JIJAI AMBA *Ex parte.*

Their Lordships' judgment was delivered by

Sir BARNES PEACOCK :—Their Lordships are of opinion that it was entirely a matter of discretion with the Court as to the removal of the Receiver, and, looking to the case, their Lordships think that the Court have exercised a very sound discretion in not removing him. They will therefore humbly advise Her Majesty to dismiss this appeal.

Solicitors for the Appellants : Messrs. Lawford, Waterhouse, and Lawford.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

1889. February 13. April 3. 1890. March 17.

HALL AND OTHERS (DEFENDANTS), APPELLANTS,

v.

VENKATAKRISHNA (PLAINTIFF), RESPONDENT.*

Malicious prosecution—Matters in issue—Burden of proof.

In a suit for damages for malicious prosecution it was found that the charge brought by the defendant against the plaintiff was unfounded, and that it was brought without probable cause :

Held, that the absence of probable cause did not imply malice in law, and that on the failure of the plaintiff to prove that the defendant did not honestly believe in the charge brought by him, the suit should have been dismissed.

SECOND APPEAL against the decree of V. Srinivasacharlu, Subordinate Judge of Cocanada, in appeal suit No. 452 of 1887, confirming the decree of L. Narayana Row, District Munsif of Rajahmundry, in original suit No. 67 of 1887.

The District Munsif passed a decree for the plaintiff, which was confirmed on appeal by the District Judge.

The defendants preferred this second appeal.

Mr. *Michell* for appellants.

Mahadeva Ayyar for respondent.

The facts of this case appear sufficiently for the purposes of this report from the judgment.

JUDGMENT :—The appellants are merchants carrying on business at Cocanada on their own account and as agents of Messrs.

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* Second Appeal No. 1300 of 1888.

Arbuthnot and Company of Madras. In payment of a debt due to them by one Butchi Ramesam they took over the unexpired portion of a lease which he had in regard to certain lankas or islands in the Godavari, and the respondent was a tanadar on the establishment entertained by them for the purpose of collecting rents due to them under the lease. Mr. Macnab, a member of the appellants' firm, charged the respondent and two others before the Joint Magistrate of the Godavari district with having misappropriated Rs. 309-4-3 out of the collections made for them in fasli 1294. After hearing the complainant and his witnesses, the Joint Magistrate discharged the accused, as he was of opinion that there were no grounds for putting them on their defence. The complaint not being since revived, the respondent sued the appellants for damages and claimed Rs. 200 as compensation due for the false and malicious prosecution which he said they had instituted against him. They contended that they acted *bonâ fide*, and also pleaded to the jurisdiction of the District Munsif at Rajahmundry, and that the claim was barred by limitation. Both the Courts below decreed the claim and disallowed the appellants' pleas. Hence this second appeal.

The preliminary objections taken in the Courts below are again urged before us, and we shall deal with them first. The respondent brought this suit first in the Subordinate Court at Cocanada on the Small Cause Side, and it is conceded that it was brought in time. But the Subordinate Court held that it had no jurisdiction and returned the plaint for presentation to the Court of competent jurisdiction. The suit was then filed in the Court of the District Munsif of Rajahmundry, and it is not shown that the suit would be barred by limitation if the time during which it was pending in the Subordinate Court were deducted. We see no reason to doubt that the suit was first brought in the Subordinate Court under a *bonâ fide* mistake as to the Court of competent jurisdiction, and that the respondent was entitled to rely on section 14 of the Act of Limitations. We are also of opinion that the conclusion arrived at by the Lower Court on the question of jurisdiction is correct. The appellants' counsel urged that there was no evidence that any member of the appellants' firm other than Mr. Macnab was responsible for the respondent's prosecution; but this contention, which is at variance with the admission made in their written statement, cannot be supported. The substantial question, however,

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for decision is whether the Courts below have rightly apprehended what the respondent is bound to show in support of his claim, and tried it in accordance with law. The Subordinate Judge observes: "There was thus no reasonable and probable cause for making "this prosecution, and especially so against the plaintiff, and this "clearly imports malice in law even if there was no proof of "actual malice." Again, the District Munsif states the law in somewhat similar terms: "Want of probable cause, therefore, "implies malice, and the burden is shifted to the defendants to "prove that there was probable cause for the prosecution." After referring to certain dissensions in order to account for the prosecution, the District Munsif observes: "Mr. Macnab believed all "that was reported to him and hurried the proceedings without "proper inquiry. Not a single witness in this case would say "that Mr. Macnab inquired of him about the truth of the charges. "He made no inquiry whatever, and is much to blame for his "hastiness." In advertence to the same point, the Subordinate Judge remarks that: "Ramesam Suraiya and Viraragavulu bore "personal ill-will to Bhashiyacharlu, that they were the trusted "agents of Mr. Macnab, and employed by him to fish out infor-"mation against Bhashiyacharlu when he went to inquire about "his conduct in consequence of some anonymous petition received "by him. No case could be concocted against Bhashiyacharlu "alone, and some one else needed to be connected with him, and "as the plaintiff would not agree to give any evidence against "Bhashiyacharlu, he (plaintiff) was associated with him as a "delinquent." The facts found by the Courts below are that the charge brought against the respondent was not true, that he showed that there was no probable cause for it, that it was not necessary for him to prove more, that two persons who bore personal ill-will to Bhashiyacharlu gave false information to Mr. Macnab, that he hastily accepted it as correct without proper inquiry, that the respondent was charged because he gave no information against Bhashiyacharlu, and that, as the absence of probable cause implied malice in law, the respondent was entitled to a decree. We are unable to say that the law applicable to the case has been correctly understood. In *Abrath* v. *North Eastern Railway Company*(1), the legal import of reasonable and probable

(1) L.R., 11 App. Cases, 247.

cause and the law as to burden of proof in suits of the kind now before us were explained by Cave, J., in his lucid charge to the Jury. That learned Judge said: "It was for the plaintiff to "establish a want of reasonable and probable cause and malice," and then proceeded as follows: "I think the material thing for "you to examine about is, whether the defendants in this parti- "cular case took reasonable care to inform themselves of the true "facts of the case. That, I think, will be the first question you "will have to ask yourselves—did they take reasonable care to "inform themselves of the true facts of the case? Because, if "people take reasonable care to inform themselves, and notwith- "standing all they do they are misled, because people are wicked "enough to give false evidence, nevertheless they cannot be said "to have acted without reasonable and probable cause; with "regard to this question, you must bear in mind that it lies on "the plaintiff to prove that the Railway Company did not take "reasonable care to inform themselves. The meaning of that is, "if you are not satisfied whether they did or not, inasmuch as the "plaintiff is bound to satisfy you that they did not, the Railway "Company would be entitled to your verdict on that point. Then "there is another point, and that is, when they went before the "Magistrates, did they honestly believe in the case which they "laid before the Magistrates? If I go before Magistrates with a "case which appears to be good on the face of it, and satisfy the "Magistrates that there ought to be a further investigation, while "all the time I know that the charge is groundless, then I should "not have reasonable and probable cause for the prosecution. "Therefore, I shall have to ask you that question along with "the others, and according as you find one way or the other, "then I shall tell you presently, or I shall direct you, whether "there was or was not reasonable and probable cause for this "prosecution. If you come to the conclusion that there was "reasonable and probable cause, or rather that those two questions "should be answered in the affirmative, that is, that the defendants "did take care to inform themselves of the facts of the case, and "they did honestly believe in the case which they laid before the "Justices, then I shall tell you, in point of law, that this amounts "to reasonable and probable cause, and in that case the defend- "ants will be entitled to your verdict; if, on the other hand, you "come to the negative conclusion, if you think that the defendants

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"did not take reasonable care to inform themselves of the facts of "the case, or that they did not honestly believe the case which "they laid before the Magistrates, then in either of those cases you "will have to ask yourselves this further question, were they in "what they did actuated by malice, that is to say, were they "actuated by some motive other than an honest desire to bring "a man whom they believed to have offended against the criminal "law to justice? If you come to the conclusion that they did "honestly believe that, then they are entitled again to your "verdict; but if you come to the conclusion that they did not "honestly believe that, but that they were actuated by some "indirect motive other than a sincere wish to bring a supposed "guilty man to justice, then the plaintiff is entitled to your "verdict, and then it will become necessary to consider the "question of damages."

As pointed out by Lord Justice Bowen, "the plaintiff in an "action for malicious prosecution has to prove, first, that he was "innocent, and that his innocence was pronounced by the tribunal "before which the accusation was made; secondly, that there was "want of reasonable and probable cause for the prosecution, or, as "may be otherwise stated, that the circumstances of the case were "such as to be in the eyes of the Judge inconsistent with the exist-"ence of reasonable and probable cause; and, lastly, that the "proceedings of which he complains were initiated in a malicious "spirit, that is, from an indirect and improper motive, and not in "furtherance of justice. All those three propositions, the plaintiff "has to make out, and if any step is necessary to make out any "one of those three propositions, the burden of making good that "step rests upon the plaintiff. I think that the whole of the "fallacy of the argument addressed to us, lies in a misconception "of what the learned Judge really did say at the trial, and in a "misconception of the sense in which the term 'burden of proof' "was used by him. Whenever litigation exists, some body must "go on with it; the plaintiff is the first to begin; if he does nothing, "he fails; if he makes a *primâ facie* case and nothing is done to "answer it, the defendant fails. The test, therefore, as to the "burden of proof or onus of proof, whichever term is used, is sim-"ply this, to ask oneself which party will be successful if no evi-"dence is given, or if no more evidence is given than has been given "at a particular point of the case, for it is obvious that as the con-

"troversy involved in the litigation travels on, the parties from "moment to moment may reach points at which the onus of proof "shifts, and at which the tribunal will have to say that if the case "stops there, it must be decided in a particular manner. The test "being such as I have stated it is not a burden that goes on for "ever resting on the shoulders of the person upon whom it is first "cast. As soon as he brings evidence which, until it is answered, "rebuts the evidence against which he is contending, then the "balance descends on the other side, and the burden rolls over "until again there is evidence, which once more turns the scale. "That being so, the question of onus of proof is only a rule for "deciding on whom the obligation of going further, if he wishes "to win, rests. It is not a rule to enable the Jury to decide on the "value of conflicting evidence. So soon as a conflict of evidence "arises, it ceases to be a question of onus of proof. There is "another point which must be cleared in order to make plain what "I am about to say. As causes are tried, the term 'onus of "proof' may be used in more ways than one. Sometimes when "a cause is tried the Jury is left to find generally for either the "plaintiff or the defendant, and it is in such a case essential that "the Judge should tell the Jury on whom the burden of making "out the case rests, and when and at what period it shifts. Issues "again may be left to the Jury upon which they are to find gene-"rally for the plaintiff or the defendant, and they ought to be "told on whom the burden of proof rests; and indeed it is to be "observed that very often the burden of proof will be shifted "within the scope of a particular issue by presumptions of law "which have to be explained to the Jury. But there is another "way of conducting a trial at Nisi Prius, which is by asking "certain definite questions of the Jury. If there is a conflict of "evidence as to these questions, it is unnecessary, except for the "purpose of making plain what the Judge is doing, to explain to "the Jnry about onus of proof, unless there are presumptions of "law, such as, for instance, the presumption of consideration for a "bill of exchange, or a presumption of consideration for a deed. "And if the Jury is asked by the Judge a plain question, as, for "instance, whether they believe or disbelieve the principal witness "called for the plaintiff, it is unnecessary to explain to them about "the onus of proof, because the only answer which they have to "give is Yes or No, or else they cannot tell what to say. If the

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"Jury cannot make up their minds upon a question of that kind, "it is for the Judge to say which party is entitled to the verdict. "I do not forget that there are canons which are useful to a Judge "in commenting upon evidence and rules for determining the "weight of conflicting evidence; but they are not the same as onus "of proof. Now in an action for malicious prosecution the plain- "tiff has the burden throughout of establishing that the circum- "stances of the prosecution were such that a Judge can see no "reasonable or probable cause for instituting it. In one sense "that is the assertion of a negative, and we have been pressed "with the proposition that when a negative is to be made out the "onus of proof shifts. That is not so. If the assertion of a "negative is an essential part of the plaintiff's case, the proof of "the assertion still rests upon the plaintiff. The terms 'negative' "and 'affirmative' are after all relative and not absolute. In "dealing with a question of negligence that term may be consi- "dered either as negative or affirmative according to the definition "adopted in measuring the duty which is neglected. Wherever "a person asserts affirmatively as part of his case that a certain "state of facts is present or is absent or that a particular thing is "insufficient for a particular purpose, that is an averment which "he is bound to prove positively. It has been said that an excep- "tion exists in those cases where the facts lie peculiarly within the "knowledge of the opposite party. The counsel for the plaintiff "have not gone the length of contending that in all those cases "the onus shifts, and that the person within whose knowledge "the truth peculiarly lies is bound to prove or disprove the matter "in dispute. I think a proposition of that kind cannot be main- "tained, and the exceptions supposed to be found amongst cases "relating to the game laws may be explained on special grounds."

On appeal to the House of Lords the direction of the Judge to the Jury was held to be right. Lord Bramwell said: "To "maintain an action for a malicious prosecution, it must be shown "that there was an absence of reasonable and probable cause and "that there was malice or some indirect and illegitimate motive for "the prosecution" *Abrath* v. *North Eastern Railway Company*(1).

The Subordinate Judge was in error in holding that it was sufficient for the plaintiff to prove absence of probable cause, for

(1) L.R., 11 App. Cases, 251.

the essence of the wrong consists in putting the criminal law into motion without reasonable cause against an innocent person from malice or some indirect and illegitimate motive. The question for decision was not simply whether Mr. Macnab used proper care to inform himself of the facts, but also whether he honestly believed the case which he laid before the Magistrate. Again, it is not correct to say that the burden of proof lies only in part on the plaintiff, for, as already explained, the burden of proving both the propositions rests on him. Moreover the Subordinate Judge observes that the agents employed by Mr. Macnab included the plaintiff among the accused, not because he was considered to be guilty, but because he was reluctant to give information against Bhashiyacharlu and that Mr. Macnab was responsible for it. There is no distinct finding that Mr. Macnab was aware that his informants gave information from such motive, or that he was influenced by such motive in instituting the prosecution against the accused. Though there is a finding that Mr. Macnab did not use proper care to inform himself of the facts, there is no finding as to whether he honestly believed the case which he laid before the Magistrate. We shall therefore direct the Subordinate Judge to return a finding on that question after considering the evidence on record with reference to the foregoing observations. The finding will be returned within six weeks after the re-opening of the Court, and seven days after the posting of the finding in this Court will be allowed for filing objections.

[The finding recorded in compliance with the above order was to the effect that Mr. Macnab did honestly believe the case which he laid before the Magistrate.

The second appeal having come on for final hearing their Lordships reversed the decrees of the Lower Courts and dismissed the suits with costs throughout.]

Barclay & Morgan Appellants' Attorneys.