ORIGINAL CIVIL.

Before Ameer Ali J.

1932

July 26, 29.

GEETARANEE DE

v.

NARENDRAKRISHNA DE.*

Executor—Transfer by executor—Constructive notice—Failure to scrutinize will, if amounts to constructive notice.

A transfer by an executor, as such, is valid unless it is established that the transferee had notice that the executor was acting in breach of trust.

Shishirkumar Kar v. *Dhirendrachandra Kar* (1) followed.

Srishchandra Nandi v. *Sudhirkrishna Banerji* (2) distinguished.

Mere failure to scrutinize the will does not amount to constructive notice that the money was not required for purposes of administration.

Goolam Hoosein Somji v. *The Bank of Bombay* (3) and *Bank of Bombay* v. *Suleman Somji* (4) discussed and distinguished.

APPLICATION by the plaintiff.

All necessary facts appear from the judgment.

P. N. Chatterji for the applicant. It was the duty of the bank to scrutinize the will, for then they would have found out that the money borrowed was not for purposes of administration. Therefore, the mortgagees must be taken to have had notice. I would suggest that the bank have committed fraud in accepting the mortgage so negligently and in bringing their suit. The bank ought to have seen to the application of the money and made enquiries as to the necessity of the loan. *Srishchandra Nandi* v. *Sudhirkrishna Banerji* (2).

J. C. Hazra for the respondent bank. This suit is misconceived and the application must fail. The

* Application in original suit No. 1567A of 1932.

(1) (1932) O. C. 1838 of 1929, decided by Ameer Ali J. on 15th Feb.
(2) (1931) I. L. R. 59 Calc. 216.
(3) (1905) 7 Bom. L. R. 407.
(4) (1908) I. L. R. 33 Bom. 1.

mortgage bond recites that the executor was borrowing money for paying off the debts of the testator. A mortgagee who *bona fide* believes that the executor was borrowing for such purposes need not see to the application of the money. Even if the executor misappropriates, the estate is liable, unless the mortgagee was a party to the fraud. *Shri Beharilalji* v. *Bai Rajbai* (1), *Ganapati Aiyar* v. *Sivamalai Goundan* (2), *Greender Chunder Ghose* v. *Mackintosh* (3), *M'Leod* v. *Drummond* (4), *Rooploll Khettry* v. *Mohima Churn Roy* (5) and *Sooleman Somjee* v. *Rahimtula Somjee* (6).

Chatterji, in further argument. *Somjee's* (6) case was overruled by the court on appeal in Bombay and the appeal court's decision was upheld by the Privy Council in *Bank of Bombay* v. *Suleman Somji* (7) where the executor is also the residuary legatee, the transferee must enquire into the purpose for which the transfer is made.

Cur. adv. vult.

AMEER ALI J. I dismiss the application. The first defendant is the executor of the estate of his father, Ambikacharan De, who died on the 2nd July, 1925, leaving considerable property. He left him surviving the first defendant, Narendrakrishna De, a grandson and a granddaughter, who by her next friend, her mother, the wife of the first defendant, is the applicant. In his will, the testator mentioned his debts. He also gave the present applicant a legacy of Rs. 8,000 to be spent for her marriage. The first defendant was residuary legatee, and also named as executor, in the alternative. He obtained probate in 1926, and, according to the allegations in the petition, he has dissipated the property, with the result that even this sum of Rs. 8,000 cannot be found to satisfy the legacy of the applicant.

(1) (1898) I. L. R. 23 Bom. 342.
(2) (1912) I. L. R. 36 Mad. 575.
(3) (1879) I. L. R. 4 Calc. 897.
(4) (1810) 17 Ves. Jun. 153; 34 E. R. 59.
(5) (1870) 10 B. L. R. 271 (n).
(6) (1904) 6 Bom. L. R. 800.
(7) (1908) I. L. R. 33 Bom. 1.

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Among other alienations made by the executor, which are set out in paragraph 8 of the petition, is the transaction, now challenged, *viz.*, a mortgage, made in January, 1927, of No. 11/1, Goâbâgân Street, Calcutta, for Rs. 30,000 in favour of the Co-operative Insurance Society, Ld., the defendant No. 2 and the sole respondent to this application. The mortgagee obtained preliminary and final decree, and the property was about to be sold when this application to stay the sale was made. I granted *ad interim* stay on terms.

I do not propose to go further into the facts or to deal with the merits of the application, because, in my view, it is based upon a misconception of the law.

The mortgage in question (Ex. "B" to petition) was clearly by Narendrakrishna De, as executor. It is sought to affect the transferee on grounds set out in paragraph 10 of the petition, the material allegations being that the second defendant had or ought to have had full knowledge that the said loan was required by Narendrakrishna De for his own personal and private purposes. That is an allegation of actual notice or constructive notice.

Counsel for the applicant put his case of notice in the following way:—that it was the duty of the mortgagee to scrutinise the will. Had the mortgagee so scrutinised the will he would have noticed that the amount of debts left by the testator, according to his own statement, was small though the estate was large; and, secondly, that there was a legacy or a bequest to the present applicant. It was argued from this that not only must notice be inferred, but also fraud of the mortgagee in accepting the mortgage and in bringing the suit.

It was not suggested that the mortgagee had any actual notice. It was argued that, according to law, an executor cannot create a mortgage which is valid so far as outsiders are concerned, unless the amount raised was actually necessary and utilised for the purpose of the estate, and, in support of such

argument, counsel relied upon the case of *Srishchandra Nandi* v. *Sudhirkrishna Banerji* (1).

Now, I think it necessary to point out that this decision establishes nothing of the kind. The question before the learned Judges was entirely one of unsecured loans to an executor continuing the business of the testator. On this question the judgment contains a most careful and complete summary of the law. The question of transfers by way of mortgage or sale by executors was in no way before them. In two places the learned Judges point that out. At page 228 they say:—"We are "speaking here of simple cases of loans on "promissory notes or *hâtchitâs* or other contracts, "that is to say, cases where no charge has validly "been created on the estate," and, again, at page 230, they refer to this aspect of an executor's activity, possibly, in language too restricted. That, however, was a matter with which they were not dealing.

In the case of *Shishirkumar Kar* v. *Dhirendrachandra Kar* (2) the two aspects of the matter fell to be dealt with,—

(*a*) unsecured loans and (*b*) transfers by executors.

In giving judgment in that case I pointed out that in these two matters the law starts with entirely different considerations.

(*a*) In the case of unsecured loans to an executor, the executor is personally liable, and the creditor only obtains a right to proceed against the estate by a circuitous and artificial route, *viz.*, subrogation, for which purpose he has to prove that the loan was necessary, that it was properly applied, and so forth. The mortgagee or transferee has to prove nothing of the sort.

(*b*) In the case of a transfer by an executor one starts with the assumption that the transfer is valid,

(1) (1931) I. L. R. 59 Calc. 216. (2) (1932) O. C. 1838 of 1929, decided by Ameer Ali J. on 15th Feb.

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qua the transferee, until and unless it is established that the transferee had notice that the executor was acting in breach of trust.

The portion of the judgment in *Shishirkumar Kar* v. *Dhirendrachandra Kar* (1), dealing with transfers by executors reads as follows:—

> With regard to mortgages by executors, disclosed as executors, the principles appear to me to be as follows:—
>
> (i) An executor *qua* executor may make a mortgage for purposes of administration. He may not do so for any other purpose, *i. e.*, for his private purposes (or for carrying on a business left by the testator).
>
> (ii) He is, however, when mortgaging, presumed by law to be mortgaging for purposes of administration, and a mortgagee is not bound to see to the application of the money.
>
> (iii) If the mortgagee has notice that the executor is not mortgaging for purposes of administration, *i.e.*, if he has notice that the executor is borrowing for his own private purposes, he becomes a transferee with notice of breach of trust, and he gets no better title.

Thereafter the cases in support of those propositions are set out.

In this case, no ground for notice is suggested except that the lender should have scrutinised the will, and from that gathered that there was no necessity for this loan. In my view, there is no authority for such a proposition, and, that being the state of the law, I must refuse the application. The application must be dismissed with costs.

July 29.

The following will supplement my judgment in this matter delivered on Tuesday last, the 26th July, 1932.

I then dismissed the application of the plaintiff, a legatee under the will of Ambikacharan De for stay of sale of certain property belonging to the estate mortgaged by the executor, her father. I dismissed the application without going into the merits because, in my opinion, the proposition of law upon which it was based was misconceived.

Shortly put, the only ground upon which the transaction *vis a vis* the transferee was assailed was that the transferee should have considered the will and gathered from it that there were no debts to be

(1) (1932) O. C. 1838 of 1929, decided by Ameer Ali J. on 15th Feb.

discharged, and that, therefore, the executor was mortgaging for his own private purposes. I was unable to accept this proposition. At the time, counsel for the applicant relied upon the case of *Srishchandra Nandi* v. *Sudhirkrishna Banerji* (1). Subsequently, counsel for the applicant asked for an opportunity to place before me a ruling which in his view was directly in point, *viz.*, *Goolam Hoosein Somji* v. *The Bank of Bombay* (2), affirmed on appeal to the Privy Council under the name of *Bank of Bombay* v. *Suleman Somji* (3). I will call it Somji's case.

I had not overlooked this case. In the judgment in *Shishirkumar Kar* v. *Dhirendrachandra Kar* (4). I treated *Somji's* case (5) as typical of that class of case where an executor transfers, but is not known to the transferee in the transaction as an executor. The significance of this will, I hope, become apparent from what follows.

In the report of the case, before Sir Lawrence Jenkins, there are many passages which, taken by themselves, are undoubtedly encouraging to counsel for the applicant, but I regret that again I must disappoint him in my view of the law. It is only fair, however, that I should state my reasons in detail.

The essential facts of *Somji's* case (3) were as follows :—

In 1885, Somji Parpia died leaving a will. To his four sons by his first wife, whom he made executors, he left the whole of his estate subject to a legacy of Rs. 35,000 in favour of his four sons by his second wife. The four executors and residuary legatee continued to carry on the family businesss under the name of Somji Parpia & Co. Many years later in 1899, they were indebted to the Bank of Bombay in respect of this business on *hundis* or bills of

(1) (1931) I. L. R. 59 Calc. 216.
(2) (1905) 7 Bom. L. R. 407.
(3) (1908) I. L. R. 33 Bom. 1.
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exchange, in the name of the firm. As security for this indebtedness they deposited with the bank by way of mortgage the title deeds of certain property which had formed part of the estate of the testator. When taking this deposit, the bank were unaware that these four sons, the mortgagors, were executors, and were unaware of the provision of the will. The bank dealt with the mortgagors as being entitled in their own right to the property mortgaged.

There were three points in *Somji's* case (1), *viz.*,—

First. That the mortgage was not made by the mortgagors as executors. "We start with the fact "that the bank admittedly did not deal with the first "four defendants as executors, but as owners of the "property mortgaged". This passage occurs in that portion of the judgment which deals with the question whether the mortgagee took with notice that the executors were acting improperly (see below). It would, in my opinion, have been more logical to treat this fact as a matter *dehors* the question of notice, by itself constituting a fundamental distinction between such a case and a case when the mortgagee deals with the mortgagor as executor.

Second. That, even regarded as a mortgage by an executor, the mortgagee was affected by notice. Sir Lawrence Jenkins held that notice was established on two grounds—

(*i*) the ground already mentioned, *viz.*, that the bank was in point of fact not dealing with the mortgagor as executor.

(*ii*) That the mortgage being clearly to secure advances to the mortgagors, the bank had notice that the executors were not acting for purposes of administration, bringing the case directly within the decision of *Hill* v. *Simpson* (2).

Third. The third point was the contention (raised by the bank) that, notwithstanding the above

(1) (1905) 7 Bom. L. R. 407, 411-3. (2) (1802) 7 Ves. Jun. 152 (168-9); 32 E. R. 63 (68-9).

considerations, by reasons of the fact that the mortgagors were not only executors, but also residuary legatees, therefore, on the principle of *Graham* v. *Drummond* (1), the transaction could not be impeached. The principle of *Graham* v. *Drummond* (1) is shortly stated as rule No. 6 in Williams on Executors, 12th edition, 572. As regards this aspect of the case, Sir Lawrence Jenkins, while accepting *Graham* v. *Drummond* (1) as good law, distinguished the case before him on the ground that the claimants were not merely creditors but legatees. In the case before me the claimant is also a legatee, and the executor is also a residuary legatee, but it is not necessary for the transferee to resort to this last line of defence, and I, therefore, have not to consider the effect or applicability of *Graham* v. *Drummond* (1).

The Judicial Committee took the same view of the applicability of *Graham* v. *Drummond* (1). Their lordships agreed that the bank had constructive notice of the will and of its provisions (*vide* 33 Bom. 11); but the importance of the ruling is that it is based substantially on the Irish case *Queale's Estate* (2), the facts of which they considered to be similar.

As the report of this case may not be generally available, I quote the material passage in full:

> I will consider, in the first instance, how the position of John William Queale, as executor, independent of his position as residuary legatee, affects the case. The power of an executor to deal with personal estate is, I need hardly say, well known. He has full power to sell and mortgage it, not only as against pecuniary legatees, but also as against specific and residuary legatees; and dealing with the property *qua* executor, a *bona fide* purchaser and mortgagee is not under any obligation, and has no right, to require the executor to show that what he is doing is required for the purposes of administration. But the case is different where the purchaser knows that the executor is abusing his position; and if an executor, being merely executor, mortgages for his own private debt, such a transaction, being *mala fide*, cannot stand. In the present case, I do not see how the bank can be considered as having dealt with John William Queale as executor. If they did, the fact of the debt secured, being the private debt of Queale to the bank, would destroy their title.

(1) [1896] 1 Ch. 968.

(2) (1886) Ir. L. R. 17 Ch. D. 361, 366.

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Then the Judge goes on to say:—

> But the strength of the argument for the bank was that Queale dealt with them as absolute owner, that as residuary legatee he was such absolute owner

and so forth.

In my opinion, the real decision in *Somji's* (1) case was that a transferee who deals with a transferor (who happens to be an executor) not as executor but as owner, is not entitled to the protection which the law affords to transferees from executors acting *qua* executors.

It is not contended that there is any difference, which would operate in the applicant's favour, between English and Indian law. In my view, section 307 of the Succession Act gives the executor powers at least as extensive as those of an executor in England before 1926. I should have mentioned that the will contains no restriction on the ordinary powers of an executor.

Mr. Chatterji, for the applicant, as a last resort, has argued that in the present case the mortgage was not by the executor *qua* executor. I do not agree. Although the mortgagor is described as "Narendra-"krishna De in his personal capacity and in his "capacity as executor", the rest of the document makes it perfectly clear that he was mortgaging *qua* executor.

I do not again propose to deal with the merits of the application. In too many cases there is *devastavit* by the executor. This may be one of those cases. In some cases there is collusion between the executor and the applicant. In still a greater number of cases there is a mixture of *devastavit* and collusion, a common proportion, I should say, being two of *devastavit* to one of collusion.

But assuming that this is a case solely of *devastavit*, in my view of the law I must refuse interlocutory relief.

This being the case, it is not necessary for me to consider an aspect of the matter which appears to

(1) (1905) 7 Bom. L. R. 407.

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have been overlooked by counsel for the applicant. Even if the plaintiff be right in law, it does not necessarily follow that this mortgage will be set aside. She may have a charge on the property for her legacy of Rs. 8,000. This charge may take precedence on the security of the mortgagee, the latter may be perfectly valid subject to such prior charge.

My previous order dismissing the application for stay of sale will, therefore, stand. In further protection of any possible rights of the plaintiff I direct that the application for payment out by the purchasers will be made on notice to the plaintiff.

Application dismissed.

Attorney for plaintiff applicant: *M. N. Mitter.*

Attorneys for defendant respondent: *H. N. Datta & Co.*

S. M.