

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

RA'JMAL MA'NIKCHAND MA'RWA'DI (ORIGINAL PLAINTIFF), APPELLANT,
v. HANMANT ANYA'BA, SUPERVISOR, PUBLIC WORKS DEPARTMENT AT
NÁ'SIK (ORIGINAL DEFENDANT), RESPONDENT.*

1895.

August 27.

Civil Procedure Code (Act XIV of 1882), Sec. 424—Civil Courts' Act (XIV of 1869), Sec. 32—Suit against an officer of Government—Suit ex contractu—Notice.

Section 424 of the Civil Procedure Code (Act XIV of 1882), which requires notice to be given to a public officer two months before the institution of a suit against him, does not apply where the suit is one *ex contractu*.

Sáhebzadee Shahnsháh Begum v. Fergusson(1) and *Máneklál v. The Municipal Commissioner for the City of Bombay* (2) referred to.

APPEAL from the decision of S. Hammick, District Judge of Ahmednagar.

On 10th February, 1890, the plaintiff brought this suit to recover from the defendant the price of certain timber supplied him by the plaintiff in 1877. The defendant had been appointed by the Executive Engineer at Násik to supervise the building of a kacheri for the Mámlatdár of Ráhuri. The plaintiff alleged that the defendant had promised to pay him for the timber from the Mámlatdár's treasury, but had failed to do so. The cause of action was stated to have arisen on 1st August, 1887.

The plaint was originally filed in the Court of the Second Class Subordinate Judge at Ráhuri, but, as the defendant pleaded that he had obtained the goods as a Government servant and that, therefore, the Court had no jurisdiction (section 32 of Civil Courts' Act XIV of 1869), the plaint was returned for presentation to the proper Court. On appeal by the plaintiff the order for the return of the plaint was confirmed by the High Court on the 28th November, 1892 (No. 87 of 1892).

The plaintiff thereupon on the 3rd January, 1893, served the defendant with notice under section 424 of the Civil Procedure Code (Act XIV of 1882), and on the 4th January, 1893, presented the plaint in the District Court and applied that the case should stand over for two months in order to allow the defendant the

* Appeal No. 17 of 1894.

(1) I. L. R., 7 Cal., 499.

(2) I. L. R., 19 Bom., 407.

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time required by section 424 of Civil Procedure Code (Act XIV of 1882). The Court, however, refused this application on the 3rd February, 1893.

Against the order of refusal the plaintiff appealed to the High Court (Miscellaneous Appeal No. 14 of 1893), but the appeal was dismissed.

The District Court having accepted the plaint registered it as Suit No. 1 of 1893. The case came on for hearing on the 27th October, 1893, when the District Judge dismissed it on the ground that notice had not been served on the defendant two months before it was filed, as required by section 424 of the Civil Procedure Code.

The plaintiff appealed.

Branson (with *Gangdrám B. Rele*) for the appellant (plaintiff):—The Judge was wrong in dismissing this suit for want of notice. No notice was necessary. This is a suit for breach of contract and to such suit section 424 is not applicable.—*Shahbezadee Shahynshah Begum v. Fergusson* ⁽¹⁾; *Ranchod Varajbhai v. The Municipality of Dákor* ⁽²⁾; *Bháu Balápa v. Nána* ⁽³⁾; *Sárdársing v. Ganpatsingji* ⁽⁴⁾; *Nagusha v. The Municipality of Sholápur* ⁽⁵⁾; *Manaklál Motilál v. The Municipal Commissioner for the City of Bombay* ⁽⁶⁾; *William Allen v. Ba Shri Dariba* ⁽⁷⁾.

If, however, notice was necessary we say that the defendant had sufficient notice of the suit, which was originally filed in the Subordinate Judge's Court in 1890.

Ráo Sáheb *Vásudea J. Kirtikar* (Government Pleader) for the respondent (defendant):—We rely on section 424 of the Civil Procedure Code. The language of that section is imperative, and the notice mentioned therein would be necessary even if the present suit be considered to be one *ex contractu*. The cases relied on are distinguishable. Some of them were under the Municipal Acts and in others the defendants were not sued in their official capacity.

(1) I. L. R., 7 Cal., 499.

(2) I. L. R., 8 Bom., 421.

(3) I. L. R., 13 Bom., 343.

(4) I. L. R., 14 Bom., 295.

(5) I. L. R., 18 Bom., 19.

(6) I. L. R., 19 Bom., 407.

(7) P. J., 1884, p. 361.

JARDINE, J. :—This is a suit which we must treat as brought under section 32 of Act XIV of 1869 against the defendant, an officer of Government, in his official capacity. The District Judge held that the defendant was entitled to two months' notice under section 424 of the Code of Civil Procedure; and dismissed the suit, because it had been brought before the expiry of that period. The suit is one *ex contractu*; and no case has been cited to show that section 424 applies to such a suit, whereas *Saheb-zadee Shahunshah Begum v. Fergusson* ⁽¹⁾ decides to the contrary, and the opinion of Farran, J., in *Máneklál v. The Municipal Commissioner for the City of Bombay* ⁽²⁾ is in accordance with that decision.

On these authorities we must reverse the decree of the District Judge, and remand the cause for trial; the respondent to pay the costs of this appeal.

Order reversed and case remanded.

(1) I. L. R., 7 Cal., 409.

(2) I. L. R., 19 Bom., 407.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

*IN RE SHRI VISHWA MBHAR PANDIT. ALIAS NA'NA MAHA'RA'J.**
Privy Council—Appeal to Privy Council—Civil Procedure Code (Act XIV of 1882),
Sec. 596—Substantial question of law—Practice—Procedure.

1895.

August 28.

*Per JARDINE, J. :—*Where the High Court in appeal has confirmed the decree of the lower Court and has taken substantially the same view of the facts and where, upon the facts as found by both Courts, no question of law arises, leave to appeal to the Privy Council should be refused.

*Per RÁNÁDE, J. :—*There is a distinction between the confirmation of a decree and the affirmation of the decision and findings of the Court of first instance by the High Court. The substantial question of law referred to in section 596 of the Code of Civil Procedure (Act XIV of 1882) need not directly arise out of the concurrent findings of fact, but it is enough if it is involved in those findings, and can, if the appeal is allowed, be raised in the course of the argument.

APPLICATION for leave to appeal to the Privy Council from a decree of the High Court.

* Civil Application, No. 155 of 1895.