

1877.

SUBHA'BHAT
BIN
BABANBHAT
"
VA'HUDEV-
BHAT BIN
SUBHA'BHAT
AND OTHERS,

grantee could have maintained any suit against him either for principal or interest—(vide *Goodman v. Grierson*⁽¹⁾ and *per Cottenham L. C. in Williams v. Owen*⁽²⁾). In *Howard v. Harris*⁽³⁾ there was a covenant by the mortgagor to pay, upon which he might be sued by the mortgagee—a circumstance which distinguishes that from the present case. Here, in fact, there would not have been any debt whatever due from the grantor until he adopted a son, and the grantee, except in that event, would not have the usual remedies of a mortgagee. This, therefore, seems to us to be a case of a sale liable to be converted into a mortgage, and not like *Rámji v. Chinto*,⁽⁴⁾ *Shankarblúti v. Kassibhái*,⁽⁵⁾ and the cases there mentioned, which are instances of mortgages liable to be converted into sales. There has not been any adoption by the grantor here, and he could not have redeemed unless he adopted a son. For these reasons we affirm the decree of the District Judge with costs.

Decree affirmed.

[ORIGINAL CIVIL.]

Before Sir M. R. Westropp, Knight, Chief Justice, and Mr. Justice Green.

July 27.

THE LONDON, BOMBAY, AND MEDITERRANEAN BANK, LIMITED,
(PLAINTIFFS, APPELLANTS) v. BHANJÍ ZUTANI AND ANOTHER
(DEFENDANTS, RESPONDENTS).*

*Company—Contributory—Description—Balance order—List of contributors—
Cause of action—Evidence—Amendment of plaint.*

Where the holder of shares in a company was described in the list of contributors, against whom a balance order by the Court of Chancery had been made, as "Devji Bhanji, cotton merchant," and as being sued "in his own right",

Held that the plaintiff company could not be allowed to give evidence that the shares were in fact held by a firm consisting of two individuals, named respectively Bhanji Zutani and Devji Hemráj; nor could the plaintiffs be allowed, at the hearing of the appeal, to amend their plaint, originally framed against both partners with a view to making the firm liable for the amount of the calls, so as to sue Bhanji Zutani only, who alone was alleged to have signed the articles and memorandum of association in the name of Devji Bhanji, and to make him personally liable as the holder of the shares.—*Weikersheim's Case* (L. R. 8 Ch. Ap. 331) distinguished.

(1) 2 B. and B. 274, 279.

(3) 1 Vern. 190.

(2) 5 My. and Cr. 303, 308.

(4) 1 Bom. H. C. Rep. 199.

(5) 9 Bom. H. C. Rep. 69.

* Suit No. 514 of 1875, Appeal No. 135.

THE plaintiffs sued the defendants, Bhánji Zutáni and Devji Hemráj, trading in co-partnership together under the style or firm of Devji Bhánji, to recover the amount of calls due on certain shares in the London, Bombay, and Mediterranean Bank, Limited, alleged by the plaintiffs to have been allotted to and held by the defendants. The suit was brought on a balance order of the Court of Chancery, dated 26th January 1871, made against the persons appearing in the list of contributories as holders of shares in the company. In the list of contributories the name of the holder of the shares in question was entered as "Devji Bhánji," who was also there described as "cotton merchant," and as being sued "in his own right." At the hearing before Sargent, J., several issues were framed, of which the fifth, the only one material for the purposes of this report, was as follows:—

"Whether the order of the 26th January 1871 constitutes a cause of action against the defendants or either of them."

Taylor, in opening the plaintiff's case, stated that, at the time the shares were applied for and allotted, the defendants Bhánji, Zutáni and Devji Hemráj were, as they still are, trading in partnership together, under the style of Devji Bhánji, as cotton merchants. The memorandum and articles of association were signed by Bhánji Zutáni in the name of his firm Devji Bhánji.

SARGENT, J., on the statement of the plaintiff's case, dismissed the suit without going into evidence, on the ground that neither of the persons sued was the person whose name appeared on the list of contributories, and against whom the balance order had been made. The plaintiffs appealed.

Starling (with whom was *Taylor*) for the appellants:—A firm may be put on the list of contributories, and a balance order made against it, and the order, when made, may be executed by suit against the members of the firm, or by arrest of the members, or against their goods: *Weikersheim's Case*.⁽¹⁾ It is a well-known custom in this country for a firm of two individuals to be called by the first names of its two members. The firm Devji Bhánji is composed of the two individuals, Devji and Bhánji; therefore both Devji and Bhánji are, in fact, on the list of contributories. The learned Judge should have allowed evidence to have been given

(1) L. R. 8 Ch., Ap. 831.

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to show that Devji was, in fact, Devji Hemráj, and Bhánji was Bhánji Zutani, and that one of them was authorized to sign the name of the firm, Devji Bhánji, for the shares.

[WESTROPP, C.J. :—Looking only at the balance order it would appear that Devji Bhánji was a single individual. What you are asking us to do, is substantially to amend the order of the Court of Chancery.]

The description only means that the trading party known as Devji Bhánji, whether individual or firm, carried on the business of a cotton merchant, and that is correct.

[GREEN, J. :—The description “cotton merchant sued in his own right” is not correct, if, as you say, what was meant was two cotton merchants sued as partners.]

The description was not invented by the plaintiffs or by the Court of Chancery. It was supplied by the defendants themselves when they signed the memorandum and articles of association.

[WESTROPP, C.J. :—We cannot assume that.*]

At all events, if either of the defendants signed the name Devji Bhánji, whether that were his own name or not, the plaintiffs would be entitled to go against him as Devji Bhánji. The learned Judge, therefore, should have heard the evidence and passed judgment against that one of the defendants who actually signed the name Devji Bhánji for the shares.

[WESTROPP, C.J. :—That would have been a variance from the case made by the plaint.]

But not from the issues. The issue on which the learned Judge decided the case was whether the balance order constituted a cause of action against the defendants or either of them. But to prove signature by one is, in fact, only part of the case made by the plaint, for as the plaint stands we should have had to prove signature, by one of the defendants, of the memorandum and articles of association, and that the other defendant was his

* On reference to the articles of association it was found that the signature “Devji Bhánji” was in Gujaráthi; and the description, also in Gujaráthi, might be translated either “cotton merchant,” in the singular, or “cotton merchants” in the plural.

partner, and had authorized him to sign for the shares. Suppose we had succeeded only in proving the first point, we should still have been entitled to a decree against the one who actually signed, and the suit would have been dismissed as against the other. If necessary, I ask to amend the plaint now.

Mayhew and *Lang*, for the defendants, were not called on.

WESTROPP, C.J.:—The balance order of 26th January 1871 is a part of the record in Chancery, and, as such, “imports incontrovertible verity.” In *Weikersheim’s Case*⁽¹⁾ the Master of the Rolls did nothing contrary to what he found on the record, for the words *Weikersheim & Co.*, in that case, implied the existence of more than one member of the firm; whereas the words here, “*Devji Bhánji, cotton merchant,*” placed on the list “in his own right,” imply the existence of only one individual trader.

What the plaintiffs ask us to do, is to allow them to give evidence for the purpose of showing that *Devji Bhánji*, of whom the balance order speaks as one man, in the singular, was, in fact, two men, in the plural, and thus virtually to amend the record of the Court of Chancery, which we cannot do.

Nor, having sued the two defendants as partners on a joint liability, can the plaintiffs now be permitted, in the same suit, to proceed against one whom they allege to have signed as *Devji Bhánji*. That is a wholly different case from the other, and if plaintiffs were to be allowed thus to have two strings to their bow, defendants would never know what case they had to meet. The plaintiffs commenced their suit against two individuals, and so stated their case to the learned Judge in the Court below. When they produced their balance order, they showed that the Court of Chancery had not made a firm, but a single individual, liable. They did not then ask to amend their plaint by making out a case against one only and striking out the other, but chose to retain both defendants on the record, and cannot be allowed to amend the plaint at this stage, and thus make quite a new case in the court of appeal. The decree must be affirmed with costs.

Decree affirmed.

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