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CHIT-RAREKHA DAI v. BABU BANSMAN RAI. DHAVLE, J.

I would, therefore, dismiss both the appeal and the application in revision with costs.

MACPHERSON, J.—I agree.

Appeal and application dismissed.

APPELLATE CIVIL.

Before Wort, J.

1931.

May, 1.

MOHAMMAD HAROON

v.

ASGHAR HUSSAIN.*

Malicious prosecution, action for—plaintiff to prove malice and want of reasonable and probable cause—acquittal in the Criminal case, whether want of reasonable and probable cause can be inferred from—question of law—matter to be determined on the evidence before the court and not on the evidence before the Criminal Court.

In an action for malicious prosecution the plaintiff has to prove, first, that the prosecution was started by the defendant without reasonable and probable cause and, secondly, that the prosecution was malicious.

Balbhaddar Singh v. *Badri Sah*(1), referred to.

The onus of proving want of reasonable and probable cause cannot be discharged merely by proof of the plaintiff's acquittal in the Criminal case.

The question has to be determined by the court on the evidence before it and not on the evidence in the criminal court.

Brown v. *Hawkes*(2), referred to.

Questions of malice and reasonable and probable cause are questions of law, but facts upon which those questions of law are to be determined are questions of fact.

* Appeal from Appellate Decree no. 586 of 1929, from a decision of Babu Brajendra Prasad, Subordinate Judge of Saran, dated the 17th December, 1928, setting aside a decision of Babu Hargobind Prasad Sinha, Munsif of Chapra, dated the 4th January, 1928.

(1) (1926) 30 Cal. W. N. 866, P. C.

(2) (1891) 2 Q. B. D. 718.

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Appeal by the defendant.

The facts of the case material to this report are stated in the judgment of Wort, J.

J. Chatterji and *Ram Prasad*, for the appellant.

L. N. Singh and *Hareshwar Prasad Sinha*, for the respondent.

WORT, J.—This is an appeal from the decision of the learned Subordinate Judge of Saran, who reversed the decision of the Munsif in an action for malicious prosecution. The plaintiff in the trial Court failed but on appeal to the learned Subordinate Judge, as I have indicated, a decree was given in favour of the plaintiff for Rs. 326-8-0 less Rs. 75 as damages; the Rs. 75 was the amount of compensation which the Magistrate in a criminal case awarded the plaintiff, the accused, as compensation.

One of the points made here is that the learned Subordinate Judge was not entitled to deduct that Rs. 75. Undoubtedly he was. The plaintiff received compensation from one Court and it might be said, and in fact must be said, that he was not entitled to recover compensation twice over for the same cause of action, although by this statement I must not be understood to suggest that the plaintiff was not entitled to recover damages before the Civil Court. He made out his case and in regard to the Rs. 75 which was deducted it must be remembered that the Criminal Court was not intending to award the accused full compensation for the trouble he had gone through but some measure of compensation only.

It is contended by Mr. Jyotirmoy Chatterji on behalf of the defendant, who was the prosecutor in the criminal case, that the learned Judge has misdirected himself as regards the law. In the first place it is stated that his finding on the question of whether there was reasonable and probable cause is based merely on the fact that there was an acquittal by a Court of competent jurisdiction, and, therefore,

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it is said that the learned Judge has come to the conclusion that there was prima facie evidence of want of probable cause; and, having stated that, the learned Judge proceeds to enter into an inquiry as to what the defendant's version in the case was. Another point in which the learned Judge has misdirected himself is that he has stated that in a case of this kind it is necessary for the plaintiff to prove his innocence. This does not materially affect the defendant appellant before me because by this statement of the law the learned Subordinate Judge has placed the onus on the plaintiff much greater than the law admits. The learned Judge appears to have relied on a case in this High Court to support that statement that it is necessary for the plaintiff to prove his innocence. Undoubtedly that is wrong and in this connection it is necessary for me to support my statement by reference to English authorities. In the case of *Balbhaddar Singh* v. *Badri Sah*(1) Lord Dunedin in delivering the opinion of the Judicial Committee of the Privy Council refers to the statement of the law by the learned Judicial Commissioner of Oudh in which the learned Judicial Commissioner appears to have stated that it was necessary for the plaintiff to prove his innocence upon the charge on which he was tried. Lord Dunedin points out how this mistake may have occurred by reason of the old forms of pleading in England, and he goes on to state that the correct view is that the plaintiff has to prove that with regard to the proceedings complained of they terminated in his favour. But it is hardly a material point in this case in any event.

Now what the plaintiff has undoubtedly to prove, apart from the point which I have just referred to, is, first, that the prosecution was started by the defendant without reasonable and probable cause, and, secondly, that the prosecution was malicious. It is to be noted that although it is found that there was no reasonable and probable cause, yet an action for

(1) (1926) 30 Cal. W. N. 866, P. C.

malicious prosecution will not lie unless malice is also proved, and also the converse must be noticed that if in fact there was reasonable and probable cause, however improper the motive of the prosecutor may have been, no action will lie for malicious prosecution: in other words, two things have to be established and they cannot be divorced. One that there was no reasonable and probable cause, and, as I have already said, the prosecution was started maliciously.

The main point upon which Mr. Chatterji has argued his appeal is, apart from the alleged misdirections of law, the fact that in substance the learned Subordinate Judge has placed the onus on the defendant and not on the plaintiff.

Before I come to that, I should state that both the question of reasonable and probable cause and the question of malice are questions of law: in other words, to put them in the language of the English Bench and Bar, the question of reasonable and probable cause and the question of malice are questions for the Judge. But it must be remembered that the facts from which an inference of want of resaonable and probable cause or an inference of malice are to be drawn must be found by the Jury: in other words, they are questions of fact.

Now keeping those propositions clearly before one's mind, we should see whether the learned Subordinate Judge has misdirected himself or not. The learned Judge has stated, and I have already referred to the matter, that the plaintiff was acquitted in the Criminal case started by the defendant against him, and I have to see whether the defendant's version is correct. That undoubtedly is wrong in law. The onus is always on the plaintiff and it is for him to establish it in this case.

A number of witnesses were called. What they proved I do not know; but what the learned Judge had to address his mind to was whether the evidence of the plaintiff established want of reasonable and

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probable cause. It is true, as I have already stated, that the onus is always on the plaintiff, but that does not prevent the learned Judge from considering the evidence of the defendant as well as that of the plaintiff, but no failure on the part of the defendant can possibly help the plaintiff in an action of this kind.

The learned Judge was undoubtedly wrong, in my opinion, when he satisfied himself that the plaintiff had discharged his part of the onus by coming to the conclusion that the acquittal was prima facie evidence of want of reasonable and probable cause. To repeat myself, it was necessary for him to go through the evidence and then if he came to the finding at which he appears to have arrived in this case, namely, that the case of the prosecution under section 506 was false, that as a matter of law would entitle him to say that there was want of reasonable and probable cause. But it is a matter of great delicacy, and it must be remembered that the matter is to be judged in the light of what the defendant thought the facts to be and not in the light of what the facts in fact were.

On the question of malice, the learned Judge appears to have come to the conclusion in this case that the prosecution was malicious by reason of the fact of want of reasonable and probable cause. In support for the learned Judge's decision on that point, there is the case of *Brown* v. *Hawkes*(1). In that case on appeal Lord Justice Kay in particular stated that it is sometimes said that the non-existence of reasonable and probable cause is some evidence on which the Jury may infer malice, and a similar observation was made by the other Lord Justices who formed the Court of Appeal. And in the last edition of Roscoe's Nisi Prius Evidence, or, as it is now called, Roscoe's Evidence in Civil Actions, it is also stated that from the fact that the plaintiff proved want of reasonable and probable cause malice might be inferred. But the soundness of the learned Judge's view as regards that

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matter, in my opinion, appears to be vitiated by his method of dealing with the question of reasonable and probable cause. On the question of reasonable and probable cause, the learned Judge is to determine that on the evidence in the case before him and not on the evidence in the Criminal Court.

To sum up, what the plaintiff has to prove in this case is, first, that he was acquitted and, secondly, that there was want of reasonable and probable cause. The facts upon which that question of law is to be determined are questions of fact. But the question itself of whether there was reasonable and probable cause is a question of law; and, thirdly, the fact as to whether the prosecution was malicious or not upon which an inference is to be drawn is a question of fact. But the question of whether there was malice is a question of law.

A cross objection is raised as regards the damages allowed; but I see no ground for interfering with the measure of damages which the learned Judge has applied.

In those circumstances the matter must go back to the learned Subordinate Judge to be heard and determined according to law.

The costs of this appeal will abide the hearing in the Court below.

Appeal allowed.
Case remanded.

REVISIONAL CRIMINAL.

Before Wort, J.

1931.

May, 2.

BINDESHWAR PRASAD

v.

KING-EMPEROR.*

Prevention of Cruelty to Animals Act, 1890 (*Act XI of* 1890), *section* 6—"*permits*", *significance of—section*,

* Criminal Revision no. 161 of 1931, from an order of L. J. Lucas, Esq., Subdivisional Magistrate of Barh, dated the 15th December, 1930, an application against which was rejected by the order of F. G. Rowland, Esq., I.C.S., Sessions Judge of Patna, dated the 26th January, 1931.