

PRIVY COUNCIL

Revati Mohan Das

Vs.

Jatindra Mohan Ghosh

P.C.A.No.90 of 1932

(Lords Macmillan Wright and Sir George Lowndes JJ.)

30.01.1934

JUDGMENT

SIR GEORGE LOWNDES J.

1. The appellant in this case is the mortgagee under a mortgage for Rs. 30,000 and interest, dated 19th January 1916, upon an estate known as Taluk Raj Narain Sen. The mortgage was executed by one Raj Mohan Guha, who was then the common manager of the estate, appointed under section 95, Ben. Ten. Act, 1885. It was duly sanctioned by the local Court, and there is now no dispute as to its validity or as to the amount due under it. The mortgage debt was repayable in January 1931. Raj Mohan Guha was then dead, and one Harihar Ghosh had been appointed in his place, but the affairs of the estate being involved, he was unable to redeem the security, though he seems to have made some payments on account. He died in September 1926, and his son, respondent 1, was appointed manager in his place. On 17th December of the same year the appellant instituted a suit on his mortgage in the Court of the Subordinate Judge of Dacca, claiming the usual relief. The defendants to the suit were the manager and a large body of persons interested in the estate. Their Lordships note that the repeated recital of their names at length occupies about one quarter of the printed record, an expense which they think might well have been avoided.

2. The Subordinate Judge on 28th November 1927, passed a preliminary mortgage decree in favour of the appellant, and on 4th January 1928. a final decree for sale of the estate properties in discharge of the mortgage debt. The manager and one of the other defendants who is respondent 3 before the Board appealed to the High Court. The two appeals were heard together, and on 31st August 1931, the decrees of the Subordinate Judge were set aside and the suit dismissed, the ground of reversal being

that the manager was entitled to two months' previous notice of the suit under section 80, Civil Procedure Code, and no such notice had been given. The mortgagee plaintiff has now appealed to His Majesty in Council, contending that the section referred to has no application to his suit and that no notice was necessary. The manager alone has appeared in support of the High Court decree, and the only question raised is that of notice. Section 80, Civil Procedure Code, is as follows:

"80. No suit shall be instituted against the Secretary of State for India in Council, or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the district, and, in the case of a public officer, delivered to him or left at this office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left."

3. Assuming for the purposes of this appeal, that the common manager of an estate appointed under section 95, Ben. Ten. Act, is a public officer within the meaning of the section—a proposition which is disputed by the appellant—their Lordships think that the decision of the High Court was wrong, and that no notice of suit was required. In the case of a suit against a public officer it is only where the plaintiff complains of some act purporting to have been done by him in his official capacity that notice is enjoined. Counsel for respondent 1 contends that this condition was satisfied by the execution of the mortgage, or, alternatively, by the failure to pay off the mortgage. In their Lordships' opinion neither branch of this contention is sufficient to bring the section into play in the present case. On the first branch it is sufficient to point out that the mortgage was not executed by respondent 1, but by a former manager, and that the appellant does not complain in any way of the execution of the mortgage. This contention does not seem to have been raised in the High Court.

4. On the alternative contention their Lordships are unable to hold that non-payment by respondent 1 is an "act purporting to be done by" the manager "in his official capacity." Under the general definitions contained in Section 3, General Clauses Act, 1857, an "act" might include an illegal omission, but there clearly was no illegal omission in the present case. It is also difficult to see how mere omission to pay either interest or principal could be an act purporting to be done by the manager in his

official capacity. The mortgage imposed no personal liability upon the manager, but merely provided that if payment was not made the mortgagee would be entitled to realise his dues by sale through the Court, and this was all that the appellant sought by his suit. The manager for the time being no doubt had an option to pay in order to save the sale, but failure to exercise an option is not in any sense a breach of duty. The appellant made no claim against respondent 1 personally. He was there only as representing the estate of which the sale was sought. In their Lordships' opinion, such a suit is not within the ambit of Section 80 and no notice of suit was required. The learned Subordinate Judge held that the section had no application to suits in contract, and this dictum was rightly repelled by Mukerji, J., who delivered the judgment of the High Court. Having regard to the decision of this Board in, *Bhagchand v. Secy. of State* their Lordships think that no such distinction is possible. The learned High Court Judges, however, seem to have regarded the suit as based on a breach of contract, which they thought would be an "act" within the contemplation of the section. Their Lordships do not suggest that a claim based upon a breach of contract by a public officer may not in many cases be sufficient to entitle him to notice under the section, but they are unable for the reasons already given, to agree with the learned Judges that the omission by respondent 1 to pay off the mortgage was such a breach.

5. It is unnecessary for their Lordships to discuss the other questions dealt with in the judgments of the Courts below, nor do they think that anything would be gained by a reference to the numerous English cases which were there cited. They were decided under various Acts passed in this country for the protection of public authorities, which are not in pari materia with the section of the Indian Code. For the reasons given their Lordships think that the appeal should be allowed; that the two decrees of the High Court dated 31st August 1931, should be set aside, and the two decrees of the Subordinate Judges, dated respectively 28th November 1927, and 4th January 1928, restored; and they will humbly advise His Majesty accordingly. The costs of the appellant in the High Court and before the Board must be paid by respondents 1 and 3.

Appeal allowed.

Cases Referred.

AIR 1927 PC 176=104 IC 257=54 IA 338 =51 Bom. 725 PC)