CALCUTTA HIGH COURT

Prasaddas Sen

Vs.

K.S. Bonnerjee

(Rankin, C.J.)

29.11.1929

JUDGMENT

Rankin, C.J.

1. The plaintiffs in this suit are three in number Prasaddas Sen,. Santoshlal Sen and Hrishikesh Sen. They bring their suit against Kamalkrishna. Shelley Bonnerjee, Official Receiver of this Court, and their case is that in Suit No. 923 of 1919, by a consent decree,, dated 8th July 1920, the Official Receiver was appointed a receiver of certain immovable properties belonging to the defendants in that suit, including the promises known as No. 1, Shama Bai Lane, and; that pursuant to an order, dated 10th September 1920, the Official Receiver took: possession of the said premises under the consent decree. The defendants in the previous suit were a firm trading under the name or style of B. N. Sen & Brothers, in which firm the plaintiffs and1. Bholanath Sen, defendant 2 in the present suit, were partners.

2. The plaintiffs' case is that the premises; No. 1, Shama Bai Lane, were let to one Ramnarayan Jalan on a monthly rent of L 4-01 and they allege that the Official Receiver willfully neglected and defaulted in realizing regularly the rents of the said premises and took no steps for the collection thereof, as a result of which considerable loss and damage-has been caused to the plaintiffs.

3. In particular they say that a sum-amounting to L 16,660, being arrears of rent due from the said Ramnarayan Jalan, has been lost and has become irrecoverable by the willful default and gross negligence of the defendant in failing to collect the same as receiver. The plaintiffs have joined Bholanath Sen as a defendant to the present suit as he has refused to join them as a plaintiff. The plaintiffs ask for a decree against the Official Receiver for L 16,660 and also for an order that he do render accounts on the footing of willful default and that judgment may be given against him for such sum as may be found due upon such account. The suit has been dismissed by the learned trial Judge on the ground that, under Section 80, Civil Procedure Code, it was obligatory on the plaintiffs to give notice as therein prescribed.

4. The plaint did not originally contain an allegation that any such notice of action had been given, but it was amended by an order, dated 28th June 1927 by the addition of a statement that notice as contemplated by the section was duly served upon the Official Receiver on 18th May 1925. The defense under Section 80 was not taken originally in the written statement, and it appears that leave was given to amend the plaint, by including the allegation as to notice having been given, as a result of the Official Receiver's desire to amend his written statement by taking an objection to the suit on the ground of want of notice. The plaint was filed on 4th February 1927, the Official Receiver's written statement was filed on 24th February 1927. On 16t'h June 1927, the Official Receiver took out a summons for leave to amend the written statement, and on 18th June 1927 the plaintiffs took out a summons for leave to amend their plaint. It is reasonably clear that no question of waiver or estoppel arises to prevent the Official Receiver from making good the plaint as to want of notice.

5. Three questions require to be considered. The first is whether the Official Receiver, acting under an order appointing him. to be receiver of a particular estate, is a public officer and this question has to be decided upon a consideration of the definition of "public officer" given in Clause 17, Section 2 of the Code. The second question is whether neglect of default in realizing the rents, issues and profits of properties in respect of which the Official Receiver has been appointed a receiver by a decree of this Court comes within the words any act purporting to be done by such public officer in his official capacity.

6. If these two questions are answered in the affirmative, then the last question is whether or not the letter of 18th May 1925 is a notice sufficiently complying with the requirements of the section. It is not disputed that the letter in question was sent and received. The judgment of the learned Judge deals with the third question only.

7. At one stage of the case objection was taken that leave to sue had not been obtained from the Court, which appointed defendant 1 to be a receiver. This objection however has been expressly abandoned on his part both before the trial Judge and before us.

8. On the first point, the question is whether defendant 1 is an officer of a Court of justice whose duty it is to take charge or dispose of any property, or a person especially authorized by a Court of justice to perform such duty, or is an officer in the service or pay of Government or remunerated by fees or commission for the performance of any public duty. In my opinion the Official Receiver appointed to act as receiver in any particular case is a public officer both within Clause (d) and also within Clause (h) of the definition of " public officer " in Section 2 (17) of the Code. This Court, though it is not obliged when appointing a receiver to appoint any particular persons, has long had an official with an office and staff, who executes receiverships when appointed thereto by the Court. Rule 9, Ch. 21, of the rules of the High Court on its Original Side refers to this official as the Court Receiver. He is generally called the Official

Receiver. For his services, fees are charged under the rules. These fees are, however credited to Government which remunerates the officer himself by a salary and pays for his staff and office expenses. The Official Receiver is appointed by the Chief Justice as an officer of the Court under the powers conferred in that behalf by the Letters Patent of this Court. In *Skippers and Co. Ltd. v. E.V. David*[1], the Official Receiver was held to be a public officer. The next question is whether the present suit is instituted against the Official Receiver in respect of any act purporting to be done by such public officer in his official capacity.

[1] AIR 1927 All 182

9. The allegation against him is that of neglect and wilful default in the discharge of his official duty, and I am unable to see that this claim can be said to be outside the scope of Section 80. Two objections may however be noted. It may be said first that default or neglect or any form of mere nonfeasance is not ' an act purporting to be done in this official capacity," It may also be said that what is charged against the Official Receiver is not a tort and that there is some authority to the effect that the section is only concerned with actions in tort. In my judgment neither of these objections can be sustained. Upon the question of nonfeasance, it is true that this is a matter which has constantly been considered by Courts in England when applying the provisions of particular statutes, which provide for public officers the protection of a requirement as to notice of action. In *Davis v. Curling*[2] the words of the Statute (5 and 6 Will. 4. c. 50) were " any act done in pursuance of or under the authority of" the statute, but it was held that notice was necessary before a surveyor of highways could be sued for damages for injuries occasioned to the plaintiff by his failure to remove a heap of gravel from the road. Again in *Jolliffe v. The Wallasey Local Board*[3] the Board had neglected to cause a proper and sufficient buoy to be placed in the river at the spot, where they had cast an anchor for the purpose of securing a landing stage. This case was decided under Section 139, Public Health Act of 1848, of which the words were " for anything done or intended to be done." 'The opinion of Brett, J. was to the effect that, where the plaintiff was suing in tort, nonfeasance was to be considered as an act done within such clauses as these; and Keating, J. said:

> It has been suggested that protection is not intended to be given by clauses of this description in cases of nonfeasance. But that is not so; it is clear from the cases of *Davis v. Curling*, *Newton v. Ellis*[4] *Wilson v. Mayor and Corporation of Halifax*[5] and *Selmes v. Judge*[6] all of which seem to me to establish that a case of what appears to be nonfeasance may be within the protection of the Act.

10. The Judicial Committee of the Privy Council in *Queen v. Williams*[7] referred to Jolliffe's case [1873] 9 C. P. 62 with approval as holding that an omission to do something which ought to be done in order to be the complete performance of a duty imposed upon a public body under an Act of Parliament or the continuing to leave any such duty unperformed amounts to "an act done or intended to be done" within the meaning of a clause requiring a notice of action.

11. This is indeed what was laid down by Kelly C. B. in *Wilson v. Mayor and Corporation of*

Halifax[8] Now the words in the Indian statute (Section 80 of the Code), are any "act purporting to be done in his official capacity." But these words have to be read with the second definition given in Clause 3, General Clauses Act (10 of 1897), which provides as one of the general definitions as follows:

> "Act" as used with reference to an offence or a civil wrong shall include a series of acts, and words which refer to acts done and also to illegal omissions.

12. In strictness there is no doubt a difficulty in seeing how an omission can be said to purport to be done in an official capacity. There is an equal difficulty however in seeing

[2][1845] 8 Q.B. 286 [4][1855] 5 E. & B. 115 [6][1871] 6 Q.B. 724
[3][1873] 9 C. P. 62 [5][1868] 3 Ex. 114 [7][1884] 9 A. C. 418
[8][1868] 3 Ex. 114

how an ordinary neglect or default or 'omission to discharge completely a public duty can be said to be '"intended to be done" under the authority of a statute. The English cases I have referred to show that the English Courts have never regarded the latter difficulty as formidable and having regard to the language of the General Clauses Act namely, 'words which refer to acts done extend also to illegal omissions," I am not of opinion that this case' can be held to be outside the scope of Section 80 of the Code upon the ground that the cause of action is neglect or non-feasance. The plaintiffs are complaining of a failure to use reasonable diligence in doing the very thing which the Official Receiver had a public duty to do, namely to realize the rents, issues and profits of property over which he was appointed a receiver.

13. The second objection is that Section 80 applies only to actions in tort and that the present suit is not strictly speaking, an action in tort. It is no doubt broadly speaking true that such a section as this is not intended to apply to actions ex contractu and there are other classes of actions 'no doubt which do not come within the meaning of the expression in respect of any act purporting to be done by such public officer in his official capacity.

14. Public bodies in the course of their duty frequently have occasion to enter into contracts e. g., for the erection of buildings, wharfs etc., and if an action is brought for breach of such contract it will no doubt as a rule be outside the scope of this section. In *Sharpington v. Fulham Guardians*[8] the Fulham Guardians employed a builder to alter an old mansion house so as to make it into a receiving house for children of paupers. The builder claimed certain additional sums beyond the original contract amount. The case arose under the Public Authorities Protection Act". 1893, which provided a special period of limitation for proceedings against any person "for any act done in pursuance, etc., of any Act of Parliament or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such act, duty or authority."

15. In holding that the Act did not apply to the case Farwell, J., as he then was, after referring to certain cases in which the Act had been held to apply said:

> The present case seems to me quite different. The public duty which is here cast upon the guardians is to supply a receiving house for poor children; a breach or negligent performance of that duty would be an injury to the children or possibly to the public, who might be injured by finding the children on the highway. In order to carry out this duty they have power to build a house or alter a house and they accordingly entered into a private contract. It is a breach of this private contract that is complained of in this action. It is not a complaint by a number of children or by a member of the public in respect of a public duty. It is a complaint by a private individual in respect of a private injury done to him. The only way in which public duty comes in at all is, as I have pointed out, that if it were not for a public duty any such contract would be ultra vires. But that would apply to every contract.

16. With this we may compare what Baron Parke said in another case, *Palmer v.G.J. Ry.Co*[9].

[8][1904] 2 Ch. 449 [9][1839] 4 M. & W. 749

> If the action was brought against the railway company for the omission of some duties imposed upon them by the. Act, then notice would be required.

17. We are not here and now concerned to inquire whether the plaintiffs have a good cause of action. If they have, it is on the principle that this public officer has committed a breach of his official duty, which includes a specific duty towards the claimants, and is either liable therefore in a common law action for damages or can be called upon to make redress therefore in a Court of equity. This in my opinion makes the section applicable.

18. There remains the question whether the letter of 18th May 1925 is a sufficient compliance with the section. It seems impossible that that letter should have been written with the section in view, but if it contains the elements required by the section it is none the worse for that. At the time it was written, it would not even appear that the plaintiffs had made up their minds to bring a suit, as it seems that in August 1926, they endeavored to obtain-redress by an application in the previous suit to reopen the receiver's accounts. I am inclined to think that the section contemplates a notice of action in the English sense, since it requires a statement of the name, description and place of residence of the plaintiff; but I do not propose to proceed upon this ground. So far as the plaintiffs are "concerned the name of the client is given in the letter as Messrs. B. N. Sen & Bros., this being the name of the partnership firm which was defendant in the previous suit. The letter in no way contains either a description or anything by way of a statement of place of residence. On behalf of the plaintiffs the language of Pollock, C. B., in *Jones v. Nicholls*[10] has been pressed upon us that it is necessary to import a little common-sense into notices of this kind, and in a case in which it is reasonably clear that the defendant would have no real difficulty ' in approaching the plaintiff for the purpose of making a tender of amends, or otherwise negotiating with him, it is open to the Court, where a, name, or description, or place of residence is given, to take a broad rather than a meticulous view as to the sufficiency of the particulars given under any of these heads. I trust however that I shall not depart altogether

from commonsense in holding that a notice which contains no description and no statement of place of residence, is not a compliance with the section. In my opinion, such a notice cannot be held to be sufficient upon the strength of evidence or suggestions that the defendant would have had little or no difficulty in finding out these matters for himself whether by reference to documents in his possession or by in-independent research. The fact that the letter in question is headed *Mitsui Bussan Kaisha v. B. N. Sen & Bros*[11]., does not seem to me to incorporate as part of this letter any document stating or intending to state the place of residence of the present plaintiffs at the date of the letter. In my opinion, this appeal must be dismissed with costs.

Buckland, J.

19. I agree.

[10][1844] 13 M. & W. 361
[11] Suit No. 923 of 1919