means of concocted evidence and in fact asked defendant No. 2 to create evidence to enable him to proceed against the plaintiff in a Criminal Court. If defendant No. 2, with this knowledge, sanctioned the plaintiff's prosecution, which has been found to have been baseless and without reasonable and probable cause as to some of the charges, it follows that he did not act *bonâ fide* in the matter. "The test as to 'reasonable and probable cause' is whether the circumstances warranted a discreet man in instituting and following up the proceedings" (*Kelly* v. *Mid. G. W. Ry. Co.* (1)). "Was it reasonable and probable cause for any discreet man? Was it so to the maker of the charge?": *The Hon'ble G. N. Gajpathi Rau v. Narsing Rau Garu*(2). Judging by these tests, defendant 2's liability is clear and the Subordinate Judge rightly passed a decree against him. The plaintiff, it was urged, had given grounds for suspicion to defendant No. 2 by the fact that he had withheld the books of account of the factory; but mere circumstances of suspicion, as was held in *Busst* v. *Gibbons*(3), cannot be relied on as evidence of reasonable and probable cause as a defence to an action for malicious prosecution. In that case, as Pollock, C. B., pointed out, "there were certain circumstances which might have led the defendant to make inquiries about the plaintiff, but they amount to nothing like reasonable or probable cause." In the present case, as has been very properly found by the Subordinate Judge, "the plaintiff has from the beginning admitted that he was in possession of the account books but persistently refused to hand them over to the defendants until the account between them was adjusted and arrears of pay due to him were paid. He had even given an undertaking in writing to the defendant 2 to pay whatever amount might be found due from him after examination and adjustment of the accounts." Further, the second defendant ought to have known, and the evidence shows that he knew,

(1) (1872) 7 Ir. R. C. L. S. (2) (1871) 6 Mad. H. C. R. 85.
(3) (1861) 30 L. J. Ex. 75 at p. 77.

1903.

AHMEDBHAI v. FRAMJI EDULJI.

that the dispute with the plaintiff arose in the first place because of defendant 2's differences with his partners, and in the second place because the plaintiff had resigned when his situation had become an impossible one and his pay for several months had been withheld by defendant 2, the managing partner, without giving any reason for withholding it. He also knew that defendant 1, who had been sent as the plaintiff's successor in the management of the factory, was asking him (defendant 2) to create evidence to show that the plaintiff intended to run away. Defendant 2 made no inquiries of the plaintiff or of others but sanctioned the prosecution of the plaintiff after the latter had sued him and his partners in the Small Causes Court at Bombay for the arrears of his pay. The first complaint failed, the Magistrate having discharged the plaintiff, remarking that as to some of the charges against the plaintiff they created, if at all, a civil liability, and that as to one of the charges, it was trumped up With all this knowledge, and when the plaintiff sought to execute the decree he had obtained in the Small Cause Court, the 2nd defendant authorized defendant 1 to file a second complaint against the plaintiff, which was dismissed summarily. We must, therefore, hold that the prosecutions were both malicious and without reasonable and probable cause. It was contended as to this complaint that as it had been dismissed summarily, no action for malicious prosecution could lie in respect of it. But the authorities referred to by the Subordinate Judge in his judgment show that "a prosecution commences when a complaint is made" (*Imperatrix* v. *Lakshman Sakharam*[1]) and that it is not necessary, in order to maintain an action for malicious prosecution, that the charge was acted upon by the Magistrate. It is enough if the charge was made to the Magistrate with a view of inducing him to entertain it (Addison on Torts, 5th Ed., p. 200).

The damages awarded by the Subordinate Judge have, in our opinion, been correctly estimated.

We amend the decree of the Subordinate Judge by adding the words "Nos. 1 and 2" after the words "defendants" and rejecting the claim as against defendants 3 to 6. Defendant No. 2 should pay the costs of the plaintiff in this appeal and in the

(1) (1877) 2 Bom. 481 at p. 487.

Lower Court and bear his own. The plaintiff should pay to defendants 3 to 6 one set of their costs in the Lower Court. No order as to defendants 3 to 6's costs in this Court.

Decree amended.

1903.

AHMEDBHAI v. FRAMJI EDULJI.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Jacob.

DAUDBHAI MUSABHAI (ORIGINAL OPPONENT), APPELLANT, *v.* EMNABAI (ORIGINAL APPLICANT), RESPONDENT.*

1903. *September* 29.

Limitation Act (XV of 1877), sections 5, 14—Appeal—Delay—Excuse—Time taken up in prosecuting an appeal in a wrong Court—Sufficient cause.

In a suit for partition, the High Court on regular appeal passed a decree on the 28th February, 1898. E. who was a party to the proceedings, applied to the Subordinate Judge on the 16th February, 1901, to execute the decree. D., who was also a party to the suit, opposed the application on the ground that it was time-barred. On the 4th March, 1902, the Subordinate Judge held the application to be presented within time. D. appealed to the District Court on the 20th March, 1902; but that Court on the 28th January, 1903, upheld the order passed by the Subordinate Judge. Against this decision D. preferred a second appeal to the High Court on the 17th April, 1903, on the ground that the District Court should have held that it had no jurisdiction to entertain the appeal. On the 23rd June, 1903, the High Court held that the District Judge had no jurisdiction to entertain the appeal and directed him to return the appeal to D. for presentation to the proper Court. The appeal was accordingly returned on the 11th July, 1903, to D., who filed it in the High Court on the 17th July, 1903. At the hearing a preliminary objection was raised that the appeal was presented beyond time and that the delay could not be excused:—

Held, that, the appeal was presented beyond time; and that, no sufficient cause for not filing the appeal before April, 1903, having been shown, the delay in presenting it could not be excused under section 5 of the Limitation Act (XV of 1877).

APPEAL from the decision of B. S. Joshi, First Class Subordinate Judge at Surat.

One Ismail brought a suit for partition against several persons, of whom Daudbhai (the appellant) was defendant No. 8 and Emnabai (the respondent) was defendant No. 5. In this litigation a final decree was passed by the High Court (First Appeal No. 118 of 1896) on the 28th February, 1898.

* First Appeal No. 108 of 1903.