

We are unable, therefore, to follow the Calcutta case relied on by the lower Court. That case, moreover, is opposed to *Taponidi Hordanund Bharati v. Mathura Lall Bhagat*⁽¹⁾ and *Sivaráma v. Subrámanya*⁽²⁾. The suit, we think, falls under article 62 of the schedule. Cf. *Moses v. Macfarlane*⁽³⁾. The suit was brought within three years from the time of the receipt of the assets by the defendant, and was, therefore, within time.

We reverse the decree of the lower appellate Court and remand the appeal for a rehearing on the merits. Costs to abide the result.

Decree reversed and case remanded.

(1) I. L. R., 12 Calc., 499.

(2) I. L. R., 9 Mad., 57.

(3) 2 Burr., 1005.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

SWA'MIRAYA'CHÁRYA, PLAINTIFF, v. THE COLLECTOR OF
DHA'RWA'R AND ANOTHER, DEFENDANTS.*

1890.

December 18.

Jurisdiction—Suit against Collector—Act done in official capacity.

The plaintiff sued the Collector of Dhárwár and his *chitnis* for having destroyed certain certificates of efficiency which had been given to him by Mámlatdárs in whose service he had been employed. The defendants pleaded that the certificates had been destroyed, because they were not issued by the Mámlatdárs in proper form.

Held, that the act of the defendants was an act done by them in their official capacity, and that the Subordinate Judge could not entertain the suit.

THIS was a reference made to the High Court, under section 617 of the Code of Civil Procedure, by Ráv Bahádur Káshináth Bákrishna Maráthe, First Class Subordinate Judge of Dhárwár.

The plaintiff sought to recover Rs. 100 as damages from the Collector of Dhárwár and his *chitnis*, on the ground that they had wrongfully destroyed the testimonials of character given to him by three Mámlatdárs.

* Civil Reference, No. 23 of 1890.

1890.

SWA'MIRAY-
A'CHA'RYA
v.
THE
COLLECTOR
OF
DHÁRWÁR.

In his plaint he stated that he had obtained the said testimonials for services rendered to Government; and that the defendant had informed him that the testimonials had been destroyed, because they had not been issued by the Mámlatdárs in proper form.

The plaint was originally presented to the District Judge of Dhárwár as one against Government servants, but the District Judge, holding that the plaint complained of the defendants' conduct as private individuals and not as officials, returned the plaint for presentation to the Court of the Subordinate Judge.

The Subordinate Judge was of opinion that the action was against the defendants in their official capacity, and that, therefore, having regard to section 15 of Act X of 1876⁽¹⁾, he had no jurisdiction to entertain the suit. Consequently he referred the question to the High Court.

In his reference the Subordinate Judge remarked: "On looking at the official order I find that the Collector passes an opinion that the plaintiff's testimonials were not given him in a proper manner by the three Mámlatdárs concerned, and they were, therefore, destroyed. The order for destruction was, therefore, very probably passed after due consideration of the propriety of giving testimonials into the hands of persons by their official superiors instead of recording them in a character book kept for the purpose. The Dhárwár Collector probably thought that the Mámlatdárs under him had no right to pass testimonials to a person whose connection with the service was severed from time to time. The Collector exercised, I believe, official discretion in the matter, and he and his *chitnis*, who could not possibly be connected with the destruction of the testimonials except in his official capacity and under orders of the Collector, cannot be held responsible as private gentlemen. I do not think, therefore, that the destruction of the testimonials

(1)Section 15:—"For section thirty-two of the Bombay Civil Courts Act, No. XIV of 1869, the following shall be substituted (namely): '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 nineteen) such suit shall be instituted.'"

was a private act of the defendants. If they are anywise responsible, they are responsible in their official capacity, and the suit must be taken to the District Court. I am, however, thrown into a doubt about the matter by the District Judge's order endorsed on the plaint. The following question is, therefore, submitted for an authoritative opinion:—

“Whether the Subordinate Judge's Court at Dhárwár can entertain the suit?”

SARGENT, C. J.:—The Collector destroyed the certificates of efficiency, because they had not been issued to the plaintiff by the Mámlatdárs in proper form. In doing so, whether rightly or wrongly, he clearly acted in his official capacity. We must, therefore, answer the question in the negative.

Order accordingly.

ORIGINAL CIVIL.

Before Mr. Justice Farran.

BA'I MA'MUBA'I, (PLAINTIFF), v. DOSSA' MORA'RJI
AND OTHERS, DEFENDANTS.*

1890.

November 25.

Will—Construction—Gift to two persons for life jointly—Survivorship—Gift to a daughter and her children—Rule in Tágore Case—Power given to a daughter if she had no children to dispose of property bequeathed by will—Effect of such power—Bequest for house expenses—Bequest by testator of his wife's ornaments—Election.

J., a Hindu inhabitant of Bombay, died in November, 1869, leaving a will, dated October, 1869. He left a widow (Motivahu) and one child, the plaintiff Mámubái, then about fourteen years of age. She had then been married for two years, but up to the time of this suit she had had no children. By his will the testator directed that his immoveable property in Bombay should be formed into a trust and that the trustees were to collect the income thereof. By the fourteenth and fifteenth clauses of his will he directed that out of the trust-fund Rs. 50 per month were to be paid both to his wife and daughter for their personal expenses. In the 7th clause he directed as follows: “After deducting expenses * * * money is to be paid out of the net income, whatever it may amount to, for the personal expenses of my wife Motivahu and my daughter Mámú, and for the children of my daughter Mámú after her death agreeably to the fourteenth and fifteenth clauses of this will; and after paying the same whatever income may remain is to be paid for the purposes of my wife Motivahu and my daughter Mámú and her children in such manner as my trustees may think proper.” The

*Suit No. 57 of 1878.