

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

ANANTHARAMAN (PLAINTIFF), APPELLANT,

and

RAMASAMI (DEFENDANT), RESPONDENT.*

1888.
Jan. 24.

Civil Procedure Code, s. 424—Collector as guardian of ward not entitled to notice in suit to recover money from estate of ward.

In a suit to recover money due on a promissory note executed by a deceased zamindar, out of the estate of the deceased and of his son, the defendant, a minor under the Court of Wards, the Collector, being appointed guardian *ad litem* of the defendant, pleaded that under s. 424 of the Code of Civil Procedure he was entitled to notice before suit, and the suit was dismissed on the ground of want of notice :

Held, on appeal, that s. 424 was not applicable to the case.

APPEAL from the decree of C. Venkobacharyar, Subordinate Judge of Madura (West), in suit No. 39 of 1887.

The facts necessary for the purpose of this report appear from the judgment of the Court (Kernan and Muttusami Ayyar, JJ.).

Subramanya Ayyar for appellants.

The Government Pleader (Mr. *Powell*) for respondent.

JUDGMENT.—This is an appeal from a decree of the Subordinate Judge of Madura (West). The appellant was plaintiff in suit No. 39 of 1887 before that Court and alleged that the zamindar of Saptur, deceased, the father of the infant defendant, the new zamindar, executed a pro-note for Rs. 10,000, payable to the father, now deceased, of the appellant, and prayed for payment of the amount of the note out of the estate of the late zamindar and from the estate of the present zamindar, his son.

The infant defendant was at the time of the suit a ward of the Court of Wards, which was in possession of the zamindari. The Collector of Madura was, in his official capacity of Collector, also guardian of the infant defendant, and he filed a written statement, alleging amongst other defences, that no notice of action had been served on him as prescribed in Chapter XXVII, s. 424 of the Civil Procedure Code, issues were framed, including an issue whether such notice was served and whether such notice was necessary.

* Appeal No. 1 of 1888.

ANANTHA-
RAMAN
v.
RAMASAMI.

At the hearing the Subordinate Judge ruled that such notice was necessary and, as he found it was not served, he declined to go into the other issues and dismissed the suit with costs.

The appeal is on the ground that s. 424 was not applicable to the suit.

The s. 424 provides that no action shall be brought against a public officer in respect of an act purporting to be done by him in his official capacity until the expiration of two months next after notice in writing, containing the particulars thereby prescribed.

Now the suit was not one instituted against the Collector in his official capacity, or at all. The Collector, in his official capacity, was the guardian of the defendant, the infant, and as such, he was named as the guardian of the infant defendant.

But no cause of action against him was stated in the plaint and no relief was prayed for against him; nor could any personal decree for payment of the amount of the note sued for be made against him. Neither is the suit brought on the ground that the public officer did any act purporting to be done in his official capacity. The fact that he did not pay the amount is not an act of omission, on which the suit is brought. It is an action brought on a contract in order to enforce payment from the assets of the deceased zamindar and from the ancestral property of the present zamindar by reason of his obligation to pay thereout the debt of his deceased father. The Collector merely defends as guardian on behalf of the infant.

The case of *Narsingrav Ramchandra v. Luxumanrav*(1) referred to by the Subordinate Judge was not under Chapter XXVII of the Civil Procedure Code, s. 424. It was there only decided that a Collector, acting as guardian for an infant defendant, was acting in his public capacity, and therefore was not subject to the jurisdiction of the Subordinate Judge under the Bombay Civil Court's Act. In *The Collector of Bijnor, Manager of the Estate of Chaudhri Ranjit Singh v. Munwar*(2) also referred to by Subordinate Judge, the Collector, as guardian, illegally seized some property. This is one of the cases to which s. 424 applies and accordingly it was held that notice should have been given.

In *Shahbazadee Shahunshah Begum v. Fergusson*(3) referred to

(1) I.L.R., 1 Bom., 318.

(2) I.L.R., 3 All., 20.

(3) I.L.R., 7 Cal., 490.

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.*

RAJA (DEFENDANT), APPELLANT,

and

STRINIVASA (PLAINTIFF), RESPONDENT.*

1888.
Feb. 17, 21.

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

* Appeal against Order 169 of 1887.