APPEAL FROM ORIGINAL CIVIL.

Before Rankin C. J. and C. C. Ghose J.

THE CORPORATION OF CALCUTTA

v.

THE COMMISSIONERS FOR THE PORT OF CALCUTTA.*

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Feb. 5, 6 ; *March* 24 ; *April* 7.

Plaint—Procedure—Preliminary objection—Calcutta Port Act (Beng. III of 1890), s. 142.

Where the plaintiffs alleged that the defendants had wrongfully made holes in the plaintiffs' tunnel and thereby flooded it causing damage to their engine-room and in the alternative alleged negligence by the defendants—the Calcutta Port Commissioners—and where it did not appear on the face of the plaint that the alleged wrongful making of these holes was necessarily something done or purporting or professing to be done in pursuance of the Calcutta Port Act or that all that the plaintiffs had put forward was on the face of it no more than an allegation of a breach of the defendants' statutory duty, and where both the application of the defendants and the order, which they obtained on a preliminary objection as to want of the statutory notice under section 142 of the Calcutta Port Trust Act, contemplated that the applicability of that section should be determined upon the face of the plaint apart from evidence,

held that the question before the Court could not be decided without an investigation of the facts and the procedure followed was altogether inapplicable, the facts stated in the plaint being by themselves insufficient for the purpose of deciding the issue, a careful examination of the plaint having disclosed that the plaintiffs had put their case in more than one way.

Bradford Corporation v. *Myers* (1) referred to.

APPEAL by the plaintiffs, from a judgment of Buckland J.

The facts of the case, out of which this appeal arose, appear in the judgment of the appeal court.

B. K. Ghosh and *N. C. Chatterji* for the appellants.

N. N. Sircar (*the Advocate-General*) and *T. Ameer Ali* for the respondents.

Cur. adv. vult.

RANKIN C. J. The Corporation of Calcutta sue the Commissioners for the Port of Calcutta for

*Appeal from Original Decree, No. 92 of 1929, in Suit No. 1544 of 1928.

(1) [1916] A. C. 242.

damages in respect of the flooding on the 22nd July, 1926, of the engine-room of the Corporation's pumping station, called the Mallik Ghat Pumping Station, near to the eastern end of the Howrah Bridge. Near to the eastern bank of the river runs the railway belonging to the Port Commissioners, which they are authorised by their Act (Bengal Act III of 1890) to maintain. This railway appears to have been first constructed in 1876, when the then Commissioners for the Port of Calcutta, acting under Act V of 1870, with the sanction of Government, decided to lay down a "tramway" on the riverside road. Until 1914, the railway across the eastern approach to the Howrah Bridge had a level crossing, but in that year, it was decided to abolish the level crossing by carrying the railway lines under the road by means of a sub-way. The making of this sub-way involved considerable interference with the suction pipes leading from the plaintiffs' pumping station to the river and with the brick-built tunnels containing the pipes. It became necessary to lower the level of these suction pipes and to make incidental alterations to the tunnels. It appears that the railway, in crossing the tunnels, runs immediately over them and that water-tight steel plates constitute the roof of the tunnels over which the railway runs.

The complaint of the Corporation is that, on the 22nd July, 1926, there was a heavy downpour of rain and that water flooded into the tunnels from the sub-way by the fault or wrongful act of the Commissioners or their servants.

The suit having been brought on the 20th of July, 1928, the defendants, by their written statement, filed in September of that year, pleaded, among other defences, "that the plaintiffs' cause of action, if any, "is barred by reason of the provision contained in "section 142 of the Calcutta Port Act." The terms of this section are as follows:—

No suit shall be brought against any person for anything done or purporting or professing to be done in pursuance of this Act, after the expiration of three months from the date on which the cause of action of such suit shall have arisen.

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In February, 1929, the defendants applied to the Court and obtained an order that the suit be set down in the peremptory list for the trial of the issue, as to whether or not the cause of action of the plaintiff corporation was barred by this section. The order of the learned Judge went on to provide "that for the "purpose aforesaid, the facts stated by the plaintiff "corporation in the plaint filed herein be treated as "correct." In July, 1929, this issue came on for trial before my learned brother, Buckland J., who in the course of his judgment made the following observations :—

"I cannot say that I am wholly satisfied that the "facts stated in the plaint are sufficient for the "purpose of deciding this issue, and to my mind it "would be more satisfactory to decide it, after hearing "evidence, not as to what happened on the 22nd July, "1926, or the damages, but as to conditions at the "site and, it may be, as to the duties of the parties in "relation to the structure, but the order having been "made, I should endeavour to give effect to it and I "will, therefore, deal with this matter to the best of "my ability upon the materials available."

Accordingly, the learned Judge proceeded to decide the matter and came to the conclusion that the section relied upon was a bar to the plaintiffs' cause of action which was a breach by the defendants of their statutory duty to keep their railway, including the sub-way in question, in repair; and that no other duty was alleged as the foundation of the plaintiffs' case. It does not appear that any evidence was tendered before the learned Judge. Indeed, both the application of the defendants and the order which they obtained on the 1st May, 1929, contemplated that the applicability of section 142 should be determined apart from evidence upon the face of the plaint.

In my opinion, this procedure was altogether inapplicable, the facts stated in the plaint being by themselves insufficient for the purpose of deciding the issue. A careful examination of the plaint discloses

that the plaintiffs have put their case in more than one way. They allege, in paragraphs 11 to 13, a duty on the part of the defendants to maintain the sub-way in such a manner that no water from it entered the plaintiffs' tunnels except by percolation and that the defendants did not take adequate steps to perform this duty. They further allege, however, that the cause of the damage on the 22nd July, 1926, was the making of two holes in the wall of one of the tunnels by the removal of bricks immediately below the steel plates, which formed the tunnel's roof.

Paragraphs 15 and 16 are as follows :—

15. The said holes were made by human agency and served to drain off the water which had accumulated in the said sub-way. The plaintiff was not aware as to when or by whom the said holes were made. It charges that the making of the said holes and/or suffering the same to remain was a wrongful act on the part of the defendant, its servants or agents and the defendant is responsible for the same.

16. The plaint states in the alternative that the said holes, which were the proximate cause of the flooding, were made or allowed to remain by reason of the negligence and default on the part of the defendant, its servants or agents and the defendant is responsible for the same.

I am wholly unable to say, on the face of the plaint, that the alleged wrongful making of these holes is necessarily something done or purporting or professing to be done in pursuance of the Calcutta Port Act or that all that the plaintiff has put forward is on the face of it no more than an allegation of a breach of the defendants' statutory duty. The question before us cannot, in my opinion, be decided without an investigation of the facts. In *Bradford Corporation* v. *Myers* (1), which was a case under the Public Authorities Protection Act, 1893, Lord Haldane observed: "In such a case the Court can "only take the particular facts in the case before it, "and decide as best it can whether they come within "the words, or whether they fall altogether outside "them." In my opinion, this is the only method applicable to the present case. The plaint before us does not disclose the facts with such particularity as to entitle the Court to hold that they come within section 142. The defendants having pleaded the section may show at the trial that the facts as proved

(1) [1916] A. C. 242, 250.

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bring the case within its words, but as the pleadings stand they have no other course.

At the hearing of this appeal, it appeared to us to be possible that the defendants might have bettered their position had they served notices to admit facts upon the Corporation. Before disposing of the appeal, we thought it right to give the defendants an opportunity so to do, with the result that items 1, 4, 5 and 6 of their notice, dated the 15th February, 1930, have been admitted. In my opinion, however, these admissions in no way conclude the question before us. In my judgment, this appeal should be allowed with costs before the learned Judge and before us, together with the costs of the order of the 1st May, 1929. The decree of the learned Judge should be set aside with a direction that the suit be set down for hearing upon all issues in the ordinary course.

GHOSE J. I agree.

Appeal allowed, case remanded.

Attorney for appellants: *T. C. Mitra.*

Attorney for respondents: *G. C. Gooding.*

G. S.