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nominal value of Rs. 2,400 should be purchased and should be settled in trust to provide for those charitable purposes. After that has been done the property will be declared the absolute property of the plaintiff and the first defendant.

Costs will come out of the settled property, those of the third defendant as between attorney and client.

*Order accordingly.*

Attorneys for the plaintiff : Messrs. *Sabnis and Goregaonkar.*

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

M. F. N.

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## ORIGINAL CIVIL.

*Before Mr. Justice Beaman.*

1914.

*December* 18.

TRIBHOVANDAS NAROTAMDAS, PLAINTIFF *v.* ABDULALLY HAKIMJI PAGHDIVALA AND OTHERS, DEFENDANTS.*

*Civil Procedure Code (Act V of 1908), Order XXII, Rule 10—Lease, forfeiture of—Insolvency of a defendant—Vesting of his estate and effects in the Official Assignee—Refusal of Official Assignee to defend the suit—Inability of defendant to defend independently of the Official Assignee—Practice.*

In a suit by the lessor against the lessee for forfeiture of a lease by reason of breaches of covenant, no cause of action survives against a defendant who has become insolvent and whose estate has vested in the Official Assignee. If in such a case the Official Assignee refuses to defend a suit affecting the estate of the insolvent, the latter cannot defend independently of the Official Assignee.

THE plaintiff filed this suit as a short cause against the first defendant alone praying for a declaration

* O. C. J. Suit No. 102 of 1913.

that a certain lease dated the 1st of June 1894 had been forfeited by reason of the breach by the defendant of divers covenants contained therein and for an order that the first defendant should forthwith vacate and deliver up peaceful possession to the plaintiff of the land messuages and premises demised by the said lease and also that the said defendant should pay to the plaintiff certain monies due by way of rent in respect of the said property, under the terms of the said lease.

The suit came on for hearing on the 8th of January 1914 when, as the first defendant did not appear, an *ex parte* decree was passed against him by Beaman J. On the 9th April 1914 the first defendant issued a rule *nisi* to have the *ex parte* decree set aside alleging that he had not been served with a summons and that he came to know of the suit only on the 30th of March 1914.

The said rule was made absolute on the 15th of June 1914 by Davar J. who fixed the 26th of June 1914 for the rehearing of the suit before Beaman J.

In the meantime on or about the 26th of June 1914 it was discovered that on the 9th of March 1914 the first defendant had petitioned the Court in its insolvency jurisdiction to be adjudged an insolvent and by an order made on the same day he was adjudged an insolvent and his estate and effects were vested in the Official Assignee.

This fact the first defendant suppressed from the Court when he made his application to have the *ex parte* decree abovementioned set aside. Subsequently the Official Assignee was added as a party defendant (third defendant) to the suit, but he did not file a written statement.

The second defendant was made a party inasmuch as he was a purchaser of the property in the suit at an

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auction sale held by the first defendant's mortgagee after the institution of and with full notice of the suit. He consented to the *ex parte* decree and did not afterwards apply for it to be set aside. At the rehearing the plaintiff applied for an *ex parte* decree against the third defendant the Official Assignee on the ground that the first defendant should not be permitted to defend the suit as all his interest in the property in dispute had devolved upon the third defendant.

*Rustam Wadia*, *Kanga*, and *Setalvad* for the plaintiff.

*Bahadurji* and *Weldon* for the first defendant.

BEAMAN, J.:—The facts material to the decision of the preliminary point are admitted to be these, that the suit was brought against the first defendant and while the suit was pending and after an *ex parte* decree had been made against him, he became an insolvent. About a month after his insolvency, he applied to have the *ex parte* decree set aside and the matter was argued before Davar J. without any mention being made of the first defendant having been adjudicated an insolvent. Davar J. set aside the *ex parte* decree, and about a month later, it appears to have come to the plaintiff's knowledge that the first defendant was an insolvent. Correspondence with the Official Assignee followed. Leave seems to have been obtained to bring the Official Assignee on the record under Order XXII, Rule 10. That has been done. The Official Assignee subsequently refused to defend the suit. The first defendant, however, has elected to defend independently of the Official Assignee and appears here by two counsel. The question is, whether he can be allowed to defend the suit. Notwithstanding the elaborate decision of Sir Joseph Arnould in the case of

*In re Hunt, Monnet & Co.* v. *Bholagir Mangir et al*[1] upon which the first defendant's learned counsel strongly relies, and the decision on the Original Side of the Calcutta High Court in the case of *Chandmull* v. *Ranee Soondery Dossee*[2] following Sir Joseph Arnould's decision, it appears to me very clear, not only on principle but under the express words of our Statute, that no cause of action at present survives against the first defendant, and that the suit against him ought to be dismissed at once. It is a clear case of his interest in the plaint property having devolved upon the Official Assignee. The Official Assignee has been made a party to this suit with the leave of the Court. It is obvious, then, that he and the first defendant from whom the said interest has devolved upon him, cannot, in reason, both stand together on the array. The only person at present who possesses any interest whatever in this property from the point of view of the plaint in the present suit is not the first defendant but the Official Assignee. It is, therefore, a case in which the first defendant is being wrongly sued in the events that have happened and not a case in which it is unnecessary that the Official Assignee should be made a party-defendant.

The only question remaining to be answered is, whether, in thus dismissing the suit against the first defendant, he should have his costs. Up to the appearance before my brother Davar J. I see no reason why he should not have them. But inasmuch as he there withheld from the learned Judge what ought to have been disclosed and what being disclosed would have rendered his further appearance on the record unnecessary, in my opinion, he is not entitled to the costs of that or subsequent proceedings.

(1) (1864) 1 Bom. H. C. R. 251.

(2) (1894) 22 Cal. 259.

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I must, therefore, now dismiss the suit against the first defendant with costs up to the application for the rule granted by Davar J., and thereafter no order as to his costs.

I may say that I believe that the object of this strange procedure is simply to endeavour to get a decree from the Court in favour of the first defendant without those, who are supplying him with funds, being under the risk of paying the plaintiff's costs, should the plaintiff succeed; for I understand no one has come forward to guarantee the Official Assignee's costs, should the Official Assignee have defended the suit in place of the first defendant.

*Suit dismissed.*

Attorneys for the plaintiff: Messrs. *Malvi, Hiralal, Mody & Co.*

Attorneys for the first defendant: Messrs. *Vachha & Co.*

M. F. N.

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## APPELLATE CIVIL.

1915.

*April* 9.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), APPELLANT, *v.* BAPUJI MAHADEO GOVAIKAR AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

*Limitation Act (IX of 1908), section 10, Schedule I, Articles 14 and 120—Deposit—Order of the Collector refusing payment vested in trust—Specific purpose—No bar of time for recovery.*

In 1835 C. an ancestor of the plaintiffs, had his immoveable property sold to satisfiy his debt by the then Maharaja of Satara. Out of the sale-proceeds the debt was paid off and the balance of Rs. 1,793-0-5 was credited in

* First Appeal No. 19 of 1914.