

1892.

IN THE
MATTER OF
THE BOMBAY
FIRE
INSURANCE
COMPANY,
LIMITED;
EX PARTE
R. GILBERT.

of Ahmedbhoy; or one of the directors, to purchase the shares himself. (2) The difference in opinion between the shareholders as to whether the company should be continued or wound up, and the fact that Mr. Gilbert is in favour of winding up the company, from which I am asked to draw the inference that the views held by Mr. Gilbert are the cause of the board's refusal to allow the shares to be transferred to him. (3) The bad and unfriendly terms which Mr. Gilbert says have for many years subsisted and still subsist between him and Ahmedbhoy Hubibhoy, which suggest a cause for the board's refusal. To draw the first of these inferences would, in my opinion, be to draw an erroneous inference from the facts, in addition to its being positively denied by Ahmedbhoy. To draw the second inference would be to make a plausible guess without evidence to support it. I have not been referred to any authority which shows that the third reason suggested is an illegitimate one to influence the board's decision; but were it otherwise, I have no evidence before me to show that it did operate in their minds. I cannot act upon guesses more or less probable, and must hold that there is no proof of any fact which would invalidate the decision at which the board has arrived. I, therefore, have no option but to discharge the rule with costs.

Attorneys for appellant:—Messrs. *Payne, Gilbert and Sayani*.

Attorneys for the company:—Messrs. *Craigie, Lynch and Owen*.

ORIGINAL CIVIL.

Before Mr. Justice Farran.

LEKHRA'J CHUNILAL, PLAINTIFF, v. SHA'MLAL NA'RRONDA'S
AND OTHERS, DEFENDANTS.*

1892.

January 28.

Practice—Civil Procedure Code (Act XIV of 1882), Sec. 370—Right form of order thereunder—Power of Court to rectify its own mistake.

On the 3rd of August a case came on for hearing. Prior to that date the plaintiff in this suit had been adjudicated an insolvent and did not appear, but the Official Assignee appeared and applied for a postponement. The Court accordingly made the following order:—"It is ordered that the suit be dismissed under section 370 of the Civil Procedure, unless the Official Assignee elects on before the fifth day of October next to continue the suit and give security for the de-

* Suit No. 359 of 1890.

defendants' costs." The time for complying with the order was subsequently extended, and the plaintiff in the meanwhile obtained an order allowing the insolvency proceedings to be withdrawn. The defendant now applied that the suit should be dismissed pursuant to the terms of the above order. The plaintiff objected, as he was now no longer an adjudged insolvent, and was ready to prosecute the suit.

Held, that the order had been made in an improper form, in as much as section 370 gives the Court no power to order the dismissal of the suit. This part of the order, therefore, was wrong, and the Court could now rectify it by cancelling that portion of the order, and as a consequence refusing the defendants' application.

MOTION. The plaintiff sued the defendants to recover a sum of Rs. 2,166. The defendants denied the plaintiff's claim.

The suit was ripe for hearing when on the 15th June, 1891, the plaintiff stopped business and left Bombay. On the 15th July, 1891, one of his creditors got him adjudicated an insolvent, and he was ordered to file his schedule within a month.

This suit appeared on the list of causes for hearing on the 3rd August, 1891. When it was called on, the plaintiff did not appear either in person or by counsel, but the Official Assignee informed the Court that the plaintiff had been adjudged an insolvent, and applied that the hearing should be postponed, in order that he (the Official Assignee) might consider whether he should continue the suit or not. This application was granted, and it was ordered that the suit should be dismissed under section 370 of the Civil Procedure Code, unless the Official Assignee elected on or before the 5th October, 1891, to continue the suit and give security for the defendants' costs.

On the 12th August, 1891, the plaintiff obtained an extension of time for two months within which to file his schedule. In the meanwhile he compromised with his opposing creditor, and applied for and obtained a rule *nisi* to set aside the order by which he was adjudged an insolvent. This rule, however, was discharged on the 23rd September, 1891.

The Official Assignee did not give security for defendants' costs as ordered within the time allowed, and on the 8th October, 1891, counsel for the defendants moved to have the suit dismissed pursuant to the order of 3rd August, 1891. The Official Assignee applied for further time, and the time was accordingly extended to the 19th November, 1891.

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On the 18th November, 1891, plaintiff filed his schedule, inserting therein only the names of such creditors as he had settled with, and on the 25th November he obtained a rule to revoke the adjudication order.

On the 26th November, 1891, counsel for the defendants moved to have the suit dismissed pursuant to the order of 8th October, 1891. The plaintiff appeared by counsel, and opposed the motion on the ground of the rule which he had obtained the day before. The matter was ordered to stand over until after the ensuing Christmas vacation.

On the 23rd December, 1891, the rule obtained by the plaintiff for the revocation of the order of adjudication was made absolute.

Counsel for the defendants now applied that the suit should be dismissed pursuant to the order of 8th October, 1891.

Jardine for the defendants in support of the motion.

Scott for plaintiff, *contra*.

FARRAN, J. :—In this case Mr. Jardine for the defendant moved on Thursday last for an order dismissing the suit under section 370 of the Code.

Subsequently to the institution of the suit the plaintiff was adjudicated an insolvent. On the 3rd of August, 1891, the Court at the instance of the defendant and, after hearing the Official Assignee, made an order purporting to be made under section 370 of the Code. The plaintiff was not represented before me when that order was made. As to him it was made *ex parte*.

The order was as follows :—“It is ordered that the suit be dismissed under section 370 of the Civil Procedure Code, unless the Official Assignee elects on or before the 5th day of October next to continue the suit and give security for the defendants' costs.” That order does not appear to me now to be warranted by the section. What the section contemplates is that the Court should fix a time within which the Assignee may decline to continue the suit, and to give security for the costs thereof. It gives no power to the Court to order that the suit shall stand dismissed if that be not done. What the Code provides is that

on the expiration of that time, if the Assignee neglect or refuse to continue the suit and to give such security, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and upon such application the Court may dismiss the suit and award to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate.

Since the making of the order the time for complying with it has been extended, and the plaintiff has obtained an order allowing the insolvency proceedings to be withdrawn. The plaintiff is not now an insolvent, and the defendant is not, therefore, in a position to apply for the dismissal of the suit on the ground of the plaintiff's insolvency. Had the order been drawn up in accordance with the section, the defendants' application must *ex necessitate rei* have failed.

Must I then dismiss the suit because the order has been obtained by the defendant in an improper form in the absence of the plaintiff? The Court in making the order certainly did not intend to go beyond the section. If the plaintiff had applied to have it amended and drawn up in the proper form, his application must have been complied with. I think that I should treat his counsel as now so applying, and direct the order to be amended by striking out the words "ordering the dismissal of the suit" and making the further verbal change occasioned thereby. The same result would be arrived at by treating the unauthorized words as *ultra vires* and declining to act upon them.

I shall, therefore, refuse this application, but, (as the error was that of the Court in passing the order in an erroneous form), without costs. The costs will be costs in the cause. The result of making any other order would necessitate an application on the part of the plaintiff under section 371 to set aside the order for dismissal, or an appeal. If I have no power to amend the order of the 3rd August, or to treat it as a nullity, as I think that I have, the appellate Court would undoubtedly possess that power.

Attorneys for plaintiff:—Messrs. *Tyalji and Dayábhái.*

Attorneys for defendants:—Messrs. *Wádia and Gándhly.*

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v.
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