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J. H. Tod

v.
LAKHMIDASS
PURSHOTUM-
DAS.

point, as I have no doubt but that Shivji spoke to the defendant about the assignment, and asked him to deliver to Tod.

In this view of the case, Shivji Prágji is entitled to receive damages from the defendant for non-delivery. As in the case of the cotton contracts, he has handed the documents to the plaintiffs against the debt he owes. Entertaining doubt whether this operates as an assignment in law, I allowed the application which Mr. Scott made at the opening of the case, and directed that Shivji Prágji be made a plaintiff, instead of a defendant. [His Lordship then discussed some questions of fact as to which evidence was given, but which are not material to this report, and ultimately gave judgment for the plaintiffs in both suits, with costs.]

Attorneys for the plaintiffs:—Messrs. *Conroy and Brown*.

Attorney for the defendant:—Mr. *E. Wilkin*.

ORIGINAL CIVIL.

Before Mr. Justice Parsons.

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January 15 ;
March 17.

FATIMA BIBI AND ANOTHER, PLAINTIFFS, v. FATIMA BIBI, DEFENDANT.*

Insolvency—Vesting order—After-acquired property—Right of insolvent or his assignee to sue—Official Assignee—Practice—Parties.

One Rahimtulla became possessed of certain properties in 1872 and 1881. In 1866, Rahimtulla had presented a petition in insolvency, and a vesting order had been duly made. No final order of discharge was ever made; and Rahimtulla died in 1888. The plaintiffs sued, as the heirs of Rahimtulla, for their shares in the said properties. It was objected (i) that, looking to the insolvency of Rahimtulla, the plaintiffs had no interest in his estate, and (ii) that the Official Assignee, as the assignee of the estate and effects of Rahimtulla, was a necessary party to this suit.

Held, that the properties in question, coming to Rahimtulla after his insolvency, vested in him, subject only to the right and claim of the Official Assignee should he think fit to assert it, and that the plaintiffs, as representatives of Rahimtulla, could maintain the action.

Held, also, that the Official Assignee was not a necessary party to the suit, though, in case of a decree in plaintiffs' favour, notice thereof should be given to him by the Court.

* Suit No. 576 of 1890

THIS suit was brought to establish a claim to certain properties. The plaintiffs, the wife and son of one Hájí Rahimtulla, deceased, claimed, as his heirs, certain properties which had come to the said Rahimtulla after his insolvency in 1866. Rahimtulla had not obtained his final discharge when he died. The facts of the case sufficiently appear from the judgment. The following issues (*inter alia*) were raised by the defendants :—

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2. Whether the Official Assignee, as the assignee of the estate and effects of Hájí Rahimtulla, is not a necessary party to this suit?

3. Whether, having regard to the insolvency of the said Hájí Rahimtulla, the plaintiffs have any interest in his estate?

Russell (*Badrudin Tyabji* with him) contended that the plaintiffs could not sue; he cited *Sadolin v. W. Spiers*⁽¹⁾.

Starling (*Vicáji* with him) *contra*; he cited *Kristocomul Mitter v. Suresh Chunder Deb*⁽²⁾.

PARSONS, J.:—Two important points are raised by the second and third issues, *viz.*, whether the Official Assignee is a necessary party to this suit; and whether, having regard to the insolvency of Rahimtulla, the plaintiffs can maintain this suit.

The following are admitted facts in the case :—

Rahimtulla presented a petition in the Insolvency Court on the 1st May, 1865, and filed his schedule on the 3rd February, 1866. The petition was dismissed on the 19th February, 1866, with leave granted to file a fresh petition. A fresh petition was presented on the 6th March, 1866, and on the same day a vesting order was made. The applicant got his personal discharge on the 7th May, 1866, but no order for final discharge was ever made.

Khatiza, the wife of Rahimtulla, died in 1872, leaving her surviving her husband, one son, and two daughters. The son (Fazaluddin) died in 1881, leaving as his heirs Rahimtulla and the defendants. Rahimtulla himself died in 1888. The plaintiffs (his second wife and her son) claim, as his heirs, their shares in the property inherited by him from Khatiza and Fazaluddin.

(1) I. L. R., 3 Bom., 437.

(2) I. L. R., 8 Calc., 556.

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It is contended on behalf of the defendants that, as the estate of Rahimtulla has vested in the Official Assignee, the plaintiffs cannot bring this suit. The cases, however, of *Herbert v. Sayer*⁽¹⁾ and *Jameson v. The Brick and Stone Company, Limited* lay down the principle that, in respect of after acquired property, at any rate, the uncertificated bankrupt has the right to such property against every body but the trustee in bankruptcy, and that it is not competent for a stranger to dispute his title. If the trustee does not interfere, the bankrupt can sue. This principle is followed in the case of *Kristocomul Miller v. Suresh Chunder Deb*⁽²⁾, where the result of the English decisions is thus stated: "Subject to the right and claim of the Official Assignee, and so long as the Official Assignee does not interfere, the uncertificated bankrupt has power to buy and sell, and give discharges, and do all other acts he could have done, and had done, before the intervention of the Official Assignee."

In the present case the property, the subject of the suit, vested in Rahimtulla after the insolvency, and the Official Assignee has not interfered; I, therefore, hold that he is not a necessary party to this suit, and that the plaintiffs, as representatives of Rahimtulla, can maintain this action, subject of course to all rights and claims of the Official Assignee, to whom, in case of any decree being passed in favour of the plaintiffs, due notice should be given by the Court. The case of *Sadodin v. W. Spiers*⁽³⁾ is clearly distinguishable, since there the estate which the respondent had in the lands, which were the subject of the suit, was created, and in existence, when he filed his petition in insolvency.

Plaintiffs' solicitor:—Mr. J. C. Cama.

Defendant's solicitors:—Messrs. Tyabji and Dáyábhái.

* *Note*.—The trustee can come in and insist on being added as a plaintiff, and will be given the conduct of the action. See *Emden v. Carte*, 17 Ch. D., 169.—ED.

(1) 5 Q. B., 965.

(2) 4 Q. B. D., 208.

(3) I. L. R., 8 Cal., 556, at p. 559.

(4) I. L. R., 3 Bom., 437.