

(1941) 12 CAL CK 0027
In the Calcutta High Court

Sm. Annapurna Dasi and Others

APPELLANT

Vs

Sarat Chandra Bhattacharjee and Others

RESPONDENT

Date of Decision : 09-12-1941

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 44
Evidence Act, 1872 — Section 92

Citation : AIR 1942 Cal 394

Hon'ble Judges : Pal, J; Mohamad Akram, J

Bench : Full Bench

Judgement

Pal, J.—These two appeals arise out of the same suit. The Appeal No. 1192 of 1938 is by the plaintiffs and the other one is by defendant 1. The suit is for a declaration that a certain mortgage by an alleged receiver and the decree obtained in enforcement of that mortgage against that receiver are not binding on the parties. The relevant facts giving rise to this litigation are the following : Plaintiff 1, Annapurna Dasi, instituted suit in 1916 which has been characterised as an administration suit by the Courts below but which the plaintiffs-appellants characterise as a partition suit. This was title Suit No. 10 of 1916. In this suit the present plaintiff 1, Annapurna Dassi, was the sole plaintiff and plaintiffs 2, 3, 4 and 5 were defendants 1, 2, 3 and 4 respectively. In this suit defendant 2 of the present suit was appointed receiver on 14th July 1917 under Order 40, Rule 1, Civil P.C. That suit was ultimately referred to arbitration on 17th July 1917. The arbitrator based his award on the consent of the parties and pronounced the Same on 30th November 1917. According to this award the receiver was to be discharged and one Mr. Gunendra Chandra Ghose, a common relation of the parties, was appointed common manager of the estates. On 14th December 1917, the Court accepted this award and decreed the suit in terms of the same. The portion of the award relevant for our present purposes and relating to the discharge of the receiver ran as follows:

I also direct with like consent as aforesaid that the present receiver appointed by the Court be discharged from further acting as such after making suitable

provision for immediate payment of Government revenue and superior landlord's rent and other pressing debts of the estate and make over all cash balances, books, documents appertaining to the estate to the common manager and file his accounts in usual course.

2. In order to see the real nature of the dispute involved in that suit and the manner in which that dispute was settled a portion of the award may be quoted here. The arbitrator stated in his award:

All the parties are related to me. They are inexperienced and uneducated and are physically and intellectually incapable to look after and manage or take intelligent interest of their respective right, title and interest. The defendants are sons of Upendra Nath Bose the well-known zamindar of Panisheshala, who died leaving a will. They lost their father at a tender age and were then infants. After attaining majority defendant 1, Gobordhan Behari Bose took up the management, he is a self-sufficient youth who dressed up his little, with the attitude of much. His management as executor of the last will of his father brought about disastrous results followed by sale of valuable landed properties and limitation of several joint debts due to the estate. I, therefore, declare with the consent of all parties that the said defendant Gobordhan Behari Bose be and he is hereby discharged from further acting as executor and that he is hereby directed to render a true and faithful account of his dealings with the estate of his father in the plaint in this suit mentioned. For the benefit of all parties concerned and with such like consent as aforesaid I do hereby declare that Gunendra Chandra Ghose a near relation of the parties of No. 142, Baranashi Ghosh's Street, Calcutta, be and he is hereby appointed with the consent of all parties as the common manager of the estate and effects left by the said Upendra Nath Bose to act as such without remuneration with the help and co-operation of all parties especially of defendant 1 Gobordhan Behari Bose for the purpose of looking after and managing the estate and especially for realizing outstanding assets and payment of all just and subsisting debts.... I find, declare, and award with like consent as aforesaid that the plaintiff as the sole heiress of her deceased son Sailaraj Bose who died intestate and unmarried after the death of his father, be and she is hereby entitled to one-fifth part or share of and in the estate and effects, moveable as well as immovable, left by her deceased husband Upendra Nath Bose in severalty and absolutely. I do also find, declare and award with like consent as aforesaid that the said plaintiff is also entitled to the bequest of Rs. 15 per month made to her in and by the last will and testament of her said deceased husband.... I also do find, declare, award with like consent as aforesaid that such of the said defendants.... is entitled to one-fifth part or share of and in the estate and effects, moveable and immovable left by the said Upendra Nath Bose deceased, in severalty and absolutely.....

3. The award then vested the common manager with all the powers of a receiver appointed by Court and directed that "he is to be governed by all the provisions laid down in the CPC applicable to receiver." The common manager named in the

award expressed his consent in writing. The actual drawing up of the decree was delayed as the Court at first demanded a non judicial stamp from the parties, the suit being for partition. Ultimately on 20th December 1917 the Court directed : "It appears from the award that the arbitrator did not make any partition of the lands in suit between the parties. So no non-judicial stamp for the purpose of drawing the decree is required. Let usual decree be drawn up."

4. On 21st December 1917 the Court made the following order:

The receiver will be discharged according to the arbitrator's award on his payment of all rents and revenue due in respect of the properties in his possession and all pressing debts and on his submission of proper accounts.

5. The receiver, defendant 2, however, continued in possession for the next fourteen years with the full knowledge of the parties and the Court all along functioned in respect of the estate as if the same was in its custody through that receiver. The powers that were conferred upon the receiver by his appointment dated 14th July 1917 were, in terms of the provisions of Order 40, Rule 1(d), Civil P.C., and ran as follows:

He shall have all such powers, as to bringing and defending suits and for the realization, management, protection, preservation of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, as the owners themselves have, and in all important matters he shall take the instructions of the Court (vide Ex. T, order sheet in title Suit No. 10 of 1916, order No. 58).

6. On 4th May 1921 the receiver asked for permission of the Court to raise a loan of Rs. 3000 on mortgage of some property belonging to the estate to pay off the rent decree against the estate and the putni rent. The receiver in his application for permission mentioned the rate of interest of the proposed loan as 18 per cent, per annum. The Court granted permission but pointed out that the interest was rather too high and directed that an attempt should be made to have a loan at a lower rate of interest. On this permission the receiver took the loan of Rs. 3000 from defendant 1, the interest stipulated for being compound interest at 18 per cent, per annum with six monthly rests, On 10th May 1921 he reported the loan to the Court, stating that interest at a rate lower than 18 per cent, per annum could not be had. In this report, however, he did not mention that the loan taken by him was to bear compound interest. Defendant 1 instituted his suit for enforcement of this mortgage in November 1929, making the receiver alone the party defendant. Before instituting this suit defendant 1 applied to the Court for leave to sue the receiver and the Court by Its order dated 29th June 1929 permitted him "to sue the receiver Nagendra Nath Bose." The owners (the present plaintiffs) applied to be made : parties to this suit on 25th January 1930 but their application was resisted by the mortgagee and was rejected by the Court. On the same day the receiver made an application for adjournment of the suit. That application was also rejected and an ex parte mortgage decree was

made for Rs. 13000. The present suit was, thereupon, instituted by the present plaintiffs on 9th May 1930 making the mortgagee decree-holder defendant 1 and the receiver, defendant 2.

7. In the original plaint the relief claimed was only a declaration that the mortgage and the mortgage decree were not binding on the plaintiffs and on the estate left by Upendra Nath Bose. It transpires on evidence that execution of the aforesaid mortgage decree had already been started before the institution of the present suit. The plaintiffs did not make any prayer for permanent injunction restraining the decree-holder from executing his decree. But they made an attempt to have a temporary injunction restraining defendant 1 from executing the decree pending the disposal of the present suit. The plaintiffs were unsuccessful in this attempt and the mortgaged property was sold in execution of the decree on 18th November 1930 and it was purchased for Rs. 12000 odd by Kshetra Mohan Pal who is now defendant 3 in the suit. The purchaser took delivery of possession of the property on 15th March 1931. Thereafter, on 26th March 1931, the plaintiffs made an application for amendment of their plaint by adding Kshetra Mohan Pal as defendant 3 and also adding a prayer for possession of the property. The Court dealt with this application for amendment by its order No. 29 dated 1st April 1931 and granted their prayer for amendment by adding the purchaser as defendant 3 but without saying anything about the other prayer. The plaintiffs do not seem to have pressed that other prayer of theirs any further. There was an episode relating to the amount of court-fees payable on the plaint, but that is not relevant for our present purposes. In their plaint the plaintiffs based the reliefs claimed on the following grounds:

(1) That after the decree in the partition suit dated 14th December 1917 discharging the receiver and after the order dated 21st December 1917 discharging the receiver pursuant to the decree there was no receiver of the estate. The Court ceased to have any custody over the estate. Consequently, the permission dated 4th May 1921 granted by the Court for the loan and the loan taken by the alleged receiver on that permission were ultra vires and not binding on the estate.

(2) That even assuming that the Court had jurisdiction to grant permission to take loan and that the receiver functioned as receiver the loan taken and the mortgage given were in excess of the terms of the permission inasmuch as the Court never sanctioned compound interest at 18 per cent, per annum with six monthly rests : (a) consequently the loan and the mortgage are not binding on the estate : (b) at least that portion of the loan which is in excess of the terms of the sanction is not binding on the plaintiffs.

(3) That the loan and the mortgage was the result of fraud and collusion between the defendants 1 and 2, the mortgagee and the receiver, and, consequently, was not binding on the estate.

(4) That the suit in enforcement of the mortgage was only against the alleged

receiver and that though the plaintiffs applied for being made parties to that suit twice their applications were resisted by the mortgagee and were rejected on 18th September 1929 and 25th January 1930.

(5) That the loan was not for the benefit of the estate.

8. The Court of first instance overruled all these contentions of the plaintiffs and held - (1) that as a matter of fact the Court did not give up the custody of the property and that the receiver continued to function as such till 4th February 1931 when the receiver by a petition gave up possession of the property; (2) that the loan was taken for the necessity of the estate ; that money was needed for payment of astam dues to save putni mahals and to make deposit to set aside some rent execution sales, and that there was evidence to establish that the money realised by loan was actually applied to those purposes; that one of the plaintiffs, Gobordhan Babu, accompanied the receiver while the latter approached defendant 1, for the loan and that there was real pressure on the estate and the loan was a necessity, there was nothing to show any fraud or collusion on the part of the mortgagee; (3) that as the Court's order sanctioning the loan did not prohibit compound interest, stipulation for compound interest was not in excess of the terms of the sanction. In this view the Court of first instance dismissed the suit.

9. On appeal by the plaintiffs the learned District Judge modified this decree. He affirmed the finding that the receiver in fact remained in possession of the estate as such receiver with the knowledge and consent of the parties and while taking the loan he functioned as receiver. The learned District Judge, however, found that the compound interest was never sanctioned by the Court and that the stipulation about compound interest was entered fraudulently and collusively in the bond, that this stipulation was the result of collusion between the receiver and the mortgagee, and that the decree so far as it allowed the compound interest was also obtained collusively. He, therefore, held that the estate would not be liable for the compound interest and would only be liable for a portion of the decretal amount, namely Rs. 7354. As regards the auction-purchaser the learned District Judge treated him as %a purchaser pendente lite and, therefore, bound by the decision in the suit. In the result he declared "that the estate of late Upendra Nath Basu will be liable only to the extent of Rs. 7354 and proportionate costs of the decree in suit No. 72 of 1929." He further directed in the following terms:

As it appears that the mortgagee defendant 1 has already realized the entire decretal amount by selling the properties and defendant 3 has purchased the property, it is ordered, in exercise of the inherent jurisdiction of the Court, that the plaintiffs would deposit in the lower Court Rs. 7354 and proportionate costs of the mortgage suit within a month from this date and the auction-purchaser will have a lien over this amount and will be entitled to withdraw it on his giving up possession of the properties to the plaintiffs. The auction-purchaser will be entitled to realise the balance of his purchase money with interest at 6 per cent,

per annum from the date of payment on the entire purchase money from the mortgagee u/s 44, Civil P.C. Seems to be a mistake for Section 144 ? Ed. The plaintiffs may recover the mesne profits in appropriate proceedings.

10. Both the plaintiffs and defendant 1 have preferred appeals against this decision. S.A. No. 1192 is by the plaintiffs and S.A. No. 1260 is by defendant 1. Defendant 3 has preferred cross-objections in both these appeals. Dr. Sen Gupta, in support of the appeal by the plaintiffs, reiterates the points raised in the plaint and contends that after the decree in the partition suit the receiver ceased to exist as receiver. Thereafter he became a mere intermeddler with the estate of the plaintiff. The Court also ceased to have any jurisdiction over the estate and consequently the loan and mortgage by the intermeddler even with the permission of the Court, which had no jurisdiction in the matter, would not be binding on the estate. He further contends that under the provisions of Order 34, Rule 1, Civil P.C., the owners were the necessary parties in the mortgage suit and as they were not made parties the decree obtained therein was not binding on them and consequently the sale in execution of that decree did not affect their title. Mr. Das appearing in support of the appeal by the mortgagee defendant 1, raised the following points:

(1) That the suit as framed is not maintainable, being hit by the provisions of Section 42, Specific Relief Act: (a) inasmuch as even on the date when the suit was originally instituted the plaintiffs were able to seek further relief in the shape of a permanent injunction restraining the defendant decree-holder from proceeding with the execution of his decree but omitted to do so; (b) inasmuch as after the addition of defendant 3 as party defendant the plaintiffs should have sought farther relief by claiming recovery of possession;

(2) That the finding as to fraud and collusion was not based on any evidence on record;

(3) That on a proper construction of the order sanctioning the loan, the loan and the mortgage were not in excess of its terms ;

(4) That on his own finding the learned District Judge ought to have directed interest to run at the sanctioned rate up to the period of grace;

(5) That inasmuch as the plaintiffs sought relief on the basis of fraud committed by the receiver the suit was bad for want of notice u/s 80, Civil P.C; and

(6) That in a pure declaratory suit where there was no claim by one defendant against another and after the dismissal of the suit by the Court of first instance, there was no appeal or cross-objection by defendant 3, the Court of appeal had no jurisdiction to direct defendant 1 to make any payment to defendant 3.

11. In reply to Dr. Sen Gupta's contention that the decree in the mortgage suit was not binding on the plaintiffs on the ground that they were necessary parties under Order 34, Rule 1, Civil P.C., and were not made parties, Mr. Das contended (1) That this is a new case which the plaintiffs are making for the first time in

second appeal; and (2) That the decree obtained against the receiver as such was binding on the plaintiffs. Mr. Gupta appearing for defendant 3, the auction purchaser, contended in support of his cross-objections : (1) That the receiver was functioning as receiver when he created the mortgage; consequently the mortgage was binding on the estate; (2) That in the mortgage suit the receiver functioning as such was really representing the estate and consequently he was there on behalf of the owners of the estate; (3) That his purchase was unaffected by the decision in the present suit reversing or modifying the mortgage decree and that the Court of appeal below was wrong in applying the doctrine of *lis pendens* to his case.

12. We shall, first of all, take up some of the points raised by Mr. Das in support of the appeal by defendant 1. The first point raised by Mr. Das is that the suit as filed is not maintainable, being hit by the provisions of Section 42, Specific Relief Act, inasmuch as the plaintiff, being able to seek further relief in the shape of a permanent injunction restraining the defendant decree-holder from proceeding with the execution of his decree, omitted to do so. The point was not raised in this form in any of the Courts below and in our opinion it has no substance. The decree sought to be assailed in the present suit was not obtained against the present plaintiffs and consequently as was held in *Aisa Siddika v. Bidhu Sekhar Banerjee* 17 C.L.J. 30 the plaintiff, in such a case, was not bound to pray for an injunction. The other ground on which Mr. Das urges that the frame of the suit was bad u/s 42, Specific Relief Act, is not available to his client, defendant 1, at all. The suit as originally framed against him had not this alleged defect. The disturbance of possession, if any, took place subsequent to the institution of the present suit and if the original relief claimed became, by reason of t any subsequent change of circumstances, inappropriate, it was open to a Court of justice to take notice of such events as had happened since the institution of the suit and to mould its decree according to the circumstances as they stood at the time the decree was made. It "has been laid down in several cases that it is incumbent upon a Court of justice to take notice of such subsequent events : *Ramyad Sahu v. Bindeswari Kumar* 6 C.L.J. 102 *Rai Charan Mandal v. Biswa Nath Mandal* AIR 1915 Cal. 103, *Dinanath Mahish and Others Vs. Nabakumar Hajra and Others*, and *Nuri Mian v. Ambica Singh* AIR 1917 Cal. 716. We would not have been prepared to throw out the suit of the plaintiffs" on this ground and if necessary, we would have allowed him to amend the plaint even at this stage.

13. In the present case, however, the auction purchaser took possession on 5th March 1931, not from the plaintiffs but from the receiver. The property was at that time in the custody of the Court and was in the possession of the receiver. The plaintiffs were not entitled to present possession on that date and consequently the relief in the shape of recovery of possession was not open to them. They applied for the amendment of their plaint by adding the auction purchaser as defendant 3 on 26th March 1931. This prayer was granted on 1st April 1931. Even then the estate was in the custody of the Court. The receiver gave up the estate only on 14th April 1931. This fact made the relief by way of

recovery of possession unavailable to the plaintiffs at the relevant date. Consequently, there was no omission on their part to pray for any available relief. The case is thus completely covered by the authority of the Judicial Committee in AIR 1938 73 (Privy Council) .

14. As regards the second point raised by Mr. Das, namely, that the finding arrived at by the Court of appeal below as to fraud and collusion between the receiver and the mortgagee was not based on any evidence on record, we are again unable to accept his contention. The circumstances relied on by the Court of appeal below are also evidence in the case and when a final Court of fact has relied on that evidence and come to its own conclusion based on the same, we sitting on second appeal cannot interfere with that finding. The learned Judge observed: "So there is no doubt that the terms about the compound interest were collusively and fraudulently entered into the bond without the knowledge of the Court, and the decree so far as regards the contract about compound interest was also obtained collusively, for the receiver did not raise this objection and allowed the whole claim to be decreed ex parte and the plaintiffs who wanted to be made parties, were carefully shut out." The circumstances relied on by the Court of appeal below in drawing the inference that the compound interest was also obtained collusively might not have induced another Court of fact to come to that conclusion. But certainly these circumstances were evidence in the case and it is not for us to say whether the final Court of fact has attached any undue weight to this piece of evidence.

15. As regards the third point, it is difficult to see how the order sanctioning the loan can be construed to include a sanction to the compound interest. In our opinion, the learned District Judge has taken the correct view of the sanction. As regards the fourth point, we are of opinion that the interest should have been directed to be calculated at the rate payable on the principal up to the period of grace allowed by the preliminary decree. The Court of appeal below allowed interest only up to the date of the suit without assigning any reason why interest at that rate should not run on the principal up to the period of grace. As regards the fifth point raised by Mr. Das, namely, that the suit was bad for want of notice u/s 80, Civil P.C., we are again unable to accept this contention. No relief has been sought for in this suit against the alleged receiver, and in our opinion no notice u/s 80 was necessary in a case like this. The sixth point raised by Mr. Das need not be considered in view of the order proposed by us.

16. We next take the points raised in the plaintiff's appeal. The first point to be considered is whether the estate was still in the custody of the Court and whether the receiver remained in possession of the estate as such receiver of the Court at the date of the alleged loan. Both the Courts have found that in spite of the order of discharge in the award and in the decree and the formal order of the Court dated 21st December 1917, the receiver continued in possession for 14 years up to 1931 with the knowledge and consent of the plaintiffs and managed the estate. It appears from the order sheet in T.S. No. 10 of 1916 that the Court

all along functioned as if the estate was still in its custody by virtue of the order appointing the receiver. It seems that both the order of discharge in the award and the order of the Court dated 21st December 1917 were understood by the parties including the receiver and the Court as mere conditional orders. No final order of the Court terminating the functions of the receiver seems to have been made and the parties also seem never to have attempted to get the custody of the Court terminated by such final order. We, therefore, agree with the Courts below that the estate continued to be in the custody of the Court and the receivership of defendant 2 also continued till 14th April 1931. In our opinion, in the circumstances of this case the Court did not cease to have jurisdiction over the estate and it acted within its competence when it permitted the receiver to raise the loan, From the terms of appointment of the common manager given in the award, it seems that the parties contemplated thereby the continuation of the Court's custody though the person through whom the Court will continue in custody of the estate was to change from the then receiver to the common manager named in the award. The award vested the common manager with all the powers of a receiver appointed by the Court and directed that "he was to be governed by all the provisions laid down in the CPC applicable to receivers."

17. The next point urged by Dr. Sen Gupta is that even assuming that the mortgage by the receiver was binding on the plaintiffs as owners of the property, they were necessary parties to the mortgage suit under Order 34, Rule 1, Civil P.C., and as they were not made such parties, the decree in the mortgage suit is not binding on them. Order 34, Rule 1, Civil P.C., lays down that all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. It cannot be disputed, and as a matter of fact it was not disputed, that the plaintiffs had interest in the right of redemption. The appointment of the receiver did not take away their interest in the right of redemption and consequently it cannot be contended that they were not necessary parties to the mortgage suit.

18. Mr. Gupta, appearing for defendant 3, contended that the receiver as party defendant in the mortgage suit represented the right of redemption fully and that he was there representing the present plaintiffs. There is no express order of the Court appointing the receiver allowing the receiver to represent the true owners in the mortgage suit. Admittedly the property never vested in the receiver, his appointment being only under Order 40, Rule 1, Civil P.C. The property was only in the custody of the Court and the receiver was simply managing the estate as an officer of that Court. No doubt while he mortgaged the property with the sanction of the Court he must be taken to have represented the owners of the property. But that was the effect of the express sanction given by the Court. The mortgage by the receiver, in these circumstances will no doubt be binding on the real owners, the present plaintiffs; but the question is whether in an action in enforcement of the mortgage they should have been made parties or whether even then the receiver did continue to represent them as a result of the Court's order sanctioning the loan. Mr. Gupta in support of his contention that the

receiver would continue to represent the interest of the real owners, even for the purpose of the action in enforcement of the mortgage, relied on *Jagat Tarini Dassi v. Nabagopal Chaki* ('07) 34 Cal. 305. That was a suit for arrears of rent of a taluk instituted by the receiver of the estate of the landlord in his own name. The defence inter alia was that the receiver was not competent to sue in his own name but should have brought the action in the name of the persons interested in the estate. It was held that he was entitled so to sue in his own name. It was observed in this case:

The receiver in the present case was appointed with full powers u/s 503, Civil P.C. (now Order 40, Rule 1, Civil P.C.) Now Section 503 authorizes the Court to grant to the receiver all such powers as to bringing and defending suits as the owner himself has. When an appointment has been made under that section and full powers granted to the receiver, we are disposed to agree with *Peter O'Kinealy J.* in the view taken by him in *William Robert Fink v. Maharaj Bahadur Singh* ('98) 25 Cal. 642 that power is conferred upon the receiver to bring and maintain suits in his own name, always supposing that the ownership of the property is completely represented in the suit in which the receiver is appointed. We are also disposed to agree with *Wilson J.* in the view indicated by him in *Oriental Bank Corporation v. Gobin Loll Seal* 10 Cal. 713 that it is competent to a Court to authorize a receiver to sue in his own name.

19. The question in the present case is not whether the receiver can sue or be sued in his own name. The question is whether by reason of the appointment of the receiver the owners cease to have the right to be made parties under Rule 34, Rule 1, Civil P.C. In course of the judgment in the above case, it was observed, on the authority of *Alderson on Receivers*, that "a receiver by virtue of his appointment and of his character as representative of all parties interested in the property, may be regarded as a quasi assignee, and may be treated as invested with the title to all rights of action possessed by his principal, at the time of the appointment, to such an extent at least, as will enable him to sue upon them in his official character. Later on it was observed:

The object and purpose of the appointment of a receiver may be generally stated to be the preservation of the subject-matter of the litigation, pending a judicial determination of the rights of the parties thereto. The appointment of a receiver therefore determines no right either of the parties to the controversy or of strangers thereto. But although the receiver has no title to the property and although he is a custodian to take charge of and hold the property during or pending litigation it does not necessarily follow, that if he is authorised to sue, he cannot sue in his own name. Though he is in one sense a custodian of the property of the person, whom in certain respects he is made to supplant there seems to be no reason why his power should not be held to be co-extensive with his functions. It is clear that he cannot conveniently perform those functions, unless upon the theory that he has sufficient interest in the subject-matter committed to him, to enable him to sue in respect thereof by virtue of his office,

in his own name.

20. All this goes only to establish that the receiver may have certain powers co-extensive with his functions. But this does not touch the question involved in the present case. Mr. Gupta also urged the question from the point of view of convenience and pointed out that the rule allowing a receiver to be sued in a case like the present is preferable. He urged that a receiver may be appointed in a suit in which there is a dispute as to the title to the property, and that it may be necessary for him to raise a loan by mortgaging a portion of that property. In a case like this the mortgagee should not be driven to sue all the parties to the litigation but should be entitled to enforce his mortgage by making the receiver alone party. This may be a convenient rule for the mortgagee and it may be that in a case of that character the Court would sanction the suit against the receiver alone, directing him to represent fully the right of redemption. But we are not sure whether in view of the provisions of Order 34, Rule 1, C.P. Code, it would be within the competence of a Court appointing a receiver to make an order like that. In any case, no such order has been made on the present occasion, and in the present case the loan was sanctioned after the dispute as to the title to the property was finally determined by the Court. If it is convenient to the mortgagee to have the law to be so, it may be highly prejudicial to the owners of the mortgaged property, and convenience of the creditor is certainly not the only consideration. The receiver may not always adequately represent the interest of the owners in a matter like this. A receiver, for example, may have only very limited resources at his disposal for the purpose of redemption. He may be the receiver only of the property that has been mortgaged and the fund available to him for redeeming the same may be very much inadequate, while the owners may have much larger resources for the purpose. Again, the defences available to the owners may not be open to the receiver. The present case itself is an illustration of the latter point. The defence that the stipulation for compound interest was inserted into the bond by the fraud and collusion between the Receiver and the mortgagee might not have been available to the receiver, though there is ample authority for saying that it would have been available to the present plaintiffs : See *Pertab Chunder Ghose v. Mohendra Nath Purkait* ('90) 17 Cal. 291 and AIR 1936 70 (Privy Council) .

21. The bar of Section 92, Evidence Act, would not have been available against the owners as they were not parties to the instrument and though the receiver was representing them they were not the receiver's representatives in interest. Mr. Gupta contends that if the owners were possessed of larger resources, nothing would have prevented them from redeeming the property. But, if the decree against the receiver be available against Them, they would have to redeem on payment of a sum which is much larger than what would be payable by them when they would be party to the suit and would thus be entitled to urge their own defence. As the property was in custodia legis, the receiver might have been a proper party to the mortgage suit but in our opinion the real owners who had interest in the right of redemption were also the necessary parties. Even

assuming that the receiver would normally represent the owners in a suit of this character, in the present case as soon as he was in collusion with the mortgagee he ceased to represent the interest of the owners. The plaintiffs in the present case took sufficient steps to indicate that they were not allowing the receiver to represent them and if, even after that, the mortgagee proceeded only against the receiver he did so at his risk. In our opinion, at least in view of the finding of fraud and collusion arrived at by the Court of appeal below the receiver did not represent the entire right of redemption on the present occasion and the decree obtained by the mortgagee in his suit against the receiver did not represent the entire right of redemption on the present occasion and the decree obtained by the mortgagee in his suit against the receiver did not affect the right of redemption of the plaintiffs. The mortgagee did not make them party. They themselves came forward to be made such parties, but on the mortgagee's opposition their prayer was rejected. In our judgment, the decree obtained in the mortgage suit in their absence would not be binding on them.

22. Of course, in view of the findings arrived at by the Court of appeal below the mortgage itself was binding on the plaintiffs excepting the stipulation as to the compound interest, In the above view of the matter, the sale held in execution of that decree will equally fail to bind the plaintiffs. The Court of appeal below held that the auction purchase by defendant 3 in execution of the mortgage decree was hit by the doctrine of *lis pendens*. It is difficult to extend the operation of the doctrine to sales of this nature. Before the present suit was instituted, there was a final decree for the sale of certain properties. This decree is given effect to when the property is sold during the pendency of the present litigation. In *Chinnaswami Padayachi Vs. Darmalinga Padayachi*, it was pointed out that the doctrine does not extend so as to affect the proceedings in earlier instituted suits. If earlier proceedings are affected or rendered ineffective by subsequent proceedings the reason must be not *lis pendens* but something else. This view finds support in *Harpershad Lal v. Dalmarden Singh* ('95) 32 Cal. 891 per Mitra J.). But the view that we; have taken of the effect of the decree obtained by defendant 1 in his suit for enforcement of the mortgage against defendant 2 makes it unnecessary for us to consider whether or not the purchase by defendant 3 at a sale held in execution of that decree was or was not affected by the doctrine of *lis pendens*. It appears to us that if the right of redemption of the plaintiffs was: not affected by the decree it was neither affected by the sale in execution of that decree. In this view the practical result will be that defendant 3 purchased nothing as the judgment-debtor, defendant 2, had no saleable interest in the property sold.

23. In the result we allow S.A. No. 1192 of 1938 and dismiss S.A. No. 1260 of 1938 and the cross-objections. The judgment and decree of the Court of appeal below are set aside and in lieu therefor we declare : (1) that the stipulation for compound interest in the deed of mortgage executed by the receiver is not binding on the plaintiffs' estate; (2) that with the above modification the mortgage given by the receiver is binding on the plaintiffs' estate; (3) that the

decree obtained by defendant 1 in Title Suit No. 72 of 1929 is not binding on the plaintiffs and the same did not affect their right of redemption; (4) that the sale held in execution of that decree did not affect the plaintiffs' right of redemption. The decree will be drawn in the above terms. In the circumstances of this case we direct that the parties will bear their own costs throughout.

Mohamad Akram, J.

24. I agree.