

APPELLATE CIVIL.

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

K.P.S.P.P.L. FIRM

v.

C.A.P.C. FIRM.*

1929

Jan. 30.

Insolvency Court's powers—Directions as to distribution of assets—Discharge of insolvent does not affect Court's powers as to distribution—Insolvency proceedings not necessarily ended on discharge—Court's power to order refund from creditor—Receiver's commission.

The immoveable properties of an insolvent were sold by the Receiver, free of all mortgages. He deducted his commission from the sale proceeds and under the orders of the Court distributed the balance amongst the secured creditors of whom the appellants were one. Respondents were also secured creditors but they were omitted from the schedule of creditors by an oversight and consequently got nothing. After the discharge of the insolvent they applied for a refund of a portion of the sale proceeds paid to the appellants. This portion represented the sale proceeds of certain lands which were mortgaged to the respondents alone and not to any other creditor. Appellants questioned the jurisdiction of the Insolvency Court to make the order, quite especially after the discharge of the insolvent.

Held, that the Insolvency Court has jurisdiction to give directions as to the distribution of the assets among the creditors, and this power of the Court is not taken away on account of the insolvent's discharge. A discharge does not necessarily end the insolvency proceedings.

Rowe & Co. v. Tan Thean Taik, 2 Ran. 643—*referred to*.

A receiver cannot claim his commission on the gross sale proceeds of the property sold by him free of a mortgage, but only on the balance, if any, after satisfying the mortgage debt.

R.M.M. Firm v. Hla Bu, 5 Ran. 623—*referred to*.

B. K. B. Naidu for the appellants.

Venkatram for the respondents.

HEALD and MYA BU, JJ.—The present parties are creditors of one Kyin Sein, who was adjudicated insolvent on his own petition in Civil Miscellaneous Case No. 99 of 1926 of the District Court of Tharrawaddy.

* Civil Miscellaneous Appeal No. 55 of 1928 from the order of the District Court of Tharrawaddy in Civil Miscellaneous No. 99 of 1926.

The insolvent possessed only the following properties :—

- (1) A house at Tharrawaddy.
- (2) Two holdings of paddy land said to be Nos. 33 and 35 of 1925-26 of Thanatpyit *kwin*, measuring together 37.67 acres.
- (3) Two holdings of paddy land said to be Nos. 33 and 35 of 1925-26 of Tawyagon *kwin*, measuring together 22.99 acres.
- (4) Two holdings of paddy land said to be Nos. 52 and 53 of 1925-26 of Ashe *kwin*, measuring together 29.00 acres.

The M.T.T.K.M.M.S.M.A.R. Chettyar Firm proved in respect of a first mortgage over the house for Rs. 8,152-15.

The K.P.S.P.P.L. Firm, who are the present appellants, proved in respect of a second mortgage on the house and the lands in Thanatpyit *kwin* for Rs. 7,917.

The M.L.M.R.M. Firm proved in respect of a first mortgage on the lands in Thanatpyit *kwin* and a first mortgage on Holding No. 52 in Ashe *kwin* for Rs. 7,307-4.

The C.A.P.C. Firm, who are the present respondents, proved in respect of an only mortgage on the lands in Tawyagon *kwin* and on Holding No. 52 in Ashe *kwin*, and a second mortgage on Holding No. 52 in Ashe *kwin* for Rs. 6,557-8.

There were other creditors whose debts were unsecured.

By an oversight the C.A.P.C. Firm, that is the present respondents, were omitted from the schedule of creditors.

The Receiver sold all the properties free of mortgage, as shown below :—

	Rs.	A.	P.
(1) The house for	8,635	0	0
(2) „ Thanatpyit paddy lands for	10,900	0	0

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		Rs.	A.	P.
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	(4) " Ashe <i>kwin</i> " " "	1,150	0	0
		21,305	0	0

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From this amount the Receiver deducted Rs. 1,065 as his commission, leaving for distribution Rs. 20,239-12.

That amount was divided among the creditors as follows :—

		Rs.	A.	P.
To the	M.T.T.K.M.M.S.M.A.R. Firm	8,203	4	0
"	K.P.S.P.P.L. "	4,439	4	0
"	M.L.M.R.M. "	7,597	4	0
		20,239	12	0

The C.A.P.C. Firm, who received nothing, naturally complained and the Court said that because the lands which were mortgaged to them and were not mortgaged to any of the other creditors had been sold for Rs. 1,770, they were entitled to recover that amount from the K.P.S.P.P.L. Firm who had taken the money out of Court.

The K.P.S.P.P.L. Firm appeals against that finding on grounds that the Insolvency Court had no jurisdiction to decide in insolvency proceedings such a question as that arising between them and the C.A.P.C. Firm, that if it had such jurisdiction generally, it had no such jurisdiction at the time when the order was made because an order for the discharge of the insolvent had already been made, that the application of the C.A.P.C. Firm was *res judicata* by reason of the rejection of similar applications made at earlier stages of the proceedings and that on the merits the C.A.P.C. Firm was not entitled to recover the sum of Rs. 1,770 from them.

There is clearly no force in the first of these grounds because the Insolvency Court undoubtedly has power to give directions as to the distribution of

the assets among the creditors who have proved in the insolvency. Similarly, there is no force in the ground that the discharge of the insolvent put an end to the Court's power to give such directions. It was said in the case of *Rowe v. Tan Thean Taik* (1) that "One of the main objects of every adjudication of an insolvent is to make his estate divisible amongst the creditors and it must often occur that valuable assets are still in the hands of the Official Assignee and in process of realisation for that purpose at the date when the insolvent applies for his final discharge", and we agree with the conclusion of the learned Judge in that case that an order under section 41 of the Act does not necessarily put an end to the proceedings in the insolvency. We have no doubt that in this case the Court still had power to make the order against which appellants appeal. There is clearly no question of *res judicata*. It is true that respondents had made various prior applications for the proceeds of the sale of the properties mortgaged to him, but there was no final order adjudicating on their claim before the order which is under appeal. As for the merits, it is clear that appellants' case has no merits of any sort. The sum of Rs. 1,770 mentioned in the lower Court's order represents the sale proceeds of the Tawyagon lands and of both the holdings in *Ashe kwin*. The Tawyagon lands were mortgaged only to respondents and as the sale proceeds of those lands were insufficient to satisfy respondents' mortgage respondents were clearly entitled to the whole of those sale proceeds, none of the other creditors having any interest of any sort in them. The amount of those sale proceeds was Rs. 620. As for the *Ashe kwin* lands respondents held a first mortgage over holding No. 53 and a second mortgage over holding No. 52, the

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M.L.M.R.M. Firm having a prior mortgage over holding No. 52. The M.L.M.R.M. Firm's first mortgage over holding No. 52 was satisfied by the sale of the Thanatpyit lands, which were also included in their mortgage, without recourse to the sale proceeds of holding No. 52, and therefore the sale proceeds of holding No. 52 as well as those of holding No. 53 were wholly available for satisfaction of respondents' mortgage debt. Appellants held no mortgage over any of lands which were mortgaged to respondents and in respect of which respondents claim the sale proceeds, and since those sale proceeds were insufficient to satisfy respondents' mortgage debt, neither appellant nor any other creditor had any rights in respect of them.

The only matter in which the lower Court's order was mistaken is that it ordered appellants to pay the gross sale proceeds to respondents, disregarding the fact that the Receiver had already taken his commission out of them. The order must therefore be varied by deducting from the sum of Rs. 1,770 the amount of the Receiver's commission on the sale of these properties. That commission amounted to Rs. 88-8 and therefore the sum payable by appellants to respondents is Rs. 1,681-8.

The Receiver had however no right to any commission, *vide* the ruling of this Court in the case of *R.M.M. Firm v. Hla Bu* (2) and the rules contained in paragraph 307A (1) of the Burma Courts Manual, and therefore he must refund to respondents the sum of Rs. 88-8 which he has wrongly taken. On application by any of the other creditors who are interested in the matter he should be made to refund the balance of his commission so far as such commission was not

paid in respect of the surplus of sale proceeds over the mortgage debt due on the particular lands sold.

We note that the conduct of the insolvency proceedings in the lower Court reflects no credit on either the Court or the Receiver. The Court clearly framed the schedule of creditors carelessly, since it omitted to notice that respondents had proved their mortgage debt and it failed to enter them in the schedule, and both the Court and the Receiver seem to have been entirely ignorant of the provisions of section 47 of the Insolvency Act and of the fact that the Receiver is not entitled to commission on the amount of the mortgage money realised by the sale of the mortgaged property.

In the result the order of the lower Court is varied by the substitution of the amount Rs. 1,681-8 for Rs. 1,770 as payable by appellants to respondents and by the addition of an order for the payment of Rs. 88-8 by the Receiver to respondents.

In view of the fact that the grounds for the alteration of the order were not mentioned by appellants in the appeal, appellants will pay respondents' costs in this Court, advocate's fee to be five gold mohurs.

The respondents have filed a cross objection claiming that the Court ought to have allowed them interest on the amount awarded. The learned Judge in the lower Court considered respondents' claim to interest and rejected it, and we are of opinion that in refusing interest he exercised a right discretion, because respondents were negligent in not seeing that they were brought on to the schedule of creditors. They were present at the sale and raised no objection to the sale of the properties, which were mortgaged to them, free of their mortgage.

We therefore dismiss the cross-objection without orders for costs.

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