

APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

SADODIN AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, v.

W. SPIERS (ORIGINAL PLAINTIFF), RESPONDENT.*

1879
July 22.

Insolvency—Right to sue—Practice—Objection taken for the first time in appeal.

As soon as an order is made under section 7 of the Indian Insolvency Act (11 and 12 Vic., c. 21), any rights of property which an insolvent may have possessed at the date of his petition in insolvency, vest in the Official Assignee, and he alone is competent to sue for the purpose of enforcing these rights.

Herbert v. Sayer (1) and *Jameson & Co. v. The Brick and Stone Company (Limited)* (2) distinguished.

Where the defendants for the first time in second appeal objected to the plaintiff's right to sue on the ground of his having taken the benefit of the Insolvency Act, the objection was entertained by the High Court upon admission, by the plaintiff, of the fact of his insolvency.

THIS was a second appeal from the decision of S. H. Phillpotts, Judge of the District of Poona, amending the decree of R. B. Chintaman S. Chitnis, Subordinate Judge (First Class) of Poona.

The suit was brought to recover the plaintiff's half share in the produce of a piece of land in the Haveli Taluka of the Poona Collectorate. The defendants denied their liability. The Subordinate Judge rejected the plaintiff's claim; the District Judge then varied the decree, and awarded a part of the claim.

The defendants made a second appeal to the High Court, and urged in their petition of appeal that the District Judge's decree was wrong on the merits. They subsequently raised the objection that the plaintiff, having taken the benefit of the Insolvent Debtors' Act, was incompetent to institute the suit. The plaintiff's pleader on being questioned by the Court at once admitted the fact of the insolvency.

Nanabhai Haridas, Government Pleader, for the appellants—If our objection as to plaintiff's incompetency to sue is valid, his suit fails. All the property and rights which the plaintiff possessed before his insolvency vested in the Official Assignee by

*Second Appeal, No. 110 of 1879.

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the Court's vesting order. He is, therefore, the proper person to enforce those rights.

Shantaram Narayan for the respondent relied on *Jameson & Co. v. The Brick and Stone Company (Limited)* (1) and *Herbert v. Sayer*.(2)

M. MELVILL, J.—If this appeal were to be decided on the merits, we should be prepared to confirm the decree of the Court below. But it is objected by the appellants, and it is admitted by the respondent's pleader, that the respondent took the benefit of the Insolvent Debtors' Act in 1872, but has not yet obtained his final discharge. It is clear, on the face of the proceedings, that the estate which the respondent had in the lands which are the subject of this suit, was created before 1872, and was in existence when the respondent filed his petition in insolvency. It is argued that this estate became vested in the Official Assignee, and that, therefore, it was not competent to any one but the Official Assignee to bring a suit to enforce rights arising out of such estate. The objection has been taken at a very late period ; but the facts, on which it is based, are admitted ; and we do not think that we can refuse, even at this late stage of the proceedings, to consider and give effect to it. It appears to us that the objection is a good one, and must prevail. The cases of *Herbert v. Sayer* (3) and *Jameson & Co. v. The Brick and Stone Company (Limited)* (4) have been relied upon as showing that the plaintiff in this suit may maintain an action. But those cases are distinguishable from the present. In the first case it was held that an uncertificated bankrupt may *after his bankruptcy* acquire property, and contract for the benefit of his assignees, and may sue in respect of such property or contract. In the latter it was held, on the authority of *Herbert v. Sayer*, that an undischarged bankrupt may maintain an action in respect of a debt due to him for work and labour done *after his bankruptcy*, if the trustee does not interfere. The principle on which *Herbert v. Sayer* seems to have been decided was that the bankrupt might be considered to have contracted as agent for his assignees, and that it was no plea that the contract was made for the benefit of the assignees, any

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(4) 5 Q. B. 965.

more than it would be a defence to an action by a factor, broker, or agent for another to plead that the contract was made by the plaintiff for his principal. In *Jameson & Co. v. The Brick and Stone Campnay (Limited)* the case was argued for the plaintiff on the same principle: and as the Court did no more than follow the decision in *Herbert v. Sayer*, it may be presumed that the same principle was adopted. It is not necessary to express any opinion as to the applicability of these decisions to similar cases arising under the Indian Insolvent Act. It is sufficient to say that they do not, in our opinion, furnish any authority for holding that an insolvent may bring a suit to enforce the terms of a settlement regarding landed property made before he filed his petition in insolvency. Any rights which the insolvent had under such settlement vested, as soon as the Court made its order under section 7 of the Indian Insolvent Act, in the Official Assignee; and a suit to enforce such rights could be maintained by the Official Assignee only.

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We reverse the decree of the Court below, and restore that of the Subordinate Judge; and direct that the appellants and respondent bear their own costs in both Courts below, and that the respondent bear all the costs of this appeal, and the costs of the third defendant, Nuru Nisa in the Courts below.

Order accordingly.

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ORIGINAL CIVIL.

Before Mr. Justice Green.

IN THE MATTER OF THE NEW FLEMING SPINNING AND WEAVING
COMPANY (LIMITED), IN LIQUIDATION.

H. R. CORMACK AND OTHERS, OFFICIAL LIQUIDATORS.

July 16.

Bill of exchange—Liability of a company to third parties on a bill drawn by directors as such—Indian Companies Act (X of 1866), Sec. 47—Company—Winding up—Interest on debts subsequently to date of order to wind up—Rules of Court of 3rd August 1866—Rule No. 24.

The articles of association of the New Fleming Spinning and Weaving Company, Limited, authorized the directors "to raise or borrow from time to time in the name or otherwise on behalf of the company such sums of money as they from time to time think expedient, either by way of sale or mortgage of the whole or