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exercise of the revisional power of this Court we should not have interfered with his judgment on this account, he having acted within his jurisdiction; but that Vishnu has another ground on which to rely, and one that should have been fully considered before judgment was given against him. He purchased from Gopál more than twelve years before the institution of the present suit. Gopál was the ostensible owner, and if Vishnu bought from him for value, he thus acquired a right, which under Schedule II of article 134 of the Limitation Act (XV of 1877) would become unassailable by the mortgagor after twelve years—*Baivákhán Dáudkhán* v. *Bhiku Sázbá*[1]. We have not Gopál before us, nor have we the materials for determining whether Vishnu really purchased from him or not. We will send the case back that the Special Judge may determine on the fact whether Vishnu's purchase is proved, and decide the case accordingly. The rule is made absolute. Costs of this application to be borne by the opponent.

Rule made absolute.

(1) I. L. R., 9 Bom., 475.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

1887. *July* 4.

GOPI MAHA'BLESVAR BHAT, (ORIGINAL PLAINTIFF), APPELLANT, *v.* SHESO MANJU, (ORIGINAL DEFENDANT), RESPONDENT.*

Jurisdiction—Malicious prosecution—Prosecution when official—Bombay Civil Courts Act (XIV of 1869), Sec. 32—Bombay Act X of 1876, Sec. 15—Prosecution instituted by order of superior officer.

An officer of Government who prosecutes for an injury personal to himself is not generally acting in his official capacity as prosecutor. If any particular class of interest is placed specifically under his tutelage, with a direction to guard them by the appropriate legal proceedings, suits instituted in the fulfilment of the duty thus assigned to the functionary are of course instituted in his official capacity. A similar remark applies to criminal proceedings. A prosecution by a functionary is official when in carrying it on he is discharging a duty expressly or impliedly assigned to him by law. If the duty of prosecuting in any particular case is not

* Appeal from Order, No. 14 of 1887.

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assigned to an officer as such, the consent or the order of his superior will not make the act an official one which in its nature is not so, as lying outside his official functions.

The defendant was a forest officer in the service of Government. He prosecuted a certain person for theft in the Magistrate's Court at Sirsi. The accused was defended by the plaintiff, who was a pleader. During the hearing of the case the defendant in open Court made use of certain expressions towards the plaintiff, which it was alleged were defamatory, and were calculated to lower him in the estimation of the public, to injure his reputation, and to mar his professional prospects. The plaintiff sent him a notice claiming Rs. 4,500 as damages for the injury done to him by the defendant. The defendant thereupon lodged a complaint before the Divisional Magistrate at Sirsi charging the plaintiff, under section 189 of the Indian Penal Code (Act XLV of 1860), with holding out a threat, &c., to a public servant for the purpose of inducing him to refrain from doing his duty as such public servant. The Magistrate dismissed the charge, and the plaintiff then filed the present suit against the defendant for malicious prosecution. The defendant pleaded that in lodging the complaint against the defendant he had acted in his official capacity and under the orders of his superior officer with reasonable and probable cause, and not maliciously; that the suit was brought with reference to an act done by him in his official capacity as forest officer, and that, therefore, the Court of the Subordinate Judge has no jurisdiction. The Subordinate Judge held that he had no jurisdiction, being of opinion that the defendant had prosecuted the plaintiff in his character as a public servant, and that, therefore, the present suit against the defendant was one in which an officer of Government in his official capacity was a defendant, and as such was cognizable by the District Judge only, under section 32 of the Bombay Civil Courts Act (XIV of 1869). He, therefore, dismissed the suit. In appeal, the Acting District Judge was also of opinion that the Subordinate Judge had no jurisdiction; but he held that the Subordinate Judge was wrong in dismissing the suit, instead of returning the plaint for presentation to the District Court. He, therefore, reversed the decree of the Subordinate Judge, and referred the plaintiff to the District Judge.

On appeal by the plaintiff,

Held, by the High Court, that the defendant was sued as a private person for an alleged wrong to the plaintiff, and that the suit was rightly brought in the Court of the Subordinate Judge. The order appealed from was, therefore, reversed, and the District Judge was directed to dispose of the appeal on its merits.

APPEAL from the order of A. H. Unwin, Acting District Judge of Kánara, in Appeal No. 65 of 1885.

This was a suit to recover damages for malicious prosecution.

In July, 1882, the defendant, an assistant conservator of forests in Government service, prosecuted one Purli Kotraya for

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theft in the Court of the Second Class Magistrate at Sirsi. The plaintiff, a pleader of the Kánara District, conducted the defence on behalf of the accused. In the course of this trial the forest officer used certain expressions, in open Court, towards the plaintiff, which it was alleged were defamatory, and were calculated to lower him in the estimation of the public, to injure his reputation, and to mar his professional prospects. The plaintiff, therefore, sent a notice, in writing, to the forest officer, demanding Rs. 4,500 as damages for the wrong done to him.

On the receipt of this notice, the defendant lodged a complaint before the Divisional Magistrate (First Class) at Sirsi, charging the plaintiff, under section 189 of the Indian Penal Code, with holding out a threat to a public servant, for the purpose of inducing him to refrain from doing his duty as such public servant.

The Magistrate, who inquired into this complaint, discharged the accused, (the plaintiff), holding that no offence had been committed by him, and that he was within his right in issuing the notice complained of.

Thereupon the plaintiff filed the present suit against the defendant for malicious prosecution. He claimed Rs. 1,500 damages.

The suit was filed in the Court of the Subordinate Judge at Sirsi.

The defendant replied *(inter alia)* that the prosecution had been instituted by him in his official capacity, and under orders of his superior officers, with reasonable and probable cause, and not maliciously; that the suit was brought with reference to an act done by him in his official capacity as forest officer; and that, therefore, the Court of the Subordinate Judge had no jurisdiction to entertain the suit.

The Subordinate Judge held that the prosecution of the plaintiff, under section 189 of the Indian Penal Code, was instituted by the defendant in his character as a public servant, and that, therefore, the present suit against the defendant was one in which an officer of Government in his official capacity was a defendant and as such was cognizable by the District Judge alone,

under section 32 of the Bombay Civil Courts Act (XIV of 1869). He, therefore, dismissed the suit for want of jurisdiction.

In appeal, the Acting District Judge was also of opinion that, as Government had undertaken the defence of the suit, the Subordinate Judge's jurisdiction was ousted. But he held that the order dismissing the suit was wrong, and that under section 32 of (Bombay) Act XIV of 1869 the plaint ought to have been returned for presentation to the District Court[1]. He accordingly reversed the decree of the Subordinate Judge and referred the plaintiff to the District Judge.

Against this decision the plaintiff appealed to the High Court.

Náráyan Ganesh Chandávárkar for the appellant:—The prosecution, of which the plaintiff complains under section 189 of the Penal Code, was instituted by the defendant, not in his official capacity in the discharge of his official functions, but in his individual character for a wrong personal to himself. The mere fact that he instituted the prosecution with the sanction of his superior officer does not alter the character of the prosecution. The defendant is sued, not in his official, but in his individual, character. The suit is, therefore, cognizable by the Subordinate Judge. Refers to *Venkatráv Shrinivás Kavzalgi* v. *Bápu Rámbaksh*[2]; *Bankat Hargovind* v. *Náráyan Váman*[3]; *Mohan Ishwar* v. *Haku Rupá*[4]; *The Collector of Bijnor* v. *Munuvar*[5].

Ráv Sáheb *Visvanáth Náráyan Mandlik*, (Government Pleader), for the respondent:—The prosecution was instituted by the defendant under the orders of his official superior. He did not prosecute, except for and on behalf of the Forest Department. He, therefore,

(1) Section 32 of the Bombay Civil Courts Act (XIV of 1869) as amended by section 15 of the Bombay Revenue Jurisdiction Act (X of 1876) provides as follows:—

"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 19) such suit shall be instituted."

(2) Printed Judgments for 1875, p. 40.
(3) I. L. R., 11 Bom., 370.
(4) I. L. R., 4 Bom., 638.
(5) I. L. R., 3 All., 20.

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prosecuted in his official capacity. And the suit is substantially against an officer of Government for an act done in his official capacity. The suit, therefore, falls within the purview of section 32 of Act XIV of 1869 as amended by section 15 of Act X of 1876. As a public officer the defendant is entitled to a notice under section 424 of the Civil Procedure Code. Refers to *Shahebzadee Shahunshah Begum* v. *Fergusson*[1].

WEST, J.:—The rulings of this Court in *Venkatráv Shrinivás* v. *Bápu Rámbaksh*[2] and *Bankat Hargovind* v. *Náráyan Váman Devbhankar*[3] show that an officer of Government who prosecutes for an injury personal to himself is not generally acting in his official capacity as prosecutor. If any particular class of interests is placed specifically under his tutelage, with a direction to guard them by the appropriate legal proceedings, suits instituted in the fulfilment of the duty thus assigned to the functionary are of course instituted in his official capacity. A similar remark applies to criminal proceedings. A prosecution by a functionary is official when in carrying it on he is discharging a duty expressly or impliedly assigned to him by law. If the duty of prosecuting in any particular case is not assigned to an officer as such, the consent or the order of his superior will not make the act an official one, which in its nature is not so, as lying outside his official functions. Such an order may, however, be most important on the question of malice, *i. e.*, a conscious violation of the law to the prejudice of the plaintiff (Broom's Legal Maxims, p. 311). It may also be important on the question of reasonable cause, and it is to be borne in mind that a plaintiff suing for malicious prosecution has to establish that the defendant had no reasonable cause for the steps taken by him against the plaintiff.

In the present case it seems that the prosecution complained of was instituted under the order of the defendant's superior; but that, however important, is not conclusive, as two officers of different rank might conspire to injure an innocent person. In

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

(2) Printed Judgments for 1875, p. 40.

(3) I. L. R., 11 Bom., 370.

such a case each would be responsible for the wrong. It is not likely that such a case would frequently arise, but when it does, no one could say that the conspiracy was an act in the discharge of a public duty. Nor could individual malice be so protected under the English system of law. The allegation of an official justification must be made out by the individual sued as a private person, and it must amount to more than a mere pretext or colour, as good faith is required in the discharge of all public functions that affect the persons or possessions of subjects of the Crown.

For these reasons, we must hold that the defendant, sued as a private person for an alleged wrong to the plaintiff, was rightly sued in the Court of the Subordinate Judge. If the plaintiff has failed to make out the essential points of his case, the District Judge should decide accordingly; but we must reverse his order for giving back the plaint, and direct him to dispose of the appeal on its merits. Costs of this appeal to abide the event.

Order reversed and case sent back.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

JIVAN BHA'GA, (ORIGINAL DECREE-HOLDER), APPELLANT, *v.* HIRA' BHA'IJI, (ORIGINAL JUDGMENT-DEBTOR), RESPONDENT.*

1887. *June* 28.

Civil Procedure Code (Act XIV of 1882*), Sec.* 266 *(c)—Building site—Agriculturist bhágdár—Bhágdári Act (Bom. Act V of* 1862*)—Decree—Execution against bhág.*

A having obtained a decree against B, who was a *bhágdár*, attached his *bhág* in execution, including the *gabhán* or site upon which B.'s house was built. B. applied to have the attachment removed from the *gabhán*, on the ground that he was an agriculturist, and that, therefore, the *gabhán* of his house was protected from attachment by clause (c) of section 266 of the Civil Procedure Code (Act XIV of 1882).

Held, that the *gabhán* was subject to attachment, and was not protected by the above clause. B. did not hold as an agriculturist. He could not have occupied the house, except as a *bhágdár*, and it was as part of a *bhág* that the site was attached. The protection of section 266, clause (c), was intended for agriculturists in the strictest sense, and for agriculturists in that sole character.

* Second Appeal, No. 37 of 1887.