

APPELLATE—CIVIL.

*Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice,
and Mr. Justice Wallace.*

K. M. PARTHASARATHY NAIDU AND OTHERS (PLAINTIFFS),
APPELLANTS,

1922,
July 26.

v.

P. MUKUNDAMMAL (DEFENDANT), RESPONDENT.*

Will—Executor—Power of sale expressly given under will for discharging debts—Power of sale, whether includes power to mortgage—Mortgage executed by executor—Onus of proof as to reality of testatrix's debts.

Where by a will express power is given to the executor to sell the property to pay off debts, that power includes the power to mortgage, unless there be some reason to be gathered from the terms of the will itself why it should be excluded.

Haldenby v. Spofforth (1829) 1 Beavan, 39., applied; *Purna Chandra Bakshi v. Nobin Chandra Gangopadhya* (1903) 8 C.W.N., 362, followed.

Where an executor has the power to mortgage for payment of debts, the mortgagee cannot be called upon to show the reality of the testator's debts for payment of which the mortgage was executed.

APPEAL against the judgment and decree of COURTS TROTTER, J., passed in the exercise of the ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 273 of 1920.

The plaintiffs brought a suit to enforce two mortgages, one executed by one Kuppammal and the other by her son Ramanjulu as executor of her will for the purpose of discharging the debts incurred by the testatrix. The will gave an express power of sale to the

* Original Side Appeal No. 90 of 1921.

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executor for discharging the debts of the testatrix. The material terms of the will were as follows :

“ . . . I appoint my son Poodi Ramanjulu Naidu as executor to manage after my lifetime all my immoveable and moveable properties which I got by stridhanam and have been enjoying. The abovesaid executor shall take possession of my immoveable and moveable properties, *sell* such of my immoveable and moveable properties as the executor wishes for the debts due by me to people, pay off the debts, properly manage the remaining immoveable and moveable properties, be paying to my daughter-in-law Mukundammal the remaining income after deducting the necessary taxes, etc., from the income received and if they get issue, give all these properties to them equally without difference between the male and female issue. In case there be no such issue they should make an adoption. The whole of my property should go to the adopted son. If not, any advisable charity shall after the death of these two persons be performed with these properties in Sri Parthasarathi Temple, Triplicane.”

The learned Trial Judge (COUTTS TROTTER, J.) gave a decree in respect of the mortgage executed by the testatrix but in respect of the other mortgage held that the executor had no power *under the will* to execute a mortgage to raise funds for the discharge of the testatrix's debts, that express power for sale being given under the will, the power to mortgage for such purpose was excluded and that therefore the mortgage was invalid. Against the decree in respect of the latter mortgage, the plaintiffs preferred this appeal.

T. L. Venkatarama Ayyar for the appellant.—Under section 90 of the Probate and Administration Act, an executor has absolute powers to sell or mortgage subject only to any restriction in the will. Express mention of the power to sell does not, by implication, prohibit the power to mortgage. The power to mortgage is not inconsistent with the power to sell, and is indeed necessarily implied in the latter, because mortgage is only a conditional

sale. See *Mills v. Banks*(1). *Haldenby v. Spofforth*(2) was a case of a direction for *conversion* of the estate, and a mortgage could not answer that purpose. But where, as here, the object of the testator is the *preservation* of the estate after payment of the debts, a power to sell is only one mode, and it is not a restriction on other modes. See *Ball v. Harris*(3), *Purna Chandra Bakshi v. Nobin Chandra Gangopadhya*(4).

T. Ethiraja Mudaliyar for respondent.—A prohibition under section 90 of the Probate and Administration Act need not be express. It can be implied and the express mention of the power of sale excludes the power to mortgage. See *Kanti Chandra Chattopadhya v. Kristo Churn Acharjee*(5), *Satis Chandra Chaturdhurin v. Jnanada Sundari Chawdhurani*(6), *Jugmohandas v. Pallonjee*(7).

JUDGMENT

SCHWABE, C.J.—In this case the mortgagees brought a suit to enforce the mortgage. The mortgage was executed by an executor under a will. That will gave the executor express power to sell any part of the estate, moveable or immovable as the executor might wish, for purposes of paying off debts. It was contended before the learned Judge that, this power being an express power of sale, he had no power to mortgage. The learned Judge with regret came to the conclusion that that was the proper construction of the will and that he was bound by *Haldenby v. Spofforth*(2) and Indian cases following that case so to hold. On a careful examination of that case, so far from being authority in favour of the proposition that the executor with power of sale cannot mortgage, it is in my judgment direct authority for the

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(1) (1724) 3 P. Wms., 1.

(3) (1839) 4 My. and Cr., 264.

(5) (1899) 3 C.W.N., 515.

(2) (1839) 1 Beav., 390.

(4) (1903) 8 C.W.N., 362.

(8) (1909) 1 I.C., 364.

(7) (1898) I.L.R., 22 Bom., 1.

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proposition that he can, except in cases, such as the case there, where a prohibition against mortgage can be inferred. The Master of the Rolls, Lord Langdale referring to the case of *Mills v. Banks*(1), said this:—

“ Lord Macclesfield also observed that the Court had decreed that the trusts declared concerning the term empowered the trustees to sell the premises and a power to sell implied a power to mortgage which was a conditional sale. This I conceive to mean, that where it is intended to preserve the estate, there, under a direction for sale, a mortgage will sufficiently answer the purpose.”

The facts of *Haldenby v. Spofforth*(2) were that the direction there was not to preserve the estate but to convert the whole estate into money. Turning to the authorities in this country it is sufficient to quote *Purna Chandra Bakshi v. Nobin Chandra Gangopadhya*(3), which is a direct authority for the proposition that, where by a will power is given to sell the property to pay off debts, that power includes the power to mortgage. By section 90 of the Probate and Administration Act, 1881, the power of an executor to dispose of immoveable property is subject to any restrictions which may be imposed by the will. But in my judgment the power of sale is not a restriction imposed by the will, and the power of mortgage, so far from being inconsistent with it, is, as pointed out in the English case, included in it unless there be some reason to be gathered from the terms of the will itself why it should be excluded.

We are then asked to remand the case so that further evidence may be given. The learned Judge held, as I understand his judgment, that the onus was on the defendant to show, if it was open to him to show, that there were no debts and that the executor was not

(1) (1724) 3 P. Wms. 1.

(2) (1839) 1 Bear., 390.

(3) (1903) 8 C.W.N., 362.

mortgaging for the purpose of paying off debts. No evidence of that kind was tendered and it is therefore unnecessary to consider whether, if it had been tendered, it would have been admissible. In my judgment it was a perfectly proper ruling that it was not upon the mortgagee to prove as part of his case that the executor with power of sale was acting properly in effecting the mortgage. On those grounds, I think, the judgment must be reversed and judgment must be entered for the plaintiffs as prayed for with costs here and below.

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WALLACE, J.—I agree. I just wish to say a few words on the second point. I agree with the Trial Judge that, where an executor has the power to mortgage, the mortgagees cannot be called upon to show the reality of the testator's debts for which their money was borrowed and, as the defendant here merely does not admit that there were debts other than the mortgage debt of 24th February 1918 and does not assert that there were no other debts, there seems to be no sound ground for remand for proof of the reality of the debts for which the mortgage was taken. I agree that the second mortgage is binding on the defendant.

K.R.
