

## APPELLATE CIVIL.

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

THE AHMEDABAD UNITED PRINTING AND GENERAL AGENCY COMPANY, LIMITED (ORIGINAL PLAINTIFF), APPELLANT, v. ARDESIR KAVASJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.\*

1912.

March 20.

*Family firm—Mortgage by manager—Suit upon the mortgage—Dismissal of the suit on the ground that the estate was not legally represented by the mortgagor on the date of mortgage—Reversal of the decree—Claim based upon a mortgage purporting to bind the partners in the firm and the mortgaged property.*

One Kavasji Mancherji had three sons, Ardeshir, Phirojsha and Eruchsha. They constituted a family firm known as Kavasji Mancherji and Sons. After the death of Kavasji, Ardeshir, in his capacity as the manager of the said firm, executed a *san* mortgage bond dated the 17th April 1899 to the plaintiff and it was attested by Eruchsha as one of the attesting witnesses. The mortgage debt was contracted for the purpose of paying off a judgment-creditor who had attached one of the family properties. The plaintiff having brought a suit for the recovery of the mortgage debt, the first Court dismissed the suit on the ground that the estate of Kavasji was not legally represented by Ardeshir at the time of the mortgage.

On appeal by the plaintiff,

*Held*, reversing the decree, that the mortgage debt could not be a debt of Kavasji because it was incurred after his death, therefore, it would not give rise to any claim against the estate of Kavasji. The claim was based upon a mortgage which purported to bind the partners in the firm of Kavasji Mancherji and Sons and a certain property which was specified in the mortgage. The interest which was intended to be conveyed in the mortgaged property was the interest of Ardeshir, Phirojsha and Eruchsha.

FIRST appeal against the decision of G. V. Saraiya, First Class Subordinate Judge of Ahmedabad, in suit No. 304 of 1909.

The facts were as follows:—

One Kavasji Mancherji and his three sons, Ardeshir, Phirojsha and Eruchsha, were the owners of a family firm styled Kavasji Mancherji and Sons. Kavasji Mancherji died on the 9th August 1890 and after his death his said three sons carried on business in the name of the firm. On the 17th April 1899 Ardeshir, in his capacity as the manager of the firm of Kavasji Mancherji and Sons, borrowed from the plaintiff

\* First Appeal No. 3 of 1911.

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Rs. 4,150 on a *san* mortgage bond which was attested by Eruchsha as one of the attesting witnesses. On the 5th May 1909 the plaintiff brought the present suit for the recovery of Rs. 6,787 due on the mortgage. The suit was brought against Ardeshir and Phirojsha as defendants 1 and 2, Bai Avabai, widow of Eruchsha, as defendant 3, and Framroj, son of Eruchsha, as defendant 4. Defendants 3 and 4 were joined as parties because they had obtained letters of administration to the estate of Eruchsha and also to the estate of Kavasji Mancherji.

The plaintiff prayed for the recovery of the said amount of Rs. 6,787 with costs and interest by sale of the mortgaged property and asked that liberty should be given to him to apply for proceeding against the defendants personally in the event of the sale proceeds of the property being found to be insufficient.

Defendants 1 and 2 were absent though duly served.

Defendants 3 and 4 answered that they did not know if there was a firm doing business in the name of Kavasji Mancherji and Sons; that they did not know that defendant 1 was the *vahivatdar* (manager) of any such firm; that the estate of Kavasji Mancherji was not liable to the trade debts of defendant 1; that the estate of Kavasji was not liable in respect of transactions entered into by a person without obtaining letters of administration; that they had obtained letters of administration to the estate of Kavasji Mancherji; that the estate of Kavasji Mancherji was not liable for the debts of the firm, if any, in the name of Kavasji Mancherji and Sons; that the *san* mortgage bond in suit was not executed by deceased Eruchsha; that the estate of Kavasji had derived no benefit from the debt sued upon; that defendants 1 and 2 were not necessary parties, as the plaintiff sought to make the estate of Kavasji liable; that all the heirs of Kavasji were not on the record, and that the manager of the plaintiff Company and defendant 1 were acting in collusion.

The Subordinate Judge found that the *san* mortgage bond in suit was passed by defendant 1 not as *vahivatdar* (manager)

of Kavasji Mancherji and Sons but as *vahivatdar* of the ancestral estate of all the defendants; that on the date of the bond, the business was not done in the name of Kavasji Mancherji and Sons by defendant 1 as *vahivatdar*; that no such bond affecting the said property could be passed or any other act done respecting the same without obtaining letters of administration to the said property and the bond could not be given effect to, and that the plaintiff was not entitled to any relief. The Subordinate Judge, therefore, dismissed the suit.

The plaintiff appealed.

*Setalvad* with *G. N. Thakore* for the appellant (plaintiff).

*L. A. Shah* for respondents 3 and 4 (defendants 3 and 4).

SCOTT, C. J. :—This is a suit upon a mortgage executed on the 17th of April 1899 purporting to be between Ardeshir Kavasji, Manager of the firm Kavasji Mancherji and Sons, at Ahmedabad, and Ranchodlal Gangaram, Manager of the United Printing and General Agency Company, Limited, who are the plaintiffs in this case.

The document is attested amongst other attesting witnesses by Eruchsha Kavasji, brother of Ardeshir, the executing party. Kavasji Mancherji, whose name is mentioned as that of the family firm, had three sons, Ardeshir, Phirojsha and Eruchsha; and it is not disputed that the money was raised from the mortgagee for the purpose of paying off a judgment-creditor who had attached one of the family properties.

The learned Subordinate Judge holds that at the time of the mortgage it is satisfactorily proved, upon the admissions of Eruchsha, that Ardeshir was in the *vahivat* of the estate of Kavasji Mancherji on behalf of Eruchsha and Phirojsha and with their consent, and that the deed is of such a character as to bind part if not the whole of the estate of Kavasji, but he thinks that the plaintiff's suit must fail because the estate of Kavasji was not legally represented by Ardeshir at the time when he passed the *san* bond in 1899.

Now the mortgage debt could not be a debt of Kavasji because it was incurred after Kavasji's death. And, according

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to the rule enunciated in *Farhall v. Farhall*<sup>(1)</sup>, it would not give rise to any claim against the estate of Kavasji. Therefore section 190 of the Indian Succession Act to which reference is made by the Subordinate Judge has no application.

We are not concerned with a claim enforceable against the estate of Kavasji whether it be represented or unrepresented. We are concerned with the claim which is made upon a mortgage which purports to bind the partners in the firm of Kavasji Mancherji and Sons, and a certain property which is specified in the mortgage. The partners in Kavasji Mancherji and Sons so long as that firm continued were Ardeshir, Phirojsha and Eruchsha, and from the point of view of the mortgagees it is absolutely immaterial whether the firm was a going concern or whether it was not, because, it is quite clear that the interest which was intended to be conveyed in the mortgaged property was the interest of Ardeshir, Phirojsha and Eruchsha.

It is not disputed that the beneficial interest in the property which is the subject of the mortgage and the beneficial interest in the other immoveable property of Kavasji is in the mortgagors subject to the satisfaction of the claims of their sister under a consent-decree which has recently been passed in this Court, and it is clear that under the provisions of section 43 of the Transfer of Property Act the mortgagors upon getting the beneficial interest in this property are bound to satisfy the mortgagee's claim out of that interest. Even if the administration suit had proceeded and had not been closed by the final consent-decree, we think that the mortgagee would have been entitled to come in in the suit and ask that the properties should be marshalled in order that his mortgage should be given effect to and that the other properties should be applied to satisfy the claims on Kavasji's estate. But under the present circumstances there is no difficulty in satisfying the claim of the mortgagee out of the property mortgaged.

The only other objection which was raised was that it was not satisfactorily proved that Eruchsha was bound by the mortgage.

(1) (1871) L. R. 7 Ch. 123.

We have, however, the fact that he was an attesting witness. He was a Government servant who must have understood the effect of the deed which he was attesting and which was executed by his brother who was in *vahivat* of all the family properties. The occasion of the mortgage was the necessity of raising the attachment on the family property before the marriage ceremony of one of Eruchsha's own daughters took place, and we have the uncontradicted statement of Ardeshir upon oath that Eruchsha consented to this mortgage.

For these reasons we reverse the decree of the Subordinate Judge and decree that the plaintiff will be entitled to an order that if the money due under the mortgage is not paid within six months from this date with costs and interest at the mortgage rate, the interests of Ardeshir, Phirojsha and Eruchsha's heirs in the mortgaged property be sold and that the proceeds be applied in satisfaction of the decretal debt.

Costs of this suit and appeal must be added to the mortgage debt.

Interest will run at mortgage rate up to the date of payment.

The pleaders to settle the amount of the mortgage claim.]

*Decree reversed.*

G. B. R.

## APPELLATE CIVIL.

*Before Mr. Justice Russell and Mr. Justice Chandavarkar.*

GOVINDJI VIRAMJI (ORIGINAL DEFENDANT No. 3), APPELLANT, *v.* SAKHARAM GOVINDA (ORIGINAL PLAINTIFF), RESPONDENT.\*

1911.

November 9.

*Civil Procedure Code (Act XIV of 1882), sections 324A, 272, 285—Execution of decree—Money lying with Collector—Prohibitory order upon Collector by another Court—The executing Court attaching the money in execution of another decree—Payment to the decree-holder—Remedy of the first decree-holder at whose instance prohibitory order was issued—Practice and procedure.*

Ramchandra and others obtained a decree against Shambu and another in the Court of the Subordinate Judge, Second Class, at Chalisgaon. Those decree-

\* Second Appeal No. 441 of 1910.