

APPELLATE CIVIL.

Before Mukerji and Mitter JJ.

JAGADISHCHANDRA DEO DHABAL DEB

v.

DEBENDRAPRASAD BAGCHI.*

1930

Aug. 21, 22, 26.

Receiver—Public Officer—Notice of suit—Notice of application to sue—Difference between the two—Notice, want of—Plaint, rejection of—Code of Civil Procedure (Act V of 1908), s. 80 ; O. XLI, r. 1, cl. (d) ; O. XLVIII, r. 2.

A receiver, appointed under Order XL, rule 1 of the Code of Civil Procedure and on whom the powers referred to in clause (d) of that rule have been conferred, is a public officer.

The word "especially" does not suggest that the appointment, spoken of in the definition must be for a particular class of duties and not duties of a like nature as regards a particular matter.

Notice of a suit is entirely different from notice of an application for leave to sue.

The words of section 80, as to how the notice is to be served, are also mandatory and not controlled by the provision contained in Order XLVIII, rule 2, which should be read as subject to the special procedure as to service contained in section 80 itself.

Seeing that section 80 of the Code itself provides that the plaint shall contain a statement as to the notice, it is the duty of the court to look into the plaint and, when, on the face of it, there is no averment as to service of the notice, the court should hold that the suit is one which could not be instituted and should reject the plaint, instead of going on with the suit.

FIRST APPEAL by the plaintiff.

The facts of the case out of which this appeal arose appear fully in the judgment under report herein.

H. D. Bose, Saratchandra Basak (Senior Government Pleader) and Narendrakrishna Basu for the appellant.

Brajlal Chakrabarti, Bijankumar Mukherji, Radhabinode Pal, Rupendrakumar Mitra, Rameshchandra Pal and Hiralal Ganguli for the respondent.

Cur. adv. vult.

*Appeal from Original Decree, No. 121 of 1930, against the decree of Probodhchandra Ray, Subordinate Judge of Midnapur, dated May 21, 1930.

MUKERJI AND MITTER JJ. The plaintiff, whose suit for accounts and compensation has been dismissed on the ground that the provision of section 80 of the Code of Civil Procedure has not been complied with, has preferred this appeal.

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On behalf of the appellant it has been urged in the first place that the defendant No. 1, the principal defendant, was not a public officer, and secondly that the provision contained in section 80 has been substantially complied with.

As regards the first contention, it may be said that there are several decisions, which have proceeded on the footing, that a receiver appointed under Order XL of the Code is a public officer, and no decision has been cited before us in which a different view has been taken. The words of the section 2, sub-section (17), in which "public officer" has been defined as meaning "every officer of a court of justice "whose duty it is as such officer * * * to take charge "or dispose of any property * * * and every person "especially authorized by a court of justice to perform "any of such duties" [clause (d)], in our opinion, sufficiently include a receiver appointed under Order XL, rule 1, Civil Procedure Code and on whom the powers referred to in clause (d) of that rule have been conferred. An unreported decision, in which a Division Bench of this Court expressed a doubt as to this matter, was cited before us, but the learned Judges expressly left the matter undecided. On the other hand, it would appear from the judgment appealed from that the appellant did not dispute before the court below that a receiver is a public officer within the meaning of the expression as defined in the Code. It was argued before us that the word "especially" occurring in the definition militates against this view, and that the word "especially" suggests that the appointment spoken of in the definition must be for a particular class of duties and not for duties of a like nature as regards a particular matter. We are unable to agree in this contention.

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For his second contention, the appellant relies upon the service on the defendant No. 1 of a notice of an application, which he made to this Court for leave to institute the suit. It has been urged that as all the particulars, which were subsequently embodied in the plaint, are to be found in that application, and that application contained all matters that have to be specified in a notice under section 80, the service of that notice was a substantial compliance with the provisions of that section. It is true that the object of a notice under section 80 seems to be to give the public officer an opportunity of investigating into the truth of the alleged cause of action and of making amends or settling the claim, if so advised. But even then, notice of a suit is entirely different from notice of an application for leave to sue. Their Lordships of the Judicial Committee have pointed out that "Section 80 is express, explicit and "mandatory and admits of no implication or "exception" [*Bhagchand Dagadusa v. Secretary of State for India in Council* (1)]. There is no reason why its provisions should not be strictly complied with. As no notice of the intended suit was served on the defendant No. 1, it is not necessary to consider whether the mode adopted for the service of the notice of the application for leave was one authorised by law. What was done as regards that other notice was that it was served on the son of the defendant No. 1. In our opinion, the words of section 80, as to how the notice is to be served, are also mandatory and not controlled by the provision contained in Order XLVIII, rule 2, which, in our judgment, should be read as subject to the special procedure as to service contained in section 80 itself.

The question that remains for consideration is whether, in the circumstances, the suit should have been dismissed or whether the plaint should not have been rejected. In the case of *Bachchu Singh v. The Secretary of State for India in Council* (2), it was

(1) (1927) I. L. R. 51 Bom. 725 ; (2) (1902) I. L. R. 25 All. 187.
L. R. 54 I. A. 338.

held that the proper course was to reject the plaint. There are, on the other hand, cases in which the suit was dismissed. Seeing that section 80 itself provides that the plaint shall contain a statement as to the notice, we think it was the duty of the court to look into the plaint, and when, on the face of it, there was no averment as to service of the notice, the court should have held that the suit was one which could not be instituted, and should have rejected the plaint, instead of going on with the suit. It may be mentioned here that though a large number of issues were framed, none except that as regards section 80 was decided, nor any evidence taken on any of the other issues. The remarks which the Judge below has made on the merits of the suit are all *obiter*.

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The result is that we dismiss the appeal, subject to the variation that, instead of affirming the decree dismissing the suit, we order that the plaint be rejected. The order for costs made in the decree of the court below will stand. The defendants respondents will get their costs in this appeal.

The costs will be divided equally among the different sets of respondents who appeared.

The cross-objection is not pressed and is dismissed without costs.

Appeal dismissed; decree varied.

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