

and that after such enquiry has been held and such re-imburement made, the shares in the estate be estimated and a final decree be passed by the Township Court for the purpose of granting the plaintiff possession of his share or recovery of its equivalent in money.

As regards costs I award the defendant half his costs in this Court and I think that each party should bear his own costs in the lower Courts.

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 MAUNG
 GYI
 AND ONE
 v.
 MAUNG
 AUNG PYO.
 LENTAIGNE,
 J.

APPELLATE CIVIL.

Before Sir Sydney Robinson, Kl., Chief Justice, and Mr. Justice Baguley.

ALLAN BROTHERS & CO.

v.

SHAIK JOOMAN SONS & Co. (*represented by the Official Assignee*).*

1924
 Sep. 6.

Presidency-Towns Insolvency Act (III of 1909), sections 52, 53—Execution of decree—Order, prior to adjudication of the judgment-debtor, for satisfaction of decree by monthly instalments and also for security in the form of a mortgage on his immoveable property, under Civil Procedure Code. Order 20, Rule 11 (2)—Unsuccessful attempts by the judgment-creditor to discharge the order for instalments and security and to proceed with the execution—Mortgage unexecuted up to date of adjudication—Civil Procedure Code, section 36.

Where the Court, acting under the provisions of Order 20, Rule 11 (2), of the Civil Procedure Code, ordered that the judgment-debtor shall satisfy the decree against him by monthly instalments and shall, in the meanwhile by way of security for such monthly payments, execute in favour of the decree-holder a mortgage on his immoveable property, *held* that the subsequent adjudication of the judgment-debtor could not affect the position of the decree-holder.

Held further, that so long as the order for security remained undischarged the fact that up to the date of the judgment-debtor's adjudication the mortgage ordered had not been executed owing to the decree-holder's unsuccessful attempts to have the order in question discharged so that he might forthwith be able to proceed to execution, did not deprive the decree-holder of his right to obtain from the insolvent judgment-debtor the mortgage in accordance with the Court's order.

Chandra Kumar De v. Kusum Kumari Roy, 28 C.W.N. 187—referred to.

* Civil Miscellaneous Appeal No. 94 of 1924 against the order of the High Court in its Civil Regular Suit No. 609 of 1923.

1924

ALLAN
BROTHERS
& Co.

v.

SHAIK
JOOHAN
SONS & Co.ROBINSON
C.J.*Patel*—for the Appellant.*Clifton*—for the Respondent.

ROBINSON, C.J.—The facts that lead up to this appeal are somewhat complicated, and must be set out in some detail in order to appreciate the matters now in question.

The appellants obtained a decree against the respondent, and applied for attachment, in execution, of the goods in his shop. These, according to the respondent, were worth Rs. 1,25,000. Respondent then applied that the decree be made payable by instalments of Rs. 2,500 a month. The matter came up before my brother Beasley, and an order was passed under Order 20, Rule 11 (2) on the 6th of February, 1924, that the decree shall be payable by instalments of Rs. 10,000 per mensem, and that the respondent should give as security a second mortgage on 23A, Phayre-street. The result of this order was that the application for attachment remained in abeyance.

A week later, respondent alienated eighteen properties. Appellant then applied to have him adjudicated an insolvent. My brother Rutledge held that he should not pass an *ex-parte* order of adjudication; but he appointed a Receiver of the goods in the shop, and issued notice to the respondent. Respondent then applied to set aside the order appointing a Receiver, alleging that he had been compelled by his creditors to alienate the properties. This was accepted, and the application to adjudicate was rejected. But the learned Judge in his order states that the previous orders in execution as to payment by instalments and the execution of a second mortgage as security should stand. They, of course, could not be effected. Respondent then, as the goods in the shop had not been attached,

instructed Messrs. Balthazar & Son to sell the stock-in-trade. Appellant then applied to my brother Beasley, urging that further security should be given by instructing Balthazars to credit the proceeds of the sale of the goods in stock to the appellant's decree.

The matter came on for hearing on the 3rd of March and Counsel for the respondent applied for an adjournment, and gave an undertaking that the sale-proceeds would be deposited in Court. Thereupon, respondent cancelled his instructions to Messrs. Balthazar & Son to sell and advertised a great reduction sale of his stock-in-trade.

On the 24th of March my brother Beasley passed an order, setting out that his previous order for payment of the decree by instalments and for executing the mortgage should stand, and appointed Mr. Joakim, Receiver, to take possession of the stock-in-trade, to sell it and pay the proceeds into Court.

The stock-in-trade was sold on the 17th of April, and, on the 28th of April, respondent applied to be adjudicated an insolvent. The stock-in-trade realized some Rs. 26,000, and, on the 14th of May, the Receiver deposited Rs. 23,000 out of this sum in Court. Appellant then applied that this money be paid to him ; and the matter was placed before the Judge. He also applied that the second mortgage on 23A, Phayre-street, should be executed.

Respondent having been adjudicated, the Official Assignee objected. His Counsel urged that the matter could not be heard by the executing Court, but should be transferred to the insolvency division.

It was heard by my brother May Oung, who then passed an order refusing appellant's application that a mortgage be executed, and postponing decision as to what was to be done with the Rs. 23,000. He also directed that the balance, still with Mr. Joakim

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after deducting his commission, charges, etc., should be paid to the Official Assignee. Later, he passed an order directing that the Rs. 23,000 should be paid to the appellant.

From that order the present appeal is filed in respect of the balance money, which was ordered to be paid to the Official Assignee, and in respect of the execution of a mortgage.

The Official Assignee has not appealed against the order as to the payment of the Rs. 23,000 to the appellant; and it is very properly admitted that the balance of the sum realized by the sale of the stock-in-trade should also be paid to the appellant. The Official Assignee will accordingly be directed to pay this sum to the appellant.

As regards the mortgage, it is urged that, having obtained an order for security in the form of a second mortgage on 23A, Phayre-street, the appellant deliberately refrained from accepting the mortgage and, instead, applied to adjudicate respondent.

The reason of that conduct is, I think, clear. The Insolvency Court could not pass any orders as to the mortgage, for orders to that effect had already issued, and appellant feared that this question of mortgage might affect his application in insolvency.

Appellants applied to review my brother Beasley's order by a petition, dated the 25th of February 1924. After setting out all the conduct of the respondent, the application was to cancel the order for payment of the decretal amount by monthly instalments, and to order execution as originally prayed, or, in the alternative, to order that the sale proceeds of the stock-in-trade be deposited in Court to the credit of the decretal amount. They were, no doubt, at that time seeking to be relieved of the burden put upon them by the original order for

payment of the decree by instalments, and, if that had been granted, the order as to the execution of a second mortgage by way of security would also have gone by the board. But that application was not granted; the order was that the previous order as to instalments and as to a mortgage should stand.

It is urged that the original order, which would convert the appellants into secured creditors, was made with the respondent's consent, and that they could not have acquired the position of secured creditors without that consent.

The order was, however, varied by directing that the sale proceeds of the stock-in-trade should be credited to the appellants' decree. That was not made with the respondent's consent; therefore the appellants could not become secured creditors, and their own remedy was to enforce their original decree. I think the argument is mistaken.

The order of the 6th of February, by which the appellant was granted the position of a secured creditor, has not only not been set aside, but has been confirmed, and, if the appellant acquired the position of a secured creditor by virtue of that order, he has not lost it since. At the time the order was passed, respondent was not adjudicated an insolvent; and the fact that he has subsequently been adjudicated cannot affect the position of the appellant.

The order that is now sought, namely, that a mortgage be executed as previously directed, is an order which may be executed as if it were a decree by reason of the provisions of section 36 of the Civil Procedure Code. [*Chandra Kumar De v. Kusum Kumari Roy* (1).]

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The provisions of sections 52 and 53 of the Presidency-Towns Insolvency Act also apply in favour of the appellant.

The mortgage was ordered prior to the adjudication; the appellant has never lost the right to have that order executed in his favour; and this appeal must be accepted, and the insolvent must execute the mortgage as directed, and, on his failure to do so, the Court will order the mortgage to be executed.

As to costs, the respondent must pay the appellant's costs of this appeal. Advocate's fee will be fixed at five gold mohurs.

BAGULEY, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Young.

MAUNG MAUNG AND ONE,

v.

MAUNG SHWE GOE AND TWO.*

1924
 Sep. 10.

Buddhist Law—Pre-emption—Offer made to co-heirs before offer to a stranger, whether sufficient.

Held, that in a case of pre-emption, it was sufficient for the vendor to offer the property to his co-heirs and then on refusal to sell it to a stranger; and that he was not bound, having offered it to a stranger, to offer it again to his co-heirs at the same price.

Gobind Dayal v. Mayatullah, 7 All. 775; *Ma Ngwe v. Lu Bu*, S.J., 76; *Maung Shwe Nyan v. Ma So* (1897-01), 2 U.B.R., 155; *Nga Myaing v. Mi Baw*, S.J., 39; *Ye Nan O v. Aung Myat San*, 8 B.L.T., 167—*referred to*.

May Oung's Leading Cases on Buddhist Law; Sparks' Code of Buddhist Law—*referred to*.

McDonnell—for the Appellants.

Anklesaria—for the Respondents.

YOUNG, J.—The only question raised in this appeal was whether, in a case of pre-emption, it was sufficient

* Special Civil Second Appeal No. 442 of 1923 from the decree of the District Court of Mergui in Civil Appeal No. 54 of 1923.