
(1910) 05 CAL CK 0074
In the Calcutta High Court

Shama Bibi

APPELLANT

Vs

Chairman of Baranagore Municipality

RESPONDENT

Date of Decision : 17-05-1910

Acts Referred:

Bengal Municipal Act, 1884 — Section 218, 363

Citation : 6 Ind. Cas. 675

Hon'ble Judges : Mookerjee, J;Carnduff, J

Bench : Division Bench

Judgement

1. The events antecedent to the litigation, which has culminated in the present appeal, have not formed the subject of controversy before this Court. The plaintiff appellant is the owner of a garden house situated within the limits of the jurisdiction of the defendant Municipality. In the year 1900, she let out the garden to her maternal uncle, Juggarnath Das, who erected a privy thereon as also walls along portions of the western and southern boundary lines of the garden house. In November 1903, the Vice-Chairman of the Baranagore Municipality served notice upon the plaintiff requiring her to remove the structures on the ground that they had encroached upon Municipal land. The plaintiff in reply intimated to the Municipality that the garden house was in the entire charge of Juggarnath Das and the notices ought to be directed to the latter. Her objection was overruled and she was prosecuted u/s 218 of the Bengal Municipal Act, 1834. The case for the plaintiff is, that this prosecution was wholly unjustifiable and was malicious. The Magistrates, however, who were Commissioners of the Municipality and who tried the petitioner in the Original Court, convicted her and sentenced her to pay a fine of Rs. 50, in default to undergo imprisonment for 15 clays. The plaintiff, thereupon, moved this Court with the result that the conviction and sentence were set aside on the ground that Section 218 of the Bengal Municipal Act had no application inasmuch as Section 202 under which the notice had been issued upon the plaintiff, could be applied only against the person who had actually raised the obstruction. [Shama Bibi v. Jadub Chunder Banerjee 2 C.L.J. 226 : 2 Cr. L.J. 613.] Subsequently, the

defendant Municipality took proceedings against Jaggarnath Das, and demolished the structures. The result was that on the 20th November 1904, Jaggarnath Das commenced an action against the Municipality for damages for unlawful removal of the alleged obstructions. There was an elaborate investigation in the Court of first instance to determine whether the disputed structures had really caused any obstruction upon Municipal lands. It was held by the learned Judge that there had been no obstruction, and that, on the other hand, the road had been narrowed by reason of obstruction caused by buildings erected by another rate-payer who occupied a holding on the opposite side of the road. The Court accordingly decreed the suit and allowed Jaggarnath Das damages against the Municipality. The Municipality then applied to this Court, with the result that their appeal was dismissed with costs on the 28th February 1908. Meanwhile Shama Bibi had, on the 4th January 1906, commenced the present action for damages for malicious prosecution against the Municipality. The defendant Municipality resisted the claim on the ground that there was reasonable and probable cause for the prosecution, and that in any event, the action of the Municipality was not prompted by malice. They further pleaded that the suit was barred by limitation and that no suit of this description could lie against a public corporation created by statute. The Subordinate Judge overruled the objection of limitation, held the suit was maintainable and found upon the evidence that the plaintiff had been criminally prosecuted, maliciously and without reasonable and probable cause. In this view, the Subordinate Judge gave her a decree for damages. Upon appeal by the defendant Municipality, the learned District Judge has set aside this decision. He has held that the plaintiff had failed to prove that the prosecution was malicious, and that consequently the suit was barred by limitation. He has not expressed any specific opinion upon the question whether there was reasonable and probable cause for the prosecution nor has he decided the question of the liability of a public corporation for damages for malicious prosecution instituted by its officers. The plaintiff has now appealed to this Court and on her behalf, the decision of the District Judge has been assailed substantially on two grounds namely, first, that the District Judge ought to have found that the criminal prosecution was without reasonable and probable cause; and, secondly, that the District Judge should have held that the prosecution was also malicious. It has further been contended that if the criminal prosecution is established to have been malicious, no question of limitation arises. All these positions have been strenuously contested on behalf of the defendant respondent, and it has further been argued on their behalf that a public corporation, created by statute, is not liable for damages for malicious prosecution commenced at the instance of its officers. It is needless, in our opinion, to discuss this last question, which is one of considerable nicety and not altogether free from difficulty, because the plaintiff must be unsuccessful on the ground that she has failed to prove that the prosecution was without reasonable and probable cause and was malicious.

2. It has not been disputed before us, and in view of the decision of the Judicial

Committee in *Gunnesh Dull Singh v. Mugnee Ram Choudhary* 11 B.L.R. (P.C.) 321 : 17 W.R. 283, and of the House of Lords in *Abrath v. North Eastern Railway Company* 11 A.C. 247 : 55 L.J.Q.B. 457 : 55 L.T. 63 : 50 J.P. 659, that before the plaintiff can succeed, she must establish that the prosecution was both without reasonable and probable cause and malicious. In so far as the first of these elements is concerned, it is clear that the case of the plaintiff is full of difficulties. As we have already stated, the plaintiff was convicted in the Court of first instance, although she was subsequently acquitted by this Court on the ground that the notice u/s 202 ought to have been directed not against her as owner, but against Jaggar-nath Das as a person who had actually erected the alleged obstructions. There was in substance a divergence of judicial opinion as to the precise scope of Section 202 of the Bengal Municipal Act. Under such circumstances, the fact that the plaintiff was convicted by a Court of competent jurisdiction would afford strong evidence that her prosecution was not without reasonable and probable cause. It is not necessary to lay down an inflexible rule of law, as appears to have been done in the case of *Adams v. Bucknell* (1890) 126 Ind. 210 : 22 Am. St. Rep. 576, that in an action for malicious prosecution, founded upon a conviction in the original Court followed by an acquittal on appeal, the conviction, in the absence of fraud, is conclusive evidence of probable cause and relieves the defendant from liability. The rule, which is deducible from numerous judicial decisions in this country, is that the fact that the plaintiff has been convicted by a competent Court though he may subsequently have been acquitted on appeal is evidence of the strongest possible character, if unrebutted, against the plea of want of reasonable and probable cause. (See *Doongrussee Byde v. Gridharee Mull Dosgur* 10 W.R. 439, and *Koibutoollah v. Motee Peshakur* 13W.R. 276, where Mr. Justice Jackson observed that an allegation of want of reasonable and probable cause can hardly be supported when there has been a conviction on the original trial and acquitted on appeal, inasmuch as the fact of conviction by the Magistrate, who had jurisdiction to determine the matter, shows that there must, at any rate, have been fair cause for imputing to the plaintiff the crime of which he was accused. The same view has been accepted by the other Indian High Courts. [See *Gungaram v. Hoolasee* v2 A.H.C.R. 88; *Jadubar Singh v. Sheo Saran Singh* 21 A. 26, *Parimi Bapurazu v. Bellam Konda Chinna Venkayya* 3 M.H.C.R. 238, *Ramaya v. Sivaya* 24 M. 549, *Boja v. Perumal* 26 M. 506.] A similar view was adopted by the Court of King's Bench in a case on appeal from Ireland [*Reynolds v. Kennedy* (1748) 1 Wilson 233], where Lee, C.J., ruled that an action for malicious prosecution did not lie against an informer by a plaintiff who had been prosecuted successfully upon such information, although the conviction had been reversed on appeal. The very fact that a Court of competent jurisdiction convicted the plaintiff, shows that the defendant had a foundation for the prosecution. Substantially the same view is supported by a large preponderance of authorities in the American Courts, where it is stated that a conviction of the accused is conclusive evidence of probable cause unless it, has been obtained by fraud or unfair means which may be shown in rebuttal, and this is true though afterwards on appeal the conviction is set aside or the

accused acquitted. (See Cooley on Torts, 3rd Ed. Volume 2 page 333 and Kinkead on Torts Volume I, Section 426). The true rule is that if the plaintiff has been convicted in the first instance and ultimately acquitted on appeal, the presumption is against the absence of reasonable and probable cause, unless the original conviction is proved to have proceeded on evidence, known by the defendant to be false or on the wilful suppression by him of material information. The position is perfectly intelligible that if the conviction at the original trial has been procured by the defendant by false or fraudulent testimony or other unlawful means, and such conviction is subsequently reversed by a higher Court and the plaintiff is acquitted and discharged, the fact of conviction ought not to be treated as conclusive proof of probable cause. But if such conviction has not been obtained by means fraudulent or otherwise improper, the position is manifestly different. The fact of such conviction, though reversed by a Court of appeal, is obviously entitled to great consideration upon the question of the presence or absence of reasonable and probable cause [Goodreach v. Warner 21 Conn. 432.] Now in the case before us, it is not necessary to hold that the judgment of a conviction by the Court of first instance furnishes conclusive evidence of reasonable and probable cause. But such conviction is prima facie evidence of the existence of probable cause. It cannot be said that such presumption has been rebutted by the plaintiff by proof that the conviction was procured by fraud or perjury, nor has any evidence been adduced to show that the conviction was under circumstances which deprive it of any natural probative effect. No doubt, it has sometimes been suggested that when a conviction has been made in the Court of first instance under a misapprehension of the law, if shared by the prosecutor, it does not affect the question of reasonable and probable cause, [Hazzard v. Fluty 120 N.Y. 223 and Nehar v. Dobbs (1896) 47 Nebraska 863 : 66 N.W. 864.] This distinction, however, is only of importance when the rule is stated to be that the conviction in the original Court is conclusive proof of reasonable and probable cause. In the view we take, namely, that such conviction merely affords strong presumptive evidence of reasonable and probable cause, the suggested distinction loses its value. It has further been contended by the learned Vakil for the appellant that the conduct of the defendant was such as to show conclusively an absence of reasonable and probable cause, because, as pointed out in the case of Hicks v. Faulkner (1878) 8 Q.B.D. 167 : 51 L.J.Q.B. 268 : 30 W. 545 : 46 L.T. 127 : 46 J.P. 420, reasonable and probable cause is an honest belief based, upon a full conviction founded upon reasonable grounds in 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 was probably guilty of the crime imputed. To the same effect are the decisions in Turner v. Ambler (1847) 10 Q.R. 252 : 74 R.R. 287 : 16 L.J.Q.B. 158 : 6 Jur. 346, Johnson v. Emerson (1871) L.R. 6 Ex. 329 : 25 L.T. 337 : 40 L.J. Ex. 201 and Bhimsen v. Sitaram 24 A. 363. Judged by this test we are unable to hold that the criminal prosecution of the plaintiff was without reasonable and probable cause. It is conceded that new structures had been

erected in the garden. The reply given by the plaintiff to the notice served, by the Municipality was of the vaguest description and as the person upon whom the responsibility was sought to be fastened by the plaintiff was her relation and it was not clearly intimated that he was lessee in possession, the action taken by the Municipality cannot be deemed unreasonable. No doubt, the plaintiff protested that she had not erected the structures and was not responsible; but, she did not fully disclose to the Municipality the circumstances which would have shown that her relation was acting in an independent capacity and on his own responsibility. There can, in our opinion, be no doubt that the plaintiff has failed to prove that she had been prosecuted without reasonable and probable cause. The first element, therefore, which is essential to sustain the action fails.

3. In so far as the second element is concerned, the case of the plaintiff is equally full of difficulties. The plaintiff cannot possibly succeed unless she establishes that the prosecution was not only without reasonable and probable cause but also that it was malicious. It has been suggested by the learned Vakil for the appellant that if absence of reasonable and probable cause is established, the presence of malice may be inferred from it and in support of this proposition, he has placed reliance upon the case of *Rai Jung Bahadur v. Rai Gudar Sahcy* 1 C.W.N. 537. This contention, in our opinion, is too broadly expressed and it cannot be affirmed that the mere absence of reasonable and probable cause justifies the conclusion as a matter of law that the prosecution was malicious, though it is quite conceivable that the evidence which is sufficient to prove absence of reasonable and probable cause may also establish malice. [*Sri Nath Shaha v. Ralli* 10 C.W.N. 253]. It has further been contended, upon the authority of the decision in *Town Municipality of Jambasar v. Giya Shanker Narsiram* 30 13. 37 : 7 Bom. L.R. 655, that even if the prosecution was not malicious in its inception, it became so during its continuance. Now it may be conceded that, as pointed out by Cockburn, C.J., in *Fitz John v. Mackinder* (1861) 9 C.B.N.S. 505, a prosecution, though in the outset not malicious and commenced under a bona fide belief in the guilt of the accused, may nevertheless become malicious in any of the stages through which it has to pass, if the prosecutor having acquired positive knowledge of the innocence of the accused perseveres *malo animo* in the prosecution with the intention of procuring *per nefas* a conviction of the accused. But this doctrine obviously has no application to the circumstances of the present case. We are unable to hold that during the continuance of prosecution any circumstances were disclosed in the evidence to indicate to the defendant the innocence of the plaintiff. The present case is entirely different from that of *Ahmed Bhai v. Framji* 28 13. 226 : 5 Bom. L.R. 940, where it was ruled upon the authority of *Busst v. Gibbons* (1801) 30 L.J. Ex. 75, that circumstances of suspicion cannot be treated as evidence of reasonable and probable cause as a defence to an action for malicious prosecution; nor is there any analogy between the present case and that of *Mussa Yaqub v. Mani Lal* 29 13. 368 : 7 Bom. L.R. 20, where the defendant was held liable for a prosecution initiated by himself though finally sanctioned by the Court. It is beyond dispute that the plaintiff has

here to prove that the prosecution was malicious, i.e., that it was commenced or continued from a wish to injure the plaintiff rather than to vindicate the law. In this the plaintiff has completely failed. She alleged that the Municipality did not proceed against Jagannath Das because they knew him to be a troublesome man, in other words, the suggestion was that she was prosecuted from an indirect and improper motive although the defendant Municipality knew that she had not committed any offence. This theory has not been proved and it is further clearly answered by the fact that the Municipality did subsequently proceed against Jagannath Das although the result was a very expensive litigation. In our opinion the plaintiff has failed to establish the second element necessary to sustain the action.

4. There was some discussion at the bar as to whether the question of the absence of reasonable and probable cause or the presence of malice is a question of fact or law. It is not necessary, in the view we take, to discuss this question minutely because we have arrived at the conclusion that neither malice nor the absence of reasonable and probable cause has been established by the plaintiff. We may point out, however, that the decision of the Judicial Committee in the case of *Pestonji Muncherji Mody v. Queen Insurance Company* 25 B. 332 does leave room for discussion of this point, as the last passage in the judgment appears to be incorrectly printed. Their Lordships are reported to have observed as follows: "The case comes before them with a certificate that the appeal involves a substantial question of law. It appears to their Lordships that the only question involved is a question of fact on which there are concurrent findings. It is quite true that according to English Law, it is for the Judge and not for the Jury to determine what is reasonable and probable cause in an action for malicious prosecution. The Jury finds the facts, the Judge draws the proper inference from the findings of the Jury. In the sense the question is a question of law, but where the case is tried without a Jury there is really nothing but a question of fact and a question of fact to be determined by one and the same person. It appears to their Lordships that the certificate allowing the appeal to Her Majesty must have been granted under a misapprehension." It is possible that in the last passage the expression question of fact", which is repeated twice, was intended in one place to be "question of law" and this appears to have been the view of the learned Judges who decided the case of *Harish Chunder v. Nishi Kanta* 28 C. 591, where they observed that if the case is tried by a Judge without a Jury, the Judge becomes himself the Judge of the law and the facts. Our own inclination is to hold that the question is a mixed question of fact and law. In so far as the facts have been found by the Court of appeal below, they are binding upon this Court, but whether from the facts so found absence of reasonable and probable cause or presence of malice can be inferred is a question of law for determination by the Court alone.--*Hailes v. Marks* (1861.) 7 H. & N. 56 : 30 L.J. Ex. 389 : 7 Jur. (N.S.) 851 : 4 L.T. 805 : 9 W.R. 808 *Broughton v. Jackson* (1852) 18 Q.B. 378 : 21 L.J.Q.B. 265 : 16 Jur 886, *Lister v. Ferryman* (1870) L.R. 4 H.L. 521 : 39 L.J. Ex. 177 : 23 L.T. 269 : 19 W.R. 9.

5. We may add that in the view we take, we must also hold that the suit is barred by limitation. The decision of this Court in the criminal proceedings was given on the 3rd January 1905; the notice on the defendant Municipality was served on the 29th November 1905, and the suit was commenced on the 4th January 1906. The suit is, therefore, clearly barred u/s 333 of the Bengal Municipal Act. If it had been found that the officers of the defendant Municipality had acted maliciously and without reasonable and probable cause, it could not be contended that their act was done under the statute and special limitation provided in Section 363 would have been inapplicable. But when it has been found that the act, of which the plaintiff complains, was done in good faith and that there was reasonable and probable cause for the criminal prosecution, the provisions of the Act must be held applicable. [Poorno Chunder Roy v. Balfour 9 W.R. 535; Chunder Sikhur Bundopadhya v. Obhoy Churn Bagchi 6 C. 8; Shudhanguh Bhusau Roy Chowdhry v. Bejoy Kali Roy Chowdhry 3 C.L.J. 376; Fishcher v. Twigg 21 M. 367; Ranchordas v. Municipal Commissioners 25 B. 387 Selmes v. judge L.R 6 Q.B 724 : C.J.Q.B. 287 : 4 L.T. 905 : 19 W.R. 1110]. The present case is not distinguishable from that of In re Bishunpada Chatterjee 3 C.L.J. 36 (Note.), where the act complained of was intended to be done under the statute.

6. The result, therefore, is that the decree made by the District Judge must be affirmed and this appeal dismissed with costs.