

PRIVY COUNCIL.*

P. C.
1900.

June 21, 22.
July 21.

PESTONJI MUNCHERJI MODY, PLAINTIFF, v. THE QUEEN
INSURANCE COMPANY, DEFENDANT.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

*Privy Council—Practice—Civil Procedure Code (XIV of 1882), section 600—
Certificate that appeal to the Privy Council involves a question of Law—
Malicious prosecution—Question of malice and reasonable and probable cause—
Concurrent findings of lower Courts.*

In an action for malicious prosecution in which the plaintiff claimed Rs. 3,00,000 as damages, the Court of first instance dismissed the suit, holding that the plaintiff had not proved either the existence of malice or the absence of reasonable and probable cause. The plaintiff appealed and the appeal Court dismissed the appeal on the same grounds, and on appeal to the Privy Council their Lordships also *held* that both as regards malice and the absence of reasonable and probable cause, the plaintiff had failed to discharge the burden of proof which lay upon him.

The case came before the Privy Council on a certificate granted by the High Court of Bombay that the appeal involved a substantial question of law. It appeared to their Lordships of the Privy Council that this certificate must have been granted under a misapprehension. The only question involved was a question of fact on which there were concurrent findings. 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 jury finds the facts. 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 really nothing but a question of fact and a question of fact to be determined by one and the same person.

APPEAL from a decree (18th December, 1894) of the High Court affirming a decree (13th October, 1893) of the High Court in the original jurisdiction dismissing the suit.

The appellant, described as a Parsi merchant in Bombay, brought this suit on the 25th June, 1891, against the Queen Insurance Company, charging them with having, by their Secretary, falsely, maliciously and without reasonable or probable cause prosecuted him for cheating, on which charge he was committed for trial, tried before the Sessions Court, and acquitted on the 17th September, 1890.

* Present: LORDS HOBHOUSE, MACNAGHTEN AND LINDLEY, SIR RICHARD COUCH,
and SIR HENRY DEVILLIERS.

The defendant company in their written statement traversed the plaintiff's allegations. Issues were framed accordingly. The suit was dismissed in the original jurisdiction of the High Court, and an appeal by the plaintiff was dismissed in the Appellate Court.

All the relevant facts in evidence, as well as the proceedings in the Indian courts, appear in their Lordships' judgment.

Leave to file this appeal was granted on the 12th July, 1895, a certificate being granted under section 600 of the Civil Procedure Code, 1882.

The appellant appeared in person.

H. E. Duke, Q.C., and *J. D. Mayne* appeared for the respondents.

Their Lordships' judgment was delivered on the 21st July, 1900, by

LORD MACNAGHTEN :—This is an appeal against an order of the High Court of Bombay which confirmed a decision of the same Court in the exercise of its original jurisdiction.

The action in which the decision was given was brought by the appellant, Mr. Mody, against the respondents, the Queen Insurance Company, to recover damages for alleged malicious prosecution.

The main facts are not in dispute. The appellant, a Parsi merchant trading in Bombay, had a large shop there in Apollo Street. The respondent company, whose principal place of business is in Liverpool, had a branch office at Bombay, where it was at the time represented by a Mr. Symington.

In February, 1889, Mr. Mody insured his goods in his shop in Apollo Street with the respondents for Rs. 40,000.

On the 11th of November, 1889, Mr. Mody's premises in Apollo Street were burnt down and a claim was made upon the Insurance Company for the full amount of the policy.

The investigation of the claim was entrusted to Messrs. Lidbetter and Young, fire adjusters. The investigation was conducted on the footing that Mr. Mody had only one shop in Bombay and that all documents evidencing his goods and their value at the date of the fire referred to goods in Apollo Street.

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or goods stored at the Prince's Dock where some heavy articles belonging to Mr. Mody, such as fire engines, were warehoused.

On the 9th of December, 1889, Messrs. Lidbetter & Co. reported that the goods destroyed by the fire exceeded Rs. 40,000 in value.

On the 12th of December, 1889, Mr. Symington prepared a cheque for Rs. 40,000, and wrote to Mr. Mody desiring him to call. The next morning Mr. Mody came. Some conversation took place about the loss. Mr. Symington questioned Mr. Mody and understood him to say in reply to specific inquiries that at the time of the fire he had no goods except those in the Apollo Street shop and those in Prince's Dock. Mr. Symington then wrote out a short and simple declaration to that effect. He read it to Mr. Mody. Mr. Mody read it himself and signed it and thereupon Mr. Symington handed over the cheque.

In May, 1890, Mr. Symington received information which led him to believe that the declaration was untrue. He made inquiries. He wrote to Mr. Mody on the subject and received an evasive reply from Mr. Mody's solicitors. Then having satisfied himself that the declaration was false Mr. Symington swore an information before the Chief Presidency Magistrate of Bombay. Mr. Mody was arrested and the matter was investigated at great length on several days in the police court. Mr. Mody made no explanatory statement before the Magistrate. All he said was that he was not guilty and that he wished to leave the matter entirely in his solicitor's hands. The Magistrate committed him for trial on a charge of cheating. He was tried before the Sessions Court and acquitted.

Nine months afterwards Mr. Mody brought this action against the Insurance Company charging them with having, by their Secretary, Mr. Symington, falsely, maliciously and without reasonable or probable cause prosecuted him on a charge of cheating. He claimed three lakhs of rupees as damages.

Parsons, J., who tried the case without a jury, dismissed the action with costs. He thought that Mr. Mody had not proved either the existence of malice or the absence of reasonable and probable cause.

Mr. Mody appealed and his appeal was dismissed with costs.

There is no note of the judgment of the Appeal Court, but from an endorsement on counsel's brief it appears that the Court took precisely the same view as the Judge of First Instance.

On his appeal before this Board Mr. Mody conducted his own case in person. He addressed the tribunal at some length and with much earnestness imputing partiality to his Judges and all sorts of misconduct to his opponents. Every line of evidence which he thought material was read. Their Lordships listened attentively to all that was read and to all that was urged on his behalf, but they are unable to find any reason for differing from the Courts below. They are satisfied that Mr. Mody had a fair and impartial hearing both before the Judge of First Instance and the Court of Appeal, and they think it perfectly clear that no Judge guided by the evidence could have come to any other conclusion.

Mr. Mody was acquitted of the charge made against him. It must therefore be taken that he was innocent. But that circumstance of itself goes very little way towards entitling him to a verdict on the issue raised in the present action. In order to succeed he must prove that the respondents acted maliciously, that is from some indirect motive, and that there was no reasonable or probable cause for their action. Evidence of malice there is absolutely none. In order to make out a case of malice it was alleged in the Court of First Instance that Mr. Symington himself knew right well that the declaration which he asked Mr. Mody to sign was untrue—a proposition in support of which there is not the slightest evidence, though Mr. Symington no doubt had some suspicion on the subject. The suggestion was that he entrapped Mr. Mody into signing the declaration in order that the Insurance Company might get into their hands a document which they could afterwards use as a means of extorting from Mr. Mody some portion of the money they were paying over to him. It is difficult to imagine a more absurd suggestion. Obviously Mr. Symington would not have handed over the cheque if he had known that the statement in the declaration was untrue. Mr. Mody did not repeat that ridiculous charge or insinuation before this Board. But he said that Mr. Symington had a personal grudge against him because he once refused to

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give Mr. Symington a horse which he wanted to get. There is not the slightest evidence in support of that story either. It is true that Mr. Mody made the allegation in his answers to interrogatories, but those answers are not evidence against the respondents. Mr. Mody did not say a word about it in his oral examination nor was Mr. Symington who was examined on commission, asked a single question on the subject.

In the Courts below it was held that Mr. Symington acted in good faith. Their Lordships are of that opinion also. Most of the evidence on which the prosecution relied in the Police Court broke down at the trial. But it is quite clear that Mr. Symington with the aid of the police and his solicitors took reasonable care to sift the evidence that was laid before him in support of the charge.

Mr. Mody does not deny that the declaration which he signed was false. His excuse is that he did not at that time understand English well enough to master its meaning. It is a very short document and very plain. It is difficult to suppose that Mr. Mody failed to understand it. The learned Judge who tried the case thought it more probable that Mr. Mody did understand the document, but that for some reason or other he attached very little importance to its contents.

Their Lordships agree with both the Courts below in thinking that there was no evidence to show that the prosecution was instituted without reasonable and probable cause. Both as regards malice and the absence of reasonable and probable cause the burden of proof lay upon Mr. Mody and he has not discharged it.

There is only one further observation which their Lordships desire to make. The case comes before them with a certificate that the appeal involves a substantial question of law. It appears to their Lordships that the only question involved is a question of fact on which there are concurrent findings. 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 jury finds the facts. 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 really nothing

but a question of fact and a question of fact to be determined by one and the same person. It appears to their Lordships that the certificate allowing the appeal to Her Majesty must have been granted under a misapprehension.

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be dismissed:

The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the respondent-company:—*Messrs. Payne and Lattey.*

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MALKARJUN (ORIGINAL DEFENDANT), APPELLANT, v. NARHARI
AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

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Civil Procedure Code (Act X of 1877), sections 234, 248, 311—Execution—Decree—Death of judgment-debtor after decree but before execution—Sale in execution without notice to legal representatives—Notice given to wrong person—Title of purchaser at such sale—Sale irregular but not a nullity—Suit to set aside such sale must be brought within one year—Limitation Act (XV of 1877), art. 12.

An account and redemption of a mortgage, effected in 1877, were refused where the mortgaged property had since then been sold at a judicial sale in execution of a decree. The plaintiffs were the heirs representing the mortgagor. The purchaser at the sale was the mortgagee. The sale took place after notice had been wrongly served upon a person who was not the legal representative of the judgment-debtor's estate. The executing Court had erroneously decided that he was to be treated as such representative.

Held, that the judicial sale was not a nullity, and could not be treated as invalid, notwithstanding this irregularity, even though a material one, for the jurisdiction of the Court to execute had been complete throughout. It had not been lost by reason of the above error, and had empowered the Court to decide wrongly as well as rightly.

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