

Before Mr. Justice Muhammad Rafiq and Mr. Justice Stuart.

SIAM SARUP AND ANOTHER (DEFENDANTS) v. NAND RAM (PLAINTIFF)*.
 Act No. III of 1907 (*Provincial Insolvency Act*), section 16 (2) and (5)—*Mortgage executed, without objection on the part of either the receiver or the Court, by insolvent to pay off principal or only creditor—Heirs of insolvent not entitled to object.*

1921
 March, 30.

During the pendency of proceedings in insolvency, the insolvents, whose principal, if not the only, creditor was a mortgagee, executed another mortgage in favour of a third party and paid off the first mortgage. Neither the receiver nor the court in which the insolvency proceedings were took any objection to the execution of the second mortgage.

Held, on suit brought by the second mortgagee on the mortgage in his favour against the heirs of the mortgagors, that it was not open to the defendants to contest the suit upon the ground that the execution of the mortgage involved a breach of the insolvency law.

THE facts of this case sufficiently appear from the judgment of the Court.

Saiyid Raza Ali, for the appellants.

Munshi Budri Narain, for the respondent.

MUHAMMAD RAFIQ and STUART, JJ. :—This appeal arises out of a suit brought on foot of a mortgage, dated the 25th of October, 1912, for the recovery of the mortgage money. It appears that Chheda Lal and Kanhaiya Lal executed a prior mortgage on the 10th of March, 1908, in favour of Bhagwan Das. That mortgage remained unpaid until the execution of the mortgage in suit on the 25th of October, 1912, in favour of Nand Ram. Both the executants of the two mortgages, i.e., Chheda Lal and Kanhaiya Lal, were declared insolvents on the 6th of May, 1912, i.e., a few months before the execution of the mortgage in suit. On the 15th of November, 1917, the suit out of which this appeal has arisen, was instituted by Nand Ram for recovery of the money due on his mortgage-deed and Chheda Lal and the heirs of Kanhaiya Lal (the latter having died) were impleaded as defendants. The claim was resisted on several pleas; but the two chief pleas were that, the mortgage in suit having been given after the order of adjudication had been passed under the Provincial Insolvency Act, the mortgage was

*Second Appeal No. 1502 of 1918 from a decree of Ram Chandra Saksena, Additional Subordinate Judge of Moradabad, dated the 6th of July, 1918, confirming a decree of S. M. Mir, Additional City Munsif of Moradabad, dated the 28th of February, 1918.

1921

SHYAM SARUP
v.
NAND RAM.

invalid, and, secondly, the mortgaged property being ancestral, Kanhaiya Lal had no right to create a charge upon it. The court of first instance disallowed the pleas in defence and decreed the claim. The sons of Kanhaiya Lal alone preferred an appeal to the District Court and the only objection they took to the decree of the first court was that the mortgage in suit was invalid under the Insolvency law. The learned Judge rejected the plea and affirmed the decree of the first court. Before us in second appeal both the objections mentioned above are urged on behalf of the sons of Kanhaiya Lal. As regards the objection based on the allegation that the mortgaged property is ancestral and Kanhaiya Lal had no right without any legal necessity to create a charge upon it, we are of opinion that the objection is not open to the appellants inasmuch as it was not urged in the lower appellate court. The only other point then that remains for disposal is whether the deed of the 25th of October, 1912, i.e., the deed in suit, is invalid in view of the provisions of section 16 of Act III of 1907. The particular clause relied upon for the appellants is clause (2), which is as follows:—

“On the making of an order of adjudication,—

- (a) the whole of the property of the insolvent, save in so far as it includes such particulars (not being his books of account) as are exempted by the Code of Civil Procedure or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree, shall vest in the court or in a receiver as hereinafter provided and shall become divisible among the creditors; and
- (b) the insolvent if in prison for debt, shall be released: and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of insolvency proceedings have any remedy against the property or person of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the court and on such terms as the court may impose.”

It is contended on behalf of the appellants on the basis of these provisions that Kanhaiya Lal and Ohheda Lal had no right or authority left in them to create the present mortgage on the property which had already vested in the receiver. For Nand Ram the allegation is that as soon as he advanced the money on the mortgage in suit and Bhagwan Das had been paid

1921

SHYAM SARUP
v.
NAND RAM.

the proceedings pending against Chheda Lal and Kanhaiya Lal were consigned to the record room, i.e., in other words, the insolvency proceedings came to an end. The receiver, or the court that had appointed the receiver, made no objection to the mortgage in suit but on the contrary accepted the position finding that the principal, if not the sole, creditor of Chheda Lal and Kanhaiya Lal had been paid off. Moreover, it is said on behalf of the respondent that it is not open to the appellants who are neither the creditors of Chheda Lal and Kanhaiya Lal nor in any way represent the receiver to object to the validity of the mortgage in suit on the basis of clause (2) of section 16 of Act III of 1907. They represent Kanhaiya Lal if they represent any one at all. They are legal representatives of Kanhaiya Lal if they stand in his shoes. They practically are mortgagors. They have no right to object to the validity or enforcement of the mortgage of the 25th of October, 1912. Besides, the provisions of clause (5), section 16, of Act III of 1907 protect the transaction in suit. If it is open and legal to a secured creditor to realize his security in any way he prefers, surely, the means that are adopted to realize the security are also valid unless forbidden by any statutory law. If it was open to Bhagwan Das to realize his mortgage by suing upon it and enforcing his decree, why should a private settlement come to between him and the mortgagors by which a fresh mortgage was given to a third party and from the proceeds of which Bhagwan Das' mortgage was satisfied be considered to be invalid under Act III of 1907? In our opinion the position taken up on behalf of Nand Ram and the view taken by the courts below of the mortgage in suit are correct. The appellants neither represent the receiver nor are the creditors of either of the two executants of the deed in suit. The consideration of the deed was utilized towards the payment and discharge of the mortgage of Bhagwan Das and therefore the mortgage in suit is not invalid. The appeal fails and is dismissed with costs.

Appeal dismissed.