

1958

Present : Basnayake, C.J., and de Silva, J.

P. EDIRIWEERA, Appellant, and S. WIJESURIYA, Respondent

S. C. 219—D. C. Hambantota, 182

Civil Procedure Code—Section 461—“ Act ”—Vel vidane—Liability as “ public officer ”—Irrigation Ordinance, No. 32 of 1946, ss. 25 (1), 25 (4), 26, 29, 31.

A vel vidano appointed under the Irrigation Ordinance, No. 32 of 1946, is a public officer within the meaning of section 461 of the Civil Procedure Code.

The defendant, a vel vidane, by deliberately leaving open the water pipes of an irrigation channel for a full day when he should have closed them for half the day, deprived the plaintiff of sufficient water for his paddy field and thereby caused damage to the plaintiff.

Held, that the failure of the vel vidane to operate the water pipes properly was “ an act ” done by him in his official capacity. He was, therefore, entitled to notice of action in terms of section 461 of the Civil Procedure Code.

A PPEAL from a judgment of the District Court, Hambantota.

Sir Lalita Rajapakse, Q.C., with *E. A. G. de Silva*, for Defendant-Appellant.

H. W. Jayewardene, Q.C., with *C. V. Ranawaka* and *P. Ranasinghe*, for Plaintiff-Respondent.

February 19, 1958. BASNAYAKE, C.J.—

This is an action in which the plaintiff seeks to recover a sum of Rs. 918 as damages from the defendant a vel vidane. The plaintiff's allegation is that he suffered the damages claimed by him in consequence of the defendant's action in "wrongfully and unlawfully in breach of his duty as vel vidane" manipulating the pipes supplying water to the paddy fields irrigated by the Wile-Ela scheme so as to deprive his field known as Bankolothnulla of sufficient water during the Yala season of 1951 and the Maha of 1951-52.

It would appear from the evidence of the Irrigation Engineer who, at the relevant period, was in charge of the irrigation scheme in which the plaintiff's paddy field is situated that the plaintiff's field was irrigated from a channel known as Wile-Ela which irrigated about 150 acres of paddy fields. The plaintiff complained to him on three or four occasions that his field did not receive sufficient water. He inspected the field and observed that it was true, and he formed the opinion that the plaintiff did not receive enough water because the pipes that fed the water to the fields were not properly operated and that although there was sufficient water to supply all the 150 acres the plaintiff did not get enough on account of the action of the defendant in keeping open, for a full day, certain pipes that should be kept closed for half the day.

The only question that arises for decision on this appeal is whether the defendant who is a vel vidane should have been given notice of this action under section 461 of the Civil Procedure Code. The learned District Judge has found as a fact that notice of action has not been given. He holds as a matter of law that notice of action under section 461 need only be given to a public officer who has acted "in good faith and with an honest intention of getting the law into force". He further holds that notice of action need not have been given in the instant case as malice is alleged. Learned counsel for the appellant relied on the decision of this Court in the case of *De Silva v. Hangaakoon*¹.

Learned counsel for the respondent did not, in view of the decision of this Court in that case, seek to support the learned District Judge's view that notice under section 461 of the Civil Procedure Code was not necessary where malice is alleged; but he maintained that notice was necessary only in respect of an act purporting to be done by a public officer in his official capacity. He submitted that in the instant case

¹ (1956) 57 N. L. R. 457.

plaintiff's complaint was not of an act of the defendant but of an omission by him. He further submitted that the word "act" does not in the context of section 461 include an omission. Learned counsel relied on the case of *Revati Mohan Das v. Jatindra Mohan Ghosh and others*¹. That was an action on a mortgage. One of the defendants was the common manager of an estate appointed under the Bengal Tenancy Act, 1885. It was contended that the manager, being a public officer, was entitled to notice under section 80 of the Indian Civil Procedure Code and that no such notice having been given the action could not be instituted. The Privy Council observed (pp. 97-98)—

"Their Lordships do not suggest that a claim based upon a breach of contract by a public officer may not in many cases be sufficient to entitle him to notice under the section, but they are unable for the reasons already given, to agree with the learned Judges that the omission by respondent 1 to pay off the mortgage was such a breach."

The decision of the Privy Council has no application to the instant case where it is clear that it was the act of the defendant in manipulating the water pipes in such a way as to deprive the plaintiff of sufficient water that caused him the damages he claims. The evidence of the Irrigation Engineer leaves no room for doubt that the defendant deliberately left open for a full day pipes which should have been closed for half the day. It is clear the plaintiff suffered injury not through any omission of the defendant but through his deliberate act in keeping open the pipes for a full day when he should have closed them for half the day.

Learned counsel also contended that a vel vidane is not a public officer. He relied on the Irrigation Ordinance No. 32 of 1946. It was decided by this Court in the case of *Tampoe v. Murukasu*² that an irrigation headman appointed under Ordinance No. 10 of 1901 is a public officer within the meaning of that expression in section 461 of the Civil Procedure Code. If a vel vidane could properly be regarded as a public officer under the Irrigation Ordinance of 1901 he is more so under the present Ordinance No. 32 of 1946. Although the mode of selection of a vel vidane is election by the majority of registered proprietors of the division (section 25 (1)) he is appointed by the Government Agent (section 25 (4)) and is liable to be retired or dismissed by him (section 26). He has public duties to perform (section 29) and may receive such remuneration for his services as the Government Agent (section 31) may award.

3 The appellant is entitled to succeed. We allow his appeal with costs and set aside the judgment of the learned District Judge and dismiss the plaintiff's action with costs.

DE SILVA, J.—I agree.

Appeal allowed.

¹ (1934) A. I. R. Privy Council p. 96.

² 1 Current Law Reports 107.