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 v.
 MOHAMMAD
 ABDUL
 SHAKOOR
 AND
 ANOTHER

*Ziaul Hasan,
 J.*

the plaintiff, defendant No. 2, was a transferee of a portion of the property mortgaged by Ex. B-4. The deed Ex. B-4 however clearly states that the mortgaged property is subject to no encumbrance whatever except two, one dated the 25th November, 1927, and the other dated the 3rd January, 1928, in favour of Babu Lal, Hazari Lal, Munshi Lal, Parmeshar Din and Jagdamba Prasad. This means that the 4 bighas of land mortgaged by Ex. B-4, with which defendant No. 2, was concerned was not subject to the mortgage of the 2nd April, 1924, (Ex. 1) and the plaintiff-appellant cannot in my opinion go behind this statement of his mortgagors.

The appeal is decreed in part against Bhujang Singh respondent No. 1, but dismissed as against Abdul Shakoor, respondent No. 2, with costs. The suit of the plaintiff appellant will be decreed with costs in respect of the two bighas of land held by Bhujang Singh only. Six months' time from this date will be allowed under Order XXXIV, rule 4, Civil Procedure Code.

Appeal partly allowed.

APPELLATE CIVIL

Before Mr. Justice Radha Krishna Srivastava

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 January, 23

FATEH CHAND (DEFENDANT-APPELLANT) v. L. KUNJ
 BEHARI LAL (PLAINTIFF-RESPONDENT)*

Tort—Malicious prosecution—Presence or absence of reasonable and probable cause can be inferred from facts of case and is a question of law—Second appeal against finding about absence of reasonable and probable cause, if can lie—Presumption of absence of reasonable and probable cause, when arises.

The presence or absence of reasonable and probable cause is a question relating to the state of the mind of the accuser and has to be inferred from the facts of each particular case. The question whether the inference from certain facts is correct or not is a question of law. Therefore the finding of the lower appellate court that there was an absence of reasonable and

*Second Civil Appeal No. 336 of 1937, against the order of W. Y. Madeley, Esq., I.C.S., District Judge of Lucknow, dated the 25th of May, 1937.

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probable cause for the complaint is not a finding of fact and can be questioned in second appeal. *Pestonji M. Mody v. The Queen Insurance Company* (1), discussed. *Harish Chunder Neogy v. Nishi Kanta Banerjee* (2), *Manyar Mahton v. Lala Harihar Baksh Singh* (3), *Mahadeo Prasad v. Chunni Lal* (4), *Bansi and others v. Hukam Singh* (5), and *Arjun and another v. Thakur Prasad* (6), referred to. *Mohammad Haroon v. Asghar Hussain* (7), and *Nagendra Nath Ray v. Basanta Das Bairagya* (8), relied on.

In many cases the finding that the complainant's case was false may lead to a presumption that the complainant had no reasonable and probable cause for bringing the complaint leaving him, in an action of malicious prosecution, to rebut that presumption, but in certain other cases such presumption may not arise at all merely upon the finding that the case was a false one.

When there was a mutual assault between the parties and when both parties to the assault were in a position of equal advantage and disadvantage and there was a finding that the complaint as lodged by the defendant was false, it could not be said that the defendant could not have entertained a belief that on those facts the plaintiff was not at all guilty of the offence complained of. The pivot upon which an action for malicious prosecution turns is the state of mind of the prosecutor at the time he institutes the prosecution.

Messrs. *Ram Bharosey Lal, Suraj Sahai and Murlī Manohar Lal*, for the appellant.

Mr. *Hydar Husain*, for the respondent.

RADHA KRISHNA, J.:—This is a defendant's second appeal arising out of a suit for compensation for malicious prosecution.

The facts are that on the 16th March, 1935, an incident of mutual assault between the parties took place in a lane in Mohalla Asharfabad in the city of Lucknow. The defendant filed a complaint on the 18th March, 1935, a copy of which is Ex. 5, charging the plaintiff-respondent and others under sections 323, 324 and 448 of the Indian Penal Code. A counter complaint was lodged by the plaintiff-respondent against the defendant

(1) (1900) I.L.R., 25 Bom., 332. (2) (1901) I.L.R., 28 Cal., 591.

(3) (1917) 8 Oudh and Agra Law Reporter, 213. (4) (1925) 2 O.W.N., 62.

(5) (1930) A.I.R., All., 216.

(6) (1936) O.W.N., 722.

(7) (1931) I.L.R., 10 Pat., 842.

(8) (1929) I.L.R., 57 Cal., 25.

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appellant and others on the 22nd May, 1935, charging them under sections 325, and 323 of the Indian Penal Code. On the 15th November, 1935, the plaintiff was acquitted in the complaint of the defendant, and Ex. 6 is the judgment of the criminal court.

The plaintiff filed a suit for damages for malicious prosecution claiming a total of Rs.2,050. The trial court decreed the suit for a sum of Rs.518.

The defendant filed an appeal in the court of the learned District Judge and the plaintiff-respondent filed a cross-objection as regards costs. In the result the learned District Judge dismissed the appeal, modifying the decree of the trial court in respect of costs only.

The defendant has come up to this Court in second appeal.

It is not disputed that in order to succeed in an action for malicious prosecution the plaintiff must establish:

- (1) that he was prosecuted by the defendant,
- (2) that the proceedings complained of terminated in favour of the plaintiff, if from their nature they were capable of so terminating,
- (3) that the prosecution was instituted against him without reasonable and probable cause, and
- (4) that it was due to a malicious intention of the defendant and not with the intention of carrying the law into effect. [Vide *Balbhaddar Singh v. Badri Sah* (1), and *Indar Bahadur Singh and others v. Sukhdeo Prasad and others* (2).]

It is further admitted that the first two requirements in an action for malicious prosecution are fulfilled.

The complaint of the learned Counsel for the defendant appellant is that on the evidence on the record the plaintiff respondent failed to prove that there was an absence of reasonable and probable cause or that the complaint was brought with a malicious intention.

(1) (1926) I.L.R., 1 Luck., 215, P.C. (2) (1932) 9 O.W.N., 1067.

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The trial court framed the following issue on the questions raised in this appeal:

(1) Was the complaint filed by the defendant maliciously and without reasonable and probable cause?

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On an examination of the oral evidence produced before it the trial court held that the defendant's version about the occurrence was not true and that there was ill-feeling between the parties from before the occurrence. The trial court held the defendant's version to be false and, therefore, without any reasonable and probable cause and as there was grudge between the parties from before malice could be presumed from the absence of reasonable and probable cause for the complaint. This finding of the trial court has been upheld by the lower appellate court.

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In order to appreciate the argument of the learned Counsel for the defendant appellant it is necessary to reproduce below the portions of statements of P. Ws. 6, 7 and 8, who were produced by the plaintiff to prove that the complaint against him was false.

P. W. 6 said—

“I was not present at the time of the *marpit*, but I reached sometime after that.”

P. W. 7 said—

“The plaintiff caught hold of the defendant after the first few lathi blows and the latter fell down and then the other brothers began to beat the plaintiff . . . When the plaintiff and the defendant were lying on the ground grappling with each other, the brothers of the defendant were showering lathi blows and it is possible that one blow struck the defendant . . . Lala Ram Das and Madan Lal and others ‘extracted’ the parties from the grip of each other . . .”

P. W. 8 said—

“When I reached the scene, I saw the parties struggling on the ground and Gopi and Ganga striking the plaintiff with sticks . . . When I reached the parties were grappling with each other, who were standing and lathis were being struck on the plaintiff. . . . I never tried to find out the cause of the quarrel.”

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The defendant's version of the occurrence was that he was sitting on his *chabutra*, which was $2\frac{1}{2}$ feet wide, against one of the open doors of his sitting room which opens on the platform, that he had risen from his sick-bed and that the plaintiff with his three and four other companions shouted taunts at him to the effect that although he had been ill, yet he was so shameless that he did not die outright. At this the defendant rejoined that it would be better that his ill-wishers should die. Thereupon the plaintiff and his party ran towards him, got upon the platform and pounced upon him belabouring him with lathis. On his shouting for help, his cousin Ganga Prasad ran to his help and he snatched from the plaintiff's arm the lathi, with which he had already struck lathi blows.

On the other hand, the plaintiff's version was that the defendant and his brother Gopi Chand and cousin Ganga Prasad beat him with lathis.

The two courts below refused to enquire into the plaintiff's version but on an examination of the defendant's story held it as stated above to be false.

The learned Counsel for the appellant has argued that reasonable and probable cause is 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 an ordinary, prudent and cautious man to the conclusion that the person charged was probably guilty of the crime imputed, and that where the assault was mutual and evidence disclosed, as in the present case, that one party was grappling with the other and that each party had an equal advantage or disadvantage against the other, then it could not be held that there was an absence of an honest belief in the guilt of the other on the part of that party who appeared as an accuser against the other.

The learned counsel for the respondent has argued that the findings of the courts below that there was

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an absence of reasonable and probable cause for the complaint and that the complaint was malicious are findings of fact and cannot be questioned in second appeal. Strong reliance has been placed in support of this contention on a decision of their Lordships of the Privy Council reported in *Pestonji M. Mody v The Queen Insurance Company* (1), and upon *Harish Chunder Neogy v. Nish Kanta Banerjee* (2), *Manyar Mahton v. Lala Harihar Bakhsh Singh* (3), and *Mahadeo Prasad v. Chunni Lal* (4), in which also following the above Privy Council case it was held that the question of want of reasonable and probable cause was a question of fact. I regret I am unable to accede to this contention of the respondent's counsel. In my opinion the presence or absence of reasonable and probable cause is a question relating to the state of the mind of the accuser and has to be inferred from the facts of each particular case. To my mind the question whether the inference from certain facts is correct or not is a question of law.

In *Pestonji M. Mody v. The Queen Insurance Company* (1), the question of malice and the absence of reasonable and probable cause had been decided against the plaintiff, by Courts in India, who had obtained a certificate that the appeal involved a substantial question of law. Their Lordships of the Privy Council held that the certificate that the appeal involved a substantial question of law must have been granted under a misapprehension. In expressing their opinion their Lordships observed as follows:

“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 Judge draws the proper inference from the findings of the Jury. In that sense the question is a question of law. But where the case is tried without a Jury there is

(1) (1900) I.L.R., 25 Bom., 332 at (2) (1901) I.L.R., 28 Cal., 591.

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(3) (1917) 8 Oudh and Agra Law (4) (1925) 2 O.W.N., 62.
Reporter, 213.

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really nothing but a question of fact and a question of fact to be determined by one and the same person."

In my humble opinion their Lordships of the Privy Council in observing as above did not lay down that the determination of what is reasonable and probable cause in an action for malicious prosecution in a suit in India is determining a question of fact not open to consideration in second appeal. All that their Lordships meant was that the determination of reasonable and probable cause in a given case was not a substantial question of law within the meaning of section 600 of the Act (XIV of 1882) = section 110 of the present Code of Civil Procedure.

For the reasons stated above I refuse to follow *Harish Chunder Neogy v. Nishi Kanta Banerjee* (1), *Manyar Mahton v. Lala Harihar Bakhsh Singh* (2), and *Mahadeo Prasad v. Ghunni Lal* (3), all of which are based upon the Privy Council decision mentioned above.

For the view that I have taken above I find support from a decision of the Patna High Court in *Mohammad Haroon v. Asghar Hussain* (4), and also from a decision of the Calcutta High Court in *Nagendra Nath Ray v. Basanta Das Bairagya* (5). In *Mohammad Haroon v. Asghar Hussain* (4), it was held that the questions of reasonable and probable cause as well of malice were questions of law.

In *Nagendra Nath Ray v. Basanta Das Bairagya* (5) MUKERJI, J. observed as follows:

"In India also, the balance of authorities is in favour of the view that the question is a mixed one of law and fact and the inference deducible from proved facts may be examined by this Court on second appeal."

Coming to the merits of the case, I have quoted above from the statements of P. Ws. 6, 7 and 8 on whose

(1) (1901) I.L.R., 28 Cal., 591.

(3) (1925) 2 O.W.N., 62.

(4) (1931) I.L.R., 10 Pat., 842.

(2) (1917) 8 Oudh & Agra Law Reporter, 213.

(5) (1929) I.L.R., 57 Cal., 25 at p. 37.

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evidence the trial court held that the defendant's case was false. It is true that in many cases the finding that the complainant's case was false may lead to a presumption that the complainant had no reasonable and probable cause for bringing the complaint leaving him in an action of malicious prosecution to rebut that presumption, but in certain other cases such as the present one such presumption may not arise at all merely upon the finding that the case was a false one. In the present case the acquittal of the plaintiff and the finding of the two courts below that the defendant appellant's complaint was a false one do not lead to the conclusion that the defendant appellant must have believed that there was no reason for prosecution. On the facts of the present case and having regard to the evidence, particularly of P. Ws. 6, 7 and 8, a step from the finding that the complaint was false to the finding that it was without reasonable and probable cause is a long one. From the judgment of the trial court I find that it did not approach the decision of issue no. 1 from a correct point of view. When there was a mutual assault between the parties and when both parties to the assault were in a position of equal advantage and disadvantage and there was a finding that the complaints as lodged by the defendant was false, it could not be said that the defendant could not have entertained a belief that on those facts the plaintiff was not at all guilty of the offence complained of. The pivot upon which an action for malicious prosecution turns is the state of mind of the prosecutor at the time he institutes the prosecution. The belief of the defendant-appellant on the facts of the present case that the plaintiff was guilty of the offence complained of cannot be said to be without reasonable and probable cause.

On the other hand, on behalf of the plaintiff respondent my attention was drawn to a decision in *Bansi and others v. Hukam Singh*, (1) and it was pointed out

(1) (1930) A.I.R., All., 216.

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that that was also a case of mutual *marpit*. In that case it was held that the defendants appellants had invented a story of rescuing the cattle which was held to be absolutely false. The learned Judge who decided the case held that prosecuting another person on a groundless charge for the purpose of establishing a false defence in another case is actionable.

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I do not see any parallel between the facts of the present case and the facts of the case relied upon.

In *Arjun and another v. Thakur Prasad* (1), Mr. Justice BISHESHWAR NATH SRIVASTAVA (later Sir BISHESHWAR NATH, C.J.) seems to have been of the same opinion, as appears from the last three lines of the last but one paragraph of his judgment. It is not possible to lay down any general rule applicable to a case but in the present case on the facts appearing from the evidence I hold that it is not possible to infer that there was no reasonable or probable cause for bringing the complaint against the plaintiff respondent.

In view of the above finding on the question of want of reasonable and probable cause it is not necessary to go into any other question. The plaintiff having failed to discharge the burden of proving want of reasonable and probable cause, his suit must fail.

The result is that I allow the appeal and dismiss the plaintiff's suit, with costs throughout.

Appeal allowed.

(1) (1936) O.W.N., 722.