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SORA'BJI NASSARVA'NJI DUNDAS v. THE JUSTICES OF THE PEACE FOR THE CITY OF BOMBAY.

re-trial on the merits. If the plaintiff succeed ultimately in recovering the land, he must have his costs of this appeal from the defendants. If he do not so succeed, the costs of this appeal must be costs in the cause.

Order accordingly.

[ORIGINAL CIVIL JURISDICTION.]

Suit No. 760 *of* 1873.

Appeal No. 278.

IBRA'HIM BIN MAHA'SIN ....*Plaintiff.*
ABDUR RAHIMA'N BIN ALLI......................*Defendant.*
HENRY GAMBLE, Official Assignee ....*Appellant.*
ABDUR RAHIMA'N BIN ALLI ....*Respondent.*

September 10.

Civil Procedure Code, Sections 106 *and* 119—*Abatement—Notice—Dismissal of suit—Limitation.*

Section 106 of the Civil Procedure Code means that a suit abates by the insolvency of the plaintiff, but that the defendant shall not plead the abatement without giving the Official Assignee an opportunity of prosecuting the suit. Where, therefore, the plaintiff after the institution of a suit became insolvent, and the defendant thereupon obtained an order that the Official Assignee should give security for the costs of the defendant within fourteen days, and should be made a party to the suit within one month, and that, in default of such security, the suit should be set down for dismissal within eight days after the expiration of the time so limited,

Held that such order was irregular.

Held, also, that the Official Assignee, having notice of the order, was not entitled to further notice of the setting down of the suit for dismissal, he not having given the security required, and that the giving of such security was a condition precedent to his being made a party to the suit.

Where the suit was dismissed in accordance with the terms of the order mentioned above, and the Official Assignee did not apply, within thirty days of the passing of the order of dismissal, either to the Court making the order or to the Appellate Court, for its reversal,

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Held that an application to the Appellate Court for the reversal of an order discharging a rule *nisi* for the reversal of the order of dismissal, and for the restoration of the suit to the board for hearing, was barred.

AFTER the institution of the suit the plaintiff became insolvent, and his estate and effects vested in the Official Assignee. The defendant thereupon, on the 23rd June 1874, took out a summons in chambers, calling upon the Official Assignee and the insolvent to "show cause why the Official Assignee should not proceed with the suit, and give security for the defendant's costs, and, in default, why the suit should not be set down for dismissal." On the 27th June 1874 the order was made absolute in the following terms:—"Upon reading the Judge's summons, issued herein on the 23rd June 1874, and upon hearing Messrs. Crawford and Boevey, Attorneys for the defendant, in support of the said summons, and upon hearing Messrs. Hearn and Cleveland on behalf of the Official Assignee, and Assignee of the estate and effects of the plaintiff, an insolvent, I do order that the Official Assignee do, within fourteen days from the date of this order, give security for the defendant's costs in the sum of Rs. 1,000, and that he be made a party to this suit within one month from this date, and that, in default of such security for costs being given within the said period of fourteen days, this suit be set down for dismissal within eight days after the expiration of the time so limited, and that, in default of the Official Assignee being made a party to this suit within the said period of one month, this suit be at any time thereafter set down for dismissal." The Official Assignee did not give the security required, and the suit appeared on the board for hearing on 16th July 1874, when the defendant's counsel, before the suit was called on, moved for and obtained an order for the dismissal of the suit in the following terms:—"This Court doth order that this suit be, and it is hereby, dismissed, and this Court doth further order, that the plaintiff do pay to the defendant his costs of this suit when taxed." On 14th August 1874 the plaintiff's counsel obtained a rule *nisi* calling on the defendant to show cause why the order of 16th July 1874 should not be set aside, and the cause restored to

the board for hearing. This rule was discharged, after argument, on 31st August 1874. The Official Assignee then obtained a rule *nisi* on 22nd September 1874 calling upon the defendant to show cause why the order of 16th July 1874 should not be set aside, and the cause be restored to the board for hearing, and on 19th November 1874 this rule was also discharged. The present appeal was then preferred by the Official Assignee on 9th December 1874 against the order discharging the rule last mentioned.

The appeal was heard by WESTROPP, C.J., and GREEN, J.

Scoble (Advocate General) and *Purcell* for the appellant.—The liberty given by the order of 27th June was to set down the cause for dismissal. This was clearly wrong, for that order was, on the face of it, framed in accordance with the provisions of Section 106 of the Civil Procedure Code, which contemplates, not the dismissal of a suit, but its abatement, so that it can be subsequently revived at any time not barred by the Limitation Act. If the Official Assignee had been a party to the suit prior to its dismissal, it might have been dismissed under Section 119, but in that case he would have been entitled to notice; as it was, he had none, and on 16th July the suit was dismissed. That order can only be held to have been made against the insolvent, for the Official Assignee not having then joined the suit, the order dismissing it cannot be said to have been made against him, nor, for the same reason, could he well appeal against it. The order of 27th June obliges the Official Assignee to be made a party, and allows a month for that purpose. The Civil Procedure Code contains no provision for the dismissal of a suit in which the Official Assignee ought to be the plaintiff but only for its abatement.

[WESTROPP, C.J. :—We certainly cannot hold "abate" to mean the same as "dismissed". The meaning of Section 106 seems to us to be, that a suit abates by the insolvency of the plaintiff, but that the defendant shall not plead the abatement without giving the Official Assignee an opportunity of prosecuting the suit.]

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IBRA'HIM BIN MAHA'SIN v. ABDUR RAHIMA'N BIN ALLI.

Mayhew and *Inverarity* for respondent.—We forego the costs awarded to us by the order of 16th July dismissing the suit. Marriott, J., discharged the rule for setting aside the order of 16th July. That order was based on the order of 27th June, which is still in force, and against which no application has yet been made. Of that order the Official Assignee had notice, for it was served on his attorneys. According to the terms of that order the Official Assignee should have given security within a fortnight. He did not do so, and it was on that ground that the suit was dismissed, and he did not apply within thirty days to have that order set aside. He had no right to be made a party till he had given security. We do not say that the order of 27th June is unimpeachable; but an order may be irregular, or even wrong, but it is not on that account a nullity. It must be regularly appealed against within the prescribed period, and in this case the time for making such an application as the present has expired.

Scoble in reply.—We admit having had notice of the order of 27th June, and that we cannot now ask the Court to interfere with it; but the order of 16th July is not justified by that order. We never acquiesced in having the suit set down for dismissal without the usual notice to which we were entitled according to the practice of the office.

[WESTROPP, C.J.:—Were you entitled to notice, not having given the required security within the prescribed time?]

Had we had notice we should have had an opportunity of pointing out the irregularity in the order of 27th June. That order does not expressly provide for giving us no further notice, and the usual practice is to give four days' notice when a suit is to be set down for dismissal. Instead, however, of giving us any such notice, the defendant comes in on 16th July, and asks for, and gets more than he is entitled to under the order of 27th June, viz., costs of the suit. Section 119 cannot apply, unless the Official Assignee has been made a party. In this case he has not, and, therefore, he is not affected by the order of 16th July, and, consequently, the thirty days' rule does not apply to him.

WESTROPP, C.J.:—We think that the order of 27th June 1874, providing for the dismissal of the suit, was irregular, and that, had the Official Assignee objected to it, he could have successfully resisted it. But he was not taken by surprise, for it is what the summons asked for and what was granted. Further, we think that fourteen days being named at the time of making the order as the period within which the Official Assignee should give security, and being accepted by Mr. Cleveland, after consultation with the Official Assignee, the Judge was justified in thinking that he assented on behalf of the Official Assignee, seeing that he was present and made no objection personally. As to setting down the cause for dismissal on 16th July without further notice, *cui bono* should notice be given, the Official Assignee having given no security? We do not think such notice was necessary, because the Official Assignee had not availed himself of the liberty reserved to him, by the order of 27th June, to come in within fourteen days. That order, no doubt, is clumsily drawn in stating that the Official Assignee shall be made a party, as though that were obligatory; but the latter part of the order shows, we think, that this was only conditional on security being given. Now, irregular as the order of 27th June was, the defendant doubtless went beyond it by taking on 16th July, not only the dismissal of the suit, but the costs. Those costs the defendant's counsel now consent to forego; but, even did they not, we very much doubt whether the fact of costs having been awarded to the defendant, would have been a sufficient ground for reversing the order of Marriott, J. The Official Assignee made no application whatever to set aside the order of 27th June; he did not apply, within thirty days of the making of the order of 16th June to the Judge who made it, to have it set aside, nor did he appeal to us within thirty days for its reversal; so that, in whatever light this application is viewed, it must be held to be time-barred. The appeal must be dismissed; but, having regard to all the circumstances of the case, without costs.