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from the statement in the judgment of the Lower Court that notice was served personally upon the appellant, but, if the notice was addressed, as it was in this case, to four defendants, then it seems to me that Rule 3 of Chapter I of the Rules made by the Bengal Government, dated the 21st December 1885, has not been complied with, and the provision that personal service shall be effected in the manner prescribed for service of summons on a defendant under the Code of Civil Procedure does not apply to the case: that only applies to the case where the notice is addressed to a single person. That being so, the whole suit fails, and the appeal must be allowed with costs, in all the Courts.

BANERJEE, J.—I am of the same opinion.

S. C. G. *Appeal allowed.*

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice and Mr. Justice Banerjee.

HARISH CHUNDER NEOGY . . . . . DEFENDANT.

v.

NISHI KANTA BANERJEE . . . . . PLAINTIFF.

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Malicious prosecution—Onus of proof—Innocence—Reasonable and probable cause—Malice—Judge of law and facts.

In a suit for malicious prosecution, in order to enable the plaintiff to succeed he must prove, first, that he was innocent of the charge brought against him; secondly, that the defendant acted without reasonable and probable cause in instituting the prosecution; and thirdly, he must satisfy the Court that the defendant was actuated by feelings of malice in the course which he took.

The question of reasonable and probable cause is, if the case is tried by a Judge with a jury, a question for the Judge and not for the jury: but in India, where there is no jury, the Judge becomes himself the Judge of the law and the facts.

Pestonji Mody v. *The Queen Insurance Company* (1) referred to.

THIS appeal arose out of a suit brought by the plaintiff for damages for an alleged false and malicious prosecution. The allegation of the plaintiff was that the defendant Harish Chunder

* Appeal from Appellate Decree No. 1323 of 1899, against the decree of J. Pratt, Esq., District Judge of 24 Pergunnahs, dated the 16th March 1899, reversing the decree of Babu Rajendra Kumar Bose, Subordinate Judge of that District, dated the 8th of June 1898.

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Neogy appointed him in Baisak 1300 B. S. a *naib* for the property in the Backergunj District, which he, the defendant, looked after on behalf of his father; that he held this appointment till the 11th Magh 1302 (24th January 1896), when he was dismissed; that on the 7th Sraban 1302 (27th July 1895) he came to Calcutta, the defendant having sent for him to render accounts, and having remained there for three weeks he returned to his duty on the 28th Sraban; that subsequently on the 27th May 1896, when he came to defendant's house, the latter had him arrested on a charge of criminal breach of trust; that on the 30th November 1896 he was acquitted after a long and protracted trial. Hence the present suit. The Court of First Instance dismissed the suit. On appeal the learned District Judge of 24-Pergunnahs, holding that the criminal prosecution was based upon a false and malicious allegation, and that the defendant had no reasonable and probable cause for instituting it, reversed the decision of the first Court. Against this decision the defendant appealed to the High Court.

JUNE 10th. *The Advocate-General* (Mr. *J. T. Woodroffe*) and Babu *Mainindra Nath Bhattacharjya* for the appellant.

Dr. *Ashutosh Mookerjee* for the respondent.

JUNE 11TH. MACLEAN, C. J.—This case comes before us on second appeal from the District Judge of the 24-Pergunnahs. The suit was one for malicious prosecution. The first Court dismissed the suit, but Mr. Pratt, now Mr. Justice Pratt, reversed that decision and gave a decree to the plaintiff for about 2,600 rupees.

The defendant has appealed against that decree. An ingenious attempt was made by the Advocate-General, who appeared for the appellant, to allure us to go into the evidence in the case, but we felt bound to resist his invitation. We must take the facts as found by the Court below. In order to enable the plaintiff to succeed in this action, he must make out, the onus of proof being upon him—*first*, that he was innocent of the charge brought against him; *secondly*, that the defendant acted without reasonable and probable cause, in instituting the prosecution, and

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lastly, he must satisfy the Court that the defendant was actuated by feelings of malice in the course which he took. The question of reasonable and probable cause is, if the case is tried by a Judge with a jury, a question for the Judge and not for the jury: but here, where there was no jury, the Judge becomes himself the Judge of the law and the facts. I may refer on this point to a recent case in the Privy Council, *Pestonji Mody* v. *The Queen Insurance Company* (1). There can be no doubt that the Court below has found that the defendant acted maliciously and without reasonable and probable cause. But it was argued that the Judge has not found that the defendant has proved his innocence of the charge brought against him. It is perfectly true that he has not said so in so many words, but his language clearly implies that that was his conclusion. In the early part of his judgment he states what the charge was. He states that, after protracted trial, the plaintiff was acquitted. Then he says "that the question is whether that criminal charge was false, for, if it was, there can be no doubt that it was made maliciously and without reasonable and probable cause, as Harish said he had personally given the money to the plaintiff." When we come to the conclusion of his judgment we find that the learned Judge summed up his judgment in this way: "Reviewing the whole case, I come to the very decided conclusion that the criminal prosecution was based upon a false and malicious allegation, and that the defendant had no reasonable or probable cause for instituting it." He has, therefore, found that the charge was a false charge and, if he has found that the charge was a false charge, the inference is irresistible that he considered that the plaintiff was innocent. I think that the learned Judge has found in the plaintiff's favour upon the three points, which the plaintiff had to make out, and that being so, I do not see how we can interfere, and the appeal must be dismissed with costs.

BANERJEE, J.—I concur.

S. C. G. *Appeal dismissed.*

(1) (1900) I. L. R. 25 Bom. 332.