

(1969) 06 OHC CK 0002
In the Orissa High Court
Case No : First Appeal No. 24 of 1964

Jogendra Garabadu and Others	Vs	APPELLANT
Lingaraj Patra and Others		RESPONDENT

Date of Decision : 24-06-1969

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 204 , 258(1)
Evidence Act, 1872 — Section 101, 102, 103, 104, 114
Limitation Act, 1963 — Article 74

Citation : AIR 1970 Ori 91 : (1969) 35 CLT 855 : (1969) 35 CLT 835 : (1970) CriLJ 819

Hon'ble Judges : S. Acharya, J;A. Misra, J

Bench : Division Bench

Advocate : B. Mohapatra and S.C. Ghosh, for the Appellant; L.K. Dasgupta, G.N. Sengupta and B.B. Ray, for the Respondent

Judgement

A. Misra, J.—The unsuccessful plaintiffs are the appellants. Originally, the suit was instituted by 12 plaintiffs, but as plaintiff No. 5 died during the pendency of the suit, his name was expunged and the remaining 11 plaintiffs continued the suit.

2. Plaintiffs' case, in brief, is as follows: They are all members of the Brahmin Nijjog whose office is situate on plot No. 738 adjoining a tea stall owned by defendant No. 1 on plot No. 737. Defendant No. 1 had cherished a grudge against them on their refusal to allow him some further space to expand his tea stall. During the night preceding 31-10-58, the roof of defendant No. 1's tea stall was burnt. On the morning of 31-10-1958 out of the grudge which he cherished against the plaintiffs, defendant no, 1 conspired with defendants Nos. 2 to 4 and lodged a F. I, E. making false accusations against the members of the Brahmin Nijjog including the plaintiffs of having committed certain offences in relation to him and his property while he was rearranging his articles in the shop.

As a result, some of the plaintiffs were arrested on 31-10-58, remained in

custody till release on bail and others surrendered in court and got enlarged on bail. Ultimately, police submitted charge-sheet against the original plaintiffs nos. 1 to 10 for offences Under Sections 147, 452 and 149 I. P. C. After protracted trial, plaintiffs were acquitted on merits. Alleging that the prosecution was started without any reasonable and probable cause and out of malicious motives, plaintiffs claim that they are entitled to damages for malicious prosecution from the defendants. So far as the quantum is concerned, each of the plaintiffs claimed Rs. 1,000/- for loss of reputation and mental agony; Rs. 75/-each towards loss sustained by them in not being able to attend to their normal avocations; Rs. 1,800/- incurred as lawyer's fee in defending themselves in the criminal Court; Rs. 240/- as the amount paid to the Advocate's clerk, besides an amount of Rs. 60/- alleged to have been spent in performing religious propitiation ceremonies for those who were released from custody on bail.

3. Defendants deny the allegation of conspiracy to prosecute the plaintiffs and state that the allegations made in the F. I. R. are not false; that the same were not made without reasonable and probable cause; that the police were the real prosecutors and that the report was not lodged out of any malicious motives but with the object of vindicating their legal rights. According to them, defendant No. 1 purchased 0.44 1/2 acre on the southern side of plot No. 737 from the Common Manager of the Bhingarpur De-bottar estate with the permission of the District Judge on 9-8-56. Having come to know of this, plaintiff No. 11 obtained a document on behalf of the Brahmin Nijjog for a portion of the very same plot from some members of the Choudhury family who had no power of disposal but could not get possession of the same. Therefore, they wanted to forcibly dispossess defendant No. 1 and take possession of the land. On the date of occurrence, while defendant No. 1 was rearranging his tea stall, members of the Brahmin Nijjog including plaintiffs formed themselves into an unlawful assembly with the common object of forcibly dispossessing defendant No. 1 from the tea stall, entered into it and tried to demolish the wall separating the tea stall and the nijjog office. When defendant No. 1 protested, he was pushed aside and his furniture and articles thrown away.

In response to the alarm raised by him, police arrived there, seized crowbar and pickaxes, prevented further damage to the wall and other properties of defendant No. 1. Defendant No. 1 thereupon, went to the P. S., lodged the F. I. R. on the basis of which police took up investigation and ultimately charge-sheeted some of the plaintiffs. The quantum of damage claimed is disputed and the high status and respectability claimed by the plaintiffs is denied.

4. On a consideration of the evidence and circumstances, the trial court dismissed the suit on the following findings; (1) Defendant No. 1 is the real prosecutor and the alleged conspiracy with defendants nos. 2 to 4 not being proved, the suit against defendants Nos. 2 to 4 is not maintainable; (2) the prosecution terminated in favour of the plaintiffs; (3) irrespective of the merits, the claim by plaintiffs nos. 11 and 12 is clearly barred by limitation; (4) the

prosecution was not false and it was not without reasonable and probable cause; and (5) the prosecution was not malicious.

5. The trial court also assessed the quantum of damages in case all or any of them are found entitled to a decree as follows: An amount of Rs. 200/- each as solatium for loss of reputation and mental agony, so far as plaintiffs nos. 1, 2 and 4 are concerned; Rs. 150/- each, so far as plaintiffs nos. 3, 6 and 8 to 10 are concerned; a consolidated amount of Rs. 750/- towards lawyer's fee of all the plaintiffs and Rs. 50/- each for loss of occupation, so far as plaintiffs nos. 1 to 4, 6 and 8 to 10 are concerned. It found that plaintiffs are not entitled to the rest of the items of claim laid by them.

6. There is no dispute that to succeed in a suit for damages for malicious prosecution, it is incumbent on the plaintiff to prove (1) that he was prosecuted by the defendant; (2) that the prosecution complained of terminated in his favour if it is capable of so terminating; (3) that there was absence of reasonable and probable cause for initiating the prosecution against the plaintiff and (4) that the prosecution was malicious.

7. Regarding the first element, the trial court has found and it is not disputed before us that plaintiffs were prosecuted by defendant No. 1. It is, however, contended by learned counsel for appellants that though the F. I. R. against the plaintiffs was lodged by defendant No. 1, the other defendants also should be treated as prosecutors as they conspired with him to initiate the prosecution on false accusations, joined hands with him at all stages of the proceeding and gave false and perjured evidence. This contention has been negated by the trial court, and in our opinion, rightly so.

There is no evidence direct or otherwise to prove any conspiracy between the defendants in lodging the F. I. R. All that has been said against defendants nos. 2 to 4 is that they deposed in support of the prosecution case and their evidence was not accepted. The mere fact that the evidence of defendants nos. 2 to 4 examined as P. Ws. in the criminal case was not accepted by the criminal court does not and cannot prove a conspiracy between them and defendant No. 1 in initiating the prosecution. Therefore, we agree with the trial court's finding that defendants nos. 2 to 4 cannot be said to be the prosecutors, and as such, the action for damages for malicious prosecution against them is not maintainable.

8. Before dealing with the main contentions urged before us by the respective parties, it will be convenient to dispose of the claim of appellants Nos. 6, 10 and 11 who were plaintiffs nos. 7, 11 and 12 in the trial court. As already stated, plaintiff No. 5 having died during the pendency of the suit, his name was expunged. Learned counsel for appellants contends that though plaintiff No. 7 did not examine himself in the suit, the evidence adduced on the side of plaintiffs being on behalf of all of them, the court below erred in holding that plaintiff No. 7 cannot be entitled to any damages even if otherwise such a claim is found to be maintainable. It is not necessary for us to consider the merits of this

contention, in view of the concession made before the trial Court. In Paragraph 18 of the trial Court judgment it has been observed:

"It is fairly conceded by the learned counsel for the plaintiffs that the claim for personal damages made on account of plaintiffs Nos. 5 and 7 cannot be allowed. So the damages claimed on account of their personal inconvenience and loss of reputation has to be disallowed."

Learned counsel for appellants does not say that such a concession was not made in" the trial Court. Therefore, irrespective of the merits of the present contention, so far as appellant No. 6 (plaintiff No. 7) is concerned, his claim in this appeal cannot be sustained.

9. As regards appellants Nos. 10 and 11 who figured as plaintiffs Nos. 11 and 12 in the trial court, it is admitted case that though their names found place in the F. I. R. (Ex. 4), they were omitted from the chargesheet and were not actually put on trial. Learned counsel for appellants contends that though they were not actually put on trial and the proceeding was dropped against them at the time of filing the chargesheet, they had to suffer humiliation and other inconvenience during police investigation, because defendant No. 1 had levelled accusations against them in Ext. 4 which led to the investigation. Further, it is contended that as a protest petition had been filed by defendant No. 1 against dropping of the proceeding against these two appellants and the said petition remained undisposed of, the bar of limitation will not stand in their way.

In our opinion, this contention is not acceptable. On the day, on the report of the police the proceeding was dropped against these two appellants, while cognizance was taken against others, the proceeding, so far as these two appellants are concerned, terminated. The period of limitation necessarily will commence from the date of such termination. The protest petition, if any, filed by defendant No. 1 cannot be treated as a continuation of the proceeding. Therefore, we agree with the Court below that so far as appellants Nos. 10 and 11 are concerned, irrespective of other considerations the claim is barred by limitation.

10. The only other question that remains for consideration is the claim of appellants Nos. 1 to 5 who were plaintiffs Nos. 1 to 4 and 6 and appellants Nos. 7 and 9 who figured as plaintiffs Nos. 8 and 10. Out of the four elements which are required to be proved to successfully maintain a claim for malicious prosecution, as already stated, the first two, i.e. defendant No. 1 being the prosecutor and the proceeding terminating in favour of the above appellants are proved and not seriously disputed. It now remains to be seen how far the other two elements, i.e. absence of reasonable and probable cause and the prosecution being malicious are established in this case. The findings of the trial court on both these questions are against the plaintiffs.

Mr. B. Mohapatra, learned counsel for appellants, challenges the correctness of the findings of the trial court on the above two points, mainly on the following

grounds; (1) though the trial court has correctly stated the proposition of law relying on the decision of the Patna High Court reported in *Taharat Karim and Another Vs. Malik Abdul Khaliq and Others*, and the consistent view taken by this Court in a series of decisions on the question of onus regarding absence of reasonable and probable cause, it has erred in application of the principle of law while discussing and assessing the evidence; (2) irrespective of the question of onus, the trial court has failed to properly appreciate the evidence and erred in its finding that the prosecution was not without reasonable and probable cause and that it was not actuated by malice and (3) even if on the evidence it is found that there was reasonable and probable cause in initiating the prosecution, the trial court should have further considered whether such reasonable and probable cause existed in implicating all the plaintiffs and if it found that there was no such justification for implicating some of the plaintiffs, at least it should have partially decreed, so far as their claims are concerned, instead of dismissing the suit in toto.

11. Mr. Dasgupta, learned counsel appearing for respondents, on the other hand, contends that in an action for malicious prosecution, the onus to prove absence of reasonable and probable cause invariably rests on the plaintiffs. It is argued that the Patna case reported in *Taharat Karim and Another Vs. Malik Abdul Khaliq and Others*, puts the proposition rather too broadly and such a proposition does not find support from the authorities which it purports to follow. It is further contended by him that the decisions which have followed the view expressed in *Taharat Karim and Another Vs. Malik Abdul Khaliq and Others*, are distinguishable, inasmuch as, they are all cases where the prosecution has been categorically found to be false. Lastly, it is urged by him that in view of the later Division Bench decision of the Patna High Court reported in *Ucho Singh Vs. Nageshwar Prasad Singh and Others*, , the decision in *Taharat Karim and Another Vs. Malik Abdul Khaliq and Others*, is no longer good law and the decisions of our High Court which have followed it require reconsideration.

12. As a broad proposition of law, there is no divergence of opinion that the onus to prove absence of reasonable and probable cause in an action for malicious prosecution normally rests on the plaintiff. It was however, held in *Taharat Karim and Another Vs. Malik Abdul Khaliq and Others*, that once plaintiff establishes that defendant instituted the prosecution on the allegation that the offence was committed in his presence and the trial results in an acquittal on the merits, the obligation to establish absence of reasonable and probable cause is satisfied and the onus necessarily shifts to the defendant to prove affirmatively that he had reasonable and probable cause to institute the prosecution. This view has been consistently followed by this Court in a series of decisions.

A Division Bench of this Court in the unreported decision in S. A. No. 490 of 1950 (Pat) (*Niku Tarini v. Kapai Beero*) disposed of on 11-1-1955 agreeing with the decision reported in *Taharat Karim and Another Vs. Malik Abdul Khaliq and Others*, observed as follows:

"With great respect, we entirely agree with the view of Mr. Justice Dhavle in the case i Taharat Karim and Another Vs. Malik Abdul Khaliq and Others, , which, was subsequently followed in Darsan Pande Vs. Ghaghu Pande and Others, , and hold that where the complaint against the plaintiff was in respect of an offence which defendant claimed in the criminal proceeding to have seen him committing, and the trial ends in an acquittal on the merits, there would be a presumption in favour of the plaintiff that there was no reasonable and probable cause for the accusation."

This view has been reiterated by Mr. Justice Barman (as he then was) in the decision reported in Gobind Chandra Sambarsingh Mohapatra Vs. Upendra Padhi and Another, and by Mr. Justice G.K. Misra (as he then was) in the decision reported in (1963) 29 C. L.T. 357 (Gangadhar Mohanti v. Priyanath Das), though the later decision of the Patna High Court reported in Ucho Singh Vs. Nageshwar Prasad Singh and Others, was cited and it was contended that by this later decision the proposition laid down in Taharat Karim and Another Vs. Malik Abdul Khaliq and Others, was no longer good law. The same view has been expressed by the High Court of Andhra Pradesh in the decision reported in Pendekanti Subbarayudu Vs. Bysani Venkatanarasayya and Others, . Mr. Dasgupta contended that in the light of the later Division Bench decision of the Patna High Court reported in Ucho Singh Vs. Nageshwar Prasad Singh and Others, , the position requires reconsideration. The view taken in Taharat Karim and Another Vs. Malik Abdul Khaliq and Others, has been dissented from in the decision reported in Ucho Singh Vs. Nageshwar Prasad Singh and Others, mainly relying on certain observations of Bowen, L. J. at page 457 in the decision reported in (1883) 11 QBD 440. The observations by Bowen. L. J. in the same decision occurring at page 462 and other Division Bench decisions of the Patna High Court have not been noticed in the decision reported in Ucho Singh Vs. Nageshwar Prasad Singh and Others, . The following observation by Bowen, L. J. at page 462 in the decision reported in (1883) 11 QBD 440 to a certain extent qualifies the broad proposition of law expressed at page 457 and followed in Ucho Singh Vs. Nageshwar Prasad Singh and Others, .

"Something has been said about innocence being proof, prima facie, of want of reasonable and probable cause. I do not think, it is. When mere innocence wears that aspect, it is because the fact of innocence involves with it other circumstances which shew that there was the want of reasonable and probable cause; as, for example, when the prosecutor must know whether the story which he is telling against the man whom he is prosecuting, is false or true. In such a case, if the accused is innocent, it follows that the prosecutor must be telling a falsehood, and there must be want of reasonable and probable cause. Or if the circumstances proved are such that the prosecutor must know whether the accused is guilty or innocent, if he exercises reasonable care, it is only an identical proposition to infer that if the accused is innocent there must have been a want of reasonable and proper care. Except in cases of that kind, it never is true that mere innocence is proof of reasonable and probable cause. It must be

innocence accompanied by such circumstances as raise the presumption that there was a want of reasonable and probable cause."

13. The question also came up before another Division Bench of the Patna High Court in the decision reported in Nagendra Kumar Vs. Etwari Sahu and Others, . There, it was observed:

"The principles which can be extracted from the just mentioned cases cited by the Bar may be stated thus:

(1) if a man acts on his own knowledge, and if he gives information of the commission of an offence committed in his presence, and, therefore, the accusation against the plaintiff is in respect of an offence which defendant claims to have seen him committing, and the trial commenced, on acquittal on merits the presumption will be not only that the plaintiff was innocent but also there was no reasonable and probable cause.

x x x x x (2) Where therefore, the charge is of such a nature as must be true or false to the knowledge of the defendant, then no question of reasonable and probable cause can arise. Falsity of the evidence by the prosecutor himself would go to show want of reasonable and probable cause and further go to show malice on the part of the prosecutor."

In the latest decision of the Patna High Court. Taharat Karim and Another Vs. Malik Abdul Khaliq and Others, reported in Satdeo Prasad and Another Vs. Ram Narayan and Others, the view expressed in Taharat Karim and Another Vs. Malik Abdul Khaliq and Others, , has been reaffirmed and it is observed:

"where therefore the accusation against the plaintiff was in respect of an offence which the defendant claimed to have seen him commit, and the trial ends in acquittal on merits as is the case here, the presumption will be not only that the plaintiff was innocent but also that there was no reasonable and probable cause for the accusation."

In the body of this decision, it has been mentioned that the case reported in Nagendra Kumar Vs. Etwari Sahu and Others, was taken in appeal and was upheld by the Supreme Court. Thus, there is overwhelming authority reiterating the principles enunciated in Taharat Karim and Another Vs. Malik Abdul Khaliq and Others, .

14. Even in the decision reported in Ucho Singh Vs. Nageshwar Prasad Singh and Others, , while purporting to dissent from the view expressed in Taharat Karim and Another Vs. Malik Abdul Khaliq and Others, regarding the burden of proof, to prove absence of reasonable and probable cause in cases where the defendant purported to be an eye-witness to the alleged crime, it has been recognised that the fact that defendant purported to be an eye witness to the occurrence is a factual circumstance which should be taken into account in deciding whether plaintiff has discharged the burden of proof relating to the absence of reasonable and probable cause.

Thus, though as a broad proposition it is well settled that in an action for malicious prosecution the onus to prove absence of reasonable and probable cause rests on the plaintiff, it is subject to an exception and is qualified to this extent that in cases where the accusation against the plaintiff purports to be in respect of an offence which the defendant claimed to have seen him commit and the trial ends in an acquittal on the merits, the presumption will be not only that plaintiff was innocent, but also there was no reasonable and probable cause for the accusation. With great respect we agree with this view in spite of the observations made in the Division Bench decision reported in *Ucho Singh Vs. Nageshwar Prasad Singh and Others*, .

15. The next contention of learned counsel for respondents is that even if the aforementioned view is accepted, to attract the presumption in favour of the plaintiffs, two conditions are necessary. They are: (1) the accusations must have been made against the plaintiffs in respect of offences which defendant claimed to have seen them commit and (2) the trial must have ended in an acquittal on merits. According to him, in the present case, the acquittal being by way of giving benefit of doubt to the plaintiffs, the aforesaid presumption of absence of reasonable and probable cause cannot arise in their favour. Mr. Mohapatra, learned counsel for appellants, on the other hand, contends that the acquittal in this case was not by giving benefit of doubt, but on a consideration of the merits of the evidence.

16. What the words "acquittal on merits" precisely connote have not been dealt with in any of the decisions. Reference was made to a decision of our High Court reported in *Gobind Chandra Sambarsingh Mohapatra Vs. Upendra Padhi and Another*, where a distinction has been made between "acquittal on grounds of extreme weakness of the prosecution evidence" and "acquittal by giving benefit of doubt." It has been observed that while the former will amount to an acquittal on merits, the latter will not. For this purpose, it was observed that the criminal court judgment can be gone through to find out the reasons for the acquittal, though the reasonings and conclusions therein cannot be relied upon as conclusive or decisive in the civil suit claiming damages for malicious prosecution.

17. It is well settled that in every suit for malicious prosecution, the civil Court must hear the evidence on both sides and decide for itself independently whether or not the prosecution was without reasonable and probable cause and malicious. It is equally well settled that the judgment of the criminal Court is evidence and conclusive at that to show the acquittal of the plaintiffs as a fact in issue which is one of the essential elements to be determined in a suit for damages, for malicious prosecution. No doubt the judgment of a criminal Court is admissible to show certain facts and circumstances, such as, the names of witnesses examined, the documents exhibited or that the acquittal was on some technical grounds without going into the evidence or on the merits of the evidence, but in our opinion, the reasonings and conclusions in the judgment of a criminal Court cannot be gone into to determine whether the acquittal resulted on account of

the prosecution evidence being weak, insufficient or doubtful.

Therefore, the words "acquittal on merits" must mean an acquittal after trial on a consideration of the evidence as distinguished from and in contradistinction to acquittals which occur due to certain technical defects, such as, want of sanction etc. There seems to be no authority, and in our opinion, no adequate justification to make a further distinction between acquittals on weakness of prosecution evidence, acquittals by giving benefit of doubt or acquittals on insufficiency of evidence and holding that only some of them will amount to acquittals on merits and others not. Embarking on making such a distinction will necessarily mean utilisation of reasonings and conclusions in the criminal court judgment by the civil court in the trial of the suit which is not permissible.

18. In the circumstances of the present case, the presumption mentioned above being in favour of plaintiffs, we now proceed to consider the second contention of appellants that the court below has failed to examine the evidence in the light of the said presumption in favour of the plaintiffs.

19. In the F. I. R. (Ex. 4) lodged by defendant no. 1, the main accusations relating to alleged acts of the plaintiffs which defendant no. 1 claimed to have seen them commit are: (1) when he was arranging his articles in the tea stall some members of the Brahmin Nijjog including plaintiffs formed into an unlawful assembly and trespassed into his tea stall with the common object of forcibly evicting him therefrom; (2) they committed mischief by damaging the separating wall between the Nijjog house and the tea stall; (3) some of them assaulted defendant No. 1 and pushed him away when he protested; and (4) threw away his furniture and other articles which he was rearranging inside his stall.

20. The two essential points for determination are: (1) whether there was absence of reasonable and probable cause for making the aforesaid accusations against all or any of the plaintiffs and (2) whether it was malicious. It is not disputed that unless both these points are found in favour of the plaintiffs, the claim cannot be sustained.

21. Before dealing with the evidence relating to the incidents on the date of occurrence, it is relevant to refer to the background of the relationship which existed between defendant No. 1 on the one hand and members of the Brahmin Nijjog to which plaintiffs belong. The undisputed facts are that defendant No. 1 has got his tea stall on a portion of plot No. 737 near the Rathagada Chhak of Bhubaneswar Town, while the house used as the office of the Nijjog is situate on plot No. 738 adjacent to the tea stall. The northern wall of the Nijjog house serves as a southern protection wall of defendant No. 1's tea stall. According to defendant No. 1, he had purchased Rupee 0/15/6 pies interest in plot No. 737 from the common Manager of the Bhingapur De-bottar Estate in 1956. Besides 0.001 1/2 acre out of the same plot claimed to have been purchased on behalf of the Nijjog, plaintiffs also purported to have purchased interests of other Choudhuries in the said plot and wanted to dispossess defendant No. 1.

Thus, there was some dispute between defendant No. 1 and the Nijjog about the ownership and possession of the land comprising plot No. 737. Plaintiffs also alleged that defendant No. 1 had requested them to lease out a portion of the vacant land from the Brahmin Nijjog for expansion of his tea stall which request had been turned down. In this background of the existing relationship between the parties, the evidence regarding the incidents that are alleged to have occurred on the date of occurrence is to be considered.

22. What the expression "reasonable and probable cause" means has been explained by Hawkins, J. in the decision reported in (1881) 8 QB 167, (Hicks v. Faulkner) in the following words:

"Now I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed".

23. To determine whether there was reasonable and probable cause for defendant No. 1 to lodge the F. I. R. (Ex, 4) on 31-10-58, the first point for consideration is whether there was any occurrence at all on that day, and if so, the nature of occurrence and whether all or any of the plaintiffs against whom accusations were levelled participated therein. The facts that the roof of the tea stall of defendant No. 1 during his absence on the night preceding 31-10-58 was burnt; that he came to the spot on the morning on receipt of the information, by which time, the fire had been put out and then engaged himself in arranging his articles in his stall are not seriously disputed. The substance of the accusations is that while he was so arranging, members of the Brahmin Nijjog including plaintiffs forcibly entered into his tea stall, damaged the separating wall, committed mischief in relation to his articles and assaulted him when he protested. Some of these incidents did occur on that day is amply established by evidence.

D. W. 3, a police constable who was on Patrol duty was attracted to the spot on hearing the hullah. He found 20 or 30 persons had entered the tea stall and defendant No. 1 complained to him. He also saw people engaged in damaging the separating wall. He further mentions the arrival of D. W. 2. A. S. I. with two constables who removed people from the tea stall as well as the Nijjog Office, seized crowbar and gainti and locked both the places. He has seen a hole which was made in the separating wall between the Nijjog Office and tea stall. There is hardly any reason to discredit his testimony as it cannot be said that he is interested in one or biased against the other party. D. W. 2 has deposed that on being approached by defendant No. 1, he came to the spot, removed the persons both from the tea stall and the Nijjog office, locked both houses and seized crowbar and pickaxes. That D. W. 2 arrived at the spot and took some steps finds support from the testimony of P. W. 11 who has stated that D. W. 2 and

constable came to the spot and locked the damaged tea stall as well as the Nijjog house.

It has been argued that the evidence of D. W. 2 should be disbelieved as no seizure list relating to the seizure of crowbar and pickaxes has been prepared. Failure to prepare a seizure list or loss of the seizure list, if one was prepared, may show laches or dereliction of duty on the part of D. W. 2 but hardly justifies his testimony of what he claims to have seen being disbelieved. The Inspector (D. W. 1) who came subsequently after the F. I. R. was lodged found a hole in the separating wall and also found both the Nijjog Office and the tea stall locked which at his direction were opened by D, W. 2. The evidence of defendants Nos. 1 to 4 examined as D. Ws. 6 to 9 thus finds ample corroboration from the unimpeachable evidence of D, Ws. 1 to 3 which clearly establishes that on that day an occurrence did take place, during the course of which, the separating wall between the tea stall and the Nijjog was partially damaged, the furniture and articles of the tea stall were littered and D. W. 2 had to take steps in locking both the places to prevent the situation from further deteriorating and getting worse.

Therefore, the report by defendant No. 1 in Ex. 4 that some persons belonging to the Brahmin Nijjog with whom his relations were not cordial entered his stall taking advantage of the situation created by fire, damaged the wall and tried to commit mischief in respect of other properties cannot be said to be false or made without any reasonable and probable cause. Though an occurrence took place during the course of which certain acts were committed as alleged by defendant No. 1 in Ex. 4, the further question arises whether defendant No. 1 had reasonable and probable cause to implicate all the appellants as participants in the commission of the aforesaid acts, and if some of them were implicated without reasonable and probable cause, whether the same can be said to be malicious. Mr. Mohapatra for appellants contends that even if the occurrence as alleged is found to have taken place, and as such, report of the said occurrence was not without reasonable and probable cause, the evidence does not disclose that there was any reasonable and probable cause for implicating plaintiffs Nos. 2 to 4, 6 and 8.

It is argued by him that these plaintiffs were implicated as participants in _the alleged criminal acts out of a malicious motive simply because they were members of the Brahmin Nijjog with whom the relation of defendant No. 1 was anything but cordial. Therefore, so far as these plaintiffs are concerned, in any view of the matter, they will be entitled to damages. There appears to be some force in this contention.

24. The trial Court while assessing the evidence has not applied its mind to find out whether there was reasonable and probable cause in levelling the accusations against all the plaintiffs, but has simply proceeded to decide whether there was reasonable and probable cause for lodging a report like Ex. 4. When the accusations by defendant No. 1 were made alleging that he had seen different plaintiffs commit the offences in his presence, their acquittal after trial,

as already observed by us, amounts to an acquittal on merits. In such a case, the presumption of absence of reasonable and probable cause being in favour of the plaintiffs, it is for the defendant No. 1 to prove affirmatively that he had reasonable and probable cause for making the accusations against different plaintiffs who are said to have committed the offences in his presence. Each of the plaintiffs other than plaintiffs Noa 5 and 7, has denied their participation in the occurrence.

On a perusal of the evidence of the D. Ws., we find that there is hardly any evidence of participation in the occurrence by plaintiffs Nos. 2, 3, 6 and 8. Defendant No. 1 examined as D. W. 6 has deposed that plaintiffs Nos. 11 and 12 were instigating standing outside and mentioned the names of Jogi, Madhab and Ghana (Plaintiffs Nos. 1. 9 and 10 respectively) as persons engaged in damaging the separating wall. He has further stated that Bula Panda, who is dead and plaintiff No. 7 dragged him outside the tea stall. Thus, his evidence does not attribute any act to plaintiffs Nos. 2 to 4, 6 and 8 nor does he refer to their presence there. Defendant No. 2 examined as D. W. 7 and defendant No. 3 examined as D. W. 8 also do not implicate the aforementioned five plaintiffs. No doubt, in cross-examination, D. W. 6 has stated that plaintiff No. 6 along with plaintiff No. 1 brought a ladder to break the thatch of the tea stall but there is no corroboration of plaintiff No. 6's participation from any other witness. Further, when the roof of the tea stall had been burnt, the occasion for breaking the thatch could not have arisen.

Defendant No. 4 examined as D. W. 9 has implicated only plaintiffs Nos. 1, 9 and 10 as persons engaged in damaging the wall. He, no doubt, mentions that plaintiffs Nos. 3, 4 and 8 entered the tea stall, but was confronted with his deposition in the criminal Court where he did not mention their names. Even defendants Nos. 1 to 4 whose evidence cannot be considered disinterested substantially implicate only plaintiffs Nos. 1, 9 and 10 in the alleged commission of acts of damaging the wall during the course of occurrence. D. W. 1 arrived at the spot much later and is not competent to speak about the actual participants in the occurrence. D. Ws. 2 and 3 are disinterested persons. D. W. 2 while saying that he saw plaintiff No. 7 shouting that the wall should be demolished when some persons were removing the furniture from the stall and others were engaged in digging the wall, has expressed his inability to remember the names or to identify any of the plaintiffs as persons engaged in the commission of the acts.

D. W. 3 who arrived at the spot while the occurrence was going on has expressed his inability to name or identify any of the persons engaged in breaking the wall. He has, however, identified plaintiff No. 4 as one of the persons who was standing inside the tea stall while different acts were being committed, though he says that he did not see plaintiff No. 4 doing anything. His evidence shows that plaintiff No. 4 was among the persons who had entered the tea stall. Admittedly, plaintiff No. 4 is a member of the Brahmin Nijjog. When some

members of the Nijjog were engaged in the commission of various acts and plaintiff No. 4 was also found there, the impression or honest belief of defendant No. 1 that he was one of the miscreants in those circumstances cannot be said to be unreasonable. Therefore, though there is no evidence that plaintiff No. 4 was actually engaged in the commission of some acts, the accusation by defendant No. 1 implicating him in the participation of acts cannot be said to be without any reasonable and probable cause.

So far as D. W. 5 is concerned, his evidence has been challenged as interested. Even apart from it, he only names plaintiff No. 1 as among the persons who were making Golmal. Thus, taking the evidence adduced on the side of defendants at its best, all it purports to show is that defendant No. 1 had reasonable and probable cause for levelling accusations against plaintiffs Nos. 1, 4, 9 and 10. As regards the other four plaintiffs Nos. 2, 3, 6 and 8, neither defendants Nos. 1 to 4 nor D. Rs. 2, 3 and 5 speak anything about their participation in the commission of the acts complained of nor their presence inside the tea stall when the occurrence took place. Therefore, when defendant No. 1 included these four plaintiffs in the category of accused alleging that he witnessed them participating in the commission of various offences and they were acquitted after trial on merits, and in the absence of any evidence before the civil Court that any of them took any part in the commission of the alleged offences, it cannot be said that there was reasonable and probable cause for levelling accusations against them and implicating them in the role of accused. In these circumstances, our finding is that though there was reasonable and probable cause for making the report about the occurrence which took place on that day, and making accusations against some of the other plaintiffs Nos. 1, 4, 9 and 10, there was no reasonable and probable cause in making accusations against plaintiffs Nos. 2, 3, 6 and 8.

25. Coming to the question of malice, it is an element that can be established by inference from circumstances and cannot be proved by direct evidence. "Malice" means the presence of some improper and wrongful motive, that is to say, an intent to use the legal process in question for some other than its legally appointed or appropriate purpose. As already stated, bad blood existed between defendant No. 1 and members of the Brahmin Nijjog. Plaintiffs Nos. 2, 3, 6 and 8 are admittedly members of the Brahmin Nijjog. Therefore, when defendant No. 1 found that some members of the Brahmin Nijjog were responsible for committing certain acts in relation to his properties, it is not unlikely that he availed of the opportunity of implicating others even though they were not present and did not participate in any of the acts. Levelling of accusations of commission of different offences against plaintiffs Nos. 2, 3, 6 and 8 is Ex. 4 about whose participation or presence in the various acts alleged there is absolutely no evidence, is in the circumstances indicative of improper and wrongful motive and the necessary inference is that it was malicious. Therefore, we find that so far as plaintiffs Nos. 2, 3, 6 and 8 are concerned, there was absence of reasonable and probable cause and the prosecution was malicious. As such, they will be entitled to

damages.

26. Regarding the quantum of damages, the assessment made by the trial Court is Rs. 200/- for plaintiff No. 2 and Rs. 150/- for each of the plaintiffs Nos. 3, 6 and 8 for loss of reputation, physical pain and mental agony; Rs. 50/- each for loss of occupation, besides a consolidated amount of Rs. 750/- towards legal expenses incurred in defending themselves in the Criminal Court. We accept the assessment of damages made by the trial Court under the two heads, i.e. loss of reputation, physical pain and mental agony and loss of occupation. Regarding the legal expenses incurred in defending themselves in the criminal Court, the assessment was made at Rs. 75/- for defence of all the ten plaintiffs. As only four of them are entitled to damages, we reduce the amount to Rs. 300/-.

27. In the result, the appeal by plaintiffs Nos. 1, 4, 7, 9, 10, 11 and 12 (appellants Nos. 1, 4, 6 and 8 to 11 respectively) fails and is dismissed. The appeal by plaintiffs Nos. 2, 3, 6 and 8 (appellants Nos. 2, 3, 5 and 7 respectively) succeeds in part. Appellant No. 2 is entitled to a decree for Rs. 250/-; each of the appellants Nos. 3, 5 and 7 to a decree for Rs. 200/- and all the four jointly to a decree for a consolidated amount of Rs. 300/- towards legal expenses. As each of the parties has partially succeeded in this appeal, each party will bear his costs incurred throughout.

Acharya, J.

28. I agree.