

(1948) 11 MAD CK 0008
In the Madras High Court

Pulavarthi Ammanna and Others

APPELLANT

Vs

Bommireddipalli Ramakrishna Rao and Others

RESPONDENT

Date of Decision : 12-11-1948

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 64, Order 21 Rule 66

Citation : (1949) ILR (Mad) 904 : (1949) 62 LW 212 : (1949) 1 MLJ 249

Hon'ble Judges : P.V. Rajamannar, C.J

Bench : Division Bench

Judgement

P.V. Rajamannar, C.J.—This is an appeal against the decree and judgment of the learned Subordinate Judge of Ellore in O.S. No. 42 of

1944. The plaintiffs are the appellants. The suit was for a declaration that the plaintiffs were entitled to a three-fifths share of the properties in the

plaint schedule representing the interests of defendants 4 to 6 and to such specific items as may be allotted to defendants 4 to 6 in the final decree

in O.S. No. 52 of 1931 and to the net income pertaining to the said share in deposit or to be deposited in the said O.S. No. 52 of 1931 on the file

of the Subordinate Judge's Court, Ellore, or in the alternative, for a declaration that the plaintiffs were entitled to redeem the mortgage, dated 25th

October, 1931, executed by defendants 4 to 7 and others in favour of the Imperial Bank of India and to pass a decree in favour of the plaintiffs

permitting the plaintiffs to redeem defendants 1 to 3 and their successors in interest on payment of such amount as may be found due to them. The

learned Subordinate Judge passed a decree declaring that the plaintiffs were entitled to a 11/75th share in the properties in the plaint schedule as

well as in the income of the said share which was in deposit in O.S. No. 52 of 1931. The rest of their claim was dismissed. In their appeal, they

claim the reliefs which they claimed in the plaint. Defendants 2, 3, and the legal representatives of the first defendant, who died pending the suit,

have filed a memorandum of cross-objections, praying inter alia that the plaintiffs' suit should be dismissed in toto.

2. The facts of the case are complicated, but it is necessary to set them out in some detail to understand the contentions of the parties. The

properties originally belonged to the members of the Cherukuvada family, consisting of five undivided brothers, defendants 4 to 6, the father of the

7th defendant, and the father of the 8th defendant. The 4th defendant has four sons. The 5th defendant has two sons, and the 6th defendant, four

sons. On 25th January, 1932, the 1st plaintiff filed a creditor's petition, I.P. No. 8 of 1932 in the Court of the Subordinate Judge at Ellore, to

adjudicate defendants 4 to 6 insolvents. The petition was transferred to the Court of the Subordinate Judge at Narsapur, and re-numbered as I.P.

No. 92 of 1933 on the file of that Court. On 26th September, 1933, defendants 4 to 6 were adjudicated insolvents, and their rights vested in the

Official Receiver, West Godavari.

3. The Cherukuvada brothers were indebted to the Imperial Bank of India at Rajahmundry and defendants 4 to 7 and the sons of defendants 4 to

6 had executed on 25th October, 1931, a mortgage of all their properties in favour of the bank. On the foot of the said mortgage and the

promissory notes which formed the consideration for the mortgage, the Imperial Bank filed two suits in the Court of the Subordinate Judge of

Ellore, O.S. Nos. 11 and 12 of 1932. To those suits, defendants 4 to 7 as well as the sons of defendants 4 to 6 were made parties. Preliminary

decrees were passed in the two suits on 30th July, 1934) and the final decrees on 27th July, 1935. Though defendants 4 to 6 had been

adjudicated insolvents on 26th September, 1933, the Official Receiver was not brought on record in either suit. The Imperial Bank transferred the

two decrees obtained by them for consideration in favour of defendants 1 and 2. The bank filed E.P. No. 96 of 1935 in O.S. No. 12 of 1932 on

16th September, 1935. The relief prayed for in the petition was

to add the Official Receiver, West Godavari as 18th defendant in the decree as the defendants 4, 9, 11 and 16 were adjudicated insolvents and to

sell the properties described in the schedule herewith filed which were ordered to

be sold under the decree under Order XXI, Rules 64 and 66, CPC "", and "" to pay the sale proceeds to the plaintiff in satisfaction of the: decree amount.

Defendants 4, 9 and 11 are the present defendants 3, 5 and 6. The Court raised an objection that there should be a separate petition by the

decree-holder to add the Official Receiver as defendant. A formal petition was thereupon filed, and by an ex parte order, dated 24th October,

1935, the Official Receiver was added as defendant 18. On 18th December, 1935, the Court ordered sale notice to judgment-debtors. On 24th

January, 1936, a notice was issued to the Official Receiver, West Godavari, informing him that as the decree-holder had applied for the sale of the

defendants' Immovable property, the 10th day of February had been fixed for settling the terms of the proclamation of sale. This notice was

received by the Official Receiver on 31st January, 1936 (Ex. D-17). On 24th February, 1936, when the execution petition was called, the Official

Receiver was absent; and it is common ground that he did not take any part in the execution proceedings. As the bank had transferred the decrees

in favour of the present defendants 1 and 2, they filed a petition to recognise the transfer and to permit them to continue the execution petition. On

28th January, 1937, the transfer was recognised. On and February, 1937, the Court ordered the properties to be proclaimed and sold on 6th

April, 1937.

4. Meanwhile, on 9th February, 1936, the Official Receiver proclaimed for sale a three-fifths share of the suit properties, subject to the mortgage

in favour of the Imperial Bank. On 2nd March, 1936, the properties so proclaimed for sale were purchased by the husband of the first plaintiff"".

On 6th April, 1936, the Official Receiver executed a registered sale deed in favour of the 1st plaintiff's husband, and gave him symbolical delivery

on 25th April, 1936.

5. The purchaser from the receiver was not made a party to the execution proceedings in O.S. No. 12 of 1932. There were similar proceedings in

execution of the decree in O.S. No. 11 of 1932, and though it is not clear when the Official, Receiver was brought on record in those proceedings

also Ex. D-22 is the notice to the Official Receiver intimating that the transferee-decree-holder had made application for sale of the properties and

that the 2nd August, 1937, had been fixed for the settlement of the terms of the sale proclamation. Notice of another application made on behalf of the transferee-decree-holders for permission to bid at the sale and set off was also given to the Official Receiver. Even in this execution proceedings, the Official Receiver did not take any part. In the sale held in execution of the decree in O.S. No. 12 of 1932 (E.P. No. 96 of 1935) defendants 1 and 2 purchased the four-fifths share of defendants 4 to 7, and all the sons of defendants 4 to 6 in some of the items in the plaintiff schedule, and in the execution proceedings in O.S. No. n of 1932, defendants 1 and 2 purchased the four-fifths share of defendants 4 to 7 and the sons of defendants 4 to 6 in certain other items in the plaintiff schedule and the third defendant purchased the four-fifths share in some of the other items. All these sales were duly confirmed and symbolical delivery made. The competing claims of the purchaser from the Official Receiver (whose rights have devolved on the plaintiffs) and the purchasers at the Court-sales held in execution of O.S. Nos. 11 and 12 of 1932 fall to be decided in this appeal and the memorandum of cross-objections.

6. The learned Subordinate Judge held that the decree in O.S. Nos. 11 and 12 of 1932 and the proceedings therein did not bind the plaintiffs who claimed under the Official Receiver because the Official Receiver had not been impleaded as a party in either of the suits. He also held that the fact that the Official Receiver had notice of some of the applications in the course of the execution proceedings in the two suits did not in law render the court sales valid and binding as against him. He, however, held that the only right which the purchaser from the Official Receiver obtained was the right, title and interest of the three insolvents, defendants 4 to 6, and they together individually were entitled only to a 11/75th share in the suit properties because of the existence of their sons, who had also their individual shares in the properties. He relied on the Full Bench ruling in *Nori Ramasastrulu Vs. Teluguntla Balakrishna Rao and Another*, in which it was held that the right of a manager or father of a joint Hindu family to sell family assets to discharge debts binding on the joint estate does not devolve on the Official Receiver when such manager or father had been, adjudicated an insolvent under the Provincial Insolvency Act. He further held that the plaintiffs could redeem only their share of the properties from

the mortgage in favour of the bank.

7. Mr. P. Somasundaram on behalf of the appellants contended that though the decision of the learned Judge as regards the share to which the

plaintiffs were entitled may be right under the law prevalent at the time, under the provisions; of the recent enactment, namely, Act XXV of 1948,

the plaintiff would be entitled: to a three-fifths share. Act XXV of 1948 was an Act to amend the Provincial Insolvency Act, 1920, by the insertion

of a new Section 28-A after Section 28. That section runs thus:

The property of the insolvent shall comprise and shall always be deemed to have comprised also the capacity to exercise and to take proceedings

for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the

commencement of his insolvency or before his discharge;

There follow two provisos which are not material for the purpose of this appeal.. It cannot be denied and it was not denied by Mr. Ch. Raghava

Rao, learned Counsel for the contesting respondents, that the effect of this provision is to alter the law laid down in the Full Bench decision of this

Court, and it was also admitted that this provision is retrospective in its operation. Applying this provision to the facts of this case, the Official

Receiver must be deemed to have been vested with also the powers of the insolvent fathers, defendants 4 to 6, to sell their sons' share for the

family debts, and the sale to the plaintiffs' predecessor must be held to have been made in exercise of that power. The plaintiffs would, therefore,

be entitled to three-fifths share of the suit properties.

8. Mr. Somasundaram did not wish to challenge the finding of the learned Subordinate Judge that the plaintiffs were entitled only to redeem their

share of the properties from the mortgage in favour of the Imperial Bank, particularly in view of the fact that the integrity of the mortgage had been

broken by the purchase of a share of the mortgaged properties by the mortgagees themselves.

9. The attempt of Mr. Raghava Rao consisted in contending that the purchases made at the Court auction by defendants 1 to 3 prevailed over the

purchase by the plaintiffs' predecessor from the Official Receiver. This contention of his was developed under several heads of argument : (1)

Firstly he contended that the conjoiner of the Official Receiver in the two suits

brought on the mortgage, namely, O.S. Nos. 11 and 12 of 1932

did not render the decrees therein in any manner defective and of no avail against the Official Receiver, because the adjudication was after the suit

had been instituted. He submitted that the ruling of the Judicial Committee in (1927) L.R. 54 I.A. 190 (Privy Council) would not apply to the facts

of this case. In our opinion, there is no support for this argument either in principle or on the authority of decided cases. In (1927) L.R. 54 I.A.

190 (Privy Council) the material facts were as follows : One Tara Prasanna Bose had executed, in February, 1913, a mortgage in favour of the

defendants over properties belonging to him for a sum of Rs. 40,000. He failed to pay the mortgage interest, and on nth January, 1915, the

mortgagees instituted a suit for foreclosure of the mortgage. It was agreed upon between the mortgagor and mortgagees that the time for payment

of the mortgage debt should be extended on the undertaking of the mortgagor to pay the interest regularly every year and failing such payment the

mortgagees were to be entitled to foreclose. Before any order could be made on the compromise, thus entered into between the mortgagor and

the mortgagees, the mortgagor, Tara Prasanna died on 7th September, 1915, and the equity of redemption in the mortgaged properties devolved

by inheritance on his son, Amulya Krishna Bose. Amulya had been adjudicated an insolvent on 21st February, 1914, and a receiver had been

appointed of his estate in the insolvency. The mortgagees, instead of bringing on record the Official Receiver, with the leave of the Court, continued

the suit after bringing on record the insolvent in the place of his deceased father.. They obtained a preliminary decree against him on 15th March,

1916, and notwithstanding the subsequent intervention of the Receiver, a final decree was pronounced on the 31st August by which Amulya was

debarred from all right to redeem the mortgaged property. Thereafter, the Receiver in bankruptcy brought a suit to set aside the decree for

foreclosure of the mortgage and to redeem the property. The Subordinate Judge made a decree for redemption, but on appeal to the High Court,

the decree was set aside and the suit was dismissed. Their Lordships of the Judicial Committee reversed the decision of the High Court and

restored that of the Subordinate Judge. The reasoning on which the decision of their Lordships was based is important to notice for a determination

of the soundness of the respondents' contention before us. After referring to the provisions of Section 16, Clause (4) of Act III of 1907 (Provincial

Insolvency Act then in force), their Lordships said as follows:

This provision is perfectly clear. The moment the inheritance devolved on the insolvent Amulya, who was still undischarged, it vested in the receiver

already appointed, and he alone was entitled to deal with the equity of redemption....The mortgagor was of course a necessary party to the suit for

foreclosure, Civil Procedure Code, Order 34, Rule 1, and, as on his death his interest devolved on the Receiver in the insolvency of Amulya

Krishna Bose, the plaintiffs became entitled to continue the suit by leave of the Court against the receiver, Order 22, Rule 10. Instead of adopting

this procedure, they chose to transact with the insolvent exactly on the same footing as if he were still undivested, and obtained from him a

ratification of the deed of compromise.

An attempt to justify this procedure by the terms of Section 16, Clause 5 which saved the powers of a secured creditor to deal with the security in

the same manner as he would have been entitled to realise or deal with it was made, but did not succeed. Their Lordships went on to say:

The learned Judges of the High Court interpret this clause as inferring that the secured creditor is entitled to deal with the security as though there

had been no vesting in the Court or the Receiver. Their Lordships are clearly of opinion that this construction of the clause cannot be supported.

That the rights of the secured creditor over a property are not affected by the fact that the mortgagor or his heir has been adjudicated an insolvent

is, of course, plain, but that does not in the least imply that an action against him may proceed in the absence of the person to whom the equity of

redemption has been assigned by the operation of law. The latter alone is entitled to transact in regard to it, and he and not the insolvent, has the

sole interest in the subject-matter of the suit. To him, therefore, must be given the opportunity of redeeming the property The ratification by

Amulya of the deed of compromise on which the decree against him proceeded was therefore a nullity, and the whole proceedings by which he

was made a party to the suit were equally ineffective to bind the equity of redemption vested in the receiver.

Their Lordships repelled a contention that the decree constituted *res judicata*

because the receiver, during the pendency of the suit, after the preliminary decree, tried to come on record as a party and was heard on his objections to a final decree, in the following manner:

All this, however, will not avail the respondents. The decree, which is pleaded as constituting *res judicata*, on the face of it bears that it was

pronounced in a suit to which the appellant was not a party, and therefore does not come within the rule as to *res judicata* in Section 11, Civil

Procedure Code, which only applies to matters which were in issue in a former suit between the same parties.

In our opinion, there is nothing in the facts of the case before us which would take them out of the application of the ruling of their Lordships. The

mortgage action could not properly proceed against the mortgagor

in the absence of the person to whom the equity of redemption had been assigned by the operation of law.

10. We fail to see how there can be any difference between a case in which the mortgagor was an adjudicated insolvent on the date of the

institution of the suit and the case in which the mortgagor was adjudicated insolvent during the pendency of the suit. The decisions cited by Mr. Ch.

Raghava Rao in support of such a distinction which he tried to draw are not of any assistance to him. In *In the matter of L.W. Masse, Mansuklal*

Dolatchand and Co. ILR (1928) Rang. 201 a decision of a single Judge, of the Rangoon High Court, two suits were instituted against one N on

29th March, 1923. N had been adjudicated insolvent on 28th March, 1923. The Official Assignee was not made a party, though notice was

issued to him to report to the Court whether he would defend the suit, and he reported that he would not. The learned Judge held that as the

Official Assignee was not a party to the suits he could not be bound by the decrees passed in them. Relying upon the Privy Council decision in

(1927) L.R. 54 I.A. 190 (Privy Council) it was argued that the Official Assignee must be deemed to have been a party because he was given an

opportunity to defend the suits and elected not to do so. Dealing with this argument, the learned Judge said:

The procedure which was followed in the suits would have been correct if the insolvency had supervened after the institution of the suits. But at the

date of their institution Nasseer had been adjudicated and the equity of

redemption in the debt had devolved on the Official Assignee. He was a necessary party, and should have been sued in the first instance ; not having been sued in the first instance, he should have been placed on the record as a defendant. The case is analogous to that of a suit brought against a man who was dead at the time of its institution.

In the present case, the insolvency supervened after the institution of the suits, but the Official Receiver was not given an opportunity to come on

record and to defend the suits. In *Kandasami Chetti v. Jayapandia Athitha Nadar* (1926) 26 L.W. 47 a decision of Devadoss, J., a preliminary

decree was passed in a mortgage suit on 20th September, 1915. The mortgagor had been adjudicated insolvent on 2nd August, 1915. But the

Official Receiver was made a party only at a later stage to the application for the passing of a final decree, but he did not object to the passing of

the final decree. The learned Judge held that the decree was not an invalid decree by reason of the Official Receiver not having been made a party

to the suit before the decree was passed. Though the facts are different, it must be said that in view of the ruling of the Judicial Committee in

(1927) L.R. 54 I.A. 190 (Privy Council) the decision of the learned Judge cannot be accepted as sound law; in particular, the following

observations:

Even if the appellant was aware of the adjudication he is not bound under the law to make the Official Receiver a party to his suit.

It must be mentioned that the judgment of Devadoss, J., was delivered on 1st December, 1926, before the pronouncement of the Privy Council in

(1927) L.R. 54 I.A. 190 (Privy Council) which was in March, 1927. The decision in *Prince Victor N. Narayan Vs. Kumar Bhoirabendra Narayan*

Deb and Others, has no bearing whatever on the question to be decided. The question there was whether after his adjudication a defendant was

entitled to continue as a party to a suit.

11. It was next contended by Mr. Raghava Rao that besides the three mortgagors who were adjudicated insolvents pending the suit, their sons

were also parties to the suits in their own right and as co-executants of the mortgage, and the omission to bring on record the Official Receiver

would be at the worst analogous to defective representation of the estate of a deceased party by the absence on record of some of his proper legal

representatives. Mr. Raghava Rao even went to the length of suggesting that the sons must be deemed to have represented the interests of the

fathers also. This argument of Mr. Raghava Rao suffers from a fallacy. It may be conceded on the authority of the decision in *Tatavarthi*

Nagaportharow Vs. Pulipati Subbarow and Others, that when the father of a joint Hindu family is adjudicated insolvent, proceedings can be taken

in respect of the sons' interest in the family property without the leave of the Insolvency Court, when no objection is taken in that behalf by the

sons. But it is impossible to accept the position that the interests of all the members of the family are substantially represented by the sons. No

authority was cited for the broad proposition that when several coparceners own the equity of redemption, even if some are made parties, they

would properly represent all the coparceners-Such a right of representation is unknown to Hindu law. It may be held on the facts of a particular

case that a coparcener had been put forward as the manager of the family to represent the interests of the family in a particular litigation, but that is

not the case here. The sons did not purport to represent their fathers ; actually some of them were minors. The analogy of some of the legal

representatives representing adequately the estate of a deceased person is not apposite. In *Muthuraman Chettiar v. Adaikappa Chetti* (1934) 67

M.L.J. 681 : ILR 58 Mad. 407 *Varadachariar, J.*, held that the preponderance of authority is in favour of the view that in the absence of fraud or

collusion the representation by some of the heirs of a deceased party will be sufficient representation. of his estate. He was not inclined to the view

that unless all the legal representatives were actually on record, there could be no representation at all and the whole decree was void. It was not

necessary for the purpose of that case to say whether such a partial representation was such a representation as to preclude the person not a party

from seeking to re-open the decree by appropriate proceedings. What actually happened in the present case was that the fathers and sons were

parties as mortgagors. When the rights of the three fathers devolved by operation of law on the Official Receiver, the latter who alone could

effectively represent their interests was never brought on record and there was no other person who could validly represent their interests.

12. Mr. Raghava Rao developed at great length an argument that a notice under Order XXI, Rule 22, Civil Procedure Code, was not necessary to

be issued to the Official Receiver in the circumstances of the case and as the Official Receiver was certainly apprised of the proceedings in

execution and received the notice intimating the date for the fixing of the proclamation of sale it must be assumed that the Official Receiver was

aware of the execution proceedings and had an opportunity to intervene, and he could not, and therefore the plaintiffs claiming under him, equally

could not object to the validity of the Court sales. There was probably some justification on his part for dealing at some length on these points,

because the learned Subordinate Judge held that there was no notice under Order XXI, Rule 22, Civil Procedure Code, to the receiver calling

upon him to show cause why the decree should not be executed against him. In our opinion, the provisions of Order XXI, Rule 22, as they

originally stood or as they now stand, after the amendment by this Court on 20th October, 1936, have no application to the facts of the present

case. The provisions of that rule only govern a case where an application for execution is made against a party to the decree after the lapse of a

certain time after the date of the decree or is made against the legal representative of a party to the decree, by reason of the death or the devolution

of the interests of a party to the decree, subsequent to the date of the decree. According to the Madras Amendment, a notice under that rule is

necessary when application for execution is made, where a party to the decree has been declared insolvent, against the assignee or receiver in

insolvency. The language clearly implies that the rule will not have any application to a party who even prior to the decree had been declared

insolvent and where the Assignee or the Receiver in insolvency had not been made a party before the decree. In *Raghunath Das and Others vs.*

Sundar Das Khetri the judgment-debtors filed their petition in insolvency after the decree.

13. Mr. Raghava Rao relied upon a number of decisions in which it was held that the absence of notice under Order XXI, Rule 22, Civil

Procedure Code, when such a notice was necessary, does not ipso facto render a sale eventually held a nullity when the judgment-debtor by his

conduct has precluded himself from relying upon that irregularity. In *Fakhrul Islam v. Rani Bhubaneswari Kuer* ILR (1928) Pat. 790 for instance,

the judgment-debtor appeared and contested. In *Chandra Nath Bagchi Vs. Nabadwip Chandra Dutt and Others*, it was held by Rankin, C.J., that

where the parties had been litigating actively with each other upon the question whether an execution should proceed and how it should proceed

for a period of more than two years on a notice under Order XXI, Rule 66, it would be merely piling unreason upon technicality to hold that it was

open to the judgment-debtors to object to the jurisdiction of the Court, because they had not got a formal notice to do something, namely, to

dispute the execution of the decree which in point of fact they were busy disputing in all the Courts for the best part of two years. Vide *Sunder*

Ram and Others Vs. Harangi Ram and Others, and Bimalanandan Prasad v. United Refineries, Ltd. ILR (1933) Rang. 79. On the other hand, Mr.

Somasundaram drew our attention to the Full Bench ruling of the Patna High Court in *Ajablal v. Haricharan* ILR (1944) Pat. 528 where the

decision in *Bimalanandan Prasad v. United Refineries, Ltd.* (1933) ILR 11 Rang. 79 was distinguished. He also referred us to the two Full Bench

rulings of our Court in *Rajagopala Aiyar v. Ramanujachariar* (1923) 46 M.L.J. 104 : ILR 47 Mad. 288 and *Kanchamalai Pathar v. Shahaji Rajah*

Saheb (1935) 70 M.L.J. 162 : ILR 59 Mad. 461. We do not consider it necessary to deal at any length with this contention or with the several

cases cited before us relating to it, because this is not a case in which any of the contingencies referred to in Order XXI, Rule 22 had happened. In

all the decided cases cited before us, there was a valid decree obtained against persons who were properly parties to the suit and after the decree

there was a devolution by death or by insolvency. No decision was cited before us in which the facts were similar to the facts of the present case,

that is, where death or devolution had taken place before the passing of the decree and there was no decree against the representative as such.

14. Mr. Raghava Rao invoked the doctrine of *lis pendens* in favour of his clients. He presented his argument in two ways : He urged that as the

Official Receiver sold the properties to the plaintiffs only after he had been made a party to the execution petition in O.S. No. 12 of 1932, the

plaintiffs were bound by proceedings in the said execution petition culminating in the Court sale. The sale having been duly confirmed under Order

XXI, Rule 92, neither the Official Receiver nor the plaintiffs were entitled to question its validity in any collateral proceeding. The (law in this

argument is that in no sense was the Official Receiver a party validly impleaded in the mortgage suits. Our attention was not drawn to any provision

of law or any authority, according to which a person who ought to have been joined as a party to the suit but had not been joined before the decree, could, after the decree, be impleaded in the course of execution proceedings so as to make him bound by the decree to which admittedly he was not a party. The other way in which the doctrine of lis pendens was sought to be pleaded was that the sons were parties to the mortgage suits in their own right, and therefore the sale by the Official Receiver after the institution of the suit and before the proceedings ended in a sale of the properties in execution of the mortgage decrees was affected by the rule of lis pendens in so far as it purported to convey the interests of the sons. The answer to this argument is obvious. There was no sale by the sons as such to the predecessor of the plaintiffs. The Official Receiver did not purport to sell their shares on their behalf. The plaintiffs do not therefore claim derivatively under the sons. On the other hand, they claim title by virtue of the exercise by the Official Receiver of a power conferred by Hindu Law on the fathers, defendants 4 to 6, to convey the shares of their sons also to discharge the debts binding on the family. The doctrine of lis pendens can have no application to this case.

15. The decision in *Rm. Ar. Ar. Rm. Arunachalam Chettiar (dead) and Others Vs. Sabaratnam Chettiar and Others*, $\therefore$ was sought to be pressed into service by contending that the attachment of the sons' interest before the exercise of the father's power by the Official Receiver was similar to the liability of the sons' share to be sold to satisfy the mortgage in favour of the bank. The analogy is not sound, though it would have been if there had been in the present case also either an attachment or an actual sale of the sons' shares before the sale by the Official Receiver in favour of the plaintiffs' predecessor.

16. We find ourselves unable to accept any of the contentions of Mr. Raghava Rao and to hold that the sales in favour of his clients in execution of the mortgage decree would prevail over the purchase by the plaintiffs' predecessor from the Official Receiver, so far as the three-fifths share of defendants 4 to 6 and their sons is concerned. The appeal is therefore allowed and the memorandum of objections dismissed with costs.

17. Mr. Raghava Rao drew our attention to the decree which merely declares the plaintiffs' right to a share in the properties without declaring their

obligation to redeem the mortgage in favour of the bank. The suit itself was not for redemption, but for a declaration that the plaintiffs by virtue of

their title, were entitled to redeem the mortgage. Now that their title to the three-fifths share has been declared, it follows that they would be

entitled to redeem the mortgage to that extent. Whether they should be compelled or not so to do is not a matter to be decided in this suit.

18. This case having been set down to be mentioned this day, the Court made the following Order (delivered by the Chief Justice):

The advocate for the respondents desired the case to be mentioned on three points. The first is that there should be a declaration that the

appellants-plaintiffs are entitled to three-fifths share in the plaint properties including the moneys deposited in O.S. No. 52 of 1931 on their

redeeming to the extent of the said three-fifths share the mortgage dated the 25th October, 1931, executed by Ramachandra Rao and others in

favour of the Imperial Bank. We do not think that the decree can be made conditional in the manner suggested. By reason of our judgment the

plaintiffs will be declared to be entitled to three-fifths share in the properties. As the properties are subject to a mortgage, the plaintiffs' right will be

to the equity of redemption. They cannot however be compelled to redeem the mortgage even in respect of their share in this suit. It is for the

mortgagee or his representative in interest to take appropriate proceedings on foot of his mortgage.

19. The respondents' advocate next objects to the award of the advocate's fee on Rs. 1,00,000. The suit was valued at Rs. 1,00,000 so far as

the declaratory relief was concerned. Having regard to the fact that the title of the plaintiffs was disputed by the respondents and as the plaintiffs

have succeeded, they will be entitled to the advocate's fee on the value of the property. Rs. 12,500 only represents the mortgage amount, but as

this is not a suit for redemption, that would not be the governing factor. This objection must be overruled.

20. Lastly, it is brought to our notice that our judgment did not provide for the costs of the suit. We direct that the plaintiffs do recover half the

costs of the suit from the contesting respondents.