by the Subordinate Judge, but to which he gave no weight without assigning any reason, Mr. Justice Cunningham decided that the intention of Chapter XXVII was to give to Government representation by the Secretary of State and to give public officers in the discharge of their public duties the same protection as English statutes confer on many public officers, viz., that when it is alleged that they have committed an illegality in the discharge of their duties they shall have time and opportunity of making amends before the matter is brought into court. Probably this may have been the intention of the Legislature in framing Chapter XXVII, s. 424. But independent of this intention the language of the s. 424 is clear and requires no notice unless the suit is brought against the public officer in respect of an act done by him purporting to be in discharge of his duty, and it is equally clear this suit is not one of that class.

It is to be regretted that the Subordinate Judge, by making a hasty and ill-considered decision, put the parties to the expense and delay of this appeal. We set aside the decree of the Subordinate Judge, and remand the case for trial on hearing the evidence and merits which the discretion of the Subordinate Judge excluded. We also order that the Collector, as guardian of the minor respondent, do pay to the appellants their costs of this appeal out of the estate of the said minor respondent and that the costs of hearing already had do abide and follow the result.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1888. Feb. 17, 21.

RAJA (DEFENDANT), APPELLANT,

and

STRINIVASA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, ss. 311, 588 (8).

An application under s. 311 of the Code of Civil Procedure to set aside a sale in execution of a decree having been dismissed for default, the petitioner applied to

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* Appeal against Order 169 of 1887.

RAJA v. SRINIVASA.

the Court to restore the application to the file. The Court having rejected this application, petitioner appealed against this order:

Held, that no appeal lay.

Ningappa v. *Gangawa* (I.L.R., 10 Bom., 433) followed.

APPEAL against the order of T. Kanagasaba Mudaliar, Subordinate Judge of Tanjore, rejecting a petition to set aside the dismissal of an application in suit No. 9 of 1886.

The facts necessary for the purpose of this report appear from the judgment of the Court (Collins, C.J., and Parker, J.).

Pattabhi Ramayyar for appellant.

Ramasami Ayyangar for respondent.

JUDGMENT.—The appellant on 21st May 1887 petitioned the Subordinate Court of Tanjore under s. 311 of the Code of Civil Procedure to set aside a sale on the ground of irregularity. On the petition being called on 1st August, the petitioner was not present, and the petition was dismissed for default.

The same day (1st August) appellant presented a petition, explaining that he had been called out of Court at the moment the petition was called and praying that the petition be restored to the file for enquiry. The petition purported to be put in under s. 99 of the Code of Civil Procedure (evidently a clerical error for s. 103). The Subordinate Judge rejected the petition on 2nd August, and it is against that order that this appeal is preferred. A preliminary objection is taken that an appeal does not lie.

The appellant's pleader contends that by s. 647 the procedure of the Civil Procedure Code is made applicable to all proceedings other than suits and appeals; hence that ss. 102 and 103 are applicable and an appeal lies under s. 588, cl. (8) from an order rejecting an application to set aside the dismissal of this petition.

For the respondent it is argued that an appeal is a substantial right and not a mere matter of procedure; that s. 588, cl. (8) gives an appeal only against an order rejecting an application to set aside the dismissal of a suit, and we were referred to *Hureenath Koondoo* v. *Modhoo Soodun Saha*(1) and *Sultan Ackeni Sahib* v. *Shaik Bava Malimiyar*(2). The principle on which the first case was decided would appear to be in point, though the question then arose under the now-repealed Act XXIII of 1861, s. 38. In the second case the question was whether the High Court was competent to entertain an appeal from an order

(1) 19 W.R., 122. (2) I.L.R., 4 Mad., 295.

made by a District Court under s. 5, Act XX of 1863. The High Court held that, although the Religious Endowment Act made no provision for an appeal, the general law contained in the Civil Procedure Code was by s. 647 extended to all proceedings other than suits and appeals, and that the order passed by the Judge in the proceedings before the Court was analogous to a decree in a suit, and hence that an appeal would lie from such an order in the same manner as an appeal would (under s. 540 of the Code of Civil Procedure) lie from a decree in a suit. In *Minakshi* v. *Subramanya*(1) the Privy Council observed that they "could not assume that there is a right of appeal in every matter which comes under the consideration of a Judge; such right must be given by statute, or by some authority equivalent to a statute." Their Lordships then proceeded to discuss the order of the District Judge and held that it was impossible to bring the order within the definition of a decree as contained in the Procedure Code, and on these grounds reversed the decision of the High Court.

We have found, however, in the decision of the Bombay High Court a case in which the point was exactly the same as the present, *Ningappa* v. *Gangawa*(2). In that case also a petition under s. 311 had been dismissed for default and an application for restoration refused under s. 103; and it was held by the Bombay Court, following the principle laid down by the Calcutta Court in *Hureenath Koondoo* v. *Modhoo Soodun Saha*, that s. 647 did not confer any rights of appeal not expressly given elsewhere by the Code, and that its object was to apply to proceedings other than suits and appeals, the mode of trial and procedure incidental and ancillary thereto.

We are constrained to hold that the weight of authority is against the right of appeal.

It was then urged that an appeal would lie under s. 588, cl. (16) from the order refusing to set aside the sale, but the order of 2nd August, from which the present appeal is preferred, is not such an order. On these grounds we must hold that the appeal fails and dismiss it with costs.

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(1) I.L.R., 11 Mad., 31. (2) I.L.R., 10 Bom., 433.