

## APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

JETHABHAI KEVALBHAI (ORIGINAL DEFENDANT), APPELLANT, v. CHOTALAL CHUNILAL AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.\*

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October 6.

*Will—Executor—Testator's direction to carry on his trade—Loss suffered in the course of the business—Mortgage—Liability of the executor—Testator's assets liable.*

One Gordhandas made a will and died leaving him surviving his widow, a daughter and her husband and two grandsons by the daughter. Under the will the testator appointed his widow and the daughter's husband executrix and executor and directed among other things that in order to perpetuate his name his business should be carried on by the executor so long as it could be carried on at a good profit but, should it appear that the trade will suffer so as to destroy his reputation, the executor should stop it. At the time of his death the testator possessed *inter alia* a cotton ginning factory. The executor and executrix carried on the business in the testator's name for some time and having found that large liabilities were incurred in the course of the business the factory was mortgaged to J. with possession. The mortgage was executed by the testator's widow as owner of the firm of Gordhandas and by her daughter. The fact of the will was denied in the mortgage conveyance. The ladies executed the mortgage by affixing their marks and their names were written by the executor. J. sued the mortgagor ladies and the executor to recover the mortgage-debt and obtained a decree. The executor died while the suit was pending. The mortgage property was sold under J's decree and was purchased by him at the court-sale. In the meanwhile the beneficiaries under the will, that is, the two grandsons of the testator and the sons of the deceased executor, brought a suit against J. for a declaration that the property was not liable to be sold under the defendant's mortgage-decree and that the defendant had obtained by his purchase no right as against the plaintiffs' rights in the property.

*Held*, dismissing the suit, that the mortgage was by one member of the firm with the consent and informal co-operation of the undisclosed partner, the executor, who had the implied authority of the testator to deal with the factory in the ordinary course of business. The mortgage was therefore valid and binding on the executor as principal.

*Juggewundas Keeka Shah v. Ramdas Brijbookun-Das*<sup>(1)</sup> followed.

A mortgage by a trader under a testamentary trust of the testator's property is referable to his implied authority as a trustee and not to his position as executor.

\* Second Appeal No. 703 of 1908.

(1) (1841) 2 Moo. I. A. 487.

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*Devitt v. Kearney*<sup>(1)</sup> followed.

An executor carrying on the trade of his testator under a testamentary trust is liable personally to the trade creditors and is entitled to use as a trader the trade assets of the testator. He does not violate his trust by carrying on the trade in conjunction with his co-executor who is not named as a trade trustee.

The trustee, though personally liable for the debts which he contracts in the course of his business, has a right to be paid out of the specific assets appropriated for that purpose and the trade creditors are not to be disappointed of payment so far as the assets so appropriated are concerned.

SECOND appeal from the decision of W. Baker, District Judge of Surat, reversing the decree of J. E. Modi, First Class Subordinate Judge.

Suit for a declaration.

One Gordhandas Ambaidas died on the 3rd June 1896 after having made a will dated the 27th May 1896. He left him surviving his widow, Fulkore, a daughter, Rukhmini, and her husband, Chunilal, and two grandsons by Rukhmini and Chunilal, namely, Chotalal and Maganlal. In his will Gordhandas appointed Fulkore and Chunilal managers of his estate and gave his property to Fulkore for her life and after her to the two grandsons. Paragraph 7 of the will ran thus:—

7th. At present I am carrying on my trade (and) business in cotton—in seed, cotton, gin(ning-business), dealings and transactions, &c.—in my (own) name; and after my death, the same shall, in order to perpetuate my name, be continued (to be carried on) in my name by my son-in-law Chunilal Tribhuwandas, and such trade shall be continued (to be carried on) so long as it could be carried on at good profit. Should it appear that the trade would suffer in such a way as to destroy my name (reputation) the said Chunilal Tribhuwan shall cease to carry on trade in my name because it is my wish that it should not so happen after my death as to injure my name in any way. The said Chunilal Tribhuwan is even at present carrying on the vahivat in respect of my trade and business. He is acquainted (with the same) in every way.

Chunilal and Fulkore accordingly carried on the business of the testator in his name as the Firm of Gordhandas Ambaidas for some time and having incurred liabilities in the course of their management they mortgaged with possession a ginning factory of the testator to one Jethabhai Kevaldas for Rs. 13,000. The

(1) (1883) 13 L. R. Ir. 45 at p. 52.

mortgage was dated 29th February 1899 and was executed by Fulkore and her daughter Rukhmini. They executed the document by affixing their marks, and their names were written by Chunilal. The document denied the fact of the will in the following terms:—

Further we have not mortgaged, sold or made a gift of the said property to any other person. Similarly the deceased Gordhandas Ambaidas also has not made a gift of, or sold the said mortgaged property or any other property belonging to himself: nor has the said deceased made even any will of his own property. Consequently no person other than ourselves has a right (and) claim to the same; nor has any one a part or share therein. In spite of this should any mortgagee, claimant or co-sharer or any other person come forward and lay claim or title, we shall be duly responsible for the same.

The signatures of the two ladies were written thus:—

The signature of Bai Fulkore, widow of Gordhandas Ambaidas and owner of the Firm of Gordhandas Ambaidas: I agree to what is written above. The handwriting is that of Chunilal Tribhuvandas. The signature is made at the request of the Bai; and the Bai has made the mark with her own hand.

The signature of Bai Rukhmini, daughter of Gordhandas Ambaidas. I agree to what is written above. The handwriting is that of Chunilal Tribhuvandas. The signature is made at the request of the Bai; and the Bai has made the mark with her own hand.

In the year 1900 the mortgagee Jethabhai brought a suit, No. 158 of 1900, on the mortgage against Fulkore and Rukhmini and also against Chunilal as executor of the will of Gordhandas to recover the mortgage-debt and while the said suit was pending Rukhmini brought a suit, No. 171 of 1900, against the mortgagee Jethabhai for the cancellation of the mortgage on the ground that it was not binding on her or her sons. The latter suit was dismissed. While the mortgagee's suit was pending, defendant Chunilal died and the mortgagee obtained a decree against Fulkore and Rukhmini for the recovery of the mortgage-debt, namely Rs. 13,000, from the surviving defendants and, in default of payment by them within six months, by the sale of the mortgaged property. The decree was dated the 21st November 1902.

On the 23rd August 1903 Chotalal and Maganlal, the two grandsons of Gordhandas, brought the present suit against Jethabhai, alleging *inter alia* that the defendant had knowledge

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of the fact and the contents of the will of Gordhandas because he was instrumental in getting it executed, that the defendant's conduct in taking the mortgage from the two ladies was fraudulent and that the plaintiff further impeached the mortgage because (1) it was not for a consideration binding on the estate of the testator, (2) the will gave no power to any one to make such alienation to the detriment of the plaintiffs' reversionary rights and (3) the plaintiffs' maintenance depended upon the mortgaged factory and there was no other property available for the purpose.

The plaintiffs, therefore, prayed for a declaration that the property was not liable to be sold under the defendant's mortgage decree and for an injunction restraining the defendant from selling the property, or in the alternative, if the sale was allowed to take place, for a declaration that the sale was to hold good only during the life-time of Fulkore and even then was subject to the plaintiffs' right for maintenance and that after Fulkore's death, the plaintiffs were the full owners of the property.

The Court of first instance, the District Court and the High Court, having declined to grant an interlocutory order staying the sale, the property was sold pending the hearing of the suit and was purchased by the defendant. Owing to this circumstance, the plaintiff asked for a further declaration that the defendant had obtained by his purchase no right against the plaintiffs' aforesaid rights in the property.

The defendant answered *inter alia* that the plaintiffs' mother Rukhmini having failed in her suit, No. 171 of 1900, which she had filed for herself and on behalf of her minor sons (the present plaintiffs) for the cancellation of the mortgage, the present suit was not filed by the plaintiffs in good faith and they should not be allowed to prosecute it, that the defendant had merely attested the will of Gordhandas and did not know the contents thereof, that Chunilal, Fulkore and Rukhmini fraudulently concealed the will and represented to the defendant, that the will was destroyed by the deceased during his life-time, that the deceased was indebted at the time of his death and for the purpose of paying off his debts as well as those incurred after his death Fulkore

and Rukhmini borrowed Rs. 13,000 from the defendant on the mortgage of the factory, that the mortgage-debt being incurred by Chunilal, Fulkore and Rukhmini for carrying on the trade and for the benefit of the family was valid, that it was not true that the plaintiffs had no means of subsistence and that the claim was time-barred.

The Subordinate Judge found that the suit was not time-barred as the plaintiffs were minors when the suit was filed, that the mortgage transaction was not brought about by any fraud on the part of the defendant, that the decree in the defendant's suit, No. 158 of 1900, was binding on the plaintiffs so far as their rights were concerned under the will and was also binding on the estate of the testator, that the defendant was informed that the will had been destroyed, that the suit was brought in good faith, that the defendant was an alienee who took in good faith and that the plaintiffs were not entitled to any relief. The suit was therefore dismissed.

On appeal by the plaintiffs the District Judge found that the mortgage was not valid. He therefore reversed the decree and granted relief to the plaintiffs in the following terms:—

I reverse the finding of the lower Court and grant the declaration sought for, *viz.*, that the alienation to defendant holds good only during the life-time of Fulkore, and is subject to plaintiffs' right of maintenance, that plaintiffs are the full owners of the property and that defendant had obtained by his purchase no rights against the plaintiffs' above-mentioned rights in the property.

In view of the fact that I have found that the defendant was not a party to the fraud and was without notice of the will, and that he is not to blame for the injustice done to the minors, I think it would be hard to saddle him with the costs of this suit. I therefore direct that each party should bear its own costs.

In the judgment the District Judge made the following observations:—

From the evidence recorded it appears that Gordhan owed some money at the time of his death, and that after his death further large liabilities were incurred by Fulkore and Chunilal in the conduct of his business. The will contains a prohibition of alienation, but it also contains a direction to carry on the testator's business but not as to incur a loss.

In this connection reference is made on behalf of appellants to Williams on Executors (9th edition), Volume 2, pages 1664, 1681, 1684, 1815, 1900.

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It is argued that the executor who carries on the business of the testator makes himself personally liable for all debts so contracted and it makes no difference that he avowedly acts as executor (page 1816). The remedy of a creditor of the business for a debt incurred since the death of the testator is against the executor personally and not against the estate of the deceased. But when the executor properly carries on the business of the deceased, he is entitled to be indemnified out of the assets, which are authorized to be, or can be otherwise properly applied for the purposes of the business (page 1900).

Again executors have no authority in law to carry on the trade of the testator and if they do so, unless under the protection of the Court of Chancery, they run great risk, even though the will contains a direction that they should continue the business of the deceased. If the trade be beneficial the profits are applicable to the purposes of the trust and if it proves a losing concern the executor, on failure of assets, will be personally responsible for the debts contracted in the business since the testator's death (page 1682). In the present case we have a direction in the will that the executors should carry on the business of the testator, but on page 1689 of Williams there is a case reported very similar to the present one (*M'Neilie v. Acton* 4 De G. M. and G. 744) in which it was held that a direction in a will that the testator's trade shall be carried on, does not of itself authorize the employment in the trade of more of the testator's property than was employed in it at his decease; nor does such a direction coupled with a direction that the testator's debts shall be paid, authorize a mortgage of his real estate, not employed at his death in the trade, for the purposes of carrying it on.

It might be argued that in the present case the ginning factory was employed in the trade, but in view of the prohibition of alienation in the will and of the principles referred to above, I think that Fulkore as executor had no authority to mortgage the property in dispute for the debts incurred in carrying on her husband's business, and though the transaction may be binding on her, a point which has been already judicially decided and with which we are not now concerned, in my judgment she had no authority as executor to bind the minors and, viewed from this standpoint, the transaction is not binding on them.

The defendant preferred a second appeal.

*Coyaji* with *L. A. Shah* for the appellant (defendant).

*Selavad* with *M. N. Mehta* for the respondents (plaintiffs).

SCOTT, C. J. :—The material facts of this case are as follows :—Gordhan Ambaidas died in June 1896 leaving him surviving his wife Fulkore, his daughter Rukhmini, her husband Chunilal and two grandsons, children of Chunilal.

By his will, dated the 27th of May 1896, he appointed Chunilal and Fulkore his executor and executrix and, after charging his estate with the maintenance of his widow, daughter and grandsons and providing for the performance of certain funeral ceremonies, directed that his business in cotton, cotton-seed and cotton-ginning should, in order to perpetuate his name, be carried on by Chunilal so long as it could be carried on at a good profit but should it appear that the trade would suffer so as to destroy his reputation Chunilal should stop it. The testator then gave his widow Fulkore a life-interest in all his property with a prohibition against alienation with remainder as to his property which might remain over after her death to his grandsons.

At the time of his death the testator possessed *inter alia* a cotton-ginning factory at Sabergaum in the Surat District which was used in his business.

After his death Chunilal and Fulkore carried on the business in the testator's name. In February 1899 having, as is found by the lower appellate Court, incurred large liabilities in the conduct of the business they mortgaged the ginning factory with possession to the defendant Jethabhai for Rs. 13,000 and interest thereon at 9 per cent. per annum. The mortgage, in consequence perhaps of a desire on the part of Chunilal to escape liability as a mortgagor, was executed by Fulkore described "as owner of the firm of Gordhandas Ambaidas dealing in cotton" and Rukhmini described as "daughter of Gordhandas Ambaidas of the same estate." The ladies executed the mortgage by affixing their marks, and their names were written by Chunilal. The mortgage was attested by four witnesses.

The mortgage stated that the deceased Gordhandas had not made any will of his property and consequently no one but the ostensible mortgagors had any right or claim to the same. The consideration was stated to be received as follows:—Rs. 6,909-3-3 claimable by the firm of Motibhai Ambaidas from the firm of Gordhandas Ambaidas paid off by the defendant; Rs. 2,709 claimable by Jagjivandas Bhagwandas from the aforesaid firm paid by the defendant; Rs. 764-8-0 claimable by Motibhai Lalbhai from the said firm paid by the defendant; and Rs. 2,616-4-9 received in cash in order to pay off other debts of the firm.

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The lower appellate Court has found that the consideration was paid substantially as stated in the mortgage-deed and that the defendant was deceived by the misrepresentations of Fulkore, Chunilal and Rukhmini into the belief that the will of the testator had been destroyed.

In the year 1900 the defendant brought a suit on the mortgage against Fulkore and Rukhmini, Chunilal being joined as a defendant as executor under the will. About the same time Rukhmini, without joining her sons as parties, sued the present defendant for a declaration that the mortgage did not affect her rights or those of her sons. Her suit was dismissed for want of parties, but in the mortgagee's suit a decree was in November 1902 passed in favour of the present defendant against Fulkore and Rukhmini, Chunilal having died *pendente lite*. The decree was for payment of Rs. 13,551 and interest at 9 per cent. per annum and costs, and in default of payment within six months, for sale of the mortgaged property. It was confirmed on appeal to this Court. The property was sold under the decree and was purchased by the mortgagee for Rs. 11,000, leaving a balance due to him of upwards of Rs. 8,000. The present suit was instituted by the sons of Chunilal before the sale took place praying for a declaration that the property was not liable to be sold under the mortgage decree and for an injunction restraining the defendant from selling the property or in the alternative, if the sale was allowed to take place, then for a declaration that the alienation was to hold good only for and during the life-time of Fulkore and even then was subject to the plaintiffs' right of maintenance and that after Fulkore's death the plaintiffs were the full owners of the property.

As the Court of first instance, the District Court and this Court successively declined to grant an interlocutory order staying the sale, the plaintiffs added a prayer for a further declaration that the defendant has obtained by his purchase no rights against the plaintiffs' rights in the property. In the first Court the Subordinate Judge dismissed the suit, but in the District Court the decree was reversed and a declaration was made that the alienation holds good only during the life-time of Fulkore and is subject to the plaintiffs' right of maintenance,

that the plaintiffs are the full owners of the property, and that the defendant has obtained by his purchase no rights against the plaintiffs' rights in the property.

From this decree the defendant has appealed.

Although both Fulkore and Chunilal were joined as party defendants to the mortgage suit, it has not been contended that the estate and the beneficiaries are bound by the mortgage decree.

For the respondent it has not been suggested that the continuance of the business was unauthorised in the events which had happened. Chunilal was indeed under the will the only person who could decide whether or not the business should be stopped.

It is well established that an executor carrying on the trade of his testator under a testamentary trust is liable personally to the trade creditors and is entitled to use as a trader the trade assets of the testator. He does not violate his trust by carrying on the trade in conjunction with his co-executor who is not named as a trade trustee.

In *Ex parte Gärland*<sup>(1)</sup> Lord Eldon, discussing the position of an executor carrying on his testator's trade under such a trust, said: "The case of the executor is very hard. He becomes liable, as personally responsible, to the extent of all his own property; also, in his person; and as he may be proceeded against, as a bankrupt; though he is but a trustee. But he places himself in that situation by his own choice; judging for himself, whether it is fit and safe to enter into that situation, and contract that sort of responsibility.....As to creditors, subsequent to the death of the testator.....it is admitted, they have the whole fund, that is embarked in the trade; and in addition they have the personal responsibility of the individual, with whom they deal; the only security in ordinary transactions of debtor and creditor. They have something very like a lien upon the estate, embarked in the trade. They have not a lien upon anything else; nor have creditors in other cases a lien upon the effects of the person, with

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(1) (1804) 10 Ves. Jun. 110 at pp. 119-120.

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whom they deal ; though, through the equity, as to the application of the joint and separate estates to the joint and separate debts respectively, they work out that lien.”

*Ex parte Butterfield* <sup>(1)</sup> shows that the introduction into the business by the trustee executor of a co-executor not authorised to carry on the trade does not affect the rights of the trade creditors. In that case a sole trader directed by his will that it should be lawful for his widow to employ £6,000 in continuing his business and he appointed her and his son executors. After the testator's death his widow and son continued his business and became bankrupt. A person beneficially interested in the assets which had been employed by the bankrupts sought to prove in respect thereof against their joint estate but it was held that to the extent of £6,000 no such proof could be allowed, for the employment of the £6,000 was authorised by the will.

The nature of the trade creditor's right against the assets properly employed by a trust trader is thus stated by Sir George Jessel in *In re Johnson* <sup>(2)</sup>: “The creditor who trusts the executor has a right to say ‘I had the personal liability of the man I trusted, and I have also a right to be put in his place against the assets; that is, I have a right to the benefit of indemnity or lien which he has against the assets devoted to the purposes of the trade.’ The first right is his general right by contract, because he trusted the trustee or executor: he has a personal right to sue him and to get judgment and make him a bankrupt. The second right is a mere corollary to those numerous cases in Equity in which persons are allowed to follow trust assets. The trust assets having been devoted to carrying on the trade, it would not be right that the *cestui que trust* should get the benefit of the trade without paying the liabilities; . . . the Court puts the creditor, so to speak, as I understand it, in the place of the trustee.”

In *Strickland v. Symons* <sup>(3)</sup> Lord Selborne, referring to *Ex parte Garland* and *Ex parte Johnson*, states the principle to be that the trustee though personally liable for the debts which he

(1) (1847) De Gex. 570.

(2) (1880) 15 Ch. D. 548 at p. 552.

(3) (1884) 26 Ch. D. 245 at p. 248.

contracts in the course of the business, has a right to be paid out of the specific assets appropriated for that purpose and the trade creditors are not to be disappointed of payment so far as the assets so appropriated are concerned.

If this principle is borne in mind, a brief re-statement of the main facts of this case will show that the plaintiffs' suit must fail.

Chunilal, the trust trader, in conjunction with his co-executrix Fulkore, lawfully carries on the testator's business and employs therein the trade assets. In order to pay off trade debts he obtains money from the defendant on the security of the ginning factory used in the business. The ginning factory is worth less than the sum advanced by the defendant. The plaintiffs, as beneficiaries of the testator, seek to deprive the defendant of the benefit of the assets so come into his possession.

The argument advanced on behalf of the plaintiffs was really an attempt to take advantage of the fraud perpetrated on the defendant by the plaintiffs' father who was personally liable for the debts which the defendant was induced to pay off. It was argued that the defendant took nothing by the mortgage since the ostensible mortgagors as widow and daughter took no interest in the property, Gordhandas having died testate: that Fulkore's interest as beneficiary under the will was subject to a restraint upon alienation: and that as executrix she could only mortgage the testator's property in conjunction with her co-executor Chunilal because she had not taken out probate and so could not act alone under section 92 of Act V of 1881. In our opinion the existence of the mortgage-deed strengthens rather than weakens the defendant's case.

The mortgage was by one member of the firm with the consent and informal co-operation of the undisclosed partner Chunilal who had the implied authority of the testator to deal with the ginning factory in the ordinary course of business. The mortgage was therefore valid and binding on Chunilal as principal: see *Juggeewundas Keeka Shah v. Ramdas Brijbookun-Das*<sup>(1)</sup>. A mortgage by a trader under a testamentary trust of

(1) (1841) 2 Moo. I. A. 437.

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the testator's factory is referable to his implied authority as a trustee and not to his position as executor. See the judgment of May, C. J., in *Devitt v. Kearney*<sup>(1)</sup>.

We set aside the decree of the District Court and dismiss the suit with costs throughout on the plaintiffs.

*Decree set aside.*

G. B. R.

(1) (1883) 13 L. R. Ir. 45 at p. 52.

## APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

1909.

October 15.

SIVLAL JETHABHAI, PLAINTIFF, v. BHIKHA RAMJAN, DEFENDANT.\*

*Dekkhan Agriculturists' Relief Act (XVII of 1879), sections 12 and 13—  
Retrospective effect—Indebtedness existing at the date of the passing of  
the Act as well as future indebtedness.*

The plaintiff sued to recover from the defendant a certain sum due on a money bond, dated the 17th May 1904. The suit was cognizable by the Court in its Small Cause jurisdiction. The bond sued on was passed in adjustment of an existing debt which itself was the balance due on previous advances. Some of the provisions including sections 12 and 13 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) were made applicable to the district on the 15th August 1905 and the present suit was filed on the 26th March 1909. As the several advances which led to the bond were prior in date to the application of the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) to the district, the following question arose:—

“Whether section 13 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is retrospective so as to apply to the case of transactions entered into before the date of its extension to the district but the suit in respect of which is instituted after that date?”

*Held* in the affirmative that section 13 of the Act is retrospective.

Sections 12 and 13 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) show that it was the intention of the legislature to open up all transactions between the parties having a bearing upon the claim out of which the suit arises from the very commencement. This is one of the means adopted by the legislature to carry out the intention expressed in the preamble of relieving the agricultural classes from indebtedness existing at the date of the passing of the Act as well as future indebtedness.

\* Civil Reference No. 5 of 1909.