

interest on it and to give security which was unnecessary, and who in spite of the fact that they had agreed to pay compound interest neglected to pay the debt, for many years, with the result that after some years the amount due as interest yearly was more than the amount of the original debt. It is of course a hard case, but I think that the learned Judge in the lower Court forgot that it is hard cases that make bad law, and that his reasons for giving relief were sentimental rather than judicial.

I would therefore set aside the judgment and decree of the lower Court and give appellant a decree for the full amount claimed with costs.

MYA BU, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Mya Bu.

R.M.M. CHETTYAR FIRM

v.

U HLA BU.*

1927

July 4.

Provincial Insolvency Act (V of 1920), s. 56, sub-sec. (2) (b)—Remuneration of receiver on sale of mortgaged property—Value of equity of redemption only to be taken.

Where an insolvent's property subject to a mortgage is sold free from the mortgage and the receiver realises the purchase money, the whole of it is not assets available for distribution but only such part as remains in his hands after paying off the mortgage and it is only on such part that the receiver is entitled to remuneration.

In re Official Assignee's Commission, 36 Cal. 990 ; S. Narayan v. Atmaram Govind, 7 Bom. 455 ; S. Narayan v. K. Vitthoji, 12 Bom. 272—referred to.

P. B. Sen—for Appellant.

U Thein Maung—for Respondent.

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HEALD AND MYA BU, JJ.—The respondent, a pleader of Pyinmana, was appointed Receiver of the estate of Maung Po Tok, who on his own application was adjudicated insolvent in Civil Miscellaneous 49 of 1925. As Receiver, the respondent took possession of certain articles of jewellery and immoveable property set out in his list filed at page 16 of the record. All the properties were mortgaged or pledged with the appellant Chettyar firm. Most, if not all of these properties, were sold by the respondent, who filed his accounts on the 6th July 1926 (page 23) which shows a sum of Rs. 3,686-10-6 as having been realised, from which two sums, namely, Rs. 10 being the cost of notices for the sales and Rs. 368 being the Receiver's commission were deducted.

On the 21st August 1926, the appellant firm tendered a proof of debts due to them by the insolvents amounting to Rs. 20,413-8-0 out of which the Court admitted Rs. 12,641-6-0. Subsequently the appellant on finding that a sum of Rs. 378 had been deducted from the proceeds of sale conducted by the Receiver applied to the Court objecting to the deduction and pointing out that the appellant firm were the insolvent's secured creditors and that the amount realised by the Receiver was the proceeds of sale of properties pledged or mortgaged to them. By an order dated the 30th September 1926, the Court dismissed the application and it is against this dismissal the appellant firm have appealed.

The Court appointed the Receiver under section 56 of the Provincial Insolvency Act 1920. Under subsection (2) (b) the Court could fix the amount to be paid as remuneration for the services of the Receiver out of the assets of the insolvent. This remuneration was fixed in the shape of a commission at 10 per cent which is an excessive rate. However the

District Court having fixed the remuneration at that rate the Receiver was entitled to get his remuneration at the rate so fixed but only out of the assets of the insolvent. Where any part of the insolvent's property is subject to a mortgage, it is only the value of the insolvent's right to redeem that property which can be his assets available for distribution. A Receiver is bound as a condition of dealing with mortgaged property to pay off the mortgage. The only interest the insolvent had and which vests in the Receiver was the equity of redemption [see *Shridhar Narayan v. Atmaram Govind* (1) and *Shridhar Narayan v. Krishnaji Vilhoji* (2).] Thus if the property that vests in the Receiver is subject to a mortgage or incumbrance, it is only the equity of redemption which can be counted as assets going into the Receiver's hands. Where therefore any part of the insolvent's property subject to a mortgage is sold free from the mortgage and the Receiver realises the purchase money, the whole of it is not assets available for distribution but only such part as remains in his hands after paying off the mortgage and it is only on such part that the Receiver is entitled to remuneration. This view is supported by *In re Official Assignee's Commission* (3). The learned counsel for the respondent argues that this case is inapplicable to the one under consideration because the Official Assignee is governed by a special Act with which we are not concerned. We are unable to accept this argument inasmuch as the principles underlying the decision are the same as those upon which we are to proceed to decide the case. Even apart from the authority of this ruling we are satisfied that the Receiver is not entitled to remuneration on the whole of the proceeds of sale

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(1) (1883) 7 Bom. 455 at p. 458. (2) (1887) 12 Bom. 272 at p. 273.

(3) (1909) 36 Cal. 990.

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of property which is subject to a mortgage and that his remuneration should be calculated only on the portion of such proceeds remaining in his hands after satisfying the mortgage debt. Moveable property held by a creditor in pledge must obviously be on the same footing as property subject to a mortgage for the purpose of the question before us.

[The case was remanded for calculation of the Receiver's commission. The Court noted also that the ordinary commission of a Receiver and also under Rule 20 of the Insolvency Rules is five per cent.]

APPELLATE CIVIL.

Before Mr. Justice Maung Ba.

U TEZA

v.

MA E GYWE AND OTHERS.*

1927
 July 21.

Buddhist Ecclesiastical Law—Phôngyi whether competent to engage in sale or purchase of property—Such transaction immoral within the meaning of s. 23, Contract Act (IX of 1872).

Where a Buddhist monk claims to have purchased a house and sued for possession thereof, held that the personal law of the monk, as defined by the *Vinayas*, prohibited sale and purchase of property by Buddhist monks and that therefore the purchase alleged by him was unlawful within the purview of section 23, Contract Act, and his suit must be dismissed.

Ma Pwe v. Maung Myat Tha, 2 U.B.R. (1897-01) 54; *Po Thin v. U Thi Hla*, 1 U.B.R. (1910-13) 183; *Shwe Ton v. Tun Lin*, 9 L.B.R. 220 F.B.—referred to. *U Tilawka v. Nga Shwe Kan*, 2 U.B.R. (1914-16) 61—followed.

Myint Thein—for Appellant.

Ba Tun (2)—for Respondent.

MAUNG BA, J.—In this appeal an interesting point of Buddhist Ecclesiastical Law is involved.

* Special Civil Second Appeal No. 582 of 1926.