

1911

KESHO
PRASAD
SINGHv.
SRINIBASH
PRASAD
SINGH.

disputed sums they had spent were needed for the protection of the estate, the Court could hardly undertake to determine the validity of the objection; the result would be that the injunction, by reason of indefiniteness would be practically useless. Under circumstances like these when the plaintiff really seeks to obtain control over the expenditure of the income of the disputed property during the pendency of the litigation, the appropriate remedy is rather by the appointment of a receiver than by the grant of a vague and indefinite injunction. In our opinion, the objections we have explained are, each of them, fatal to the grant of the injunction.

The result, therefore, is that the Rule is discharged with costs.

s. c. g.

Rule discharged.

APPEAL FROM ORIGINAL CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice,
and Mr. Justice Woodroffe.*

McINERNY

v.

THE SECRETARY OF STATE FOR INDIA. *

1911

June 9.

Cause of action—Amendment of plaint—Secretary of State for India in Council—Action in tort—Notice of suit—Civil Procedure Code (Act V of 1908) s. 80—Amendment of plaint, when not permissible—Leave to withdraw.

Where notice of an action against the Secretary of State for India in Council required under section 80 of the Civil Procedure Code, pointed to a suit based on negligence, and the original plaint on that basis, and it was subsequently sought to amend setting up a cause of ~~action~~ on nuisance:-

Held, that such ame

Leave to withdraw sui.

APPEAL by the
judgment of the

1911
 McINERNY
 v.
 SECRETARY
 OF STATE FOR
 INDIA.

This appeal arose out of an action in tort brought by J. F. H. McInerny against the Secretary of State for India in Council, claiming the sum of Rs. 40,000 as damages for injuries received.

The original plaint in the suit which was filed on the 6th May, 1909, was as follows:—

“1. On the 24th August, 1908, the plaintiff was injured through falling over a post on the maidan at a place on the western side of the tram-lines nearly opposite Kyd Street in Calcutta.

“2. The said post was the property of the Government.

“3. The said post was placed and maintained by the Government in the position aforesaid.

“4. The maidan is, as the plaintiff is informed and believes, the property of the Government and is vested in the Government for the use and benefit of the public of Calcutta.

“5. The plaintiff was lawfully passing over the maidan as he was entitled to do when he fell over the said post.

“6. The said post was placed on a footpath which forms part of the maidan, where persons are in the habit of lawfully passing and re-passing.

“7. The said post was so placed as to be a wrongful obstruction of the footpath and of the maidan.

“8. The said post was negligently placed and maintained in a dangerous position on the footpath near the tram-lines.”

The remaining paragraphs of the plaint set out particulars of the occurrence and the injuries received which were admittedly of a grievous nature, and stated that due notice of action as required by section 80 of the Civil Procedure Code, 1908, was delivered on the 29th January, 1909.

The notice was in these terms:—

“Take notice that at the expiration of two months after the delivery of this notice a suit will be instituted against the Secretary of State in Council by Joseph Francis Hehir McInerny, of 9, Pretoria Street, Deputy Chief Accountant, for damages for personal injuries sustained or near Kyd Street on property of Government and on footway alongside the

levied. It was

accident was induced by the plaintiff endeavouring to enter a tramcar in motion in breach of the rules and regulations of the Calcutta Tramways Company. It was submitted finally that the plaint disclosed no cause of action.

1911
 McINERNY
 v.
 SECRETARY
 OF STATE FOR
 INDIA.

The suit came on for hearing before Fletcher J., on the 16th February, 1910.

The Advocate-General, Mr. Kenrick, K.C., (Mr. J. E. Bagram, Mr. Knight and Mr. Stokes with him), for the defendant, took the preliminary objection that the suit was not maintainable, as no action would lie against the Secretary of State for India in Council, in tort, and cited Nobin Chunder Dey v. The Secretary of State for India (1); Jehangir M. Cursetji v. Secretary of State (2); Shirabhajan v. Secretary of State for India (3).

Mr. McInerny (of the Kurrachi Bar), for the plaintiff, relied on P. & O. S. N. Co. v. Secretary of State for India (4); Forester v. The Secretary of State (5); Shivabhajan v. Secretary of State for India (3); The Secretary of State for India v. Hari Bhanji (6); The Secretary of State for India in Council v. Kamachee Boye Sahaba (7).

Fletcher J., upheld the objection in demurrer and dismissed the suit observing as follows:—

“This is a suit brought by the plaintiff against the Secretary of State claiming damages for negligence in respect of an accident which happened to him on the public highway.

The first point to be decided is whether the plaint discloses any cause of action. Now, the allegations made in the plaint are as follows. On the 24th August, 1908, the plaintiff says, he was injured by falling over a post which, in the plaint, is stated to be placed on the maidan (now counsel for the plaintiff says it was on the public highway) on the western side of the Chowringhee Road. The plaint then alleges that the post is the property of Government and is maintained and kept in position by Government. These are the material allegations, except one that relates to the ownership of the maidan, which the plaintiff says is the property of Government and subject to the

(1) (1875) I. L. R. 1 Calc. 11.

(2) (1902) I. L. R. 27 Bom. 189.

(3) (1904) I. L. R. 28 Bom. 314.

(4) (1861) 5 Bom. H. C. R. Appx. 1

(5) (1872) 12 B. L. R. 120.

(6) (1882) I. L. R. 5 Mad. 273, 279.

(7) (1859) 7 Moo. I. A. 476.

1911
 }
 McINERNEY
 v.
 SECRETARY
 OF STATE FOR
 INDIA.

trusts for the benefit of the public of Calcutta. In paragraphs 9, 10 and 11 the plaint sets forth particulars of the unfortunate accident which happened to the plaintiff on the evening of the 29th August, and it is admitted that his hand was very seriously injured by a tramcar.

Now, there is one proposition of law that cannot be doubted, and that is that no suit can lie against the Crown unless that right is given by statute. It requires no authority to support that. In this case the plaintiff has got to show that the statutes have given him a right against the Secretary of State in Council as representing the Crown. The first statute that is material is the statute of 3 and 4 William IV, Chapter 85, section 9. That was the statute which put an end to the commercial undertaking and general trading business of the East India Company and continued the Charter for a short time. Section 9 enacts that "from and after the said twenty-second day of April one thousand eight hundred and thirty-four all the Bond debt of the said Company in Great Britain, and all the Territorial debt of the said Company in India, and all other debts which shall on that day be owing by the said Company, and all sums of money, costs, charges and expenses which, after the said twenty-second day of April, one thousand eight hundred and thirty-four, may become payable by the said Company in respect or by reason of any covenants, contracts or liabilities then existing, and all debts, expenses and liabilities whatever which, after the same day, shall be lawfully contracted and incurred on account of the Government of the said territories, and all payments by this Act directed to be made, shall be charged and chargeable upon the revenues of the said territories."

Then comes the "Act for the Better Government of India," 21 and 22 Vict., Chapter 106. Section 65 enacts: "That the Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate; and all Persons and Bodies Politic shall and may have and take the same suits, remedies, and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the said Company; and the property and effects hereby vested in Her Majesty for the purposes of the Government of India or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would while vested in the said Company have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company."

Now, if these two sections stood alone, I should have shared the doubts expressed by the present Chief Justice, when he was the Chief Justice of Bombay, in the case of *Shivabhajan v. Secretary of State for India* (1). I should have thought that the word "lawfully" governed not only the word "contracted" in section 65, but also the words "liabilities incurred." That I should have thought so was because the liabilities to which the East India Company were liable after the passing of the Act of 1883, were liabili-

(1) (1904) I. L. R. 28 Bom. 314.

1911

McINERNEY
v.
SECRETARY
OF STATE FOR
INDIA.

ties which should have been incurred on account of the Government of the said territories. There is, however, a decision of this Court in the case of *P. & O. S. N. Co. v. Secretary of State for India* (1), in which it is expressly laid down that the suits which may be brought against the Secretary of State in this Court are not limited to the suits which may be brought against the Crown, but beyond that I do not think that this case is an authority for the wide proposition that the learned counsel for the plaintiff has tried to establish. The other case in this Court is the case of *Nobin Chunder Dey v. The Secretary of State for India* (2), which is a decision of Chief Justice Garth and Mr. Justice Macpherson on appeal from the Original Side, and laid down expressly what is the nature of the liability of the Secretary of State under s. 65 of the Act of 1858, and the head-note expresses precisely what was the result of that judgment, that suits such as might, previously to the passing of the Statute 21 and 22 Vict., Chapter 106, have been brought against the East India Company are limited to suits for acts done in the conduct of undertakings which might be carried on by private individuals. That case is binding upon me. The case of *The Secretary of State for India v. Hari Bhanji* (3) is not a decision of this Court. The case of *Nobin Chunder Dey v. The Secretary of State for India* (2) is binding upon the Judges of the Original Side. That being so, the only point one has to consider in this case is, is this a suit brought as stated in the decision of Chief Justice Garth and Mr. Justice Macpherson in *Nobin Chunder Dey v. The Secretary of State for India* (2)? In my opinion, obviously it is not. This case is a case to make the Government liable to pay compensation out of Government revenues. What for? For an act which happened to the plaintiff on the public highway? What commercial undertaking or other trading operation were the Government of India carrying on in maintaining the public path on the public highway? It is clear that it does not appear that this case comes within the decision of *Nobin Chunder Dey v. The Secretary of State for India* (2), and the plaint discloses no cause of action.

Learned counsel for the plaintiff has asked leave to amend the plaint. If there was any real *bona fide* intention to amend the plaint, so that the unfortunate plaintiff might recover compensation for the injuries he has suffered, I should have immediately granted it. I am satisfied, however, on the statement of the plaintiff, that this plaint cannot be amended so as to show any cause of action against the defendant. That being so, there remains nothing for me but to dismiss the suit. The general costs of the suit must go to the Government. The costs will be taxed on scale No. 2."

From this judgment the plaintiff appealed.

Mr. B. Chakravarti (Mr. J. Chatterjee with him) for the appellant, contended that the action was maintainable against

(1) (1861) 5 Bom. H. C. R. Appx. 1. (2) (1875) I. L. R. 1 Calc. 11.

(3) (1882) I. L. R. 5 Mad. 273.

1911
 McINERNEY
 v.
 SECRETARY
 OF STATE FOR
 INDIA.

the Secretary of State for India in Council: *The Secretary of State for India v. Hari Bhanji* (1); *P. & O. S. N. Co. v. Secretary of State for India* (2); *Shivabhajan v. Secretary of State for India* (3); *Salaman v. Secretary of State for India* (4); *Dhackjee Dadajee v. The East India Company* (5); *The Corporation of the Town of Calcutta v. Anderson* (6); *Kishen Chand v. The Secretary of State for India in Council* (7).

[WOODROFFE J. referred to *Rogers v. Rajendro Dutt* (8).]

On the first day of the hearing of the appeal, the 15th May, 1911, it was admitted by counsel for the appellant that the plaintiff needed amendment inasmuch as the allegations contained in the plaint could not be supported by evidence. An adjournment was granted by the Court of Appeal for the purpose of amending the plaint. Two further adjournments were granted for further amendments of the plaint on the 23rd and 25th May.

On the 8th June, the following amended plaint was sought to be placed before the Court:—

"1. On the 24th August, 1908, at about 9-15 P.M., on a dark night while the plaintiff was lawfully passing over a footpath which is a part of the Chowringhee Road being a public highway and belonging to the Corporation of Calcutta, which footpath adjoins the maidan at a place on the western side of the tram-lines nearly opposite Kyd Street in Calcutta, he (the plaintiff) was injured through falling over a post on the said footpath.

"2. The said post was wrongfully placed and left standing on the said footpath by the servants and agents of the Government in the position aforesaid in connection with the supervision of the said maidan such servants and agents purporting to act within the scope of their authority in that behalf.

"3. The said maidan was as the plaintiff is informed and believes the property of the Honourable the East India Company and subsequently became vested in the Crown and the Government lets out portions of the same from time to time in the same way as a private owner would do and thereby realises an income therefrom.

"4. The said post was so placed and so left standing by the said servants and agents as to be a wrongful obstruction of the said footpath and a source of danger to persons passing and repassing on the said footpath and the said maidan and the injuries caused to the

(1) (1882) I. L. R. 5 Mad. 273.

(2) (1861) 5 Bom. H. C. Appx. 1.

(3) (1904) I. L. R. 28 Bom. 314.

(4) [1906] I. K. B. 613.

(5) (1843) 2 Mor. Dig. 307.

(6) (1884) I.L.R. 10 Calc. 445, 478.

(7) (1881) I. L. R. 3 All. 829.

(8) (1860) 8 Moo. I. A. 103.

plaintiff were due to the wrongful obstruction aforesaid of the said footpath which was and is a public highway."

The remaining paragraphs dealt with the occurrence and the nature of the injuries suffered and stated that notice of action as required by section 80 of the Civil Procedure Code had been duly delivered.

The Advocate-General, Mr. Kenrick, K.C., (Mr. B. C. Mitter, Standing Counsel, with him), for the respondent, took the objection that whereas the notice of action pointed to a suit grounded on negligence, the proposed amended plaint was based on nuisance; the cause of action was therefore essentially altered, and the amendment should not be allowed.

Mr. Chatterjee, for the appellant, asked for leave to withdraw the present suit with liberty to institute a fresh one.

JENKINS C.J. This case comes before us by way of appeal from a decree of Mr. Justice Fletcher who dismissed the plaintiff's suit.

On the case being placed before us it was perceived that apart from the difficulty that there might be in bringing a suit against the Secretary of State for India in Council for a tort, alleged to have been committed by an agent of the Government, there was a further obstacle in the plaintiff's way that the facts as alleged in his plaint could not be supported by evidence, inasmuch as it had been discovered and was the case that the obstacle in respect of which the plaintiff claimed, was not, as the plaint alleged, on the land of the Crown, in other words, on a part of the maidan but on a part of the highway which was adjacent to the maidan. Therefore, leave was sought from us to amend the plaint so as to bring it into conformity with the facts which the plaintiff believed he could prove, and we required as a condition of this application that the proposed plaint should be drafted and placed before us. That has now been done. The plaint as now proposed by way of amendment differs in an essential degree from the original plaint. The original plaint proceeded upon *negligence*, whereas the new plaint proceeds upon *nuisance* in the form of obstruction on the highway, so that

1911

McINERNEY
v.
SECRETARY
OF STATE FOR
INDIA.

1911
 McINERNEY
 v.
 SECRETARY
 OF STATE, FOR
 INDIA.
 JENKINS
 C.J.

it is impossible to say that the cause of action is the same. This brings in the plaintiff's way the difficulty created by section 80 of the Code which prescribes that "no suit shall be instituted against the Secretary of State for India in Council. . . . until the expiration of two months next after notice in writing has been delivered to or left at the office of a Secretary to the Local Government or the Collector of the district. . . . stating the cause of action, the name, description and place of resident of the plaintiff and the relief which he claims." The notice which was served as a preliminary to the plaint as originally framed pointed to a suit based on *negligence* and it stated a cause of action different from that on which the plaintiff would rely in his proposed plaint. It follows, therefore, that it is not open to us to give the plaintiff permission to amend his plaint.

In these circumstances Mr. Chatterjee on behalf of the plaintiff has asked for leave to withdraw the suit under order XXIII, rule 1 of the Code of Civil Procedure, and he desires that he should have permission to withdraw from the suit with liberty to institute a fresh suit in respect of the subject-matter of this suit.

The defendants give no opposition to this application, though they do not encourage it, and their attitude is no doubt referable to the terms of rule 2 of order XXIII of the Code. What the effect of that rule may be on the proposed new suit, it will be out of place for me now to discuss. But in the circumstances, we give the plaintiff permission to withdraw the present suit with liberty to institute a fresh suit in respect of the subject-matter of this suit.

We do not interfere with the decision of Mr. Justice Fletcher as to costs, which will stand, and the plaintiff-appellant will pay the costs of this appeal.

WOODROFFE J. concurred.

Attorneys for the appellant: *Pugh & Co.*

Attorney for the respondent: *Kesteven.*

J. C.