

1931

*Present: Macdonell C.J. and Garvin S.P.J.*SANTIAGO *v.* SEGU MOHAMADO.

210—D. C. (Inty.) Colombo, 39,202.

Insolvency—Mortgage by insolvent prior to adjudication—Mortgagee's right to sell property—Ordinance No. 7 of 1853 s. 111.

The holder of a decree in an action on a mortgage, granted by an insolvent before the date of the petition for the sequestration of his estate, is entitled to have the mortgaged property sold under the decree.

APPÉAL from an order of the District Judge of Colombo.

H. V. Perera (with him *Soertsz*), for appellant.

No appearance for respondent.

January 28, 1931. MACDONELL C.J.—

I think this appeal must be allowed. The decree appealed from seems to be based on a misreading of section 111 of the Insolvency Ordinance, No. 7 of 1853. That section says in effect that no creditor

of an insolvent shall receive more than a rateable part of his debt, save in two excepted cases. One of these is where a creditor having attached the goods and effects of the insolvent has served and levied such execution by seizure and sale of any part of the property of the insolvent before the filing of the petition for sequestration. The other exception is where a secured creditor has a mortgage or lien upon any part of the property of the insolvent before the filing of the petition for sequestration. In either of these cases the creditor takes, not a rateable part of his debt, but whatever the sale in the one case of the property attached, in the other case of the property mortgaged, may bring him. The plaintiff-appellant in this case comes within the second of these exceptions, and this distinguishes his case from that of the plaintiff in *Seena Soona Vana and Co. v. Assignee of Segu Mohamadu*¹. He holds a decree on a mortgage granted by the insolvents before the date of the petition for their insolvency, and has an order for the realization of his mortgage security by means of a sale at auction, and there is no reason why this order should be barred from being carried into effect. It is suggested that there are reasons for impeaching the plaintiff's mortgage. After the sale or auction, the money or the proceeds thereof will have to be lodged in Court, and there will then be ample opportunity for the assignee of the insolvent, if such be then appointed, to show cause against the money being paid out to the plaintiff, and to impeach the plaintiff's mortgage.

This appeal must be allowed with costs. The costs incurred by the plaintiff in the lower Court and in this appeal will be added to the amount of the mortgage.

GARVIN S.P.J.—I agree.

Appeal allowed.

¹ 31 N. L. R. 369.