1873.
April 25.

[APPELLATE CRIMINAL JURISDICTION.]

Regular Appeal No. 4 of 1873.

GIRDHARLÁL DAYÁLDÁS..... .....*(Plff.) Appellant.*
JAGANNÁTH GIRDHARBHÁI and CHOTÁLÁL ULÁSRÁM.....*(Defts.) Respondents.*

Judge's referring to documents, and facts not in the plaint—Malicious prosecution without reasonable probable cause—Amount of damages.

A Judge, in considering, under Sec. 32 of the Civ. Pro. Code, whether he should admit or reject a plaint, is wrong in referring to documents and facts not stated in, or annexed to, the plaint, nor ascertained by him by interrogation of the plaintiff, although such documents and facts may have been on record in other proceedings in the Judge's Court.

In a plaint, claiming damage for an unsuccessful criminal prosecution of the plaintiff by the first defendant, and sanctioned by the second defendant as a Subordinate Judge, the plaintiff (though, stating in the plaint that the second defendant "maliciously and without authority" sanctioned the prosecution, and that the Magistrate, before whom it was brought, held that there was no cause whatever for the charge,) did not allege in the plaint that the last defendant prosecuted him (plaintiff) maliciously and without any reasonable or probable cause, or that the prosecution was sanctioned by the 2nd defendant without reasonable or probable cause:

Held that the plaint was properly rejected, and that there was no good ground for allowing the plaint to be amended, the plaintiff having delayed the filing of it until the last day but one allowed by the law of limitation.

Quære—whether the first and second defendants could properly be joined in such an action?

In every such plaint, plaintiff should name the amount of damages which he seeks to recover as compensation for the injury of which he complains.

THIS was a regular appeal against a decision of Mr. Newnham, the District Judge at Surat.

Girdharlál Dayáldás instituted this suit against Jagnnáth Girdharlál for damages or compensation for a criminal prosecution unsuccessfully brought against him (Girdharlál) by Jagannath, and against Chotálál Ulásrám, the 2nd defendant, as the Subordinate Judge at Broach, for sanctioning that prosecution "maliciously and without authority." The District Judge rejected the plaint on the facts and for the

reasons contained in the following extract from his judgment :—

"On consulting several papers on my records, which bear on the facts leading to this prosecution, I find that about the year 1869 Jagannáth obtained a decree in the Broach Court against Girdharlál and his brother, which was confirmed, on appeal, by my predecessor, Mr. Kemball, who, at the same time, remarked on the frivolous character of the principal objections taken by the defendants. Sometime afterwards, Girdharlál instituted criminal proceedings against Jagannáth, believing that he had discovered new evidence and requested the Broach Sudordinate Judge's sanction to them. Being refused, he applied to me; but I declined to give such sanction as long as Mr. Kemball's decree remained unaltered. On this, he applied for a review of judgment which was allowed; but, after enquiry, I found no sufficient reason to disturb my learned predecessor's decree.

"On this, it appears that Girdharlál prosecuted on a charge *not requiring sanction*, as I find Jagannáth tried by the Acting Assistant Session Judge of Broach for criminal breach of trust, but at once acquitted, that officer holding that the allegations of the prosecutor himself did not warrant such a charge.

"Jagannáth, then, in his turn, sued on another note. Girdharlál and his brother put in an answer for which Jagannáth prosecuted the former, the subordinate Judge giving formal sanction. The Magistrate, Mr. Entee, however, discharged him, expressing strongly his opinion of his innocence. Hence this plaint which has been tendered on the last day allowed by the law of limitation.

"Against Jagannáth, there is certainly a ground of action; but with regard to the Subordinate Judge—the inclusion of whom in the plaint has rendered necessary its presentation in this Court—this is the first plaint of the kind that I have seen.

"In the cases of *Vinayak* v. *Itcha* (*a*) and *Venkat* v. *Armstrong* (*b*) there was an irregularity in defendant's actions; in

(*a*) 3 Bom. H. C. Rep. A. C. J. 38. (*b*) Ibid. 47.

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the latter case, WESTROPP, J. remarked 'prima facie the act complained of is a wrongful act.' So in *Vithoba v. Corfield* (c), the action was irregular. But in this case, the Subordinate Judge had clearly jurisdiction to give leave for a prosecution, if he thought it advisable, although the plaintiff says it was done 'without authority' (*vagar adhikari*) whatever he may mean by that. There is no question of the Subordinate Judge 'believing himself in good faith to have jurisdiction' (Act XVIII of 1850); he *had* jurisdiction, acting on his opinion of the case. The plaintiff, it is true, charges him with acting 'in malice' (*pap budhi the*). But if every one who may choose to assert that a public officer performed a perfectly regular act *maliciously*, is to be allowed to sue him in the Civil Court, it follows that every Magistrate and every Sessions Judge, whose sentence may be reversed on appeal, must be prepared to vindicate the good faith of his decision, as defendant in a suit brought by the successful appellant. Either Act XVIII. of 1850 was passed to prevent a state of things so absurd and so contrary to public policy of this, or it is all but useless.

"I find that the plaintiff has no cause of action against the Subordinate Judge; he might sue Jagannáth, but it must be in the Lower Court. Had he done his, this Court would have, on his application, transferred the suit to the Court of *another* Subordinate Judge. As a matter of course the plaint is rejected.

"I observe, moreover, that the claim is not valued, and made on a 10 Rupee stamp; this is also incorrect, as nothing hindered the plaintiff from appraising the injury he has sustained at whatever rate he pleased."

The appeal was heard before WESTROPP, C.J., and MELVILL, J., on the 25th April 1873.

Nagindas Tulsidas (with him *Chunilal Maniklal*) for the appellant.

WESTROPP, C.J.:—This is an appeal from the decision of the District Judge which rejected, under Sec. 32 of the Civil

(c) 3 Bom. H. C. Rep. Appx. 1.

Procedure Code, a plaint presented by a Vakil of the High Court against the defendant, Jagannàth Girdharbhái for a malicious prosecution for giving false evidence, and against the defendant, Chotálál Ulásrám, Subordinate Judge at Broach, for maliciously sanctioning that prosecution.

The District Judge was in error in referring to documents and facts, neither mentioned in or annexed to the plaint, nor ascertained by interrogation of the plaintiff by the Judge. Although those documents and facts may have been on record in other proceedings in the Judge's Court, yet being *dehors* the plaint and not stated or referred to by the plaintiff (after being questioned by the Judge as contemplated by Section 32), the Judge ought not to have taken them into consideration in order to determine merely whether or not the plaintiff made out such a *prima facie* cause of action as rendered his plaint admissible on the file.

Independently, however, or any information obtained by the District Judge of matters extraneous to the plaint, we think that it is a plaint in its present from unsustainable against either of the defendants. The plaint does state that the Subordinate Judge (the 2nd defendant) "maliciously and without authority" sanctioned the prosecution of the plaintiff, and that Mr. Máneckji Kávasji Entee, the F. P. Magistrate at Broach, was of opinion that there was no cause whatever for the charge against the plaintiff: but the plaintiff does not himself, anywhere in the plaint, aver that the charge was made against him by the 1st defendant, Jagannáth Girdharbhái, maliciously and without reasonable or probable cause, or that the sanction for the prosecution was given by the 2nd defendant, Chotálál Ulásrám, without reasonable or probable cause, which the plaintiff should have averred, inasmuch as it is quite possible that a sanction might be granted with reasonable and probable cause, and yet be so granted maliciously. No doubt, it would be very improper for, and discreditable to, any Judge or Magistrate to permit private malice or vindictiveness in anywise to enter into his motives for

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granting or withholding a sanction; but if there be reasonable and probable cause for the sanction, it would not be vitiated in legality by the improperly superadded malice.

So too as regards the prosecutor; he may be strongly actuated by malice in bringing a prosecution, but, if he have reasonable and probabe cause for it, his malice does not render him liable to action for having prosecuted.

In *Johnstone* v. *Sutton* (*d*), it is appositely said in the judgment of the court: "The essential ground of this action is that a legal prosecution was carried on *without a probable cause*. We say this is emphatically the essential ground; because every other allegation may be implied from this; but this must be substantively and expressly proved, and cannot be implied.

"From the want of probable cause, malice may be, and most commonly is implied. The knowledge of the defendant is also implied.

"From the most express malice the want of probable cause cannot be implied.

"A man, from a malicious motive, may take up a prosecution for real guilt, or he may, from circumstances which he really believes, proceed upon apparent guilt; and in neither case is he liable to this kind of action."

And in *Morgan* v. *Hughes* (*e*), Buller, J., said:—The grounds of a malicious prosecution are, 1st, that it was done maliciously, and 2ndly, without probable cause. The want of probable cause is the gist of the action".

In an anonymous case reported in 6 Mod. R. 73, the court of K. B. held "that let a prosecution be never so maliciously carried on, yet if there be *probable cause* or ground for it, no action for malicious prosecution will lie." See also *Reynolds* v. *Kennedy* (*f*), 2 Saunders Pl. and Ev. by Lush 321, 324 2nd ed.

(*d*) 1 T. R. 544 (*e*) 2 *Ibid.* 231. (*f*) *Wils.* 232.

We think, therefore, that for these reasons, and not for the reasons relied upon by the District Judge, he was justified in rejecting the plaint, and we affirm his order.

As regards the stamp, we are of opinion that it, being one for 10 rupees, would have covered damages to the extent of Rupees 130 and no more, and that there was no reason why the plaintiff should not have named the amount of damages which he sought to recover as compensation for the injury of which he complained.

We see no grounds sufficient to induce us to permit the plaintiff to amend his plaint, he having delayed the presentation of it until the last day, or last day but one, on which the law of limitation would permit him to file it.

We decide nothing as to the propriety of joining both defendants in one action, and as to the necessity of suing them, if at all, separately. It is unnecessary for us to determine that question, and by our silence on that point we are not to be understood as concuring in the course adopted by the plaintiff.

Order affirmed.

[APPELLATE CIVIL JURISDICTION.]

Regular Appeal No. 65 *of* 1871.

April 9.

FÁTMÁ KOM NUBI SÁHEB.....*Appellant.*
DARYÁ SÁHEB and THE COLLECTOR of KALADGI.....*Respondents.*

Proper framing of plaint—Amendment—Collector's books—Title.

A person claiming a share in land in right of heirship, cannot sue a Collector for entry of his name in the revenue books, but should sue the coheirs for an award of a share in the land, or for a declaration of right to such a share.

The Collector's book is kept for purposes of revenue not for purposes of title, and the fact of a person's name being entered in the Collector's book as occupant of land, does not, necessarily, of itself, establish that person's title, or defeat the title of any other person.