1897.

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would have been, I think, technically more correct if it had dismissed the suit with costs.

Appeal dismissed with costs.

Attorneys for the appellants:—Messrs. *Mansuklal, Damodar and Jamsetji.*

Attorney for the respondent:—Mr. *K. J. Mantri.*

APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Fulton.

1896.
March 30.

HANMANT ANYABA (ORIGINAL DEFENDANT), APPELLANT, *v.* RAJMAL MANIKCHAND (ORIGINAL PLAINTIFF), RESPONDENT.*

Jurisdiction—Money lent to public officer—Money lent to him in his official capacity—Jurisdiction of Subordinate Judge—Act XIV of 1869, *Sec.* 32.

The plaintiff had contracted to supply materials requisite for a public building. The defendant was the supervisor, Public Works Department, in charge of the work. From time to time defendant borrowed money from the plaintiff, and (*inter alia*) four sums amounting to Rs. 385 which he paid as wages to labourers working under him. It was not proved, however, that he had borrowed the moneys as supervisor, and the defendant did not plead that he borrowed them in his official capacity.

Held, that inasmuch as a Public Works supervisor has not usually authority to borrow money for the purpose of the work of which he may be in charge, or in any way to pledge the credit of Government, the mere statement of the defendant when he borrowed the moneys that he wanted them to pay the labourers was not under the circumstances enough to show that the defendant borrowed them in his official capacity, and that the Subordinate Judge had authority to entertain the suit in respect of them.

In claims arising out of contracts the same test must be applied to determine the question of jurisdiction as in those having their origin in tort, *viz.*, was the loan contracted by the defendant in his official capacity?

SECOND appeal from the decree of A. Steward, District Judge of Ahmednagar.

The plaintiff sued to recover certain sums of money lent by him to the defendant.

* Cross Second Appeals, Nos. 60 and 100 of 1895.

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The plaintiff was the contractor for the building of the Mámlatdár's kacheri at Ráhuri, and the defendant was the Public Works supervisor employed on the work.

The defendant pleaded that he had lodged Rs. 521-14 with the plaintiff and had drawn on this sum as he required it by *chitties* (cheques) on the plaintiff; that if he had overdrawn at all he had not done so beyond the amount of Rs. 55, which he was willing to pay to the plaintiff.

The Subordinate Judge passed a decree for the plaintiff for Rs. 524-13-6, finding that the defendant had repaid the sum of Rs. 887-9-0.

The District Judge on appeal varied the decree by awarding the plaintiff Rs. 1,027-6-6. He, however, disallowed an item of Rs. 385 claimed by the plaintiff, holding that this sum, which had been lent to the defendant for the purpose of paying the labourers employed on the kacheri, had been lent to the defendant in his official capacity, and that as regards it, the suit was one against the defendant in his official capacity which under section 32 of Act XIV of 1869 the Subordinate Judge had no jurisdiction to entertain.

Both parties appealed.

Daji A. Khare for the appellant (defendant).

Gangaram B. Rele for the respondent (plaintiff).

FARRAN, C. J.:—The District Judge in this case has disallowed Rs. 385 out of the plaintiff's claim on the ground that the Subordinate Judge was incompetent, having regard to section 32 of Act XIV of 1869, to entertain the suit in so far as it included that sum. He held, as to it, that the suit was against the defendant in his "official capacity."

The plaintiff had contracted to supply the wood-work and stones requisite for the building of the Mámlatdár's kacheri at Ráhuri. The defendant was the supervisor, Public Works Department, in charge of the work. The defendant appears to have constituted the plaintiff as his banker or savkár and to have borrowed several sums from him in respect of which the plaintiff opened an account or "kháta" with him in the plaintiff's books.

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Amongst the sums so borrowed are four items making up the above sum of Rs. 385, and the question is whether the defendant borrowed them in his "official capacity."

No cases have been brought to our notice, nor do we know of any in which this question has arisen in connection with a claim arising out of contract; but we think that the same test must be applied to such a claim as to one having its origin in tort, *viz.*, was the loan contracted by the defendant in his official capacity? See *William Allen* v. *Bai Shri Dariaba*[1]. In considering that question it must be borne in mind that a Public Works supervisor has not usually authority to borrow money for the purpose of the works of which he may be in charge, or in any way to pledge the credit of Government. That being so, in order to deprive the Subordinate Judge of jurisdiction it must, we think, be shown that the defendant purported at least to borrow the money as supervisor; that he affected to enter into the contract on behalf of his department. If he did not, but only intended and affected to pledge his own private credit, it is difficult to understand how he can be said to have contracted the loan in his official capacity.

Now in the present case the parties made no distinction between the sums in question and the other moneys which the defendant borrowed from the plaintiff. The defendant did not sign the orders for the money as supervisor, but simply in his own name. The sums were entered to his debit in his own private account, and when the plaintiff sued for them, he sued for them and the rest of the items upon the same footing. The defendant did not himself plead that he borrowed them officially. The parties evidently treated these as private borrowings. In the course of the evidence it came out that the defendant, when he borrowed the sums in question, wanted them to pay labourers. Why he so needed them is not shown. Whether he had received and spent the money to pay the labourers, or whether he wanted to pay them before he received official moneys for that purpose, we know not. The defence was not raised in the Court of first instance, so no evidence was given upon the question. All we

(1) I. L. R., 21 Bom., 751.

know is that the defendant stated, when he borrowed the moneys, that he wanted them to pay labourers.

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Having regard to the other circumstances which we have referred to, we consider that that is not enough to show that the defendant borrowed these sums in his official capacity and that the Subordinate Judge had authority to entertain the suit in respect of them. We must, therefore, allow the cross appeal and vary the decree of the District Judge by awarding to the plaintiff Rs. 385 in addition to the sum decreed, or Rs. 1,412-6-6 in all. We do not think that we can, in second appeal, award interest between the date of suit and decree. The District Judge was not asked to do it, nor is this made a ground of appeal. We have already intimated our opinion that the defendant's appeal cannot be sustained. The defendant must pay the costs throughout on the amount awarded.

Decree varied.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

RANCHHOD HIRABHAI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), RESPONDENT.*

1896. *March* 31.

Civil Procedure Code (*Act XIV of* 1882), *Secs.* 59, 138, 139—*Production of documents—Bombay Revenue Jurisdiction Act* (*X of* 1876), *Sec.* 11—*Practice—Procedure.*

Under section 11 of the Bombay Revenue Jurisdiction Act (X of 1876) in a suit to which that Act applies, the Court, before taking evidence on the merits, should require the plaintiff to prove first of all that he has, previously to bringing the suit, "presented all such appeals allowed by the law for the time being in force as within the period of limitation allowed for bringing such suit it was possible to present."

Section 138 of the Civil Procedure Code (Act XIV of 1882) is enacted to prevent fraud by the late production of suspicious documents, and not to shut out formal evidence beyond suspicion, such as certified copies of public documents like records of Government.

Syed Ikram v. *Ram Lochun* (1) followed.

* Appeal, No. 66 of 1895.

(1) 23 Cal. W. R., 29.

1896.

RANCHHOD v. THE SECRETARY OF STATE FOR INDIA.

APPEAL from the decision of R. A. L. Moore, Assistant Judge, F. P., of Surat at Broach.

Plaintiffs sued to recover possession of certain *gabhan* lands, alleging that they had been wrongfully dispossessed of the same by the Assistant Collector of Broach. They also claimed damages for loss caused to them by the superstructure on the said lands having been pulled down.

The defendant pleaded (*inter alia*) that under section 11 of Act X of 1876[1] the suit could not be entertained, as the plaintiffs had not presented all such appeals to the Revenue Courts as were allowed to him by law.

The first hearing of the case took place on 25th March, 1893. The issues were framed on 31st July, 1893; and the case was adjourned to the 12th March, 1894, when some evidence was taken; but the plaintiffs made no attempt to prove that they had exhausted all the rights of appeal in the Revenue Courts until the 19th March, 1895, when they tendered in evidence two papers purporting to be answers to appeals made by them to the Collector of Broach and the Secretary to Government, respectively.

The Assistant Judge under sections 138 and 139 of the Civil Procedure Code (Act XIV of 1882) refused to admit the documents because they had been produced at so late a stage of the suit.

He then dismissed the suit, holding it to be premature, the plaintiffs not having exhausted all rights of appeal to the Revenue authorities.

From this decision plaintiffs appealed to the High Court.

Gokaldas Kahandas for the appellants (plaintiffs):—The objection that the plaintiff had not exhausted all his remedies in the Revenue Courts was taken by the defendant in his written statement. The burden of proving this allegation was, therefore, upon

(1) Section 11 of Act X of 1876.—No civil Court shall entertain any suit against Government on account of any act or omission of any Revenue officer unless the plaintiff first proves that previously to bringing his suit he has presented all such appeals allowed by the law for the time being in force, as within the period of limitation allowed for bringing such suit, it was possible to present.

him. The plaintiff however, produced the documents received from the Revenue authorities. The Assistant Judge ought to have admitted them in evidence. They did not take the defendant by surprise. These documents had not been called for. Section 138 of the Code of Civil Procedure (Act XIV of 1882) does not apply; see *Mahbub* v. *Patasu* [1]. That section is merely intended to prevent surprise, or fraud, or forgery: see *Syed Ikram* v. *Ram Lochun*[2].

Ráo Sáheb *Vasudev J. Kirtikar*, Government Pleader, for the respondent-defendant.—Under section 138 of the Civil Procedure Code a plaintiff ought to be ready with the whole of his evidence at the first hearing. The cases of *Mahbub* v. *Patasu*[1] and *Minakshi* v. *Velu*[3] do not apply. The plaintiffs knew what he had to prove. The issues were fixed on 31st July, 1893, and fifteen hearings took place subsequently, at which evidence on the merits was recorded. Section 59 of the Civil Procedure Code precludes the plaintiff from producing new evidence.

JARDINE, J.:—There have not been many decisions on section 138 of the Code of Civil Procedure: but we follow *Syed Ikram* v. *Ram Lochun*[2] in believing that it was enacted to prevent fraud by the late production of suspicious documents and not to shut out formal evidence beyond suspicion, such as certified copies of public documents like records of Government. The Court below has overlooked the excuse given by the appellans, *viz.*, that the Court had not called on them to produce the documents, which is supported by *Mahbub* v. *Patasu*[1] and *Minakshi* v. *Velu*[3]. The record does not show that any call was made.

As Act X of 1876 was held to apply, the Court ought, before taking evidence on the merits, to have required the plaintiffs (appellants) to prove first of all that they had, previously to bringing the suit, "presented all such appeals allowed by the law for the time being in force, as within the period of limitation allowed for bringing such suit it was possible to present." Otherwise, as section 11 says, "no civil Court shall entertain any suit against

(1) 1 Ben. L. R., 120. (2) 23 Cal. W. R., 29.
(3) I. L. R., 8 Mad., 373.

1896.

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Government, &c." By taking evidence on the merits without dealing with this question of jurisdiction raised in the 7th issue the plaintiffs were likely to be misled as to what section 59 of the Code requires. We refrain from deciding whether the requisite appeals had been presented and whether an appeal presented after the period of limitation, therefore, is outside of the words "allowed by the law." The facts must first be found.

The Court for these reasons, and considering that, in such matters of procedure as section 138 deals with, it should rather lean to an interpretation which advances justice than to a contrary interpretation, reverses the decree of the Assistant Judge and remands the suit to his Court for disposal according to law: costs to abide the result.

Suit remanded.

APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Fulton.

1896.
April 8.

TATIA (ORIGINAL PLAINTIFF), APPELLANT, *v.* BABAJI (ORIGINAL DEFENDANT), RESPONDENT.*

Vendor and purchaser—Executed deed of sale set aside for want of consideration—Contract Act (IX of 1872), Sec. 25.

On the 18th November, 1892, A executed to B a deed of sale of certain land. The deed was duly registered and it recited that the consideration money, Rs. 90, had been duly paid. B got into possession of the land. A subsequently brought a suit to set aside the deed of sale, and to recover possession, alleging that he had been induced to execute the deed when incapacitated from illness, and that the consideration money had not been paid. Both the lower Courts found that the consideration money had not been paid. The lower appellate Court dismissed the suit, holding that A's remedy was to sue for the consideration money if it was unpaid, and that he had a lien on the land for the amount, but that he could not set aside the deed.

Held, that the deed should be set aside and the plaintiff should recover possession.

Per FULTON, J.:—The sale was void for want of consideration. Section 25 of the Contract Act (IX of 1872) applied to the transaction.

Trimalrav Raghavendra v. *The Municipal Commissioners of Hubli*(1) distinguished.

* Second Appeal, No. 611 of 1895.

(1) I. L. R., 3 Bom., 172.