

(1912) 09 BOM CK 0012
In the Bombay High Court

Naginlal Chunilal

APPELLANT

Vs

The Official Assignee

RESPONDENT

Date of Decision : 24-09-1912

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80

Citation : 17 Ind. Cas. 876

Hon'ble Judges : Rao, J;Batchelor, J

Bench : Division Bench

Judgement

1. The appellant before us in this first appeal was the plaintiff in the Court below. The first defendant is the Official Assignee and the third defendant is a declared insolvent. According to the plaintiff, he had purchased certain furniture from the third defendant, and had hired it back to him before the insolvency, but when thereafter the third defendant was declared an insolvent, the Official Assignee seized the furniture in dispute, as well as other property which admittedly belonged to the insolvent and was in the insolvent's possession. The plaintiff made a claim in respect of this furniture, but the Official Assignee refused to recognize the claim, and on or shortly after the 15th September, for the exact date cannot be ascertained, the Official Assignee ordered this furniture to be sold by auction on the 25th September. On the 23rd September, or two days before the threatened sale, this suit was brought by the plaintiff.

2. The whole question involved in the appeal is whether the learned Judge below was right in his view that the plaintiff's suit was bad because no notice was served on the Official Assignee u/s 80 of the Civil Procedure Code. It is necessary, therefore, to consider what Section 80 requires, and what is the real character of the present suit. Section 80 lays down, so far as its provisions are immediately relevant, that no suit shall be instituted against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to the public officer.

3. In this suit, the plaintiff prayed for a declaration that he was owner of the goods in question, and for a permanent injunction restraining the defendants from disposing of them by the sale. In the alternative, it was prayed that the furniture should be restored to the plaintiff, or if restoration was impossible, that plaintiff should receive compensation equal to the value of the goods. The question is whether to such a suit as this, the provisions of Section 80 apply. It appears to us that that question should be answered in the plaintiff's favour. It must be observed, in the first place, with reference to the phraseology of Section 80, that this is a suit brought against a public officer, other than the Secretary of State for India in Council. This observation is important since the language of the section lends colour to the view that the Secretary of State for India in Council occupies in respect of the required notice a more favourable position than any other public officer; and this view of the meaning of the section was adopted by Mr. Justice Chandavarkar in *Secretary of State v. Gajanan Krishna Marlinkar* 35 B. 362; 13 Bom. L.R. 273; 10 I.C 639.

4. In the present case, it is unnecessary for us to consider what would be the plaintiff's position if he were suing the Secretary of State for India; and the only question before us is whether notice was required upon the Official Assignee. We are of opinion that upon that question, a correct explanation of the meaning and extent of Section 80 is to be found in Mr. Justice Cunningham's judgment in *Shahebzadee Shahunshah Begum v. Fergusson* 7 C. 499 where after referring to *Attorney-General v. Hackney Local Board* (1875) 20 Eq. 626 : 44 L.J. Ch. 545 : 33 L.T. 244 the learned Judge observes that the object is, that if a public body or officer entrusted with powers happens to commit an inadvertence, irregularity or wrong, before any one has a right to require payment in respect of that wrong, he shall have the opportunity of setting himself right, making amends, restoring what he has taken, or paying for the damages he has done. In that view of the case before him, Mr. Justice Cunningham decided that no notice was required. The case then under judgment was, moreover, on its facts very similar to that now before us. It was a suit in which the plaintiff claimed to be entitled to a share in a certain trust fund, and no notice of the suit had been given to the defendant who was the Official Trustee and admittedly a public officer within the definition in the Civil Procedure Code.

5. We think that this construction of Section 80 receives support from the decision of the Court of Appeal in England in *Flower v. Local Board of Low Leyton* (1877) 5 Ch. D. 347 : 46 L.J. Ch. 621 : 36 L.T. 760 : 25 W.R. 545. It is true, of course, that that decision, which turned upon the meaning of Section 264 of the Public Health Act, 1875, cannot be read as a direct authority for the ascertainment of the meaning of Section 80 in the CPC of India; but it does seem to us to be of high authority as to the manner in which and the principle upon which the Courts ought to approach the task of interpreting such sections. In terms, the section of the Public Health Act, which was before the English Court for construction, was wider and harsher than is Section 80 of our Code, for whereas Section 80 of our Code limits the requirement of notice to the case of an

act purporting to be done by a public officer, the English Act required notice in respect of anything done or intended to be done or omitted to be done under its provisions. In spite of that, however, the Court held that no notice was needed where the suit was one for an injunction to restrain an immediate and otherwise irreparable injury. Sir George Jessel, M.R., said that the section was intended to apply to an action at law for damages and its object was to give an opportunity to the local authority to make payment or tender of compensation for the damage sustained. It could not be intended to apply to a case where the local authority was pulling down a house, or stopping a sewer. If that were so, it would amount to a license to every local board to do what injury they pleased while the notice was running. It may be observed that this comment exactly agrees with the view which Mr Justice Cunningham took in explaining Section 80. Flower's case (1877) 5 Ch. D. 347; 46 L.J. Ch. 621; 36 L.T. 760; 25 W.R. 545 was the subject of notice by a Bench of this Court in *Secretary of State v. Gajanan Krishna Maclankar* 35 B. 362 : 13 Bom. L.R. 273 : 10 Ind. Cas. 639 where we agree generally with the observations of Mr. Justice Heaton on this point.

6. If this is the true way in which to read Section 80, it appears to us clear that the present suit is outside that section. The suit is brought, not in regard to the wrongful seizure by the Official Assignee, but in regard to the threatened sale, and the primary relief claimed is by way of injunction to restrain that sale. The real object of the suit is to obtain relief by injunction against an act, not done, or purporting to be done, but merely threatened, namely, the act of causing the furniture to be sold by auction. It is true that in the alternative, the plaintiff seeks an award of compensation equal to the value of the goods, but that, in our opinion, is only a subsidiary prayer; and the main purpose of the suit is to obtain the injunction. As Vice-Chancellor Malins said in Flower's case (1877) 5 Ch. D. 347; 46 L.J. Ch. 621; 36 L.T. 760; 25 W.R. 545, the Court must look at all the circumstances to see whether the necessity really exists for an injunction, or whether the real claim is not for compensation in damages. In this case, we think, that the really substantial claim in the suit is the claim for the injunction.

7. Now the learned Judge himself by granting a temporary injunction has admitted the immediate necessity for the institution of this suit, since only by filing the suit could the plaintiff obtain that temporary injunction, which the learned Judge himself has considered the plaintiff entitled to obtain. We think that, seeing that the object of the suit is to obtain against a public officer, not the Secretary of State in Council, an injunction to restrain what would otherwise be an irreparable injury, the suit is not subject to the notice required by Section 80.

8. Mr. Ratanlal for the respondents called our attention to several cases, but none of them, we think, is really in conflict with the opinions we have expressed. In *Ram Pitam Shah v. Shoobul Chunder Mullick* 15 C. 259 and in *Bakhtawar Mal v. Abdul Latif* 29 A. 567 : 1907 A.W.N. 170 the primary object of the suits was to recover back either monies or moveable property which had wrongly been taken. In *The Collector of Bijnor v. Munuvar* 3 A. 20 (sic) Mr. Ratanlal also referred to,

the suit was a suit for damages. In *Talukdari Settlement Officer v. Ishwardas* 14 Bom. L.R. 577 : 16 Ind. Cas. 445 to which one of us was a party, the suit was, we think, decided on its own facts, and the point there argued was, not that the suit did not require a preliminary notice, but that notice had been furnished and the notice furnished was good in law.

9. For these reasons, we must reverse the decree under appeal and remand the suit for trial on the merits; and we must express the hope that the plaintiff having since the 23rd of September 1910 been baulked of reaching the merits of his suit by a decision upon one preliminary point after another, the District Judge will now go into the merits of the suit irrespective of any opinion which he may form upon any other preliminary point. The appellant must have his costs here and in the Court below.