(1931) 04 AHC CK 0036

In the Allahabad High Court

David, E.V. APPELLANT

Vs

The Judge, Small Cause Court RESPONDENT

Date of Decision : 27-04-1931

Acts Referred:

Citation : (1931) 04 AHC CK 0036

Hon'ble Judges : Sulaiman, Acting C.J.;Smith, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Sulaiman, Ag. C.J.

1. This is a civil revision from an order made by the Court of Small Causes calling upon the Official Receiver to refund certain amounts which he had taken in the course of realising the assets of an insolvent. The insolvent''s property was heavily mortgaged and the amount due to a mortgagee was Rs. 32.349. Under an arrangement with the mortgagee the receiver obtained his consent to sell the property free from the incumbrance and to pay him the mortgage money. The property fetched Rs. 33,000 free of the incumbrance. The receiver charged his commission at the rate of 5 per cent on the whole amount of the sale proceeds, namely, Rs. 33,000 and also charged expenses of administration in the form of salaries said to have been paid to the ministerial and clerical staff appointed by him. The mortgagee received Rupees 31,320, that is to say, the balance after 5 per cent on the gross amount as commission had been deducted from the sale proceeds together with an extra sum of Rs. 30 said to cover the expenses of administration. The mortgagee then applied to be entered as a scheduled creditor for his surplus amount of over Rs. 1,000; he was paid Rs. 65 as dividend.

2. The Court below has coma to the conclusion that the receiver was entitled to his commission on the equity of redemption, represented by Rs. 651, only and not on the entire sale proceeds. It has however held that inasmuch as the mortgagee took away another sum of Rs. 65 owing to a mistake of the receiver

the latter should be called upon to refund this amount also. The Court has also come to the conclusion that the staff said to have been employed by the receiver had been employed without the previous sanction of the District Judge, and the receiver therefore was not entitled as of right to claim the whole costs of this establishment; but that if he satisfied the trial Court that the expenses had been incurred in good faith and were reasonable, he would be entitled to claim credit for them in connexion with the management of the estate. As regards an item of Rs. 6-3-0, the Court held that it was unaccounted for by the receiver and therefore he should refund it.

3. We cannot accept the contention of the applicant''s learned Counsel that because the amount had been passed by the insolvency Court that cannot now be reopened. If on an examination of the accounts by an auditor certain mistakes and overcharges are pointed out, it is open to the Court to reopen the accounts and make the receiver refund what he has taken without justification.

4. The main question in the case is as to the amount-on which the commission of 5 per cent is to be calculated. u/s 57 (4) the Official Receiver is entitled to receive remuneration out of the fund according to the scale fixed by the Local Government. The Government Notification of 20th May 1925 allows to an Official Receiver remuneration at the rate of 5 per cent of the gross assets coming into his hands subject to a minimum commission of Rs. 5 in each case.

5. If there were no authority to the contrary I would, speaking personally for myself, have been inclined to think that the assets spoken of in the notification mean the assets of the insolvent and not moneys belonging to other persons. In the case of simple money creditors, who have no charge on the insolvent''s estate, the price fetched by the sale of the insolvent''s property is part of the gross assets received by the receiver. But where the property of the insolvent had been previously transferred under a mortgage, and the secured creditor is entitled to keep out of the insolvency proceedings and his charge is paramount to the claims of all other creditors, an interest in immovable property has been carved out and has passed to the mortgagee, with the result that only the equity of redemption remains with the debtor mortgagor, which alone can vest in the receiver. It would therefore seem to follow that the assets of the insolvent which come into the hands of the receiver can only be the value of the equity of redemption which remains with the insolvent. I am therefore inclined to hold that the basis of the calculation should be 5 per cent on the gross assets of the insolvent which come into the hands of the receiver. If by some private arrangement with a prior mortgagee who however does not choose to give up his security, the receiver sells the mortgaged property free from the incumbrance and pays off the amount of the incumbrance to the mortgagee, the amount of the mortgage money should not be allowed to be treated as part of the gross assets of the insolvent. In the present case the amount of the commission claimed by the receiver is about three times the value of the insolvent''s equity of redemption which he has sold. There is some support for this view in some of the

cases of the other High Courts, although the language to be interpreted in those cases was quite different. At the same time I must confess that the language of the notification is somewhat ambiguous, and a Bench of this High Court has interpreted it as meaning that the receiver is entitled to charge 5 per cent as commission on the gross amount that, is to say, the entire sale proceeds of the property sold free from the prior mortgage and not only on the value of the equity of redemption. If this interpretation of the Government Notification is not correct it would be open to the Government to make the notification clear. I therefore do not think that it will be proper to take a different view on the question of interpretation. Following the ruling In Re: Official Receiver, I would hold that the receiver was not wrong in charging commission on the whole amount of the sale proceeds.

6. Once this point is settled, it is quite obvious that the amount left after deducting the commission was less than the amount of the mortgage money. If therefore the receiver has taken any money in excess, he has done so out of what ought to have gone to the mortgagee and the insolvent''s estate has in no way suffered.

7. The receiver therefore cannot be called upon to refund any part of his commission.

8. The order of the Court below as regards the expenses of management in addition to his commission seems to be right. The staff was employed without the previous sanction of the District Judge and therefore the receiver was not entitled to claim expenses. If however he satisfied the Court that any part of the expenses was reasonably incurred and was incurred in good faith he would be entitled to claim credit for the same.

9. The learned advocate for the applicant does not seriously press the item of Rs. 6-3-0. I would accordingly allow this revision and modifying the order of the Court below and reduce the amount ordered to be refunded to Rs. 6-3-0. I would further maintain the order directing the trial Court to enquire into the propriety of item No. 3 relating to the expenses of establishment.

Smith, J.

10. I agree.

11. We accordingly allow this revision and modifying the order of the Court below reduce the amount ordered to be refunded to Rs. 6-3-0. We further maintain the order directing the trial Court to inquire into the propriety of item No. 3 relating to the expenses of establishment.

