

CRIMINAL REVISION.

Before Guha and Nasim Ali JJ.

PREMCHAND MALLIK

v.

NEELMANI DAS.*

1933

Dec. 1, 4.

Insolvent—“Obtaining credit,” Meaning of—*Insolvent, if can deal with after-acquired property—Presidency-towns Insolvency Act (III of 1909), s. 102.*

Subject to the right and claim of the Official Assignee, so long as the Official Assignee does not interfere, an uncertificated bankrupt has the power to buy and sell and give discharge and do all other acts as he could have done and had done before the intervention of the Official Assignee.

Herbert v. Sayer (1) and *Kristocomul Mitter v. Suresh Chunder Deb* (2) followed.

An undischarged insolvent has a right to mortgage a property acquired by him after the order of adjudication was passed in the insolvency proceedings.

The transfer of property by way of mortgage in raising a loan on hypothecation of immoveable property, acquired by the insolvent, after the adjudication order, does not stand on the same footing as obtaining “credit” merely, as mentioned in section 102 of the Presidency-towns Insolvency Act.

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Narendrakumar Basu, Kanaidhan Datta and Mrigendranath Datta for the petitioners.

No one for the opposite party.

GUHA AND NASIM ALI JJ. The petitioner has been convicted by the learned Chief Presidency Magistrate of Calcutta, under section 102 of the Presidency-towns Insolvency Act, for an offence of borrowing a sum of money from the complainant in the case, on the mortgage of some land with the

*Criminal Revision, No. 939 of 1933, against the order of S. K. Sinha, Chief Presidency Magistrate of Calcutta, dated Sep. 11, 1933.

(1) (1844) 5 Q. B. 965 ;
114 E. R. 1512.

(2) (1882) I. L. R. 8 Cal. 556.

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knowledge that he, the accused person, was an undischarged insolvent, and has been sentenced to undergo rigorous imprisonment for six months. It appears that the petitioner obtained an order of adjudication as an insolvent in an insolvency proceeding in this Court, declaring him an insolvent on the 20th April, 1921, and that since that order of adjudication was passed by this Court, the Official Assignee did not take possession of any asset of the petitioner. It further appears that, on the 23rd November, 1923, the petitioner purchased property from one Rateendralal Mitra for a sum of Rs. 6,000 and that, on the 7th June, 1924, the petitioner executed a deed of mortgage in favour of the complainant Neelmani Das and obtained the loan, hypothecating the property purchased by the petitioner on the 23rd November, 1923, from Rateendralal Mitra. It is further to be mentioned in this connection that, according to the finding arrived at by the Chief Presidency Magistrate in this case, the petitioner did not bring to the knowledge of the complainant the fact that he was an undischarged insolvent when the mortgage was executed, on the 7th June, 1924. The learned magistrate has, in his judgment, dealt with the facts of the case in detail, and has proceeded to observe as follows:—

It is unnecessary to decide whether accused had real title to the land he purported to mortgage. "Credit" is defined in Wharton's Law Lexicon (11th Edition) as a "transfer of goods on trust in confidence of future payment." It seems to me perfectly clear that the transaction in question is of that nature. The defence is that the accused, who acquired this property two years after his adjudication, had every right to mortgage it * * *. It is, therefore, urged that, even if accused did not inform complainant of his insolvency, he committed no offence in mortgaging this property. Section 102 is clear. The accused undoubtedly obtained credit fraudulently. It is inconceivable that the complainant would lend Rs. 2,250 to a stranger whom he knew to be an undischarged insolvent. The accused is found guilty under section 102 of the Provincial-towns Insolvency Act and sentenced to six months' rigorous imprisonment.

Two questions, in our judgment, arise for consideration in this case: whether the property mortgaged being an after-acquired property, an undischarged insolvent in possession of the property

has the right to mortgage, and to deal with the property, and, as such, whether the provision of section 102 of the Presidency-towns Insolvency Act has any application to the present case. In the second place, whether the expression "obtaining credit", as used in the section 102, means and includes taking loan on mortgage of immoveable property.

So far as the first question goes, subject of the after-acquired property, as regards an uncertificated bankrupt has been considered in England from time to time, and the result is this that, subject to the right and claim of the Official Assignee, so long as the Official Assignee does not interfere, the uncertificated bankrupt has the power to buy and sell and give discharge, and do all other acts as he could have done and had done before the intervention of the Official Assignee. The law in England is summed up in *Herbert v. Sayer* (1), and the Indian Insolvency Act has, in our judgment, to be considered on the same principle. The view as taken above is in consonance with what has been laid down in *Kristocomul Mitter v. Suresh Chunder Deb* (2). In the present case, the petitioner undischarged insolvent had, by way of mortgage, dealt with the property acquired by him after the order of adjudication passed in the insolvency proceedings, and had the right to do so, according to the decisions in England and in this country.

In the second place, in view of the magistrate's expression of opinion that the accused obtained credit fraudulently, it is to be observed that the decision come to by the learned Chief Presidency Magistrate overlooks the fundamental difference as between the expression "obtaining credit" used with reference to undischarged insolvent in section 102 of the Presidency-towns Insolvency Act, and the position which has been recognized in this country and in

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England, that an undischarged insolvent has the power to deal with the property acquired by him after the order of adjudication, in any manner whatsoever, if the Official Assignee does not interfere with his dealings. The decision of the learned magistrate is also not in consonance with the difference that must be recognised in law, between obtaining credit and a transaction represented by a mortgage. The mortgage of a property is to be viewed in two different aspects. Regarded as a promise by the debtor to pay the loan, it is a personal obligation, but it is also a conveyance, because it passes to the creditor the real right to the property pledged to him. (See, in this connection, Ghose on Mortgage, 4th Edition, Volume I, page 66.) In our judgment, it appears clear that the transfer of the property by way of mortgage in raising the loan on hypothecation of immovable property, acquired by the insolvent after the adjudication order, does not stand on the same footing as obtaining credit merely, as mentioned in section 102 of the Presidency-towns Insolvency Act. It may be observed in this connection that the intention of the legislature in this behalf seems to us to have been made clear in the provisions that follow section 102, relating to the penalties dealt with by the statute in Part VIII of the Presidency-towns Insolvency Act. Examined in the light of the propositions stated above, the conviction of the petitioner cannot be maintained on the facts and the circumstances of the case before us.

In the result, the Rule is made absolute. The conviction of the petitioner, and the sentence passed on him by the learned Chief Presidency Magistrate are set aside, and the petitioner is acquitted. Let the petitioner be discharged from his bail bond.

Rule absolute.

A. C. R. C.