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## [438] APPELLATE CIVIL.

*Before Mr. Justice Birdwood and Mr. Justice Parsons.*

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VISHNU BHIKAJI PHADKE (*Original Plaintiff*), Appellant v.  
ACHUT JAGANNATH GHATE (*Original Defendant*), Respondent.\*  
[17th December, 1890.]

*Civil Procedure Code (Act XIV of 1882), s. 295—Suit for a refund of assets paid to a wrong person under s. 295—Limitation Act (XV of 1877), arts. 13 and 62, sch. II.*

An order under s. 295 of the Code of Civil Procedure (Act XIV of 1882) refusing a decree-holder's application for a rateable distribution of the assets realized by sale or otherwise in execution of a decree, is not an order "in a proceeding other than a suit" within the meaning of art. 13 of the Limitation Act (XV of 1877).

On the 21st August, 1885, the defendant attached, in execution of a money decree, certain immoveable property belonging to his judgment-debtor. On the 18th January, 1886, plaintiff, who held another decree against the same judgment-debtor, applied, under s. 295 of the Code of Civil Procedure (Act XIV of 1882), for a rateable distribution of the assets to be realized by the sale of the property attached. On the 19th March, 1886, the attached property was put up for sale in execution of the defendant's decree. The defendant was allowed to buy the property at the sale and set off the purchase-money against the amount due to him under the decree under s. 294, and no money was, therefore, paid into Court. On the 14th June, 1886, the Court held that as no money had been paid into Court on account of the sale, no further proceedings could be taken on the plaintiff's application for a rateable share of the assets, and his application was accordingly rejected. Thereupon the plaintiff sued the defendant to compel him to refund the assets wrongly paid to him. The Court of first instance decided in plaintiff's favour. The lower appellate Court rejected the plaintiff's claim as barred by art. 13, sch. II of the Limitation Act (XV of 1877), on the ground that the suit was not brought within one year from the date of the Court's order refusing the plaintiff's application under s. 295 of the Code of Civil Procedure (Act XIV of 1882).

Held, that the suit was not governed by art. 13 of the Limitation Act (XV of 1877). The order made under s. 295 of the Civil Procedure Code was no bar to the suit, and a suit to set it aside was unnecessary.

*Gowri Prosad Kundu v. Ram Ratan Sircar* (1) dissented from.

[F., 1 Bom. L.R. 795; Appr., 23 A. 313 (323) (P.C.) = 3 Bom L.R. 713 = 5 C.W.N. 649 = 28 I.A. 203 = 8 Sar. P.C.J. 72; R., 3 O.C. 84 (86); 65 P.R. 1895; U.B.R. (1904), 4th Qr., Limitation, sch. II, 13; D., 1 Ind. Cas. 732 = 37 P.R. 1909 = 38 P.L.R. 1909 = 50 P.W.R. 1909.]

SECOND appeal from the decision of R. S. Tipnis, Acting District Judge of Ratnagiri, in Appeal No. 544 of 1888.

The defendant, Achut Jagannath Ghate, obtained a money decree against one Mahadaji Vishnu on 21st August, 1885, and [439] attached Mahadaji's immoveable property in execution of his decree. Pending the attachment, the plaintiff, who held another decree against Mahadaji, on the 18th January, 1886, applied to the Court under s. 295 of the Civil Procedure Code (Act XIV of 1882) for a rateable share of the assets to be realized by the sale of Mahadaji's property.

On the 19th March, 1886, Mahadaji's property was put up for sale in execution of the defendant Achut's decree. Achut was permitted to purchase the property at the Court-sale, and set off the purchase-money

\* Second Appeal, No. 754 of 1899.

(1) 13 C. 159.

against his judgment-debt under s. 294 of the Civil Procedure Code. Accordingly no money was paid into Court.

On the 14th June, 1886, the Court held that as no money had been paid into Court on account of the sale, no further proceedings could be taken on plaintiff's application under s. 295 of the Civil Procedure Code (Act XIV of 1882) for a rateable share of the assets. The application was, therefore, rejected.

The plaintiff thereupon filed the present suit to recover from the defendant Rs. 151-12-3, being the amount which he would have got by a rateable distribution of the assets realized by the sale of the judgment-debtor's property.

The suit was filed on 2nd July, 1888.

The Court of first instance passed a decree awarding the plaintiff's claim.

On appeal, the District Judge was of opinion that the suit was substantially one to set aside the order of Court rejecting the plaintiff's application under s. 295 of the Code of Civil Procedure. He, therefore, held, on the authority of *Gowri Prosad Kundu v. Ram Ratan Sircar* (1), that the suit was governed by art. 13, sch II of the Limitation Act (XV of 1877), and as it was not brought within one year from the date of the adverse order, he rejected the plaintiff's claim as time-barred.

Against this decision the plaintiff appealed to the High Court.

[440] *Ganesh K. Deshmukh*, for appellant.—This case falls under art. 62 of the Limitation Act. It is a suit for money had and received by the defendant to plaintiff's use. The ruling in *Sivarama v. Subramanya* (2) applies to the present case. The order under s. 295 of the Code of Civil Procedure is not one falling under art. 13 of the Limitation Act. It is passed in the execution proceedings, and execution proceedings are proceedings in the suit in which the decree under execution was passed. See *Mungul Pershad Dichit v. Grijakan, Lahiri* (3).

*Daji Abaji Khare*, for respondent.—The case of *Gowri Prosad Kundu v. Ram Ratan Sircar* (1) is in point. It shows that a suit like this is virtually to set aside the order under s. 295 of the Code of Civil Procedure, and, therefore, falls under art. 13 of the Limitation Act.

#### JUDGMENT.

BIRDWOOD, J.—The plaintiff sues the defendant to compel him to refund assets wrongly paid to him under s. 295 of the Code of Civil Procedure. The lower appellate Court, following the decision in *Gowri Prosad Kundu v. Ram Ratan Sircar* (1), has applied art. 13 of sch. II of Act XV of 1877 to the case, and held that the suit is barred by time, because it was not brought within one year from the date of the Court's order refusing the plaintiff's application to share in the assets in question.

The suit is not, however, in form one to set aside an order of a Civil Court. It was clearly not necessary for the plaintiff to sue to set aside any order, inasmuch as s. 295 of the Code expressly permits a suit of this kind. The order made under the section is, therefore, no bar to the suit, and a suit to set it aside is unnecessary. Again, if it be held that the relief sought by the plaintiff necessarily involves the reversal of

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(1) 13 C. 159.

(2) 9 M. 57.

(3) 8 I.A. 123=8 C. 51.

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the Civil Court's order, still the order made under s. 295 is not, apparently, an order in a "proceeding other than a suit," within the meaning of art. 13 of sch. II, inasmuch as all proceedings in execution are proceedings in the suit in which the decree under execution is made—*Ayyasami v. Samiya* (1); *Mungul Pershad Dichit v. Grijakant Lahiri* (2).

[441] We are unable, therefore, to follow the Calcutta case relied on by the lower Court. That case, moreover, is opposed to *Taponidi Hordanund Bharati v. Mathura Lall Bhagat* (3) and *Sivarama v. Subramanya* (4). The suit, we think, falls under art. 62 of the schedule. Cf. *Moses v. Macfarlane* (5). The suit was brought within three years from the time of the receipt of the assets by the defendant, and was, therefore, within time.

We reverse the decree of the lower appellate Court and remand the appeal for a rehearing on the merits. Costs to abide the result.

*Decree reversed and case remanded.*

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APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.*

SWAMIRAYACHARYA (*Plaintiff*) v. THE COLLECTOR OF  
DHARWAR AND ANOTHER (*Defendants*).\*  
[18th December, 1890.]

*Jurisdiction—Suit against Collector—Act done in official capacity.*

The plaintiff sued the Collector of Dharwar and his *chitnis* for having destroyed certain certificates of efficiency which had been given to him by Mamlatdars in whose service he had been employed. The defendants pleaded that the certificates had been destroyed, because they were not issued by the Mamlatdars in proper form.

*Held*, that the act of the defendants was an act done by them in their official capacity, and that the Subordinate Judge could not entertain the suit.

[R., 21 B. 754 (771).]

THIS was a reference made to the High Court, under s. 617 of the Code of Civil Procedure, by Rav Bahadur Kashinath Balkrishna Marathe, First Class Subordinate Judge of Dharwar.

The plaintiff sought to recover Rs. 100 as damages from the Collector of Dharwar and his *chitnis*, on the ground that they had wrongfully destroyed the testimonials of character given to him by three Mamlatdars.

[442] In his plaint he stated that he had obtained the said testimonials for services rendered to Government; and that the defendant had informed him that the testimonials had been destroyed, because they had not been issued by the Mamlatdars in proper form.

The plaint was originally presented to the District Judge of Dharwar as one against Government servants, but the District Judge, holding that the plaint complained of the defendants' conduct as private individuals

\* Civil Reference, No. 23 of 1890.

(1) 8 M. 82.  
(9) 12 C. 499.

(4) 9 M. 57.

(2) 8 I.A. 123=8 C. 51.  
(5) 2 Burr. 1005.