

(1913) 09 MAD CK 0005
In the Madras High Court

P.V.S. Krishnamurthi Pillai and Another by guardian
Kokilambal Ammal

APPELLANT

Vs

P.V.S. Sundaramurthi Pillai and Others

RESPONDENT

Date of Decision : 21-09-1913

Acts Referred:

Presidency Towns Insolvency Act, 1909 — Section 7

Citation : (1932) 63 MLJ 37

Hon'ble Judges : Ramesam, J;Cornish, J

Bench : Full Bench

Judgement

Ramesam, J.—The facts out of which these appeals arise are briefly these: One P. Venkatachalam was a well-known condiment and ice

manufacturer of Madras. He acquired considerable property and died. One of his sons Subbaraya Pillai predeceased him leaving a son

Sundaramurthi. Another son of P. Venkatachalam, namely, Subramania Pillai, was appointed executor of his last will and testament. Another son

Murugesam Pillai and some others including Sundaramurthi Pillai instituted C.S. No. 238 of 1905 in the High Court (Original Side), Madras, for

partition and administration of the properties of Venkatachalam. Sundaramurthi claimed in that suit a fifth share in the properties of the deceased

Venkatachalam. By the decree in that suit Sundaramurthi was declared entitled to a fifth share in all the properties and under that decree he got

various properties besides a sum of about two lakhs. During the pendency of that suit a son was born, namely, Krishnamurthi. Sundaramurthi

seems to have lived an extravagant life leading to wastage of the family property and heavy debts. The present suit was filed on 11th February,

1927 by his minor son Krishnamurthi already mentioned and his daughter

appearing through their mother as next friend for partition and for other reliefs appropriate to a son and daughter. Sundaramurthi was the first defendant in the suit. Defendants 2, 4 and 5 are creditors claiming to hold mortgage rights over some of the family properties and the plaintiff questions the validity of these debts. The 3rd defendant is a purchaser of house and ground No. 182, Popham's Broadway, Madras, belonging to the family under a sale by public auction held at the instance of the 4th defendant under the power contained in a mortgage executed by the 1st defendant in favour of the 4th defendant. The validity of the mortgage and sale is also impugned by the plaintiffs. Meanwhile on 3rd March, 1927, an application was filed to declare the 1st defendant an insolvent. The act of insolvency with which he was charged was that his property was attached on the 29th January and it was allowed to remain under attachment for a period of three weeks, that is up to 19th February. The 1st defendant was adjudicated insolvent on the 14th March. As a result of this adjudication the Official Assignee of Madras was added as 7th defendant on 1st September, 1927. On the ground that one V. Rangayya claimed to be in possession of two houses, Nos. 76 and 77, Poonamallee High Road, under a mortgage and claimed to recover rents thereof on the ground of an equitable assignment of rents executed by the 1st defendant on 5th November, 1926, the said Rangayya was made the 6th defendant. Kumaraswami Sastri, J., before whom the case came on for trial, passed a decree for partition after declaring that the sale to the 3rd defendant was valid and that the mortgage in favour of the 4th defendant was made for discharging the antecedent liability of the 1st defendant and was therefore binding on the plaintiff. So far as the 2nd defendant was concerned, the 1st defendant had incurred debts under three documents, Exhibits XV, XVI and XVII; but Exhibits XV and XVII were not registered and therefore were invalid as mortgages. As to Exhibit XVI it was valid as a mortgage but it was not for an antecedent debt and did not bind the share of the 1st plaintiff. There were two debts Rs. 4,000 and Rs. 2,000 due to the 6th defendant. So far as the first debt of Rs. 4,000 was concerned, though the creditor the 6th defendant had the right to collect the rents, he had no actual mortgage. As to the other debt of Rs. 2,000 it was incurred after insolvency and was not binding on the plaintiff. The

learned Judge also directed an account to be taken and passed a preliminary decree accordingly. Appeal No. 3 of 1930 is an appeal against this

decree by the plaintiffs. The 6th defendant and the Official Assignee have filed a memorandum of objections.

2. Taking up O.S. Appeal No. 3 first, it is argued by the learned advocate that the mortgage in favour of the 4th defendant was not incurred for an

antecedent debt. The facts relating to this part of the case are these: There were two houses Nos. 182, Popham's Broadway and 75, Poonamallee

High Road. They originally fell to the share of Loganatham, another son of Venkatachalam, in the partition suit. In that suit Messrs. Parry & Co.

were appointed receivers and they executed sale deeds in favour of Loganatham, Exhibits I and XXII. He mortgaged both these items to one

Nagu Sah on 24th April, 1922, by Exhibit XXIII for Rs. 35,000. This mortgage contained a power to sell and Nagu Sah brought No. 182,

Popham's Broadway, to sale. At the auction held on 8th June, 1923, it was purported to be purchased by Sundara-murthi, 1st defendant, through

his agent Kumaraswami, who was a clerk of Mr. S. Doraiswami Aiyar, an advocate of this High Court. Loganatham Pillai had borrowed a sum of

money under a promissory note, Exhibit V, dated the 25th April, 1922, from one Narayana Sah, and to discharge this debt he sold No. 75,

Poonamallee High Road, for Rs. 12,800 to Sundara-murthi under Exhibit III, dated 20th July, 1923. Sundara-murthi, as a matter of fact, had not

with him the amounts of Rs. 35,000 and Rs. 12,800 required for the above "two transactions. He therefore approached Mr. Doraiswarai Aiyar for

a loan to enable him to complete these two transactions. He had also borrowed from Mr. Doraiswami Aiyar other sums of money amounting to

nearly Rs. 12,000 for his business which was described to be some dealings in fibre through a company in Salem known as Rockforts & Co.

When the 1st defendant borrowed these various sums of money amounting to Rs. 12,000 he sub-mortgaged in favour of Mr. S. Doraiswami Aiyar

an equitable mortgage which he held from Mr. L.A. Govindaraghava Aiyar of a house named "Palm Grove" in Mylapore. On the 31st August an

account was made of the total amount due from the 1st defendant to Mr. S. Doraiswami Aiyar and it was found to be Rs. 62,212-12-4 - Mr.

Doraiswami Aiyar having undertaken the liability to pay the amounts of Rs. 35,000 and Rs. 12,800 for the sales. At about this time the 1st

defendant approached Mr. D.K. Asher, Secretary and Trustee of the 4th defendant, who is described as Sri Madan Mohanji Temple. He

represented to Mr. Asher that money was required for the purpose of completing the purchase of the two houses from Loganatham and for family

business. On the representation of the 1st defendant Mr. Asher on behalf of the temple advanced a sum of Rs. 25,000 on the 11th August, 1923,

under Exhibit II. As a matter of fact this sum of Rs. 25,000 raised by the 1st defendant was not utilised by the 1st defendant for the purpose of

discharging the debt incurred in connection with the sales but for some other business of his own. We have already seen that ultimately Mr.

Doraiswami Aiyar took on himself the task of paying Rs. 12,800 and Rs. 35,000 payable under the sales, but up to the 11th August (the date of

Exhibit II) the transaction had not yet been settled. On the representation of the 1st defendant Mr. Asher lent the money. On these facts the

learned Judge found that there was an antecedent debt and the mortgage was made by the 1st defendant representing that money was required for

the purpose of paying off debts and therefore it was binding on the plaintiffs. We agree with the finding. The fact that the 1st defendant did not

actually utilise this amount for the purpose of the sales but for some purpose of his own does not matter. The result is that O.S. Appeal No. 3 must

be dismissed with costs. Respondents. Nos. 2, 3 and 4, 5 and 7 will each get one set (in all four sets) proportionate to the value of their claims.

The appellant did not press the binding nature of the debts of the other respondents in this appeal.

3. There is a memorandum of objections filed by the 6th defendant Rangayya in this appeal. It will be convenient to take up the memorandum of

objections with his own Appeal No. 30 of 1930 as the points covered by both are practically the same.

4. Coming to O.S. Appeal No. 30 of 1930, the facts relating to this appeal are these: The appellant is a money-lender of Madras. He is also a

joint trustee of some temple. On the 5th November, 1926, the 1st defendant borrowed a sum of Rs. 4,000 and executed a promissory note for the

amount, Exhibit XVII. On the same day he executed a power-of-attorney and an agreement enabling the creditor to collect the rents of the two

houses Nos. 76 and 77, Poonamallee High Road and to let them out to others, if necessary, if the then tenants vacated the premises. This is Exhibit

XXVIII. On the same day he wrote letters to the tenants asking them to pay rents to Rangayya. The tenants replied agreeing to do so.

Sundaramurthi also wrote another letter to Rangayya undertaking not to cancel the power-of-attorney and not to deal with the properties until the

debt is discharged. Vide Exhibit XXIX to which these are enclosures. On 9th March, 1927, the 1st defendant executed in favour of Rangayya

another promissory note for Rs. 2,000 - Exhibit XXXIV. There is one other document on the record which is found stitched along with the power-

of-attorney, Exhibit XXVIII, which also purports to bear the date 5th November, 1926. It purports to be an agreement to execute a mortgage

within three months of the two houses Nos. 76 and 77 in respect of which the power-of-attorney was executed. On the basis of this agreement

Rangayya filed a suit C.S. No. 40 of 1929 for the specific performance of the agreement by execution of a mortgage deed. This suit came on

before Waller, J., who found that the agreement was ante-dated and that it was really executed on 9th March, 1927 and therefore dismissed the

suit. O.S. A. No. 30 is against this decree. The grounds raised in this appeal were also raised by Rangayya in the memorandum of objections he

filed in O.S. A. No. 3 of 1930. It will, therefore, be convenient to dispose of these together.

5. In the partition suit the Official Assignee remained ex parte. He did not file a written statement, nor did he raise any ground on the question of

the genuineness of the loan of Rs. 4,000 and Rs. 2,000. The learned Judge Kumaraswami Sastri, J., observed in his judgment:

The amount borrowed from the 6th defendant is Rs. 6,000. He is a professional money-lender and I think that 22½ per cent, interest with an

agreement to give security is exorbitant.... It is argued for the 1st plaintiff that although Rs. 2,000 was lent before the insolvency, it was after the act

of insolvency complained of in the adjudication petition and that this amount is not payable. That will be a matter for the Official Assignee to come

by a separate application, if he is so advised, in the insolvency proceedings. But so far as this suit is concerned I think Rs. 6,000 is due as there is

no defence raised of want of consideration, and that the 6th defendant is entitled to that amount with interest at 12 per cent, per annum from the

dates of the loan up to the date of payment.

6. He then observed that the Rs. 2,000 being lent after the filing of the partition suit, would not in any event be binding upon the 1st plaintiff. In

spite of the above findings there are no objections raised by the Official Assignee that the debts themselves are not due. We must therefore agree

with the finding of the learned Judge that the amount of Rs. 6,000 was due to the 6th defendant. That being so, the question whether the amount

was actually lent is res judicata between the parties in the later suit C.S. No. 40 of 1929 and it is not open to the defendant in the later suit to raise

the question of consideration. On this ground we do not agree with the observations of Waller, J., in the second suit:

It is most improbable that any one would have lent him Rs. 4,000 merely on the agreement Still less likely is it that the further Rs. 2,000 would

have been lent four months later.

7. I think it is not open to raise the question whether consideration has passed as it has been previously found in the first suit and no objection was

raised in O.S.A. No. 3 by the Official Assignee, nor was any ground raised by the appellant-plaintiff in appeal against him. We must, therefore,

assume that the Rs. 6,000 was lent by Rangayya to Sundaramurthi. Only so far as the second loan is concerned, Sundaramurthi is liable for the

amount and not his son, as the loan was given after the suit for partition was filed. It has been repeatedly held by the Judicial Committee that the

filing of a suit for partition effects a severance in status from the date of the filing of the plaint. This is subject only to the condition that the suit

terminated in a decree and is not withdrawn. In the present case the suit for partition was filed on 11th February and the loan of Rs. 2,000 was

advanced on 9th March and therefore it cannot bind the son.

8. The next question we have to discuss in this appeal is whether the agreement on which the suit for specific performance was based was ante-

dated. Waller, J. in his judgment observes that the promissory note, the letter and the power-of-attorney are signed with the same ink, but it is

quite different from that used on 9th March. Though the agreement bears the date 5th November, the ink is the same as that of 9th March. Though

no doubt such a thing is possible, still this is certainly rather a curious circumstance and taken with the other circumstances in the case supports the

case for the respondents. It is significant that the agreement was not mentioned

in any of the other documents executed on 5th November, 1926, namely, the promissory note, the power-of-attorney and the letter. We are, therefore, inclined to agree with Waller, J., that this agreement was really ante-dated. We are not, therefore, prepared to give a decree for specific performance on the basis of this letter which was actually executed on 9th March, that is, after Sundaramurthi became an insolvent. Though the actual adjudication was on 14th March, the adjudication dates back to the act of insolvency, namely, 19th February.

9. Mr. Visvanatha Sastri, the learned advocate for the appellant, then contended in the alternative that even apart from the agreement he had already an equitable mortgage or at least an irrevocable power-of-attorney creating an interest and that these are enough to be binding on the Official Assignee and that also on the ground of part performance he is entitled to stand in the position of a mortgagee. The power-of-attorney creates an interest only in the rents and not in the property. The learned advocate relied on Bowstead on Agency, Article 138. According to this Article where the authority of an agent is given by deed for the purpose of protecting or securing any interest of the agent it is irrevocable during the subsistence of such interest. As already observed the only interest created is in the rents. There is no interest in the immovable property. So far as rents had already accrued, one may say that the creditor Rangayya acquired an interest in them and until that interest is realised, the agency is irrevocable. But as to rents which are to accrue in future, they are not property in existence and it cannot be said that the creditor has an interest in such property. The utmost is there is only an agreement which enables him to collect rents of the property after they accrue. This does not amount to a mortgage or transfer of the interest in rent so as to bind the Official Assignee. In the partition suit Mr. A.K. Ramachandran was "appointed receiver on 23rd March. Immediately after his appointment he gave notice to tenants demanding them to pay rent. Mr. Visvanatha Sastri replied on behalf of Rangayya by Ex. XXXII claiming some right over these rents and mentioning that he had also written to the Official Assignee. Mr. Ramachandran replied that he took charge of the property under orders of Court and suggested to him to apply to the Court - Ex. XXXII-A. It was as a result of this correspondence that Rangayya was made a defendant in

the partition suit. Practically he lost possession of the property. It is true that he was authorised to let the premises to other tenants if the original tenants vacated. But this is different from his being authorised to get into possession. Article 138 of Bowstead on Agency declares that an authority expressed to be irrevocable in the article is not determined by the bankruptcy of the principal. But, as I have already observed, the power-of-attorney is effectual as conveying his interest only as to rents that have accrued; neither as to future rents nor as to the property can it prevent its vesting in the Official Assignee. The learned advocate also relied on Coote on Mortgages, page 61 and a number of English cases cited therein. It must be remembered that there is no law of registration in England and where possession is given for the purpose of securing a debt it will easily be construed as a mortgage - a process not permissible in India; and an equitable mortgage can be made here only by deposit of title-deeds. It is admitted that the title-deeds of the two houses in the Poonamallee High Road were really with the 2nd defendant, the Royal Bank of Scotland, and were not deposited with Rangayya. In *Spooner v. Sandilands* (1842) 62 E.R. 939 a warrant of attorney which was executed as collateral security authorised the creditor to take possession of the lands. In the present case the power-of-attorney authorised Rangayya only to let the premises again to other tenants and not to take possession himself. In *In re Davis & Co. Ex parte Rawlings* (1888) 22 Q.B. 193 the property assigned consisted of a definite number of instalments in respect of a hire purchase agreement relating to property and it was held that the assignment was valid against the trustee in bankruptcy. But in the case before us the rents accruing due in future cannot be regarded as property in esse and therefore there can be no valid assignment of the rents so as to bind the Official Assignee. Rent does not accrue unless there is a tenant occupying the premises. As a matter of fact, one of the tenants vacated one of the houses almost immediately after the transaction and it remained vacant. No rent can accrue unless a new tenant occupies the house. Therefore the assignment of rent to accrue in future cannot be regarded as assignment of property in esse and even then it does not avail to give a mortgage over the property. It is true that contracts enforceable against an insolvent may be enforceable against the Official Assignee, though even then there is a

discretion in the Court - vide R.M. Nagarathna Mudaliar and Others Vs. S.M. Chidambaram Chettiar and Others, . But in the present case we

find that there was no agreement in November, 1926. Mr. Visvanatha Sastri relied on Official Assignee v. Fakirji Cowasji AIR 1930 Sind. 77,

where it was held that though legal formalities had not been complied with equity treats the transaction as an agreement to make over the benefit of

the mortgage which will be enforced. But in this case there is no agreement to mortgage, nor is there any equitable mortgage. That being so, there

is nothing to enforce. The result is that O.S.A. No. 30 of 1930 in so far as it is against the decree refusing specific performance must be dismissed

with costs of the 2nd respondent, the Official Assignee - 1st respondent (one set) in both Courts. Any other finding in the judgment as to

consideration must be vacated.

10. We now come to the memorandum of objections filed by the Official Assignee in O.S.A. No. 3 of 1930; he complains against the direction in

Clause (6) of the decree (at page 72) that as regards debts which the 1st defendant has contracted, if the 1st plaintiff is proceeded against by the

creditors, the 1st defendant is liable to make good to the 1st plaintiff the loss occasioned to him by such proceedings. I think this complaint is

justified. All that has been laid down in the cases is that in a suit for partition provision must be made for the payment of father's debts and the rest

of the property must be divided - Venku Reddi v. Venku Reddi ILR (1926) Mad. 535 : 52 M.L.J. 387. The decree in this case directs that,

whenever creditors proceed against the plaintiff, in the first instance the plaintiff is entitled to contribution from the 1st defendant. This kind of

accounting between father and son in respect of pre-partition debts cannot be allowed. In the present case all the properties are sold by the

receiver and so far as the secured creditors are concerned most of their debts have been paid off. But it happens in many cases that some more

amounts are due. The whole debt due to the 2nd defendant remains due and the amount realised is lying in Court. No part of this money ought to

be paid to the 1st plaintiff until all the debts of the father are paid off and only in the balance so left the plaintiff should get a half share. In this case it

seems to be practically admitted that the funds now lying in Court will not be enough to pay off all the debts binding on the son. Whether it is so or

not, in this case on the report of the Official Referee a further direction will have to be given for paying off all the debts binding on the son and the balance will be divided. There is no need for a direction of the kind mentioned in Clause (6) of the decree. Clause (16) of the decree directs that the Official Referee should take accounts and submit his report and proceedings to this Court. We are informed that on an ex parts application made by the Official Assignee before Waller, J., without giving notice to the various creditors he passed an order staying further action on the part of the Official Referee and directed the amount lying in Court to be paid into the hands of the Official Assignee. But on further application made by the creditors an order was obtained from another Bench consisting of Beasley, C.J., staying this portion of Waller, J.'s order and directing that the amount should remain in Court to the credit of the partition suit. We thus see a sort of conflict between the insolvency jurisdiction and the ordinary jurisdiction of this Court and it is desirable to indicate a procedure so as to avoid this conflict. It has been held in *Sat Narain v. Behari Lal* (1924) L.R. 52 IndAp 22 : ILR 6 Lah. 1 : 47 M.L.J. 857 that the insolvency of a father does not involve the insolvency of the son and the son's share does not vest in the Official Assignee though the father's power to sell the son's share for debts binding on the family may vest in the Official Assignee. But it was held by a Full Bench in *In re Baluswami Aiyar* ILR (1928) Mad. 417 : 55 M.L.J. 175, that such power of sale terminates with the severance of the joint family status. In the present case neither the father nor the Official Assignee has any power to deal with the son's share after 11th February, 1927. In the course of argument in that case there was a suggestion that wherever a partition is allowed to have this effect the Official Assignee's rights are prejudiced by the partition and with reference to that suggestion which found favour with my brother Phillips, J., I observed that no substantial right of the Official Assignee was affected but only that one of several remedies open to him was lost. I tried to enumerate these remedies. The first I mentioned was that the Official Assignee associating himself with the creditors can file suits against the sons and obtain decrees. Secondly, I suggested that in the suit for partition he can be made a party and he can ask for decrees in favour of the creditors. I then observed:

There is possibly a third remedy open. The Judge sitting in insolvency may, if he thinks proper, decide the question raised by the Official Assignee

as between himself and the sons provided the sons fill the character of garnishees.

At page 443, I again repeated the observation that, if the Judge sitting in insolvency thinks it would serve any purpose that he should enquire into

the binding nature of the debts, he may do so provided the sons fill the character of garnishees. In that case whether the sons can fill the character

of garnishees was not argued before us and I did not decide the question. Because I did not like to decide the question whether they did or did not

fill the character of garnishees, I said that the Judge sitting in insolvency may enquire into the matter provided the sons fill the character of

garnishees; and I preceded my observation with the word "possibly" because if the sons did not fill the character of garnishees this third remedy

does not exist. Relying on my observations Curgenven and Bhashyam Aiyangar, JJ., in a later stage of the same case reported as Ramachandra

Aiyar v. Official Assignee of Madras ILR (1930) Mad. 739 : 61 M.L.J. 66 said that there is no objection to the question of the binding nature of

the debts as between father and son being decided in insolvency proceedings at the instance of the Official Assignee. At p. 748 Curgenven, J.,

after quoting from my judgment, proceeds to refer to the Full Bench decision in Official Assignee of Madras v. Narasimha Mudaliar ILR (1929)

Mad. 717 : 57 M.L.J. 145 about the scope of Section 7. He then refers to Ramasomayajulu v. Official Receiver, Godavari (1925) 23 L.W. 80

and 25 CWN 366 (Privy Council) as instances where Section 7 has been utilised. The learned Judge then proceeds to observe:

On the other hand, it is worth note that no decision against the applicability of the section has been cited before us. There is, for instance, no

authority for the view that, if it should suit the Official Assignee, as representing the insolvent, to bring what would in effect be a suit for partition,

the Insolvency Court would have no jurisdiction to entertain it.

11. With reference to these observations of the learned Judge I wish to make the following observations. Wide as the provisions of Section 7 of

the Presidency Towns Insolvency Act are, it does not follow that every possible dispute between the Official Assignee and the sons can be dealt

with u/s 7. Section 7 says that "the Court shall have full power to decide all questions of priorities...which may arise in any case of insolvency and decide all other questions". So long as the son has not appeared before the Insolvency Court, I do not see how any question can arise between him and the Official Assignee. If the son himself chooses to appear before the Insolvency Court and raises questions as to the binding nature of a debt it may perhaps be decided, but so long as he does not choose to appear I do not see how any question of the binding nature of the father's debts can be decided in insolvency behind the back of the son at the instance of the Official Assignee." The question then arises whether the Official Assignee can take-steps to compel the son to appear before the Insolvency Court and have the question adjudicated. The only section which enables the Court to do anything on the application of the Official Assignee is section 36 which says:

The Court may, on the application of the Official Assignee or of any creditor who has proved his debt, at any time after an order of adjudication has been made, summon...the insolvent or any person known or suspected to have in his possession any property belonging to the insolvent, or supposed to be indebted to the insolvent, or any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property.

12. None of these descriptions apply to the son. The half share of the son which is liable to be sold by the father or the Official Assignee to pay off the father's debts which are not immoral or illegal does not become the property of the insolvent. It is only the power of sale which the father and the Official Assignee possess. This power does not convert the son's property into the insolvent's property, especially when we remember that the power ceases to exist on the severance of the joint family. In my opinion the Insolvency Court has no jurisdiction u/s 36 to summon the son at the instance of the Official Assignee who wants to decide the binding nature of the debt between the father and son. The word "garnishee" is not used in the Presidency Towns Insolvency Act. Whether a person fills the character of a garnishee merely depends upon the language of Section 36. The learned Judges, Curgenvin and Bhashyam Aiyangar, JJ., have not discussed the terms of Section 36 in coming to the conclusion that the questions

between the Official Assignee and the son can be decided in the Insolvency Court. I am also clearly of opinion that no suit for partition can ever be filed in the Insolvency Court by the Official Assignee representing the father. The Insolvency Court exists to distribute the assets between the creditors, and not for deciding partition suits or other questions between the insolvent and the rest of the world. Section 7 enables the Court to decide only such questions as may incidentally arise. But when the son is not a party to the insolvency proceedings, no such questions can arise between him and the Official Assignee and the son can never be summoned u/s 36. The English case relied on by the learned Judges only enables important questions to be determined before distribution is made. It cannot enable partition suits to be filed before the Insolvency Court or to compel persons who do not fall under the description of Section 36 to be summoned before the Insolvency Court. I am therefore of opinion that no question between the Official Assignee and the son can be decided by the Insolvency Court but they must be decided in a partition suit to which the Official Assignee is a party. I do not agree with the observation of Curgenvin, J., that by money claim is meant any claim which can be ranked as divisible assets nor can it be said that because the father has got a right to sell the son's share in the joint family he has got a money claim against the son. The father can never sue the son for a money decree simply because he has got a right to sell the son's share. The effect of the Hindu joint family law is to give the father or creditor a right to sell the son's share but no more. We ought not to extend this privilege so as to convert it into a money claim.

13. In the partition suit we have already found that the debt of Rs. 2,000 is not binding on the son and that the debt of Rs. 4,000 is binding on the son. So far as the half share of the father in the net proceeds of the sale is concerned, it should be handed over to the Official Assignee because it vests in him and the Official Assignee may proceed with further distribution of that sum in the insolvency jurisdiction, but so far as the half share of the son in that amount is concerned the Official Assignee has no right to ask that amount to be paid to him either u/s 7 or Section 36 of the Insolvency Act and all further proceedings in connection with that fund must be for the purpose of distributing it to such of the creditors whose

debts are binding in the partition suit. In my opinion the Insolvency Court has no power to stay proceedings in the partition suit now pending before

the Official Referee so far as the son's share is concerned. The learned advocate for the Official Assignee relied on Section 18 of the Act which

says:

The Court may...stay any suit or other proceeding pending against the insolvent before any Judge or Judges of the Court or in any other Court

subject to the superintendence of the Court.

14. In my opinion a partition suit which the sons file to separate the property of the insolvent from the properties of other sharers is not a suit

involving a claim against the insolvent except in so far as it may involve a claim to account or a claim for money decree against the insolvent. It will

be extraordinary if the Insolvency Court in the exercise of powers vested u/s 18 should stop partition suits in which the insolvent happens to be a

party defendant. In my opinion the order of Waller, J., restraining the Official Referee from proceeding as per the direction in Clause (16) of

Kumaraswami Sastri, J.'s decree is without jurisdiction so far as the half share of the son is concerned. No doubt it can be justified so far as the

father's half is concerned and as we have directed that it may be paid to the Official Assignee there is no need for any stay of further proceedings

before the Official Referee so far as they relate to the son's half. We therefore direct the Official Referee to proceed with the taking of accounts as

directed in Clause (16) of Kumaraswami Sastri, J.'s decree and send up his report to the Court so that the Court may distribute the sums to the

various creditors.

15. The costs of the creditors, respondents (in both Courts) will be paid out of the fund in Court belonging to the 1st plaintiff.

16. The Official Assignee will be entitled to take his costs out of the estate.

17. We make no order as to costs on the Memorandum of Objections as between party and party.

Cornish, J.

18. I agree.

19. I think that the Official Assignee's claim to the whole of the fund paid into Court by the Receiver appointed in the partition suit is not

sustainable. The effect of the son's severance of the joint status prior to his father's insolvency was that the father's power, which on his insolvency vests in the Official Assignee, to sell the son's interest in the family property in liquidation of the father's debts, no longer existed. The partition suit put an end to it. The Official Assignee, therefore, has no right whatever to the son's share. He can only proceed against the debtors of the insolvent; and the fact that the Hindu Law imposes on the son a liability for his father's debts does not make him in any way a debtor of the insolvent father. Half of the fund paid into Court, which represents the insolvent father's share, is all that the Official Assignee can be entitled to, out of that fund. Turning to the other appeal, O.S.A. No. 30, there is no doubt that if the appellant (who was the 5th defendant in the partition suit, C.S. No. 83 of 1927) could enforce against the insolvent the agreement to execute a mortgage, the agreement would likewise be enforceable against the Official Assignee, provided that the agreement was unimpeachable under the insolvency law. But Waller, J. has come to the conclusion, which appears to me to be entirely warranted by the evidence of the documents themselves, that the agreement though it purports to have been executed on 5th November, 1926, was in reality brought into existence on 9th March, 1927, when the second pronote for Rs. 2,000 was executed by the insolvent in the appellant's favour, that is to say, on a date between the presentation of the insolvency petition and the adjudication. Section 57, Presidency Towns Insolvency Act, protects any contract with the insolvent for valuable consideration, provided that such transaction takes place before the date of the order of adjudication and that the person with whom such transaction takes place has not at the time notice of the presentation of an insolvency petition against the debtor. The appellant must have known of the ante-dating of the agreement; and its purpose was obviously to defeat the insolvency law, and it is consequently not protected by Section 57 as a bona fide transaction. It follows that specific performance of it cannot be enforced against the Official Assignee. But it has been argued that the validity of the agreement is *res judicata* by the judgment in C.S. No. 83 of 1927, and that it is not competent for us to consider the question. All that was decided in that suit with reference to the agreement was that the stipulated rate of 22½ per cent, interest was an exorbitant rate to charge where the money-lender

professed to have security for his loan. But the Court did not determine whether the security was enforceable. In fact, Kumaraswami Sastri, J., by

referring the appellant to a suit for specific performance, seems to me to have expressly abstained from deciding that question.

20. The question that remains is whether the appellant is entitled by virtue of the power-of-attorney to stand in the position of a secured creditor in

respect of his loan to the insolvent. In order to rank as a secured creditor the appellant must be a mortgagee, or have a charge, or a lien. The

power-of-attorney being unregistered would be ineffectual to create a charge on the property, even if it purported to do so, which I do not think it

did; and I do not see how the appellant can be regarded as having a lien in respect of the property. The power-of-attorney in his favour is limited

to two things: to collect the rent from the present tenants and, in the event of a vacancy, to let the premises to some other tenant or tenants in the

name of the insolvent and to collect the rent from those tenants. By a letter of the same date the insolvent authorised the appellant to appropriate

the rents so collected towards the interest due on the loan, and he undertook not to cancel the power-of-attorney till the debt was discharged. The

learned Counsel for appellant has contended that his client has possession of the property under an irrevocable power, and he has referred to a

passage in Coote on Mortgages, page 61, where it is stated that a power-of-attorney authorising a party to take possession of land is a contract to

charge and is not revoked by the death of the principal, or, as here, by his insolvency. But the power in favour of the appellant is limited to

receiving the rent from the tenants when such rent becomes payable. It does not authorise him to take possession of the houses. The power-of-

attorney cannot be regarded as a contract to charge the houses. There seems to me, therefore, no ground for holding the power-of-attorney to be

irrevocable. A power-of-attorney must, as a general rule, be treated as revoked by the insolvency of the donor of the power as against the trustee

under a subsequent bankruptcy: See Williams on Bankruptcy, 13th Edition, page 321. In my opinion, the appellant is entitled to rank only as an

unsecured creditor in respect of his pronote debt.