that the defendants (in the instant suit) had earlier instituted proceedings under Sections 107 and 145, Cr. P. C. against the plaintiff and thereafter the plaintiff, in order to harass the defendant and also to take over possession of his land, trespassed into a part of his land and forcibly erected some posts thereon, with the object of putting up a fence. In the schedule of the said complaint (Ext. A-4), where the boundaries of the land were given, it was also stated that the plaintiffs had put up a fence within the said land for about 7 cubits. Various dates for hearing were fixed by the learned Magistrate upon receipt of this complaint, but finally vide the learned Magistrate's order dated 29-4-68 the following order was passed—

"On the other hand the case is being dragged in this way since 1966. So, I do not find any justification to drag this two years old case any further. Hence the accused persons are acquitted under Section 247, Criminal Procedure Code."

2. Hence this suit for damages for malicious prosecution against the defendant (complainant in Ext. A-4).

3. In order that an action for malicious prosecution may succeed, the following elements must be proved by the plaintiff.

(1) The proceedings must have been instituted or continued by the defendant;

(2) The proceedings must have been unsuccessful — that is to say, must have terminated in favour of the plaintiff now suing;

(3) The defendant must have acted without reasonable and probable cause;

(4) The defendant must have acted maliciously.

4. There is no dispute, in the instant case, that the proceedings were instituted by the defendant, upon his complaint as per Ext. A-4, nor is there any dispute that the proceedings, so commenced and continued, terminated in favour of the plaintiff-respondent. The questions that fall for adjudication in this second appeal are, therefore, how far the defendant can be held to have acted maliciously and how far he also acted without reasonable and probable cause.

5. Undoubtedly, existence of malice as well as of reasonable and probable cause are questions of fact. As has been held in Chellu v. Palghat Municipality, AIR 1955 Mad 562, by Govinda Menon, J.—

"It seems to me that if the finding (regarding the absence of reasonable and probable cause and malice) is based upon relevant and admissible evidence then the question is one of fact and I am precluded from going behind the conclusion of fact arrived at by both the courts below."

6. Their Lordships in the Privy Council had also held in Sabhapathi v. Huntley, AIR 1938 PC 91—

"The finding of the learned Judge of first instance on the question of malice is a finding in fact. The state of a man's mind, as has been said, is as much a fact as the state of his digestion. Their Lordships see no reason for disturbing the finding of the trial Judge on this question of fact."

7. The question posed in this second appeal, however, is whether the learned Court below overlooked any material evidence in coming to its finding as regards the existence of malice and of reasonable and probable cause and also whether it mis-read and mis-construed any material evidence in doing so.

8. Mr. A. K. Dutta, learned Counsel appearing for the appellant, has drawn my attention to the following observations by the learned Appellate Court below—

"In his cross-examination he (D. W. 3) further says that he did not see the fencing being put up or any posts being attached at the alleged place of occurrence. He did not even see how many posts were attached and on how much land."

9. Mr. Dutta has drawn my attention to the deposition of this witness, from the record of which I find that all that this witness stated was—

"I did not see the fencing being put up; I saw only the posts being erected. I cannot say how many posts were erected or upon how much land such posts were erected."

10. In other words, although D.W. 3 did admit that he had not seen any fence being put up, he clearly stated in his deposition that he did see posts being erected. It may be relevant here to advert to the complaint Ext. A-4, on basis of which the proceedings were instituted. The gravamen of the complaint therein was also that posts were being put up, with the object of putting up a fence. No doubt, in the schedule to the complaint, where the boundaries of the land were stated, it has been mentioned that fencing has been put up for over 7 cubits within the land. The main body of the complaint will, however, disclose that the chief allegation was that of erecting posts, with the object of putting up a fence. In any case, I am constrained to hold that the evidence of D. W. 3 was materially mis-read, at least to the extent where he had testified to the erection of the posts, although not of the fencing.

11. The learned Appellate Court below had found, after examining the evidence on record, that the prosecution case instituted by the defendant-appellant against the plaintiff-respondent was false. If the learned Court below had come to its finding of falsity after a proper reading of all the material evidence, it would not have been open in this second appeal to canvass the matter any further. However, as stated earlier, I find that the learned Court below had overlooked and also mis-read a very material part of the deposition of D. W. 3. The finding therefore, becomes untenable in law and although one of fact, becomes open to interference in a second appeal.

12. Another observation of the learned Appellate Court below is also of great significance. It has observed—

"The onus of proving that there was probable and reasonable cause of bringing the criminal case lies on the defendant and he has hopelessly failed in discharging the onus. As said before the plaintiff has the least responsibility in proving the negative matter of want of probable and reasonable cause."

13. The learned Appellate Court below has clearly misdirected itself in holding that the onus of proving the existence of a reasonable and probale cause was on the defendant. It appears as if in coming to its finding on this issue, the Court only looked to what evidence the defendant could adduce, without in the least adverting to the plaintiff's evidence, as regards the want of such cause. It is settled law that although it involves a notoriously difficult task of proving a negative, the burden of proving absence of reasonable and probable cause is, nevertheless, on the plaintiff. Onus may at different stages of the proceeding shift from one party to the other, but a decision on an erroneous assumption as regards burden of proof and basing it on the evidence of the defendant alone, when no duty is cast upon him to adduce any, cannot be allowed to stand. No doubt, where evidence has been led by both the parties, the question of onus of proof loses much of its importance. But, where the learned Court on a mistaken view that the onus rests on the defendant, completely shuts its eyes to the plaintiff's failure to adduce evidence in support of his allegation, albeit negative in the instant case, and decides the matter on the ground that the defendant had hopelessly failed to discharge his onus, such finding must be interfered with.

14. The judgment and order of the learned Court below are set aside. There will be no order as to costs.

15. There is a cross-objection filed by the appellant which, however, is not being pressed. This cross-objection is also dismissed. There will be no order as to costs.

Order accordingly.

AIR 1972 GAUHATI 121 (V 59 C 37)

P. K. GOSWAMI, C. J. AND
R. S. BINDRA, J.

Sawna Brahma, Petitioner v. Assam Board of Revenue and another, Respondents.

Civil Rule No. 192 of 1970, D/- 12-7-1972.

HP/IP/E453/72/PSP

Index Note: — (A) Assam Fixation of Ceiling on Land Holdings Act (1956), Sections 17 and 32 — Assam Land and Revenue Regulation (1886), Sec. 147 — Assam Board of Revenue has no jurisdiction to entertain an appeal from an order of the Collector under Section 17 of the Act. Section 147 of the Regulation cannot be invoked to entertain an appeal not provided for by the Act. (Para 4)

S. K. Sen and D. R. Guha, for Petitioner; B. K. Das, for Respondents

GOSWAMI, C. J.:— This application under Article 226 of the Constitution of India is directed against an order of the Board of Revenue interfering in appeal purported to be made to it under Section 147 of the Assam Land and Revenue Regulation.

2. The Board of Revenue interfered with an order of the Collector in settling excess land acquired under the Assam Fixation of Ceiling on Land Holdings Act, 1956, hereinafter referred to as 'the Act'. The petitioner, the second Respondent and another person applied for the land in question which measures about 7 Bighas and odd. All the three applications were sent to the Sub Deputy Collector for enquiry and report. On receipt of the reports, the Collector or the authorised officer, whoever he was, settled the land in favour of the petitioner. When this came to be known, the second Respondent made a prayer to the Deputy Commissioner to stay the issue. of the patta which was done. But later on that order of stay was vacated. That led to the appeal before the Board of Revenue under Section 147 of the Assam Land and Revenue Regulation. The Board entertained the appeal and gave the second Respondent relief by setting aside the order of settlement in favour of the petitioner.

3. Mr. S. K. Sen, the learned Counsel for the petitioner, is not interested with the details of the matter or the facts and circumstances in which various orders have been passed. As a matter of fact, he did not even choose to place the order dated 22-4-1969 which was said to be the order appealed against, on the ground that no copy could be available to him. is only submission is that no appeal was entertainable against an order of settlement of this type by the Board of Revenue under the Regulation. Mr. Das, the learned Counsel for the second Respondent, anxious as he is about his fate on the Writ Application, supports the order of the Board by relying on the provisions of the Assam Land and Revenue Regulation which, according to him, are clearly attracted because of Section 16 (2) of the Act. We are concerned with the Act prior to its amendment by Assam Act VIII of 1971. Mr. Das submits that Section 16 (2) refers to Assam Land and Revenue Regulation, 1886 and, therefore, it is implicit that the entire provisions of the Regulation including even rights of

appeal conferred thereunder are available to the Board dealing with orders passed under Section 16 or 17 of the Act. We are unable to accept the above submission. The Act discloses an integrated scheme and the disposal of excess land is provided for in Chapter III of the Act. Section 15, with which it opens, provides that "subject to the provisions of this Act and of this chapter in particular the excess land acquired under Section 8 of this Act shall be at the disposal of the State Government". Sections 16 and 17 which follow deal with the manner of disposal of excess land in the first instance and disposal of the same when land could not be settled in the manner laid down in the foregoing Section 16. It is common ground that Section 16 cannot be relied upon in this case. The order was, therefore, passed by the Collector under Section 17. Both the petitioner and the second Respondent claim their respective rights under Section 17. At any rate, on receipt of the three reports the Collector preferred the petitioner and passed the order of settlement in his favour and even premium for the land was realised. Both the petitioner as well as the second Respondent appear to have already some lands. We are, therefore, not required to consider and indeed that enquiry is not permissible on the Writ side, as to who is best suited to get settlement of the land.

4. The short question that arises for consideration is whether the Board had jurisdiction to entertain an appeal against the particular order passed by the Collector in settling excess land under the Act. Section 31 (1) provides for appeals. It reads as follows:

"31. (1) Any person aggrieved by any order under Section 12 or 13 may, within 30 days of the order, prefer an appeal to the District Judge.

(2) The decision of the District Judge, or the original order when no appeal is preferred, shall be final."

Section 32 may also be read:

"32. Except as otherwise expressly provided in this Act, no decision or order made in exercise of any power conferred by or under this Act shall be called in question in any Court."

Appeal is a creature of the statute. In order to work out the entire scheme of this Act, bar to jurisdiction of the Civil Court is created. Only appeal against decisions made under the two sections is provided for. We are, therefore, clearly of opinion that no appeal is provided against any decision made under Section 16 or under Section 17 of the Act. Since admittedly the order was passed by the Collector under Section 17, no appeal lay to the Board. Section 147 of the Regulation could not be invoked to entertain an appeal which does not lie under the provisions of the Act. That being the legal position, the Board had no jurisdiction to entertain the appeal and to pass the impugned order. The appellate order of the Board is hereby quashed.

5. The application is accordingly allowed, and the Rule nisi is made absolute. We will, however, make no order as to costs.

R. S. BINDRA, J.:— 6. I agree.

Application allowed.

AIR 1972 GAUHATI 122 (V 59 C 38)

R. S. BINDRA, J.

Sardar Bir Singh, Appellant v. Noor Ahmed and others, Respondents.

Second Appeal No. 86 of 1969, D/- 8-8-72, from order of B. N. Sarma, Dist. J., Lower Assam Districts at Gauhati, D/- 6-1-1969.

Index Note: — (A) Powers of Attorney Act (1882), Sec. 2 — Construction of powers — Power to institute and conduct ejectment proceedings in Court — Implies an authority to issue notice to quit — AIR 1929 Cal 651 and AIR 1947 Nag 17 (FB), Foll. (Para 9)

Index Note: — (B) Powers of Attorney Act (1882), Sec. 2 — Construction of powers — Extent of powers granted — (X-Ref: Contract Act (1872), S. 188).

Brief Note: — (B) The extent of power given by the principal to his agent by a power of attorney has to be spelled out on a fair interpretation of the language used therein that is an interpretation which corresponds with the true intention of the principal as gathered from the language used in the document. If the principal entrusts a particular job to the agent then it is not necessary that all that has to be done by the agent to accomplish that job should be detailed minutely in the power of attorney. The authority to do all that is normally required by an individual in doing such job may reasonably be assumed. (Para 9)

Index Note: — (C) Contract Act (1872), Sec. 190 — Maxim delegatus non potest delegare — Not of universal application.

Brief Note: — (C) The maxim delegatus non potest delegare only lays down the general rule that an agent cannot delegate his power or duties to another, in whole or in part, without the express authority of the principal, or authority derived from the statute. Generally speaking, where there is personal confidence reposed or skill required there can be no delegation, however general the nature of the duties, unless necessity compels the handing over of the responsibility to some one else. To the maxim delegatus non potest delegare there are certain well recognised exceptions, where an authority

to delegate will be implied, generally on the ground that there is no personal confidence reposed or skill required, and that the duties are capable of being equally well discharged by any person. Where the very nature of the employment necessitates a partial or total delegation, the rule can have no application. Further power to employ sub-agent may be conferred by the usage of a particular trade, or implied from the mode of dealings between the parties. (Para 10)

Index Note: — (D) Powers of Attorney Act (1882), Sec. 2 — Termination of joint power — Power given by the mother and the sisters of the power holder — Power remains operative on behalf of his sisters on the death of the mother. (1914) 41 Ind App 51 (PC), Dist. (Para 12)

Index Note: — (E) Powers of Attorney Act (1882), Sec. 2 — Two consecutive powers — Abrogation of previous powers of attorney — Non-registration of power of attorney — Effect.

Brief Note: — (E) The provisions of Secs. 32 and 33 of the Registration Act 1908 can be invoked only when the question of validity of registration of a document crops up and not otherwise.

It is well settled that if the transaction is divisible and one part can be effected by an unregistered instrument and the other requires registration, the instrument may be used as evidence of the part which does not require registration of course subject to the condition that the part which is not registered must be independent of the part which requires registration.

In the instant case it is true that Ext. 6 gives right to N. to sell landed properties on behalf of his three sisters. But that power has nothing to do with the other power given by the same document to N. to file suits against the tenants and to appoint lawyers for the purpose of representing his three sisters in such suits. Even if the document Ext. 6 is not valid respecting the power for transfer of the landed properties of his sisters, for want of registration, the documents does not lose value respecting the rest of the powers given by it. Consequently, the document Ext. 6 cannot be declared illegal or invalid even for the purpose of filing suit against the tenant on behalf of the three sisters of N. The two documents can stand simultaneously, the one executed subsequently having not abrogated the previous one. (Para 14)

Cases Referred: Chronological	Paras
AIR 1947 Nag 17 = 1947 Nag LJ 1 (FB), Jiwibai v. Ram Kuwar	9
AIR 1929 Cal 651 = ILR 57 Cal 10, Bodardoja v. Ajijuddin	9
(1914) 41 Ind App 51 = 18 Cal WN 554 (PC), Venkatadri Appa Row v. Venkata Narasimha Appa Row	12

P. Choudhury, D. K. Sarma and J. N. Sarma, for Appellant; B. C. Barua, A. Kalita, N. Chakravarty, A. M. Majumdar and S. R. Bhattacharjee, for Respondents.

JUDGMENT:— The property involved in this litigation is situate in Gauhati town and was originally owned by Eda Khan who had let it out to Mia Singh more than a quarter of century ago at a monthly rent of Rs. 35/-. Eda Khan was survived by a widow, two sons including Abdul Kader, and three daughters. Abdul Kader died unmarried and Eda Khan's widow breathed her last on 27-2-61, about six months before the suit out of which this second appeal has arisen was instituted on 5-8-61. Therefore, as at present, the three daughters and the only living son Noor Ahmed of Eda Khan are the owners of the property.

2. The suit was filed by Noor Ahmed and his three sisters for eviction of Mia Singh on the grounds that he was a defaulter in the matter of payment of rent since 1st of August, 1955, that he had sub-let a part of the property to the defendant No. 3 Amivangshu Ghose without the consent of the landlord, and that the property was bona fide required by the plaintiffs for their own business. Besides the prayer of eviction and recovery of Rs. 1015/- as arrears of rent the plaintiffs had laid claim to Rs. 700/- by way of compensation for use and occupation for the period after the tenancy of Eda Khan had been terminated by giving him notice of eviction on 16-11-60 requiring him to vacate the premises by 31st of December, 1960. This compensation was claimed at the rate of Rs. 100/- per mensem.

3. Apart from Mia Singh and Amivangshu Ghose, the plaintiffs had impleaded Mia Singh's son Bir Singh as a pro forma defendant. Mia Singh having died during the pendency of the suit, his son Bir Singh assumed the role of principal defendant.

4. In the written statement filed by Mia Singh, he had denied sub-letting of any part of the property, or that he was a defaulter, or that the property was required bona fide by the plaintiff Noor Ahmed for the purposes of his business. Mia Singh pleaded, while denying the charge of his being a defaulter, that he had expended a sum of Rs. 4536 on repairs, improvements and extension of the demised property, that that much expense he had incurred with the knowledge and consent of Abdul Kader, the deceased son of Eda Khan, and that if that amount of Rs. 4536/- was credited to the account, it would be found that he had paid more than the rent which was due to the plaintiffs by the date of the suit. Mia Singh denied that the plaintiffs were entitled to claim any compensation from him for use and occupation or at the rate of Rupees 100/- per mensem.

5. As many as 15 issues were settled between the parties by the trial Court. The substance of the findings reached by