

1956 *Present: K. D. de Silva, J., and Sinnatamby, J.*

M. SUBBIAH, Appellant, and THE TOWN COUNCIL,
POINT PEDRO, Respondent

S. C. 276—D. C. Colombo, 33,917/M

Town Council—Sued for breach of contract—Notice of action not necessary—Town Councils Ordinance, No. 3 of 1949, s. 231 (1).

The notice contemplated in section 231 of the Town Councils Ordinance, which provides that no action shall be instituted against a Town Council for anything done or intended to be done under the powers of that Ordinance until the expiration of one month after written notice is given to the Council stating with reasonable certainty the cause of action etc., is required to be given only in cases where the cause of action is based on tort and not on contract.

APPPEAL from a judgment of the District Court, Colombo.

V. A. Kandiah, for the plaintiff-appellant.

H. Wanigatunga, for the defendant-respondent.

Cur. adv. vult.

December 20, 1956. DE SILVA, J.—

The plaintiff appellant instituted this action against the Town Council, Point Pedro, the defendant, to recover a sum of Rs. 347/50 on account of goods sold and delivered. The defendant filed answer denying the purchase of the goods and also pleading that this action was not maintainable as the notice required in terms of the provisions of section 231 (1) of the Town Councils Ordinance No. 3 of 1946 was not given. The learned District Judge tried the two issues relating to this plea as preliminary issues and having answered them in favour of the defendant dismissed the plaintiff's action with costs. This appeal is from that order.

Section 231 (1) of Ordinance No. 3 of 1946 provides that no action shall be instituted against a Town Council for anything done or intended to be done under the powers of that Ordinance until the expiration of one month after written notice is given to the Council stating with reasonable certainty the cause of action etc. It is contended on behalf of the plaintiff that the notice contemplated in section 231 (1) is required to be given only in cases where the cause of action is based on tort and not on contract or quasi-contract. Section 177 of the Municipal Councils Ordinance No. 17 of 1865 which is substantially the same as section 231 (1) of Ordinance No. 3 of 1946 came up for consideration in *John Walker & Co. v. The Municipal Council of Kandy*¹. In that case the plaintiff sought to recover a sum of money from the defendant Council on account of work done and goods supplied. The defendant pleaded that the action was not maintainable as the notice required by section 177 of Ordinance No. 17 of 1865 had not been given. In rejecting this plea Clarence J. stated :—

“ This clause seems to me to contemplate actions to recover damage for torts or to restrain the commission of torts. I do not think it was meant to impose a three months' time of prescription on a mere claim for goods sold or work done. ”

The same Judge adhered to this view in the subsequent case *Jayasundera v. The Municipal Council of Galle*².

In *Siripala v. U. D. C., Kalutara*³ Wijeyewardene J. had occasion to consider the interpretation of section 230 of the Local Government Ordinance No. 11 of 1920. That section is identical with section 231 of Ordinance No. 3 of 1946. In that case the plaintiff sought to recover a sum of money which he had paid for the purchase of land belonging to the Urban Council sold by auction but which sale the Council refused to confirm. The Council pleaded that the action was not maintainable as no notice had been given in terms of section 230 of Ordinance No. 11 of 1920. In construing that section Wijeyewardene J. after referring to the earlier cases observed :—

“ Apart from authority, the language of section 230 of the Local Government Ordinance leaves no doubt in my mind that the section is not applicable to actions against an Urban District Council for the enforcement of contractual or quasi-contractual obligations. ”

¹ (1881) 4 S. C. C. 140.

² (1939) 41 N. L. R. 161.

³ (1883) 5 S. C. C. 174.

I would respectfully agree with that view. Section 231 of Ordinance No. 3 of 1946 is applicable, in my opinion, to actions for the enforcement of obligations arising *ex delicto* and not to actions such as this. The judgment of Wijeyewardene J. in 41 N. L. R. 161 was cited by the plaintiff's Counsel in the Court below but the learned District Judge refused to follow it on the ground that the passage quoted above from that judgment was obiter. I am unable to understand how the District Judge could have held it to be obiter. The point was specifically raised in the case and it became absolutely necessary to decide whether or not the provisions of section 230 were applicable to actions based on contract or quasi-contract. After considering the earlier authorities and the language of the section this Court held that the section in question was not applicable to such actions. The original Courts should not lightly dismiss the views of this Court as being obiter.

The learned District Judge should have answered the preliminary issue No. 4 in the affirmative. Accordingly I would set aside the order appealed from and send the case back for trial on the remaining issues. The defendant will pay the costs of this appeal to the plaintiff.

SINNETAMBY, J.—I agree.

Appeal allowed.

