1934 *Present:* **Drieberg, Akbar, and Poyser JJ.**

KANAGARATNE *v.* YAPA

84—C. R. Galle, 13,151

Insolvency—Right of assignee to sue—No leave of Court necessary—Ordinance No. 7 of 1853, s. 82.

The right of an assignee in insolvency to sue does not depend on leave of Court previously obtained for the purpose.

CASE referred by Maartensz J. to a Bench of three Judges. The facts are stated in the reference as follows:—

This was an action by the assignee of the insolvent estate of S. D. Siyadoris and K. D. Sedris to recover from the defendants a sum of Rs. 134.07 with further interest on a sum of Rs. 120 at 18 per cent. per annum.

The defendant did not deny the claim in his answer, but took the objection that the plaintiff had not obtained the leave of Court to bring the action as required by section 82 of Ordinance No. 7 of 1853.

The action was tried on the following issues:—

1. Did the assignee obtain permission of the District Court to bring this case?
2. If not, can the action be maintained?
3. Can the action be maintained without a special averment that leave was obtained?

The learned Commissioner answered all the issues in the affirmative and entered judgment for plaintiff as prayed for with costs.

It was contended in appeal by the defendant that the Commissioner was wrong in holding that P 1 was a compliance with the provisions of section 82 of the Insolvency Ordinance.

P 1 is a motion by the assignee in paragraph 2 of which he moves "that he be permitted to take steps for the recovery of the debts due to the insolvent", on which the District Judge made the following order: "His appointment as assignee is sufficient authority".

The contention must be upheld. The object of section 82 is to prevent an assignee bringing an action in which he has no hope of succeeding and rendering the insolvent estate liable in costs. That object will not be obtained by a general application that the assignee may be permitted to take steps to recover the debts due to the estate, nor is the order made by the District Judge the "leave of the Court" contemplated by the section.

The first issue should, in my opinion, have been answered in the negative, and if the ruling in the case of *Phebus v. Fernando*[1] is followed, the plaintiff's action must fail. In that case the assignee of a legatee sued the executor of the testator's estate to recover the amount of the legacy without applying for or obtaining the leave of the Court to bring the action and succeeded in the District Court.

In appeal Burnside C.J. said, "There are, in my opinion, several objections fatal to this action, but I shall content myself with deciding the case on one alone". He then went on to hold that the assignee was in no better position to recover the legacy than the insolvent himself, and that a legatee cannot sue an executor to recover from him the amount of a legacy unless it is shown that the executor has so dealt with the *corpus* of the legacy as to make him a personal debtor to the legatee, which was neither alleged nor proved. He was of opinion that the action must fail on this ground alone, but added that "even if that defect did not defeat the action, by section 82 of the Ordinance, before an assignee can commence an action which an insolvent might have commenced, he must have first obtained the leave of Court to do so. The

[1] *1 C. L. R. 26.*

assignee's title therefore to sue depends upon leave obtained for the purpose, and not upon the fact that he is the assignee, and his title must be alleged in the pleadings. The allegation that he is an assignee standing alone is therefore valueless. It was urged that the defendant should have taken the objection by plea or demurrer. No doubt it would have been better if he had, but the fact that he has not done so cannot give plaintiff a right which the statute expressly takes from him. The prohibition is a negative one: "he shall not sue without leave". The objection is not a mere defence: it takes away the *locus standi* of the plaintiff to sue altogether. The action must be dismissed with costs".

Dias J. held that the plaintiff had no status and this was a defect which could not be waived even if the defendant wishes to do so.

I think I am bound by this decision, particularly as the judgment of Dias J. indicates that his decision is based on the fact that the assignee had brought the action without the leave of the Court.

I am, however, of opinion with due deference that the learned Judges have given greater effect to the provisions of section 82 than was intended; and my opinion is supported by the two English authorities cited by respondent's counsel.

The first case (*Lee and others v. Sangster and another* [1]) was an action by the assignees to recover from the defendant a debt due to the bankrupt, which commenced without the leave of Court as required by section 153 of the Bankruptcy Act (*12 & 13 Vic. c. 106*). On November 18 the defendants were served with a summons from the Commissioner to appear before him on December 2; on the same day they paid the assignees the amount of the debt. Thereafter a summons was taken out to stay proceedings.

The assignees showed cause and contended, and succeeded in the contention, that the only persons who can take advantage of section 153 are the creditors.

Section 82 is a verbatim reproduction of section 153 of the English Act.

The judgment of the Court consisting of Cockburn C.J., Crosswell, Williams, and Crowder JJ. was delivered by Williams J. After stating the arguments of Counsel he said "On consideration, however, we are satisfied that the statute intended to make the obtaining of the requisite leave a matter only between the assignees and the Court of Bankruptcy, and not at all between the assignees and the other party to the suit. The enactment, it must be observed, extends to the defence by the assignees of actions which the bankrupt might have defended, as well as to the commencement and prosecution of actions which he might have commenced and prosecuted. And if the assignees were to defend such an action, without having obtained the leave of the Court of Bankruptcy, it is difficult, if not impossible, to suggest how the Court of common law in which the action was pending could interfere with the defendant's proceedings. If the assignees neglect to obtain the requisite leave to sue or defend, the act provides that the costs to which they may be put shall not be allowed out of the bankrupt's estate; and the Court of Bankruptcy may, it should seem, under the general powers conferred by the act, make such orders on the assignees, with respect to the cause, as the Court may deem right. But it appears to us that no recourse can be had to the Court of common law in which the cause is pending. We, therefore, think this rule must be discharged, but without costs".

In the second case (*In re Branson, ex parte The Trustee* [2]) the trustee, without having obtained the consent of the committee of inspection as required by section 57 of the Bankruptcy Act of 1883 (*46 & 47, Vic. c. 52*), moved for an order that the debtor's solicitors should deliver up to him all books, papers, and documents in their possession belonging to the bankrupt and for a cash account showing their dealings for and on behalf of the bankrupt and for delivery of all their bills of costs. Section 57 provides that "the trustee may, with the permission of the committee of inspection . . . . bring, institute, or defend any action or other legal proceeding relating to the

[1] (*1857*) *26 L. J. C. P. 151.*

[2] (*1914*) *2 L. R. K. B. 701.*

property of the bankrupt". Objection was taken to the motion on the ground that this permission had not been obtained. In support of the objection counsel relied on section 15, sub-section (3), of the Bankruptcy Act of 1890, which says that the sanction required under section 73 of the Bankruptcy Act of 1883 for the employment of a solicitor "must be a sanction obtained before the employment, except in cases of emergency, and in such cases it must be shown that no undue delay took place in obtaining the sanction". Horridge J. held that "Section 22, sub-section (9), and section 57 of the Bankruptcy Act, 1883, and section 15 of the Bankruptcy Act, 1890, which require a trustee in bankruptcy, before taking any proceedings or employing a solicitor, to obtain the sanction of the committee of inspection or of the Board of Trade, are provisions for the protection of the estate, as between the trustee and the estate, on matters relating to his costs, charges, and expenses, and afford no defence to any proceedings which the trustee, without such sanction, may institute against other parties".

In view of these decisions I am of opinion that the ruling in the case of *Phebus v. Fernando* (*ubi supra*) should be reconsidered, and I reserve this case for consideration by a fuller Bench.

Choksy (with him *D. W. Fernando* and *B. P. Peiris*), for defendant, appellant.—No application has been made for permission as contemplated by section 82 of the Insolvency Ordinance. "The failure to get permission takes away the *locus standi* of the plaintiff altogether."—*Per* Burnside C.J. in *1 C. L. Rep. 26.* The action cannot be maintained without an express averment that sanction has been obtained. The assignee would not be entitled to his costs if he has not obtained such sanction.

If the assignee obtained leave of Court to defend, then the claim of plaintiff would be binding on the estate. Plaintiff would then be entitled to issue writ and seize property of the insolvent in the hands of the assignee for his claim and costs. Where the assignee does not apply to Court for such leave, then the plaintiff can ask that defence be struck out and get judgment entered against the insolvent estate.

From sections 70 and 71 of the Insolvency Ordinance it can be said that an assignee of an insolvent is a representative and not a trustee. It cannot be said that where he obtains sanction of Court an assignee sues in a representative capacity, and where he sues without such sanction then he does so in his personal capacity.

Section 82 is designed not only to protect the defendants, but also the insolvent estate. The law, while vesting the assignee with the right to the recovery of the debt, controls the method of exercising this right. There is an implied distinction between section 82 of the local Ordinance and section 153 of the English Bankruptcy Act.

The construction to be placed on the words "but not otherwise" in section 9 of the Matrimonial Causes Ordinance, No. 15 of 1876, has been considered in *Marie Cangany v. Karuppasamy Chetty* [1].

H. E. Amerasinghe, for plaintiff, respondent.—Whether assignee obtains leave of Court or not, he is the only person liable for costs. There is always a personal liability for costs, with a chance of reimbursement—see *Ramen Chetty v. Munasinghe et al* [2].

The case of *Lee v. Sangster* [3] has been followed in *Dublin City Distillery, Ltd. v. Doherty* [4]—a case based on *Statute 8 Edw. VII. c. 69, s. 151.*

[1] *10 N. L. R. 87.*
[2] *2 C. W. R. 247.*
[3] *(1857) 26 L. J. C. P. 151.*
[4] *(1914) A. C. 823 at pp. 849 and 849.*

In construing an Ordinance which is in the same terms as an Imperial Statute, the Supreme Court here has to follow the decisions of the English Court of Appeal—see *Trimble v. Hill*[1], which has been followed in a local decision reported in *25 N. L. R. 13 at p. 22.*

Cur. adv. vult.

December 17, 1934. AKBAR J.—

This case has been reserved for consideration by a Bench of three Judges by my brother Maartensz, who has set forth fully in his judgment the point for decision and his reasons for the reference. The only point it seems to me which has to be decided by us is the question whether the ruling of the Supreme Court in *Phebus v. Fernando*[2] was correct. In that case the assignee of an insolvent legatee sued the executor of the testator's estate to recover the amount of the legacy without applying for or obtaining the leave of the Court to bring the action. It was held by the Supreme Court in that case that the assignee had no "title" (according to the Chief Justice) or "status" (according to Dias J.) to sue until and unless he had obtained the leave of the Court to sue under section 82 of Ordinance No. 7 of 1853. The relevant portion of section 82 is as follows:—"The assignees, with the leave of the District Court first obtained, upon application to such Court, but not otherwise, may commence, prosecute, or defend any action which the insolvent might have commenced and prosecuted or defended, and in such case the costs to which they may be put in respect of such action shall be allowed out of the proceeds of the estate and effects of the insolvent".

In the English case of *Lee and others v. Sangster and another*[3] where an exactly similar section (section 153) of the Bankruptcy Act (*12 & 13 Vic. c. 106*) had to be interpreted, a Bench of four Judges came to the conclusion that the obtaining of the requisite leave was a matter which affected only the assignee and the Court of Bankruptcy and was not one which affected the assignee and the other party to the suit.

In my opinion the ruling in this case seems to be the correct one and should be adopted by us. In the first place the English case was not cited to the Judges who decided the case of *Phebus v. Fernando* (*supra*). In the second place it was held by the Privy Council in *Trimble v. Hill*[4] that in construing an Ordinance which is in the same terms as an Imperial Statute this Court is under an obligation to follow the decisions of the English Court of Appeal (see also *The Government Agent, Western Province v. Kalupahana*[5].)

If the section is interpreted in the sense contended for by the appellant one can conceive of a case where an assignee will be in a position to defeat the just claim of a plaintiff in an action which was commenced against the insolvent before the insolvency proceedings and which is continued after adjudication.

As stated by Wood-Renton J. "the effect of section 82 of the Insolvent Estates Act, 1853, is to render the assignee primarily liable for the costs of

[1] *(1879) 5 A. C. 342.*
[2] *1 C. L. R. 26.*
[3] *(1857) 26 L. J. C. P. 151.*
[4] *(1879) 5 A. C. 342.*
[5] *25 N. L. R. 22.*

any action which he institutes or defends with the leave of the Court subject to a right on his part to have such costs allowed out of the insolvent's estate". (*Ramen Chetty v. Munasinghe and others*[1].)

The words "but not otherwise" in section 82 are meant, I think, to refer to the words "first obtained". The appeal therefore fails and is dismissed with costs.

DRIEBERG J.—I agree.

POYSER J.—I agree.

Appeal dismissed.