1935

INAYAT KHAN v. HARBANS LAL

that order XXXIV, rules 4 and 5 of the Code of Civil Procedure are subject to the provisions contained in order XXIII, rule 3 of the Code of Civil Procedure.

In the case before us, the petition of objection filed by the appellant clearly alleged not a mere payment but an adjustment between the parties. The respondent denied having agreed to the adjustment of the suit alleged by the appellant. The lower court did not inquire into the truth of the appellant's allegation and threw out the objection on a preliminary ground. The appellant's allegation should have been inquired into and given effect to if it was found to be true. In these circumstances we allow the appeal, set aside the order of the lower court and remand the case to that court for disposal according to law as herein indicated. Costs shall abide the result. The court fee paid in this Court shall be refunded.

## FULL BENCH

*Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Niamat-ullah and Mr. Justice Bennet*

DISTRICT BOARD, ALLAHABAD (DEFENDANT) *v.* BEHARI LAL (PLAINTIFF)*

1935 *October*, 14

*District Boards Act (Local Act X of 1922), section 192—"Act done or purporting to be done in official capacity"—Refusal to pay a contractor—Suit by contractor for price of materials supplied and work done—Whether six months' limitation applies—U. P. General Clauses Act (Local Act I of 1904), section 4(2).*

A suit brought by a contractor against a District Board for price of materials supplied and work done and for refund of security deposit is not governed by the provisions of section 192 of the District Boards Act, and the rule of six months' limitation does not apply to it.

According to section 4(2) of the U. P. General Clauses Act, 1904, it would appear that the word "act" would include an illegal omission when the word was used with reference to

*Civil Revision No. 189 of 1934.

1935

DISTRICT BOARD, ALLAHABAD v. BEHARI LAL

an offence or a civil wrong. It would, therefore, be difficult to hold that the word "act" in section 192 includes all cases of mere omission or refusal on the part of the District Board to perform a private contract, even though they do not amount to an illegal omission within the meaning of section 4(2) of the U. P. General Clauses Act. At the same time the view that section 192 of the District Boards Act has no application to suits in contract would, as indicated by the Privy Council, be wrong.

Mr. *Harnandan Prasad,* for the applicant.

Mr. *A. P. Pandey,* for the opposite party.

SULAIMAN, C.J.:—This is an application in revision by the District Board of Allahabad from a decree of the court of small causes against a contractor who had brought a suit for refund of a deposit made by him as security for the price of certain *moram* supplied and for payment for certain extra work done. The court of small causes has given to the plaintiff a decree for the first two items but not for the third. The Board at the trial had conceded that it would refund the security money; nevertheless that point also is raised again in revision.

The main question in the case is one of limitation, as to whether the claim was governed by the six months' rule as laid down in section 192 of the District Boards Act, Act X of 1922.

There is no direct authority under this section, but there are several cases under section 326 of the Municipalities Act, Act II of 1916, which has the same phraseology, and there are numerous cases under section 80 of the Code of Civil Procedure which has some similarity, and also one case under section 273 of the Cantonments Act, which also has some analogy.

So far as the corresponding section of the Municipalities Act is concerned, there are certainly at least two cases which can be said to support the applicant's view that the shorter period of limitation is applicable. There were several cases in Madras, Bombay and Calcutta which had suggested the contrary view of the corresponding sections in their Local Acts. But in *Abdul*

*Wahid* v. *The Municipal Board* (1) a suit had been brought for the return of security as well as for compensation for work done under certain contracts entered into with the Board. The Bench came to the conclusion that the refusal by the Board was on account of a certain resolution passed by the Board at its meeting and that was clearly an act done by the Board in its official capacity and therefore the refusal to pay the amount under that resolution necessitated the institution of a suit within six months from the date of such refusal.

*Sulaiman, C.J.*

A learned single Judge of this Court in *Banwari Lal* v. *Municipal Board of Cawnpore* (2) of course followed this decision in a case where the claim was brought by an employee of the Municipal Board for recovery of certain arrears of pay to which he had been entitled. The learned Judge held that subsequent demands made by the plaintiff and refusals by the Board did not give the plaintiff any fresh cause of action and that limitation began to run when the Board decided adversely to the plaintiff. These two cases no doubt can be cited in support of the view that the shorter period as prescribed by section 192 of the District Boards Act should be applied.

In the case of *Jagannath Bhagwandas* v. *Municipal Board of Allahabad* (3) a suit had been brought for the refund of certain duty paid on imported goods, which the plaintiff alleged was not payable. It was really not a suit brought on the basis of any private contract entered into between the plaintiff and the Municipal Board, but on the ground that the Board in disregard of its statutory duty to charge the proper amount had realised an excess amount and had declined to refund the excess. The case is therefore distinguishable from the case before us. In that case the learned Judges no doubt applied the provisions of section 326 of the Municipalities Act

(1) (1923) 21 A.L.J., 161. (2) (1924) 23 A.L.J., 23.
(3) (1927) 25 A.L.J., 1038.

1935

DISTRICT BOARD, ALLAHABAD v. BEHARI LAL

Sulaiman, C.J.

and held that the claim was governed by the six months' rule.

Similarly in the case of *Munir Khan* v. *Municipal Board of Allahabad* (1) section 326 was applied to a suit which was brought by a conservancy contractor for remuneration for the work done in removing rubbish from certain parts and depositing the same in the trenching ground. The point that was argued at the Bar was that section 326 of the Municipalities Act was applicable to cases of tort only and not to cases of contract. The learned Judges came to the conclusion that the words "cause of action" were of sufficient amplitude to cover cases involving the infraction of an absolute right or of a right arising out of a contract and also of a right to compensation flowing from tort. It does not appear to have been argued before the Bench that even if the section applied to breaches of contract, the refusal to pay the amount due to the plaintiff was not "an act" within the meaning of that section. This aspect of the case was therefore neither pressed before nor considered by the Bench.

On the other hand in the case of *Municipal Board, Agra* v. *Ram Kishan* (2) there had been a contract between the plaintiff and the Municipal Board to execute certain works and the suit was brought for recovery of money due to the plaintiff in executing the works. The learned Judges came to the conclusion that section 326 of the Municipalities Act would have no application to such a suit. In the course of the judgment they assumed, for the sake of argument, the contention put forward on behalf of the Board that an act may include an omission and that in the present case the omission to pay might be included in the term "act", but considered that the suit would not come under section 326 inasmuch as the suit was not in tort but it was a suit in contract and that a suit in contract was not one contemplated by section 326.

(1) [1930] A.L.J., 461. (2) (1933) I.L.R., 55 All., 1002.

The learned Judges had presumably in mind cases of *quasi* contract, the performance of which may be a statutory obligation.

In another case decided by a Bench of this Court, arising under section 273 of the Cantonments Act, *Cantonment Board, Allahabad* v. *Hazarilal Gangaprasad* (1), it was held that that section would not be applicable to suits brought for recovery of amounts due to the plaintiff from the Board under a private contract. In that case certain materials had been supplied to the Board by the plaintiff, and the claim was for recovery of their value. It was held by the Bench that the claim could not be considered to be "in respect of any act done or purporting to have been done, in pursuance of this Act or of any rule or bye-law made thereunder". It was remarked that the cause of action for such a suit was not the action of the Board in omitting to pay the price of the goods settled, but would ordinarily arise from the fact that the goods had been supplied by the plaintiff to the Board. The language of section 273 is, however, slightly different from that of section 192 and is similar to the language used in the Public Authorities Protection Act, 1893.

*Sulaiman, C.J.*

But subsequent to all these cases there has been a recent pronouncement of their Lordships of the Privy Council in *Rebati Mohan Das* v. *Jateendra Mohan Ghosh* (2) in a suit in which the question of the applicability of section 80 of the Code of Civil Procedure arose. The words in the section are, "against a public officer in respect of any act purporting to be done by such public officer in his official capacity". These words are almost identical with the words in section 192, the interpretation of which we have to consider. In that case the former manager, who was assumed to be a public officer, had executed a mortgage deed creating a charge on certain property of the ward but had not of

(1) (1934) I.L.R., 56 All., 885. (2) (1934) I.L.R., 61 Cal., 470.

1935

DISTRICT BOARD, ALLAHABAD v. BEHARI LAL

*Sulaiman, C.J.*

course undertaken any personal liability to pay the mortgage money. When a suit was brought against the next manager on the deed, a plea was taken that the suit was defective inasmuch as notice under section 80 of the Code of Civil Procedure had not been given. Their Lordships of the Privy Council first repelled the contention that the mere execution of the mortgage deed brought the case within the purview of section 80. Dealing with the second contention whether the failure to pay off the mortgage satisfied the condition of the section, their Lordships remarked that they were unable to hold that non-payment by the manager was an act purporting to be done by the manager in his official capacity. Their Lordships first pointed out that under the general definitions contained in section 3 of the General Clauses Act, 1897, an "act" might include an illegal omission, "but there clearly was no illegal omission in the present case." Their Lordships then remarked: "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." Their Lordships then went on to emphasise that the mortgage had imposed no personal liability on the manager, but had merely given an option to pay and therefore the failure to exercise the option was in no sense a breach of duty. With reference to the view expressed by the trial court that the section had no application to suits in contract, which dictum had been repelled by the High Court, their Lordships observed that having regard to the decision of the Board in *Bhagchand Dagadusa* v. *Secretary of State for India* (1), their Lordships thought that no such distinction was possible. Their Lordships made it clear that they did not mean to suggest that a claim based on a breach of contract by a public officer may not be sufficient to entitle him to notice under the section, but they were unable to agree with the High Court that

(1) (1927) I.L.R., 51 Bom., 725.

the omission to pay the mortgage was such a breach and made the suit as one based on a breach of contract, which would be an act within the contemplation of the section. It seems to me that although section 80 forms part of another enactment, the similarity of the language used in the section makes this authoritative ruling almost directly applicable to the case before us. The claim brought by the other contracting party to recover amounts due to him on such a private contract with the Board would in my opinion not be governed by the provisions of section 192 at all. It would be an ordinary suit governed by the provisions of the Indian Limitation Act under the particular article which may be applicable to the facts of the particular case. The opinion expressed by their Lordships of the Privy Council in the last mentioned case therefore throws considerable light on the interpretation which ought to be put on the section, and in view of that expression of opinion it must be held that section 192 was not intended to apply to cases of this kind. It may also be pointed out that their Lordships of the Privy Council took care to point out that the failure to pay off the mortgage in that case was not "an illegal omission" within the meaning of the word "act" in section 3 of the General Clauses Act of 1897. The corresponding section of the U. P. General Clauses Act (Act I of 1904) is section 4(2) which reproduces those words and lays down that the word "act" 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. Therefore under this provision the word "act" would include an illegal omission when the word is used with reference to an offence or a civil wrong. Now damages for breach of contract are based on contractual liability, whereas claims based on tort are based on wrongful action of the defendant and an infringement of the plaintiff's right. There may therefore be considerable difficulty in holding that the word "act" in section 192 of the District Boards

*Sulaiman, C.J.*

1935

DISTRICT BOARD, ALLAHABAD v. BEHARI LAL

Act includes all cases of mere omission to perform a private contract, even though not amounting to an illegal omission within the meaning of section 4 of the U. P. General Clauses Act.

*Sulaiman, C.J.*

I do not consider it necessary to refer to the English cases under the Public Authorities Protection Act of 1893, though it may be observed that it appears to have been generally held in England that private contracts entered into by public authorities would not be "acts done in pursuance or execution of any Act of Parliament or of any public duty or authority", etc. I would therefore hold that the present claim was not barred by the six months' rule of limitation, but was governed by the ordinary three years' rule.

NIAMAT-ULLAH, J.:—I agree.

BENNET, J.:—I agree.

## APPELLATE CIVIL

*Before Mr. Justice Thom and Mr. Justice Smith*

1935
*October*, 15

SECRETARY OF STATE FOR INDIA (DEFENDANT) *v.* SHEOBHAGWAN CHIRANJILAL (PLAINTIFF)*

*Railways Act (IX of 1890), sections 47, 72—General Rules of Indian railways, rules 19, 27—*Ultra vires*—Contract Act (IX of 1872), sections 149, 151—"Delivery" to bailee—Liability of railway for goods accepted and allowed to remain by authorised railway servant, though no receipt granted or forwarding note received—Negligence—Sparks from engine setting fire to goods in shed—Absence of fire extinguishing appliances.*

A consignment of bales of hemp was taken to a railway station and tendered for despatch to another station. It appeared that no wagon was immediately available for the purpose; so the consignment was, with the consent and permission of an authorised servant of the railway, deposited in the railway goods shed and allowed to remain there, pending

*Second Appeal No. 699 of 1932, from a decree of Mathura Prasad, Additional Subordinate Judge of Benares, dated the 21st of March, 1932, confirming a decree of Bind Basni Prasad, Munsif of Havali, dated the 23rd of May, 1931.