Present : De Sampayo J. and Schneider A.J. 1921.

NILES *v.* VELAPPA.

69—D. C. Colombo, 2,548.

Action by assignee in insolvency for rent—Permission of Court obtained —No averment in plaint—Objection not taken in answer or issue, but at a very late stage—Motion to amend the plaint.

Plaintiff, as assignee of an insolvent estate, sued the defendant for rent. There was no allegation in the plaint that the plaintiff had obtained permission of the Court to institute the action. No objection on that ground was taken in the answer or in the issues, but at a very late stage, when the defendant was addressing the Court, he raised the objection. Plaintiff thereupon moved to amend the plaint. The District Judge refused the application, and dismissed the action.

Held, that the dismissal was not justified.

"I doubt whether the fact of permission being obtained from Court must be stated in the plaint . . . . . Under our present system of pleadings, any omission in the plaint or answer may be supplied by raising a relevant issue at the trial, and an issue may be stated at any time before judgment."

THE facts appear from the judgment.

Tisseverasinghe, for plaintiff, appellant.—Section 82 of the Insolvency Ordinance applies only as between the assignee of the estate and the creditors. A defendant cannot plead in answer to the claim of an assignee that the assignee has not obtained the leave of Court to the institution of the action. The effect of the provision is that the assignee loses his right to be paid out of the insolvent's property his costs and expenses which he may have to pay or incur in respect of such an action if he has not before commencing it obtained leave of Court. The assignee as such has a *locus standi* to sue, and the fact that he had obtained the leave of Court need not be alleged in the pleadings. In this case leave of Court has been obtained; only that fact has not averred in the plaint. The objection comes too late when taken by his counsel in his address at the close of the case. Even if the objection was good, the application to amend the plaint should have been allowed.

Phœbus v. Fernando,[1] on which the District Judge relies, was decided before the Civil Procedure Code came into operation, and is no longer law.

Arulanandam, for defendant, respondent.—*Phœbus v. Fernando* (*supra*) is in point. The words of the section are : "With the leave

[1] (*1887*) *1 C. L. R. 26.*

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of the District Court first obtained, but not otherwise." The Ordinance expressly takes away the right from the assignee to sue without leave of Court first obtained. His title must be alleged in the pleadings.

[DE SAMPAYO J.—It may be so; but why did you resist the application to amend the pleadings by averring such leave ?] The application came too late.

September 28, 1921. DE SAMPAYO J.—

This appeal should succeed. The plaintiff appellant, as assignee of the insolvent estate of one Kaliappa Pillai, sued the defendant for recovery of rent due by him as tenant of a house belonging to the insolvent. The defendant did not dispute that he owed the money claimed as rent, but set up a claim in reconvention in respect of alleged improvements made by him. The District Judge tried the case on the issue raised by the defendant, and, after some protracted proceedings, heard counsel for the plaintiff, and when it came to the defending counsel to address the Court, a new objection was taken to the maintenance of the action, namely, that there was no allegation in the plaint that the plaintiff had obtained permission of the Court to institute the action. It is true that the plaint did not contain such an allegation, but, on the other hand, no objection was taken either in the answer or by way of an issue at the trial. However, when the objection was ultimately taken, the proctor for the plaintiff moved to amend the plaint as desired. This was opposed, and the District Judge stated that he was not prepared to allow the plaint to be amended at that stage of the proceedings, and dismissed the plaintiff's action. I think the dismissal was not justified. Notwithstanding the decision cited to the District Judge, I doubt whether the fact of permission being obtained from Court must be stated in the plaint. However, that is a matter which ought to be rectified at any moment before the case is finally concluded. Under our present system of pleadings, any omission in the plaint or answer may be supplied by raising a relevant issue at the trial, and an issue may be stated at any time before judgment. I think the District Judge should have followed this course, as it was undoubtedly just in all respects. It appears that, as a matter of fact, the plaintiff as assignee had obtained permission of the Court to institute this action.

In the circumstances, I would set aside the judgment appealed from, and send the case back to be disposed of in due course, the plaint being amended, if necessary, or a proper issue stated in regard to the matter in dispute.

The plaintiff, I think, is entitled to the costs of the appeal.

SCHNEIDER A.J.—I agree.

Set aside.