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DEC. 17.
APPEL-
LATE
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15 B. 433.

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.

15 B. 441.

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.

and not as officials, returned the plaint for presentation to the Court of the Subordinate Judge.

The Subordinate Judge was of opinion that the action was against the defendants in their official capacity, and that, therefore, having regard to s. 15 of Act X of 1876 (1), he had no jurisdiction to entertain the suit. Consequently he referred the question to the High Court.

In his reference the Subordinate Judge remarked: "On looking at the official order I find that the Collector passes an opinion that the plaintiff's testimonials were not given him in a proper manner by the three Mamlatdars concerned, and they were, therefore, destroyed. The order for destruction was, therefore, very probably passed after due consideration of the propriety of giving testimonials into the hands of persons by their official superiors instead of recording them in a character book kept for the purpose. The Dharwar Collector probably thought that the Mamlatdars under him had no right to pass testimonials to a person whose connection with the service was severed from time to time. The Collector exercised, I believe, official discretion in the matter, and he and his *chitnis*, who could not possibly be connected with the destruction of the testimonials except in his official capacity and under orders of the Collector, cannot be held responsible as private gentlemen. I do not think, therefore, that the destruction of the testimonials [443] was a private act of the defendants. If they are anyway responsible they, are responsible in their official capacity, and the suit must be taken to the District Court. I am, however, thrown into a doubt about the matter by the District Judge's order endorsed on the plaint. The following question is, therefore, submitted for an authoritative opinion:—

"Whether the Subordinate Judge's Court at Dharwar can entertain the suit?"

OPINION.

SARGENT, C.J.—The Collector destroyed the certificates of efficiency, because they had not been issued to the plaintiff by the Mamlatdars in proper form. In doing so, whether rightly or wrongly, he clearly acted in his official capacity. We must, therefore, answer the question in the negative.

Order accordingly.

(1) Section 15:—"For section thirty-two of the Bombay Civil Courts Act, No. XIV of 1869, the following shall be substituted (namely): 'No Subordinate Judge or Court of Small Causes shall receive or register a suit in which the Government or any officer of Government in his official capacity is a party, but in every such case such Judge or Court shall refer the plaintiff to the District Judge, in whose Court alone (subject to the provisions of section nineteen) such suit shall be instituted.'"