APPEAL FROM ORIGINAL CIVIL.

Before Rankin C. J. and Buckland J.

PRASADDAS SEN

v.

K. S. BONNERJEE.*

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Nov. 18, 19, 29.

Receiver—Court receiver—High Court Rules, Original Side, Ch. XXI, r. 9—Official Receiver—Public Officer—Notice, requisites of—Code of Civil Procedure (Act V of 1908), s. 2 (17), cls. (d), (h); s. 80—General Clauses Act (X of 1897), cl. 3.

The Official Receiver of the High Court, 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 of Civil Procedure and the notice required by section 80 of the Code is necessary in his case.

Skippers and Company, Limited v. *E. V. David* (1) referred to.

A notice, which contains no description and no statement of place of residence, is not in compliance with section 80 of the Code.

Where the plaintiffs complained of a failure to use reasonable diligence in doing the very thing which the Official Receiver had a public duty to do, *viz.*, to realise the rents, issues and profits of property over which he was appointed receiver,

held that, having regard to the language of clause 3 of the General Clauses Act, *viz.*, "words, which refer to acts done, extend also to illegal omissions," that case could not 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.

Davis v. *Curling* (2), *Jolliffe* v. *The Wallasey Local Board* (3), *Newton* v. *Ellis* (4), *Wilson* v. *Mayor and Corporation of Halifax* (5), *Selmes* v. *Judge* (6) and *Queen* v. *Williams* (7) referred to.

APPEAL by the plaintiffs, from a judgment of Lort-Williams J.

The facts of the case, out of which this appeal arose, appear fully in the judgment of the trial court which was as follows:—

This is an action against the Official Receiver claiming damages for wilful default and neglect in his duty as a receiver, appointed by the Court, under a consent decree of the 8th July, 1920, in an action between Mitsui Bussan Kaisha *v.* B. N. Sen & Bros.

*Appeal from Original Decree, No. 37 of 1929, in Suit No. 312 of 1927.

(1) (1926) I. L. R. 48 All. 821.
(2) (1845) 8 Q. B. 286; 115 E. R. 884.
(3) (1873) L. R. 9 C. P. 62.
(4) (1855) 5 E. & B. 115; 119 E. R. 424.
(5) (1868) L. R. 3 Ex. 114.
(6) (1871) L. R. 6 Q. B. 724.
(7) (1884) 9 App. Cas. 418.

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A preliminary point has been taken, that no notice has been served upon the Official Receiver according to the provisions of section 80 of the Civil Procedure Code. That section provides that the notice shall state the cause of action, the name of the plaintiff, the place of residence and description of the plaintiff and the relief which is claimed, and that the plaint shall contain a statement that such a notice has been given to the defendant. The plaint, as originally drawn, did not contain such a statement, but was subsequently amended. The Official Receiver denies that he has received any such notice, and the plaintiff urges that such a notice was contained in a letter of 18th May, 1925, written by Mr. M. L. Mullick on behalf of his clients, Messrs. B. N. Sen & Brothers, which stated, *inter alia*, that his clients were advised that, as the Official Receiver had not taken steps for the realisation of certain rents, he was liable to make good the amount which might be lost by reason of his negligence or inactivity or failure in performing his duty as receiver. The letter goes on to say "In the absence of your arranging for realisation of the same and also in the event of the said arrears being not realised, my clients have been advised to proceed against you legally for the amount so lost, which they are of opinion is due to your wilful default and neglect." The clients, for whom Mr. Mullick purported to act, were referred to in a letter, dated 23rd July, 1923, written by Suresh C. Mukerjee & Co. and addressed to the Official Receiver, in which it is stated "our clients, Prasaddas Sen, Santoshlal Sen and Hrishikesh Sen, three of the members of the now defunct defendent firm." The defendant firm therein referred to is B. N. Sen & Brothers. It appears, therefore, that, at the date of the letter of the 18th May, 1925, the defendant firm was no longer in existence and it is difficult to understand how this notice came to be given on behalf of the firm of Messrs. B. N. Sen & Brothers. But, apart from this point, in my opinion, the statements contained in this letter do not amount to such a notice as is required by section 80. Moreover, I do not think that they amount to any notice at all, that the plaintiffs intend or have made up their minds to bring an action against the Official Receiver. Moreover, it is clear that the notice does not contain the name, description and place of residence of the plaintiff, and these particulars have been held to be essential [*Bhola Nath Roy* v. *Secretary of State for India* (1)].

For these reasons this suit is not maintainable and must be dismissed with costs.

The plaintiffs, thereupon, preferred this appeal.

Mr. H. D. Bose and *Mr. B. C. Ghose*, for the appellants.

Mr. W. W. K. Page and *Mr. Kantichandra Mukherji*, for the respondent.

Cur. adv. vult.

RANKIN C. J. 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 the 8th July, 1920,

(1) (1912) I. L. R. 40 Calc. 503.

the Official Receiver was appointed a receiver of certain immovable properties belonging to the defendants in that suit, including the premises known as No. 1, Shama Bai Lane, and that, pursuant to an order, dated the 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 and Bholanath Sen, the second defendant in the present suit, were partners.

The plaintiffs' case is that the premises No. 1, Shama Bai Lane, were let to one Ramnarayan Jalan on a monthly rent of Rs. 401 and they allege that the Official Receiver "wilfully 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." In particular, they say that a sum amounting to Rs. 16,660, being arrears of rent due from the said Ramnarayan Jalan, has been lost and has become irrecoverable by the wilful 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 Rs. 16,660 and also for an order that he do render accounts on the footing of wilful 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 of the Civil Procedure Code, it was obligatory on the plaintiffs to give notice as therein prescribed.

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 the 28th June, 1927, by the addition of a statement that notice as contemplated by the section was duly served upon the Official Receiver on the 18th May, 1925. The defence

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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 the 4th February, 1927, the Official Receiver's written statement was filed on the 24th February, 1927. On the 16th June, 1927, the Official Receiver took out a summons for leave to amend the written statement and on the 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 point as to want of notice.

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 the 17th clause of section 2 of the Code. The second question is whether neglect or default in realising 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." If these two questions are answered in the affirmative, then the last question is whether or not the letter of the 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.

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

On the first point, the question is whether the first defendant is an officer of a court of justice whose duty it is to take charge or dispose of any property, or a person especially authorised 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 person, has long had an official with an office and staff, who executes receiverships when appointed thereto by the Court. Rule 9 of Chapter XXI 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 Company, Limited* 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." 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 non-feasance is not "an act purporting "to be done in his official capacity." It may also be said that what is charged against the Official Receiver

(1) (1926) I. L. R. 48 All. 821.

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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 non-feasance, 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* (1), the words of the Statute (5 & 6 Will. IV. 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* (2) 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 of the Public Health Act, 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, non-feasance 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 non-feasance. "But that that is not so, is clear, from the cases "of *Davis* v. *Curling* (1), *Newton* v. *Ellis* (3), *Wilson* "v. *Mayor and Corporation of Halifax* (4) and *Selmes* "v. *Judge* (5), all of which seem to me to establish "that a case of what appears to be non-feasance may "be within the protection of the Act." The Judicial Committee of the Privy Council in *Queen* v. *Williams* (6) referred to *Jolliffe's case* (2) with approval as holding that an "omission to do something which

(1) (1845) 8 Q. B. 286; 115 E. R. 884.
(2) (1873) L. R. 9 C. P. 62.
(3) (1855) 5 E. & B. 115; 119 E. R. 424.
(4) (1868) L. R. 3 Ex. 114, 119.
(5) (1871) L. R. 6 Q. B. 724.
(6) (1884) 9 App. Cas. 418, 433.

"ought to be done in order to 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." This is indeed what was laid down by Kelly C. B. in *Wilson* v. *Mayor and Corporation of Halifax* (1). 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 of the General Clauses Act (X 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, "extend also to illegal omissions." 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 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.

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,

(1) (1868) L. R. 3 Ex. 114, 119.

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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." 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* (1), 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." 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.

(1) [1904] 2 Ch. 449, 456.

"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." With this we may compare what Baron Parke said in another case—*Palmer* v. *Grand Junction Railway Company* (1). "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."

We are not here and now concerned to enquire 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 therefor in a common law action for damages or can be called upon to make redress therefor in a court of equity. This in my opinion makes the section applicable.

There remains the question whether the letter of the 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, 1925, they endeavoured 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

(1) (1839) 4 M. & W. 749 (766); 150 E. R. 1624 (1631).

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behalf of the plaintiffs the language of Pollock C. B. in *Jones* v. *Nicholls* (1), 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 common sense 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 independent research. The fact that the letter in question is headed "Suit No. 923 of 1919 : Mitsui "Bussan Kaisha *v.* B. N. Sen & Bros.," 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. I agree.

Appeal dismissed.

G. S.

Attorney for the appellant : *M. L. Mullick.*

Attorney for the respondent : *D. Mookerjee.*

(1) (1844) 13 M. & W. 361 (363) ; 153 E. R. 149 (150).