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MAHAMMAD ISMAIL MIA v. SURESH CHANDRA SAHA CHOWDHURY.

CHAKRAVARTI J.

interests except those indicated as above and that the property is really the property of the permanent tenure-holder, and there seems to be no reason, based on general principle, upon which it can be held that, after a proprietor has parted with his land in favour of a permanent tenure-holder, he is under any obligation, unless there is a special contract to that effect to protect the interest of the tenure-holder in the manner suggested. I think, therefore, that the defendants-appellants have made out no case on which they can rely for a suspension of the rent which is due to the landlords for the land of this permanent tenure. When the specific case of wilful destruction of the property has failed, I do not see how the tenant can resist the claim for rent.

The appeal is, therefore, dismissed with costs.

WALMSLEY J. I agree.

S. M. *Appeal dismissed.*

INSOLVENCY JURISDICTION.

Before Buckland J.

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July 21.

KANHYA LAL SEWBUX,

*In the matter of.**

Insolvency—Deed of composition—Order by Court approving of composition—Mortgage recited in the deed and stated to be payable in the first instance—Whether payment can be enforced under the deed without proof of debt—Calcutta Insolvency Rules, r. 128—Presidency Towns Insolvency Act, (III of 1909), Sch. II, r. 11.

On an application by a creditor of an insolvent firm for an order that the trustee under a composition may be directed to pay to him a certain sum of money, being the amount due to him under a mortgage which was recited in the said deed of composition as being payable in the first

*Insolvency Case No. 57 of 1922.

instance, it was objected that the applicant's mortgage had not been proved and that until that had been done, he was not entitled to be paid :—

Held, that before the money could be paid out, the debt should be proved.

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APPLICATION.

This was an application in insolvency by Ramgopal, one of the creditors of the insolvents abovenamed for an order that Sedmull Dalmia the trustee appointed herein, be directed to pay the sum of Rs. 19,159-6 to the said Ramgopal and that in default thereof he be dealt with suitably as having been guilty of contempt of Court or in the alternative that the order to be made hereon be executed against the estate and effects of the said trustee and for other reliefs.

The facts were as follows :—on the 10th March 1923, the abovenamed firm were adjudicated insolvents and their estate and effects vested in the Official Assignee. The said insolvents had created a mortgage in favour of the applicants on the 7th March 1922, in respect of a plot of land at Delhi to secure repayment of the sum of Rs. 15,000 with interest thereon and the whole of the said sum together with interest thereon was due and owing. On the 17th September 1923 it was ordered by the High Court that the terms of composition proposed by the insolvents be accepted and the payment of the amount due to the secured creditors including the applicant and payment of 4 annas in the rupee to the unsecured creditors within one year and six months was guaranteed by the trustee Sedmull Dalmia appointed under the said deed.

The applicant alleged that the said trustee had paid away considerable sums of money to unsecured creditors out of the assets, of which he had Rs. 20,000 still in his hands. The trustee admitted a certain

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amount of assets and that he had paid certain sums to unsecured creditors but stated that he had paid them out of his own pocket.

Mr. K. P. Khaitan, for the applicant, asked for an order in terms of the notice of motion.

Mr. S. N. Banerjee, for the trustee, contended that the applicant's mortgage had not been proved. It was the duty of the secured creditor to lodge his proof with the trustee. Until that had been done, he was not entitled to be paid. Referred to Rule 128 of the Calcutta Insolvency Rules and to the second schedule of the Presidency Towns Insolvency Act, Rules 1, 9, 10 and 11.

BUCKLAND J. This is an application on behalf of Ram Gopal Poddar, one of the creditors of the insolvent, Kanhya Lal Sewbux, for an order that the trustee under the composition may be directed to pay him Rs. 19,159-6. On the 17th September 1923, an order was made approving the terms of composition annexed to the order, under which Babu Sedmull Dalmia of 69, Cotton Street a creditor to the extent at Rs. 47,216 was appointed to be the trustee. The terms of composition recite two mortgages, one in favour of Sedmull Dalmia amounting to Rs. 35,000 and the other in favour of the applicant for Rs. 15,000 and it says that these sums shall be paid first of all as soon as sufficient funds come into the hands of the trustee.

It is alleged that the trustee has paid away considerable sums to unsecured creditors out of the assets, of which at present Rs. 20,000 are still in his hands. The trustee admits a certain amount of assets and that he has paid sums to unsecured creditors, but says that he has paid them out of his own pocket.

It is objected that the applicant's mortgage, which is dated 7th March 1922, has not been proved, and that until that has been done he is not entitled to be paid. This is based upon Rule 128 of the Insolvency Rules of this Court which provides that "every person claiming to be a creditor under any composition or scheme, who has not proved his debt before the approval of such composition or scheme, shall lodge his proof with the trustee thereunder, if any, or, if there is no such trustee with the Official Assignee who shall admit or reject the same." The rule concludes that no creditor shall be entitled to enforce payment under a composition unless he has proved his debt and proof has been admitted.

I have also been referred to the second schedule, rule 11 of the Insolvency Act which says:—"If a secured creditor does not either realise or surrender his security he shall, before ranking for dividend, state in his proof the particular of his security, the date when it was given and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed."

The point is not altogether easy of determination, because the order approving the composition is made under the Act after it has been submitted by the Official Assignee to the creditors, and in the presence of the insolvent. In such circumstances, it may reasonably be argued that proof is not necessary, and that the debt is admitted.

On the other hand, there is no provision either in the Act or in the rule contemplating any such position. The mere fact that the sum is payable under the composition and is stated therein to be payable does not of itself forego the need for proof. This appears from the latter part of rule 128.

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Having regard to the terms of the Act and the terms of the rule, although possibly it may be superfluous, it seems to me that it is the duty of the secured creditor to lodge his proof, which should be done with the trustee, now that the composition has been approved and there is a trustee.

It is not necessary at this stage to anticipate what may follow hereafter. It has been said that the object of insisting on proof is to obtain the benefit of the security for the unsecured creditors. That may be so. All I have to determine at present is whether or not, before the money can be paid out, the debt has to be proved, and in my opinion, it should. I decide no more than that and as matters stand, the applicant cannot obtain the order and I dismiss the application with costs.

Attorney for the applicant: *P. D. Himatsingka.*

Attorneys for the trustee: *Khaitan & Co*

A. P. B.