to read the law, as it often is read, is, it seems to me, to reverse the principles of justice, and to convert the instruments of justice into instruments of fraud.

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TRIMBAK RAMKRISHNA v. HARI LAXMAN.

Order reversed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1910. *June* 28.

CECIL GRAY, THE SECRETARY AND A MEMBER OF THE WESTERN INDIA TURF CLUB (ORIGINAL PLAINTIFF), APPELLANT, *v.* THE CANTONMENT COMMITTEE OF POONA (ORIGINAL DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), sections 2 (17), 80—Public officer —Suit against public officer—Notice of claim necessary—Cantonment Committee is public officer—Cantonments Act (XIII of 1889)—Section 80 applies to actions ex delicto and not to actions ex contractu.

A Cantonment Committee constituted under the Indian Cantonments Act (XIII of 1889) is a "public officer" within the meaning of section 2, clause (17) of the Code of Civil Procedure (Act V of 1908). Before the Committee can be sued, the notice prescribed by section 80 of the Code must be given.

The notice contemplated by section 80 has to be given for actions sounding substantially in tort; and it makes no difference that those actions are, by operation of law, treated, for certain purposes, as actions *ex contractu*.

Rajmal v. *Hanmant* (1) considered.

APPEAL from the decision of C. Roper, District Judge of Poona.

Cecil Gray was the Secretary and a member of an unincorporated association styled the Western India Turf Club. He sued on behalf of himself and all other members of the Club.

Under a lease dated the 16th February 1907, made between the Secretary of State for India and the Club, the latter occupied certain lands and buildings in the Poona Cantonment on a rental of Rs. 1,200 per annum.

* First Appeal No. 9 of 1910.

(1) (1895) 20 Bom. 697.

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The defendants, the Cantonment Committee of Poona, were a body corporate constituted under the Indian Cantonments Act (XIII of 1889), having the control and management of the Poona Cantonment Fund. The Poona Cantonment Magistrate was the executive officer of the Committee.

The Governor in Council of Bombay imposed, under section 17, sub-section 1 of the Cantonments Act, 1889, a general rate of 4 per cent. per annum of the annual value of houses, buildings and lands within the Cantonment of Poona. The rate was made payable to the Cantonment Magistrate and formed a part of the Cantonment Fund.

The annual value of the Club's lands and buildings was for the purposes of the rate fixed at Rs. 5,038 for the years 1907 and 1908, and the rate amounted to Rs. 201-8-4. The Club did pay the sum of Rs. 100-12-2 as rate for the half-year ending the 31st March 1909. But on the 8th October 1909 the Cantonment Magistrate by a notice to the Club claimed to assess it at the sum of Rs. 9,840 per annum being 4 per cent. on an annual gross income of Rs. 2,46,000.

On the 28th November 1908, the Club paid under protest the sum of Rs. 4,819-3-10, the additional rate for the half-year ending the 31st March 1909, and informed the Cantonment Magistrate that the Club intended to appeal against his assessment to the Cantonment Committee. The appeal was made with the result that the assessment at Rs. 4,819-3-10 was brought down to Rs. 4,671. The Club further paid under protest another sum of Rs. 4,772-1-3 for the assessment for the half-year ending the 30th September 1909.

The Club, through the plaintiff, filed a suit for an injunction restraining the defendants from recovering from the Club the enhanced assessment, and for recovering the amount of assessment that was paid in excess.

The defendants contended *inter alia* that the suit was bad owing to want of notice provided for in section 80 of the Civil Procedure Code, 1908.

The District Judge tried as preliminary the issue whether the suit was bad for notice under section 80 of the Civil Procedure

Code, 1908, and found it in favour of the defendants on the following grounds:—

The preliminary issue thus raised has been argued and I find that notice was necessary. The provisions of the Cantonments Act, 1889, make it clear in my opinion that the members of the Cantonment Committee are in that capacity public officers, as that term is employed in section 80 of the Civil Procedure Code and defined in section 2 (17) (*g*) of the same Code. The learned Counsel for plaintiffs contends that a corporate body, such as the defendants, cannot come under the term "public officer" who must be an individual. Having regard to section 3 (39) of Act X of 1897 (General Clauses Act) and to section 2 (17) (*g*), Civil Procedure Code, also to sections 21 and 23 of the Cantonments Act, 1889, I think that every member of the Cantonment Committee is a public officer and so also the Committee as a body. The suit might and would properly have been brought against the Secretary of the Committee as its representative officer and in that event he would certainly come under the definition of a public officer. On the same reasoning the Cantonment Committee, which is the Cantonment authority according to the Act of 1889, is constituted of public officers in so far as they act on the said Committee. Plaintiffs' Counsel raises a second objection against the defendants' plea that notice under section 80 is necessary. It is this. The suit, he contends, is brought on a contract or at least on a quasi-contract, and is not based on tort. To such a suit section 80 is said not to apply. It may be conceded that there are authorities laying down that "ex contractu" suits are not covered by section 80, but I am of opinion that the suit is clearly based on a tort and not on a contract or even a quasi-contract. It is urged for plaintiffs that, when they paid the assessment under protest, a contractual relation arose between them and defendants. This argument is ingenious but it cannot conceal the patent fact that the suit is primarily based on an allegation that defendants in their official capacity wrongly levied certain assessments and to such a case I think section 80 has the clearest application. On these grounds I find that the suit is bad for want of notice under section 80 of the Civil Procedure Code and I accordingly dismiss it with all costs on plaintiffs. I omitted to state that I am to some extent confirmed in the above view of the meaning of the expression "public officer" by a case in this Court Civil Suit No. 63 of 1887, where an action was instituted by private persons against the Cantonment Magistrate in his capacity as Secretary of the Cantonment Committee in respect of a title to certain property in the Poona Cantonment. The plaintiff then served a preliminary notice under section 424 of the late Civil Procedure Code upon the Cantonment Magistrate and subsequently the Secretary of State was joined as a co-defendant. The cause of action in the present suit is at least somewhat similar and the fact that the suit is brought against the Committee and not against the Secretary alone cannot, I think, exempt the plaintiffs from the obligation to serve a preliminary notice.

The plaintiff appealed to the High Court.

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Shortt, instructed by *Craigie, Blunt and Caroe*, for the appellant:—The suit has been brought against the Cantonment Committee of Poona. The Cantonment Committee is nowhere specifically mentioned as a corporation in the Cantonments Act (XIII of 1889); but it is treated as a corporation, see *The Cantonment Committee, Poona*, v. *Barjorji Bamanji* (1).

A corporation is not included in the term "public officer" as defined by section 2, clause 17 of the Civil Procedure Code, 1908. The term "public officer" there means "a person falling under any of the following descriptions"; and the descriptions that follow show that only individual officers are contemplated. A corporation cannot be included within it. The General Clauses Act (X of 1897) no doubt says (section 3, clause 39) that a person shall include "any company or association or body of individuals, whether incorporated or not"; but that description applies only if there is nothing "repugnant in the subject or context." There is the repugnancy in the Civil Procedure Code where the term "person" seems to denote some person who has some one or other in authority over him. The term has to be construed in conformity with the object of the statute in which it appears. See *The Pharmaceutical Society* v. *The London and Provincial Supply Association, Limited* (2).

Next section 80 of the Civil Procedure Code, 1908, applies only to actions in tort. It has no application to actions in contract. The claim in the present case arises *ex contractu* or *quasi ex contractu*; and it is only in the alternative that a relief in tort is prayed for. We paid the money to the defendants under protest and in order to avail ourselves of the right to appeal to the Committee. The object of the suit is to recover the money which the defendants had and received. See *Rajmal* v. *Hanmant* (3).

The Government Pleader for the defendants, was not called upon.

(1) (1889) 14 Bom. 286. (2) (1880) 5 App. cas. 857.
(3) (1895) 20 Bom. 697.

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CHANDAVARKAR, J.:—This Court has held in *The Cantonment Committee, Poona* v. *Barjorji Bamanji*,[1] relied upon by Mr. Shortt in his able and careful argument in support of this appeal, that a Cantonment Committee, formed under rules framed under the Indian Cantonments Act (XIII of 1889), is a *quasi* body corporate. It is unnecessary to express any opinion on the correctness of that decision, because the question before us is whether, for the purposes of section 80 of the Code of Civil Procedure, a Cantonment Committee is a "public officer" as defined in section 2, clause (17) of the Code.

Under that section, the expression "public officer" means (*inter alia*) "a person", who is an "officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of Government." A Cantonment Committee is, according to the rules made under Act XIII of 1889, "a Cantonment authority," which is charged with the management of a fund called "the Cantonment Fund". That fund is vested in His Majesty by the provisions of section 13 of the Act, and its management by the Committee is made, by the same section, subject to the control of the Local Government.

The Committee is, therefore, an artificial person formed by the statute for the purposes of Cantonment administration.

But it is contended that the definition of "public officer" in the Code contemplates an individual, not a body composed of individuals, of the description mentioned in each of the clauses of section 2. A "public officer" means, in the first place, "a person", and the word "person", under the General Clauses Act (X of 1897), includes "any body or association of individuals, whether incorporated or not." Such a body, discharging, according to law, any of the functions, mentioned in the clauses of section 2 of the Code of Civil Procedure, falls, in our opinion, within the definition of "public officer".

As pointed out in some of the cases decided on the construction of section 424 of the old Code of Civil Procedure (Act XIV of 1882), which is reproduced as section 80 in the present Code, the object of the section is to give a public officer, acting or pur-

(1) (1889) 14 Bom. 286.

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porting to act in the execution of his public duty, an opportunity of making reparation for any damage which he may have caused in such execution without being sued in a Court. The right to notice, as a condition precedent to a suit, is given to the officer concerned in the interests of the public treasury, out of which the money must come for repairing the damage. This consideration applies to a Cantonment Committee, managing a Cantonment Fund vested in His Majesty, as much as to any public officer similarly situated.

We think, therefore, that a Cantonment Committee such as we have here is a "public officer" within the meaning of section 2 of the Code of Civil Procedure.

It is argued, however, that no notice under section 80 of the Code was necessary for the maintenance of this action against the Committee, because it arose not out of a tort but out of a contract; and *Rajmal Manikchand* v. *Hanmant Anyaba*[1] is relied upon.

The plaint and the pleadings clearly show that the cause of action complained of by the appellant is one sounding in tort. It is alleged that, under cover of authority given to it by the Cantonments Act and the rules framed under it, the respondent Committee has illegally imposed a rate upon the appellant. On the strength of that allegation, the appellant seeks the refund of a certain amount, which, he states, he deposited with the Committee "under protest" to meet its illegal demand. It is contended that the moment the appellant paid the money under protest, the Committee held it as money had and received for the appellant's use, and became bound to restore it, if the levy of the rate was illegal.

Chapter V. of the Indian Contract Act, by which this argument is sought to be supported, deals with "certain obligations resembling those created by contract", not with those arising from a contract itself, which presupposes a legal relation brought about between parties by their free volition in the form of proposal and assent. The principle of *Rajmal Manikchand* v. *Hanmant*

(1) (1895) 20 Bom. 617.

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Anyaba does not apply and was not intended to apply to the former kind of obligations. It would be straining the language of section 80 of the Code of Civil Procedure beyond legitimate limits and defeating its object, if we were to apply that principle to actions sounding substantially in tort, merely because by operation of law those actions, for certain purposes, are treated as actions *ex contractu*.

On these grounds the decree in appeal must be confirmed with costs.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1910. *July* 25.

CHINTAMAN VYANKATRAO GHADGE (ORIGINAL PLAINTIFF), APPELLANT, *v.* RAMCHANDRA VYANKATRAO GHADGE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Limitation Act (XV of 1877), sections 5 and 7—Application to file an appeal in formâ pauperis*—Delay in making the application—Minor applicant—Excuse of delay—Probate—Grant of probate—Question of title not affected by the grant—*Res judicata*—Civil Procedure Code (Act V of 1908), section 11.*

A suit filed in *formâ pauperis* was decided on the 10th February 1908. An application for leave to appeal in *formâ pauperis* was presented to the High Court on the 13th April 1908; but as it was beyond time it was rejected. On an application to excuse the delay, it was excused on the ground that the applicant having been a minor, section 7 of the Limitation Act, 1877, applied. At the hearing, it was objected that the application for permission to appeal in *formâ pauperis* must be treated as an appeal, and that section 5, and not section 7 of the Limitation Act, applied to it.

Held, overruling the contention, that whether the application was treated as falling under section 5 or under section 7 of the Limitation Act, 1877, the result was the same. If it fell under section 5, as an appeal, then under the second paragraph of that section, which applied to appeals, the Court had jurisdiction to excuse delay, after the period of limitation prescribed for the presentation of an appeal had expired. If, on the other hand, it be treated as an application and fell under section 7 of the Limitation Act, it was clearly

* First Appeal No. 46 of 1909.