ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

HAJI SAJAN LALJI, APPELLANT AND DEFENDANT, *v.* N. C. MACLEOD, RESPONDENT AND PLAINTIFF.* 1907. *December* 20.

Indian Insolvency Act (11 and 12 Vict, c. 21), section 7—Insolvent—Vesting order—Official assignee—Withdrawal of petition for insolvency—Right of official assignee to bring suit—Right of official assignee to continue suit after withdrawal of petition.

On the 14th October 1903 a petition in insolvency was filed and a vesting order was made by the Court. On the 15th June 1904 the insolvents took out a rule *nisi* to withdraw their petition, and the rule was made absolute on the 21st September 1904. But the orders were not drawn up till 27th February 1906. In the meanwhile the official assignee filed a suit on the 2nd March 1905 on behalf of the insolvents to recover a sum of money alleged to be due to the insolvents' firm in respect of certain mercantile transactions. It was objected on behalf of the defendant that the official assignee was not entitled (1) to bring the suit and (2) to continue the suit after the withdrawal of the petition.

Held, that at the date of the institution of the suit the insolvency proceedings were still in force and the assets still remained vested in the official assignee. The subsequent coming into force of the order could not vitiate the institution of the suit and it was clear that the official assignee was competent to bring the suit. He was also competent to continue it, for the order of withdrawal, even after it became operative, was not effective to divest the official assignee and revest the property in the insolvents. A withdrawal of a petition, for which no provision is made in the Act, cannot be regarded as the legal equivalent to its dismissal by consent.

THE facts of this case appear sufficiently from the judgments.

The suit was originally tried before Mr. Justice Davar who gave the following judgment:—

DAVAR, J.—Previous to the 14th of October 1903, Hashambhoy Visram, Fazulbhai Visram, and Hajibhai Visram were carrying on business as merchants in Bombay in the name of Visram Ebrahim and Company. The firm was involved in monetary difficulties and on the 14th of October Hashambhai and Hajibhai filed their petition in the Court for the relief of Insol-

* Original Suit No. 140 of 1905.
Appeal No. 1501.

1907.

HAJI SAJAN v. N. C. MACLEOD.

vent Debtors and a Vesting Order was made on the same day whereby all their property vested in the plaintiff who was then the Official Assignee. On the following day, on the petition of a creditor, Fazulbhoy was adjudicated an insolvent and on that day, a similar Vesting Order was made in favour of the plaintiff in respect of his property. Pending their insolvency the plaintiff filed a suit, being suit No. 76 of 1904, challenging certain trusts as being in fraud of the creditors. After the filing of this suit it seems that the insolvents arranged certain terms of settlement with the plaintiff and on the 15th of June 1904 Hashambhoy and Hajibhoy obtained a rule for the withdrawal of their petition and Fazulbhoy obtained a rule for the revocation of the order adjudicating him an insolvent. On the 21st of September 1904 both the rules came on for argument before the Court and both rules were made absolute on certain conditions. One of the conditions was that the insolvents were to pay to the Official Assignee as trustee for the creditors a sum sufficient to pay a composition of six annas in the rupee to the unsecured creditors—the creditors through the Official Assignee having agreed to receive the said composition in full satisfaction of their claims against the insolvents. The other conditions and provisions in the orders of the 21st of September 1904 making the rules for withdrawal of petition and revocation of adjudication absolute are immaterial for present purposes. The learned Commissioner in making the rules absolute amongst other things directed as follows :—

"Both rules absolute. Not to be drawn up till composition fees, etc., are paid to the Official Assignee as Trustee."

These orders were not drawn up and sealed till the 27th of February 1906. On the 28th of September 1904 orders were obtained directing or allowing the insolvents to pay the amount of composition within 2 months from the date of those orders—the 21st of September 1904.

The suit filed by the Official Assignee challenging the trusts was settled and a consent decree was taken on the 21st of November 1904. Hajibhai Visram was not originally a party to the suit—Hashambhoy and Fazulbhoy were the first and second

defendants. By the decree Hajibhai was added a defendant to the suit and he became the 10th defendant. All the three insolvents consented to the decree. On the following day, the 22nd of November 1904, the trustees under the Indentures of Trust which were attacked paid to the Official Assignee a sum of one lac and twenty-five thousand rupees. They have since paid nothing more. The Official Assignee has subsequently recovered certain moneys belonging to the insolvents' firm and out of the recoveries so made by him he has paid moneys to the trustees of the settlements referred to in the suit.

The facts stated above are not contested. They are either proved by the documents put in at the hearing or admitted before me in the course of argument.

This suit was filed by the Official Assignee on the 2nd of March 1905, originally against two defendants to recover a large sum of money—over Rs. 42,000—alleged to be due to the insolvents' firm in respect of certain mercantile transactions. The second defendant has been dismissed from the suit. On the 5th of April 1907, the defendant obtained a summons calling upon the plaintiff to show cause why commission should not be issued to Secunderabad and Mauritius for the examination of himself and his witnesses.

When the summons came on for argument, on reading the defendant's written statement I found that in addition to other pleas the defendant contended that the plaintiff was not entitled to maintain this suit, having regard to the fact that "Visram Ebrahim and Co. had withdrawn their petition for insolvency." In his written statement he prays that accounts may be taken *after* the legal questions and points raised by him are decided. It was stated to me that orders for withdrawal were made before the Official Assignee had filed his suit. *Primâ facie* it appeared that the Official Assignee had no right to file this suit when he did and it appeared to me to be great waste of time, money and energy to let the suit go on if the defendant's contention was correct. I was asked to allow the summons to stand over—the defendant stating that he would take out a summons for the trial of Preliminary Issues. The defendant,

1907.

HAJI SAJAN v. N. C. MACLEOD.

on the 10th of July 1907, obtained a summons for the trial of Preliminary Issues and it came on for argument before me on the 13th of July when it appeared to me that the case may be disposed of on the issue of law only and accordingly under section 146 of the Civil Procedure Code I made an order for the trial of the issue:

"Whether the plaintiff is entitled to maintain this suit?"

As at the hearing it was argued that the plaintiff was not only not entitled to maintain the suit but that when he filed the suit he was not entitled to do so I allowed by consent another issue to be raised, namely:

"Whether the plaintiff was entitled to file this suit?"

The learned counsel for the defendant, Mr. Kanga, has contended that the insolvency of the three brothers came to a termination on the 21st of September 1904, when the rules, I have mentioned above, were made absolute. He relies on the endorsements on the Schedule and certain other papers produced from the records of the Court in support of his contention that the order of withdrawal of Hashambhai and Hajibhai's petition and the revocation of Fazulbhai's adjudication were complete when the rules were made absolute. He argues that on that day, the 21st of September 1904, the property of the insolvents *revested* in the insolvents and the Official Assignee had no further interest in their property and that on the 2nd of March 1905 when this suit was filed the Official Assignee had no right to file the same and he is not now entitled to maintain it. The language of the orders making the two rules absolute is not very clear but one thing is quite certain and that is that the orders were conditional on the insolvents paying to the Official Assignee a sum sufficient to pay the unsecured creditors a composition of six annas in the rupee. That this was a condition precedent to the orders for withdrawal and revocation taking effect is quite clear from the learned Commissioner's notes: Ex. No. 6. The trustees of the settlements paid a lac and twenty-five thousand rupees on the 22nd of November 1904. It is not quite clear whether that sum was a sufficient payment together

with what the Official Assignee had in hand to enable him to pay the composition or whether in addition to the payment the Official Assignee appropriated towards the payment of composition money other moneys from the recoveries he made subsequent to the payment of the lac and quarter. To ascertain this would involve going into accounts and I felt that it was unnecessary to do that in view of the fact that the orders were not drawn up signed and sealed till the 27th of February 1906. I am bound to assume that the condition on which the orders were made was not fulfilled till then, and that on the 27th of February 1906 the Official Assignee was fully paid the composition money and the orders were thereupon drawn up and sealed. Under the circumstances I must hold that the insolvency of Hashambhai, Fazulbhai and Hajibhai come to a termination on the 27th of February 1906. This finding alone would enable me to answer the second issue in the affirmative and to hold that when the plaintiff filed this suit he was entitled to do so. The first issue, however, as to the plaintiff's right to maintain this suit at the present moment, raises some very interesting questions one of which is what legal effect has the withdrawal of a petition by the insolvent upon his property. On the filing of a petition in insolvency a vesting order is made in favour of the Official Assignee and the property of the insolvent vests in him. The adjudication of a man insolvent has the same effect. Section 7 of the Indian Insolvent Act, 11 and 12 Vic. ch. 21, deals with the dismissal of a petition and provides that the "Vesting Order made in pursuance of such petition shall from and after such dismissal be null and void." Section 11 deals with the revocation of an adjudication order and provides that "the vesting order shall in case of the adjudication being for any reason revoked be thenceforth null and void to all intents and purposes." It is a remarkable circumstance that the Act does not contemplate or provide for the withdrawal of an insolvent's petition. The want of any provision in this respect in the Act itself is supplied so far as Bombay is concerned by Rule 22 of the Bombay Rules framed by the High Court of Bombay under the powers conferred on the Court by section 76 of the Act. No corresponding Rule seems to exist in Calcutta,

1907.

HAJI SAJAN v. N. C. MACLEOD.

where in 1871, *In the matter of Pyarichand Mitter* (1), Mr. Justice Phear had to consider the Court's power to allow an insolvent to withdraw his petition. Mr. Justice Phear held that the Commissioner had no such power and instead of allowing a petition to be withdrawn he dismissed the petition by consent of all parties although there were no grounds arising out of the facts of the case why the petition should be dismissed. Now Bombay Rule 22, although it provides for the withdrawal of the petition, says nothing as to what becomes of the vesting order upon the application for withdrawal being granted. Counsel for the plaintiff have argued before me that the vesting order is not annulled and does not become void by reason of withdrawal of petition and on that basis they contended that the property of the insolvents, Hashambhai and Hajibhai, is still vested in the Official Assignee. They argue that where the Legislature intended that the vesting order should be rescinded or annulled they have made a provision for it and that the Court ought not to read into the Act or Rule a provision that was not made and did not exist. These contentions though apparently plausible did not recommend themselves to my mind. To hold that on the withdrawal of an insolvent's petition his property did not revest in him seemed to me to hold something that was quite inconsistent with the spirit of the Act and with the practice obtaining in the Official Assignee's office for very many years. To make sure as to what this practice was Mr. Shantaram Mangesh, the head clerk in the Official Assignee's office who has nineteen years' experience of the work done there, was called and examined and his evidence established the fact that the withdrawal of a petition has been treated by successive Official Assignees in exactly the same way as the dismissal of a petition or the revocation of an adjudication order. The moment an order for withdrawal of a petition is made the Official Assignee hands back to the insolvent whatever property he may have taken possession of by virtue of the vesting order. That this practice in the Official Assignee's office is correct there can be very little doubt and that even the Court have recognised that the property of the insolvent revests in him on his withdrawing

(1) (1871) 6 Beng. L. R. 558.

insolvency proceedings appears clearly from the case of *Lekhraj Chunilal* v. *Shamlal Narroudas*.[1] It seems that the plaintiff in that case became insolvent pending the suit and an order was made by Mr. Justice Farran for the dismissal of the suit unless the Official Assignee within a certain time elected to go on with the suit and furnished security. Before the expiration of the time the insolvent obtained an order for withdrawal of insolvency proceedings. Mr. Justice Farran at the end of the time refused a motion for the dismissal of the suit for want of security and allowed the plaintiff to go on with the suit. This order was clearly made on the basis that the insolvent's property had revested in him when the insolvent's petition was withdrawn. The withdrawal of the petition terminates all insolvency proceedings—the insolvent is no longer insolvent—his original status as a solvent party is restored to him—in practice his property is restored to him—the Official Assignee does not execute any conveyance in his favour and in the face of all these circumstances to hold that the vesting order does not come to end is to hold something that seems to me to be wholly unreasonable. On the other hand, it seems to me most consistent with the spirit of the Act to hold that on the withdrawal of the petition for insolvency the vesting order comes to a determination and must be taken to be annulled. I must, therefore, find that on the withdrawal of the petition of Hashambhai and Hajibhoy the vesting order was annulled and in the absence of any special circumstance modifying the position, their property would revest in them. I have held that the orders for withdrawal and revocation came into operation on the 27th of February 1906. Under ordinary circumstances—and if there are no special circumstances, as I observed above, to modify the position of the insolvents—their property would revest in them on the 27th of February 1906. If the matter rested here and if I had nothing else to take into consideration I would be bound to hold that the plaintiff is not now entitled to maintain this suit. I have, however, before me the consent decree of the 21st of November 1904 (Ex. D) and that

(1) (1892) 16 Bom. 404.

1907.

HAJI SAJAN v. N. C. MACLEOD.

decree has a very important bearing on the question under my consideration. This decree records a contract. It is a contract between three parties—the three insolvents, the trustees of the settlements and the Official Assignee. Turning back to the events as they happened what appears quite clear from the documents before me is this. The insolvents seem to have been desirous of settling with their creditors—the Official Assignee representing the creditors seems to have been willing to settle with the insolvents on reasonable terms. The trustees of the settlements, which were challenged in the suit filed by the Official Assignee, appear to have been willing to help towards bringing about an end to the litigation between themselves and the Official Assignee and to terminate insolvency proceeding. The Official Assignee and the insolvents came to an agreement—the insolvents to give and the Official Assignee to receive a composition of six annas in the rupee in full satisfaction of the claims of the unsecured creditors. To carry out this agreement required a large sum of money. Where was it to come from? First, the Official Assignee had some funds in his hands belonging to the estate; secondly, there were outstandings due to the insolvents to be recovered; and, thirdly, there was the trust property in the hands of the trustees. Previous to the 21st of September 1904 the terms of settlement appear to have been concluded between the parties. The first step towards completing the settlement was the obtaining from the Commissioner in Insolvency the conditional orders of withdrawal and revocation. On this being done the trustees set about making arrangements to pay a sum of money approximately sufficient to enable the Official Assignee to pay to the unsecured creditors six annas in the rupee. Orders are then obtained allowing the insolvents to pay within two months. When the money is ready this decree is obtained on the 21st of November 1904, exactly two months after the date of the conditional orders. The trustees pay to the Official Assignee a lac and twenty-five thousand rupees on the day following the date of the decree. As a consideration for their paying this sum out of the trust estate they obtained a stipulation from the Official Assignee with the consent of the insolvents that after the Official Assignee's claims

are fully satisfied according to the agreement arrived at, he should instead of handing over the surplus estate of the insolvents to the insolvents—convey, transfer and hand over the same to the trustees. This contract is recorded in the decree. It is a valid subsisting contract between the parties. Although the Official Assignee has as yet executed no formal document in favour of the trustees he has given effect to the contract by paying over to the trustees money out of the recoveries he has continued to make on behalf of the insolvents' estates and he has in his books closed the account of the insolvents and opened an account with the trustees. The part of the decree which records the agreement between the Official Assignee, the insolvents and the trustees runs as follows:—

"And this Court by and with such consent doth further order that upon payment of the moneys hereinbefore directed to be paid by the said third and fourth defendants, Moossabhoy Hashambhai Visram and Ebrahim Haji Mahomed Sheriff, as trustees as aforesaid to the plaintiff—the plaintiff do assign absolutely all the cash assets and estate and property of what nature or kind so ever whether moveable or immoveable whether in Bombay or elsewhere of the said firm of Messrs. Visram Ebrahim & Co. and of the members of the said firm respectively and all outstandings debts and claims due to the said firm or the members thereof . . . to the said third and fourth defendants . . . as trustees of the said indentures of settlement."

Under the provisions of this decree the insolvents authorise the Official Assignee to assign and convey to the trustees what in the ordinary course of events would have come to themselves and with their consent the Official Assignee has made a contract with the trustees that instead of handing over to the insolvents their surplus property, after paying himself he would hand over, and if necessary assign the same, to the trustees. This contract between the parties was made pending insolvency proceedings. If the decree had not come into existence the property of the insolvents on the 27th of February 1906 would

1907.

HAJI SAJAN v. N. C. MACLEOD.

have revested in the insolvents. In the case of Fazulbhai the property would have revested under the provision of section 11 of the Act and in the case of Hashambhai and Hajibhai the property, I have held above, would have revested in them by reason of the withdrawal of their petition. The decree alters the relations of parties. The insolvents have waived their right to claim their property from the Official Assignee. They have authorised the Official Assignee to hand over or assign all their surplus property to the trustees. After paying himself all sums he is entitled to under the decree the Official Assignee holds the property of the insolvents as a trustee for the trustees of the indentures. The moneys sought to be recovered in this suit is an "outstanding debt or claim" due to the firm of the insolvents and is covered by the terms of the consent decree. The Official Assignee till such time as he assigns over the claim against the defendant to the trustees of the settlements stands possessed of the right to recover the same. The trustees are, I think, entitled to request the Official Assignee to go on recovering the outstandings on their behalf. Such an arrangement may be convenient to them. They are entitled at any moment to call upon the Official Assignee to convey and assign to them the debts, outstandings, claims, etc., due to the insolvents. Till such time as they do so and the Official Assignee assigns and conveys to them in terms of the decree he is, in my opinion, entitled to make recoveries of debts and claims due to the insolvents or their firm and to file and maintain suits to recover the same.

If the facts that have been brought out at the trial of the issues had been all before me I do not think I would have made the order I made but these questions are raised in the written statement and would have had to be tried some time or other. On both the issues my findings are in the affirmative. The plaintiff was entitled to file this suit and he is entitled to maintain the same.

Costs of the trial of these issues will be costs in the cause.

Against this judgment the defendant appealed.

Kanga (*Setalvad* with him) for the appellant.

Inverarity and *Raikes* for the respondent.

1907.

HAJI SAJAN v. N. C. MACLEOD.

BATCHELOR, J.—The suit in which this appeal is brought was instituted by Mr. N. C. Macleod as Official Assignee of Hasambhai Visram, Hajibhai Visram, and Fazalbhai Visram, who had traded under the name and firm of Messrs. Visram, Ebrahim & Company. The object of the suit was to recover a considerable sum of money alleged to be due by the defendant to the insolvents' firm in respect of certain business dealings. In the Court below preliminary issues were raised as to whether the plaintiff was entitled (*a*) to file, and (*b*) to maintain the suit. These issues the learned Judge decided in the plaintiff's favour, and from that decision the defendant now appeals. The broad ground upon which the appeal is brought is that the plaintiff as Official Assignee became *functus officio* and that the property of the insolvents revested in them either before the institution, or during the pendency, of the suit; and for the better understanding of the points in controversy it is necessary to set out certain dates and facts which are not disputed.

On 14th October 1903 Hasam and Haji filed their petitions, and a vesting order was made by the Insolvency Court. On the following day the third partner, Fazalbhai, was adjudicated an insolvent, and a vesting order was made (Exts. G and H).

On 15th June 1904 Hasam and Haji took out a Rule Nisi (Ex. E) for leave to withdraw their petition "on payment to Mr. Macleod as trustee of a sum sufficient to pay a composition of six annas in the rupee to the unsecured creditors of the said insolvents"; and on the same day Fazalbhai took out a Rule for the revocation of his adjudication upon the same terms (Ex. F).

On 21st September 1904 these Rules were made absolute (Exts. B and C). But the Rules were not drawn up till 27th February 1906, and this suit was filed on 2nd March 1905.

It will be observed that the Rules of 21st September 1904 do not specify any period of time within which the payment sufficient for the six annas composition should be made. Accordingly on 28th September 1904 orders were obtained directing that "the amount of composition mentioned in and payable under the order made herein on the 21st September instant be paid as

1907.

HAJI SAJAN v. N. C. MACLEOD.

directed in the said order within two months from the 21st September instant" (Exts. 3 and 4).

In another suit filed in 1904, Suit No. 76 of 1904, the Official Assignee had impeached certain settlements made by the insolvents before their insolvency as being voluntary transfers made to defeat or delay creditors, the defendants in the suit being the three insolvents and the trustees under the impugned settlements. In this suit a consent decree (Ex. D) was taken on 21st November 1904. Speaking broadly, the terms of the decree are that the trustees under the settlement should forthwith pay to the Official Assignee a sum of money which, with the money already in his hands belonging to the estate, would enable him to pay himself as trustee for payment to the creditors of Messrs. Visram Ebrahim and Co. (in addition to all costs, charges and expenses already incurred or which might be incurred by the Official Assignee) a composition of six annas in the rupee "in accordance with the terms of the orders dated respectively 21st September last made by the Court for the relief of insolvent debtors, Bombay, in the matter of Hasambhai Visram and Hajibhai Visram and of Fazalbhai Visram."

On 21st November 1904 a payment of Rs. 1¼ lakhs was made by endorsement of a cheque by the trustees to Mr. Macleod, who apparently treated this as a payment to himself as Official Assignee; and on the following day he paid this sum over to himself as trustee for the creditors of the insolvents. On 1st January 1905 Mr. Macleod closed his account with the insolvents, and as trustee opened an account with the trustees under the settlements.

The first point urged by Mr. Kanga, who has argued the appellant's case with skill and resource, is that, under sections 7 and 11 of the Insolvent Debtors Act, the Official Assignee was divested of the assets of the insolvents on the 21st September 1904 when the rules were made absolute. In the case of Fazalbhai the argument is made to depend upon the revocation of the adjudication, which would, it is said, revest the property in the late insolvent; and no doubt that is the effect which such an order would ordinarily have. The case of Hasambhai and

1907.

HAJI SAJAN v. N. C. MACLEOD.

Hajibhai cannot, it is conceded, be brought upon the same footing unless it be held that the withdrawal of their petition was in law the same thing as its dismissal by consent. But this is a proposition for which no authority has been shown to us, and which we are not prepared to accept in this appeal. Interesting questions have been raised as to the competence of the Court to permit a withdrawal and as to the validity of Rule No. 22 of the Rules framed under the Act; but these are subjects which we are not now concerned to pursue. It is enough to say that we cannot regard a withdrawal—for which no provision is made in the Act—as the legal equivalent of a dismissal by consent; and we are fortified in our opinion in this case by the proceedings before the Commissioner, which indicate that in fact one of the creditors, Raoji Sankalchand and Co., did not consent to the withdrawal upon the terms upon which it was allowed. We must hold that the withdrawal would not operate to discharge the vesting order.

Here it is important to recall attention to the dates which I have mentioned. The suit was instituted on 2nd March 1905, and the rules absolute for withdrawal and revocation, though made on 21st September 1904, were not drawn up till 27th February 1906. This delay in drawing up the orders was in accordance with the directions given by the Commissioner, whose intention appears clearly from his judgment to have been that the orders should not become operative until they were drawn up: compare *Tolson* v. *Jervis* [1]. It follows that at the date of the institution of the suit the insolvency proceedings were still in force, and the assets of all three insolvents still remained vested in the Official Assignee. The subsequent coming into force of these orders could not vitiate the institution of the suit, and it is clear that the Official Assignee was competent to bring the suit. He was also competent to continue it, at least so far as Hasambhai and Hajibhai are concerned, for the order of withdrawal, even after it became operative, was not effective to divest the Official Assignee and revest the property in these insolvents. This reasoning does not of course apply to the case of Fazalbhai, for when on the 27th February 1906 the order for

(1) (1845) 8 Beav. 364.

1907.

HAJI SAJAN v. N. C. MACLEOD.

the revocation of his adjudication was drawn up, it would, if there were nothing more in the matter, have operated to revest his assets in him on that date, and in that event the provisions of section 372, Civil Procedure Code, would be called into play. It is, however, not necessary to consider this point further at present, since the respondent replies to it, and the learned Judge below has found, that the effect of the consent decree of the 21st November 1904 was to empower the Official Assignee to maintain the suit on behalf of Fazalbhai as well as on behalf of his late partners.

I pass therefore to Mr. Inverarity's next argument that there never was an absolute revocation or an absolute withdrawal, but only an order contemplating revocation and withdrawal upon the fulfilment of certain conditions, which in fact have never been fulfilled. As we hold that a withdrawal, even if absolute and complete, would not have divested the Official Assignee of his interest in the properties of Hasambhai and Hajibhai, it will not be necessary to consider the special bearing of this argument upon their case. As regards the case of Fazalbhai, whose adjudication was revoked, we have come to the conclusion that, though the revocation was conditional, the conditions have been fulfilled. This finding is based mainly upon the terms of the orders which have already been referred to, and need not therefore be elaborated at any great length. It must be remembered that when these orders were drawn up, the present disputes were not foreseen and in our opinion it will be safest to construe them as a whole upon a general consideration of their provisions. So reading them, we have no doubt that they were originally, and always remained, conditional, and that the condition precedent to their operation was the payment of a sum sufficient for the six annas composition. The question is, was that condition fulfilled? Mr. Inverarity in contending for the negative has urged that the consent decree substituted for the orders of the Insolvency Court a totally different arrangement, which the Court has never approved; and he has pointed to the distinction that, whereas under the Rules absolute the insolvents were to pay to the trustee "a sum sufficient to pay a composition of six annas in the rupee", the consent decree directed the trustees to pay to the

Official Assignee a sum which, with the moneys already available in his hands *minus* costs and charges incurred or to be incurred, would suffice for the composition in question. The distinction is, no doubt, there, but upon a consideration of all the materials we do not think that it is entitled to the significance which the respondent desires to assign to it. The decree, which purports on its face to give effect to the orders of 21st September, was taken on 21st November, *i. e.*, the last day on which the amount required for the composition was payable, and on the same day the cheque for Rs. 1¼ lákhs was paid to Mr. Macleod. It is true that he treated it as paid to him as Official Assignee, but there appears to have been no reason why he could not have endorsed it over to himself as trustee on the same day. It is objected, moreover, that the sum was not sufficient to pay the composition within the meaning of the orders of the Insolvency Court, but would only become sufficient on being added to the moneys already in the Official Assignee's hands. As to this, if it were necessary to confine ourselves to the actual wording of the Insolvency Court's orders, we should be prepared to hold that those orders did not exclude the reckoning in of the moneys already with the Official Assignee; but, however that may be, it seems to us clear that Mr. Macleod accepted the payment as sufficient to pay to the creditors the six annas composition "in accordance," as the consent decree runs, "with the terms of the orders dated respectively the 21st day of September last." This being so, the plaintiff seeks to fall back upon the consent decree, and we must now, therefore, consider the question whether this decree had the effect of empowering the Official Assignee to maintain the suit on behalf of Fazalbhai even after the orders had been drawn up in February 1906. Mr. Justice Davar has held that the decree has this effect, and we are not disposed to differ from him. We think that as between the insolvents, the trustees and the Official Assignee, the decree embodies a contract under which the assets of the insolvents are not to vest in them, but are to be made over to the trustees by Mr. Macleod, as Official Assignee, in whom they are to remain vested for that purpose not only until a sum sufficient for the composition has been paid, but also until he is requested by the trustees to assign the assets to them. No such request has yet been made, and

1907.

HAJI SAJAN v. N. C. MACLEOD.

under the decree the trustees are entitled to ask the Official Assignee to continue to make recoveries on their behalf. It follows that the objection that Fazalbhai should have been a plaintiff fails by virtue of the decree; the Official Assignee is entitled to maintain this suit on his behalf; and as I have already said, even apart from the decree the Official Assignee is entitled to sue on behalf of Hasambhai and Hajibhai.

For the foregoing reasons our findings on the issues are:—

(1) The plaintiff is entitled to maintain this suit, and

(2) The plaintiff was entitled to file the suit.

The result is that the appeal must be dismissed with costs.

It remains to add that the appellant has stated that his reason for taking objection to the form of the suit is that if Hasambhai, Hajibhai and Fazalbhai are not parties to the suit, they might harass him with another action. The respondent is willing that they should be joined, and we therefore order that they be added as parties—as plaintiffs if they consent, and as defendants if they do not consent.

Attorneys for the appellant: *Messrs. Thakurdas & Co.*

Attorneys for the respondent: *Messrs. Payne & Co.*

B. N. L.