

Final order of the Court.

The order of the Court is that the question referred be answered in the negative and the parties bear their own costs in this Court.

A. N. C.

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TRUSTEES,
TRIBUNE PRESS
v.
COMMISSIONER
OF INCOME-TAX.

*Question answered in the negative.***APPELLATE CIVIL.**

Before Coldstream and Bhide JJ.

PUNJAB AND SIND BANK, LD. (PLAINTIFF)

Appellant

KISHEN SINGH-GULAB SINGH AND OTHERS

(DEFENDANTS) Respondents.

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Dec. 20.

Appeal No. 907 of 1931.

Indian Partnership Act, IX of 1932, section 42—Partnership firm — Dissolution of (on death of a partner) whether subject to intention to continue the business in partnership with the legal representative—Subsequent mortgage (made in place of a prior one) found to be defective—presumption of intention to keep the prior mortgage alive—Transfer of Property Act, IV of 1882, section 70—principles of—whether applicable in the Punjab.

Held, that the dissolution of a partnership firm on the death of one of the partners is subject to contract between the partners and an intention to continue the business in partnership with the legal representative may be gathered from the conduct of the parties—*vide*, section 42, Indian Partnership Act, 1932.

Gokul Krishna Das v. Sashimukhi Dasi (1), relied upon.

Held also, that if a fresh mortgage is substituted in place of a prior one and is for any reason found to be defective, there is always a presumption that the mortgagee intended to keep the prior mortgage alive for his benefit.

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Mrs. Stewart v. Bank of Upper India, Limited (1),
Jagannath v. Raghunath (2), and *Gokal Chunder Shermany*
v. Herembo Chunder Halder (3), relied upon.

Held further, that the principle embodied in section 70 of the Transfer of Property Act, is applicable in the Punjab and, therefore, a mortgagee is entitled to accessions to the mortgaged property including buildings and machinery in the nature of fixtures.

Amar Singh v. Bhagwan Dass (4), and *R. M. P. M. Chettyar Firm v. Siemens (India), Ltd.* (5), relied upon.

First appeal from the preliminary decree of Sardar Indar Singh, Senior Subordinate Judge, Lyallpur, dated 17th February, 1931, decreeing plaintiff's suit, and ordering that the decretal amount shall be a charge on three-fourth of the mortgaged property, but not on the accessions.

R. C. SONI, M. C. MAHAJAN, and DAULAT RAM,
for Appellant.

JAGAN NATH AGGARWAL, J. L. KAPUR, and R. C. MANCHANDA, for Respondents.

BHIDE J.

BHIDE J.—This appeal arises out of a suit for recovery of Rs.74,678-11-3, by the Punjab and Sind Bank, Lyallpur, against a firm named Messrs. Kishen Singh-Gulab Singh, through its proprietors Dr. Kishen Singh, *Sardar* Gulab Singh and *Sardar* Anup Singh (defendants 1 to 3) on the footing of an equitable mortgage of a cotton factory owned by the firm. Defendant No.4 and defendant No.5 were impleaded as subsequent mortgagees.

The mortgage was originally effected by the firm for a sum of Rs.50,000 borrowed on three promissory notes, dated 14th November, 1919, 22nd November,

(1) 31 P. R. 1916.

(3) (1899) I. L. R. 16 Cal. 523.

(2) (1921) 60 I. C. 525.

(4) 1933 A. I. R. (Lah.) 771.

(5) (1933) I. L. R. 11 Rang. 322, 327.

1919, and 5th December, 1919, the transaction being accompanied by a deposit of title-deeds of a cotton factory at Gojra. The mortgagors paid a certain portion of the interest on the loan from time to time, but the principal was never repaid. On 8th August, 1922, the promissory notes were replaced by another promissory note for Rs.50,000, the balance due on the original promissory notes being shown in the accounts as paid. This was done with a view to save limitation as regards the personal liability of the mortgagors. The promissory note of 1922 was similarly renewed once more in August, 1923, and on the last occasion on 31st March, 1925. On each occasion the mortgagors addressed a letter to the Bank stating they had deposited the title-deeds of the factory by way of security to cover the loan.

There were four proprietors of the defendant firm, *viz.*, defendants 1 to 3, who are brothers, and their fourth brother, Uttam Singh. The latter died some time before March, 1925. The last promissory note of 1925 (Ex. P/10) and the corresponding letter from the firm with reference to the deposit of title-deed (Ex. P/11) were signed by defendants 1 to 3, defendant No.1 purporting to sign on behalf of the firm.

On the 19th January, 1927, Gulab Singh (defendant No.2) purporting to act on behalf of defendants 1 to 3 as also on behalf of *Mussammatt* Bharawan, widow of the deceased Uttam Singh, mortgaged the aforesaid factory, along with certain other properties, in favour of Indar Singh, defendant No.4. In the mortgage-deed it was recited that the Punjab and Sind Bank had a prior charge of Rs.50,000 and that the mortgage in favour of Indar Singh had

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been effected subject to the preservation of the rights of the prior mortgage (*vide* Ex.P/25). On the 12th April, 1927, a fresh mortgage of the same property was similarly created in favour of *Sardar* Harbel Singh, defendant No.5, the rights of the plaintiff Bank being similarly mentioned in the deed and safeguarded (*vide* Ex. P/26).

It appears that the firm Kishen Singh-Gulab Singh went into liquidation some time thereafter. But the plaintiff Bank being a secured creditor considered it preferable to realize their debt by a regular suit and the present suit was accordingly instituted on the 25th November, 1929, for realization of the mortgage money by the sale of the mortgaged property. The plaintiff also sought personal relief against defendants Nos.1 to 3, if the proceeds of the mortgaged property were insufficient to satisfy their claim.

The suit was resisted by defendants Nos.1 to 3 chiefly on the ground that the mortgage was invalid. They admitted the promissory notes, but contended that the letters passed by the firm in connection with the title-deeds of the property required registration and were inadmissible for the purpose of proving the mortgage. Defendant No.4 did not contest the suit and was proceeded against *ex parte*. Defendant No.5 resisted the plaintiff's claim on various grounds, but his principal plea was that defendants Nos. 1 to 3 were owners of $\frac{2}{4}$ th share only in the factory and hence the mortgage of the factory could be valid, if at all, only to the extent of their share. It was further pleaded that certain improvements (buildings and electric installation) in the factory, which had been effected subsequent to the mortgage in favour of the

plaintiff, were not liable for satisfaction of the plaintiff's claim.

The learned Judge of the trial Court has held that the mortgage was valid only to the extent of the $\frac{3}{4}$ th share of defendants Nos. 1 to 3 in the cotton factory in question and that the improvements subsequently effected were not liable. He, accordingly, granted a decree for recovery of the amount claimed by the plaintiffs by sale of $\frac{3}{4}$ th share of defendants Nos. 1 to 3 exclusive of the improvements. He considered that the plaintiff Bank could easily have proved their claim in the insolvency proceedings and the suit was unnecessary and, therefore, disallowed costs of the suit. From this decision the plaintiff has appealed.

The only points which were raised in this appeal by the learned counsel for the appellants were:—

- (1) That the learned Judge of the trial Court was wrong in holding that only $\frac{3}{4}$ th share in the factory was validly mortgaged;
- (2) That the improvements made in the factory subsequent to the mortgage were also liable; and
- (3) That the plaintiffs were entitled to have their costs.

I shall deal with these points *seriatim*.

As regards the first point, the decision of the trial Court is based on the grounds that the mortgage of 1925 is the one on the footing of which the plaintiffs' claim must be considered, that owing to the death of Uttam Singh the firm was dissolved by the time when that mortgage was executed and the mortgage being executed only by defendants 1 to 3, their $\frac{3}{4}$ th share in the factory could alone be held liable. The learned counsel for the appellant has urged that the view of the trial Court that the

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plaintiffs' claim rests on the mortgage of 1925 is not correct, that the plaintiffs' claim is based on the original mortgage effected in 1919 and the mere renewal of securities did not convert it into a fresh mortgage. I am doubtful whether the parties, having chosen to put their transactions in a certain form, owing to its legal advantages, can repudiate that form afterwards. But assuming that the case must be decided on the footing of the mortgage of 1925, the view taken by the trial Court is, in my opinion, incorrect. It appears that Uttam Singh had died before the mortgage of 1925, but it does not necessarily follow that the firm was dissolved. The dissolution of a firm in such a contingency is subject to contract between the parties (*vide* section 42, Indian Partnership Act) and an intention to continue the business in partnership with the legal representative may be gathered from the conduct of the parties [*cf.* *Gokul Krishna Das v. Sashimukhi Dasi* (1)]. In the present instance, it appears from the conduct of the parties that they intended that there should be no dissolution and that the business of the firm should be carried on in partnership with the legal representative of the deceased partner. In this connection, I may first invite attention to the fact that although the present suit was instituted as against the firm (under Order 30, Civil Procedure Code), no plea as regards the dissolution of the firm at any time was taken by defendants 1 to 3 who put in a defence and contested the suit on behalf of the firm. They challenged the validity of the mortgage only on the ground of want of registration, but this plea is not now relied on. Harbel Singh (defendant No.5) also did not plead distinctly that there was any dissolution. All that he

pleaded was that defendants 1 to 3 owned only $\frac{3}{4}$ th share in the factory and, therefore, the mortgage was valid only to the extent of their share. According to him, Uttam Singh having died in 1925, *Mussammat Bharanwan*, his widow, was the owner of the remaining $\frac{1}{4}$ th share and as she had not joined in executing the mortgage of 1925, her share was not liable. But in the subsequent mortgage-deed (Ex. P. 26) executed in favour of this defendant by Gulab Singh, defendant No.1, who was then acting under a power of attorney on behalf of defendants 1 to 3 as well as *Mussammat Bharanwan*, it is distinctly stated that the factory had been already mortgaged for Rs.50,000 in favour of the present plaintiff. It was urged that this fact does not estop defendant No.5 from raising the question of the validity of the mortgage. But even so, the admission of the previous mortgage in favour of the present plaintiff by Gulab Singh, who was acting as a representative of all the partners, including *Mussammat Bharanwan*, is undoubtedly a strong piece of evidence that the mortgage of 1925 was duly executed on behalf of *Mussammat Bharanwan* or was, at any rate, accepted by her. Defendant Harbel Singh has not attempted to rebut the presumption raised by Ex. P/26, by putting *Mussammat Bharanwan* in the witness-box or producing any other evidence to show that she was not a consenting party and in the circumstances that presumption must prevail. I may note further that the mortgage of 1925 was not created by defendants 1 to 3 only in their individual capacity, but defendant No.1 purported to act on behalf of the firm, as he had done in the case of the earlier transactions of 1919, 1922 and 1923 (*vide* Exs.P/10, P/11 and Ex.P/1 to P/7, P/17, P/18, etc.). The only other contention, which the learned

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counsel for the respondents had to urge in this connection, was that it is not shown that defendant No.1 had been authorised by *Mussammat* Bharanwan to effect the mortgage and that in certain subsequent transactions plaintiffs were accepting one Jagmohan Singh, a minor, as the legal representative of Uttam Singh (*vide* Ex.P/20). But even assuming that *Mussammat* Bharanwan was the proper legal representative, the mortgage-deed (Ex.P/26), executed in favour of defendant No.5, in which the mortgage in favour of the plaintiff is distinctly accepted by Gulab Singh, who was acting on behalf of all the partners, including *Mussammat* Bharanwan, seems to be quite sufficient to establish that *Mussammat* Bharanwan accepted the mortgage as valid. The learned counsel for the respondents urged that *Mussammat* Bharanwan could not *ratify* the transaction subsequently, if it was not originally executed on her behalf and relied in this respect on the provisions of section 196 of the Indian Contract Act and the commentary thereon in Pollock and Mulla's Indian Contract and Specific Relief Acts. But in the present instance, as pointed out above, the mortgage of 1925 did purport to be executed on behalf of the *firm*, *i.e.*, on behalf of all the partners for the time being. Consequently there is no reason why *Mussammat* Bharanwan could not ratify it afterwards, even if she was not actually a consenting party at the time when it was effected. I, accordingly, hold that the mortgage of 1925 was valid and binding on the firm. In view of this finding, it is not necessary to consider the question whether the mortgage of 1925 was a fresh transaction at all and whether the case should have been decided on the footing of the mortgage of 1919. But I may add that, even if the mortgage of 1925 was a fresh transaction

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as held above, I think the plaintiff could have fallen back on the mortgage of 1919, if it were necessary, *i.e.*, if the fresh mortgage were for any reason found to be defective. For, there is always a presumption in such a case that the mortgagee intends to keep the prior mortgage alive for his benefit and this presumption has not been rebutted [*cf. Mrs. Stewart v. Bank of Upper India, Ltd., Simla* (1), *Jagannath v. Raghunath* (2), *Gopal Chunder Sherman v. Herembo Chunder Halder* (3)]. The mortgage of 1919 was duly executed on behalf of the firm and its validity is not now disputed. However, on the finding arrived at above, *viz.*, that the mortgage of 1925 was valid, it is unnecessary for the plaintiff to fall back on the earlier mortgages.

In the end, I may notice one other point which was incidentally raised in the course of the arguments. It was urged that the defendant firm having become insolvent, the suit was not properly instituted as the fourth partner, *Mussammatt Bharanwan*, was not impleaded. This objection does not appear to have been raised in the Court below. However, the Receiver was impleaded and he must in the circumstances be taken to have represented all the partners.

I, accordingly, hold that the plaintiff is entitled to have his mortgage charge satisfied by the sale of the whole of the factory and not merely by the sale of $\frac{3}{4}$ th share thereof.

I come now to the question of improvements. The learned Subordinate Judge has held that in the case of an equitable mortgage the scope of the security is the scope of the title, and that as the title-deeds related to the factory, as it stood before the improve-

(1) 31 P. R. 1916.

(2) (1921) 60 I. C. 525.

(3) (1889) I. L. R. 16 Cal. 523.

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ments were effected, the latter could not be held liable for the satisfaction of the mortgage charge. But the liability of the improvements does not depend merely on the scope of the original security, but on the principle laid down in section 70 of the Transfer of Property Act, which runs as follows:—

“ If after the date of the mortgage any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession.”

The second illustration to the section is as follows:—

“ A mortgages a certain plot of building land to B and afterwards erects a house on the plot. For the purpose of the security, B is entitled to the house as well as the plot.”

The present case is exactly of the same type as this illustration. The Transfer of Property Act is not in force in this Province, but its principles are generally held to be applicable and I see no reason why the principle embodied in section 70 should not be applied in this case. The principle seems equitable for the mortgagee would be obviously prejudiced if the Factory has to be sold separate from the improvements which are in the nature of fixtures and immovable. The learned Judge of the trial Court has relied on *A. S. A. Verappa Chetty v. Ma Tin and Co.* (1), but as pointed out in *R. M. P. M. Chettyar Firm v. Siemens (India) Ltd.* (2), it does not appear that the machinery in that case which was claimed to be an accession was attached to the building. In *R. M. P. M. Chettyar Firm v. Siemens (India) Ltd.* (2), where the machinery was in the nature of a

(1) 1925 A. I. R. (Rang.) 250. (2) (1933) I. L. R. 11 Rang. 322, 327..

fixture it was held to be an accession falling within the purview of section 70 of the Transfer of Property Act. In the present instance also, the electric installation appears to be in the nature of a fixture and this fact has not been disputed.

The learned counsel for the respondents has referred to *Girdhari Ram v. Muhammed Karam Dad Khan* (1), in which the learned Judges of the Punjab Chief Court followed the broad principles of equity and good conscience in preference to those of section 63 of the Transfer of Property Act. They considered that section 63 could not be said to lay down any broad principle and that it was not equitable to apply it in the circumstances of that case. We are here concerned, however, not with the principle of section 63, but of section 70. The principle of the latter section has already been followed by a Division Bench of this Court in *Amar Singh v. Bhagwan Dass* (2). It seems to me equitable, and I would hold it to be applicable, in the circumstances of this case.

Lastly, there is the question of costs. The plaintiff was a secured creditor and there is no doubt that he had the option of realizing the mortgage debt by a regular suit. There were certain complicated questions involved which could not have been easily disposed of in the insolvency proceedings. I see no justification for the view of the learned Judge of the trial Court that the plaintiff Bank had indulged in this litigation quite unnecessarily and I see no good reason why it should be deprived of its costs.

I would, accordingly, accept this appeal and modify the decree of the trial Court by directing that the whole of the mortgaged factory inclusive of the

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(1) 63 P. R. 1918.

(2) (1933) A. I. R. (Lah.) 771.

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improvements in the shape of buildings, electric installation, etc., shall be sold to satisfy the mortgage debt found to be due to the plaintiff, if the same has not been paid in Court by the date fixed by the trial Court. The plaintiff Bank will also be entitled to get its costs throughout.

COLDSTREAM J.—I agree.

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Appeal accepted.

APPELLATE CIVIL.

Before Tek Chand and Abdul Rashid JJ.

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Dec. 21.

UDE SINGH (PLAINTIFF) Appellant

versus

MST. DAULAT KAUR (DEFENDANT)

Respondent.

Civil Appeal No. 419 of 1934.

Hindu Law—Husband's suit for restitution of conjugal rights—when not to be entertained—Deserted wife's suit for maintenance—whether necessary to prove cruelty.

Held, that under Hindu Law, a suit by the husband for restitution of conjugal rights can be defeated on the ground of the desertion of the wife for a long period and continued disregard of his marital obligations towards her; it is not necessary to prove actual physical cruelty.

The Court should, in each case, consider the entire conduct of the parties and if it comes to the conclusion that the husband has been guilty of continued neglect of the wife and has deserted her and the suit has not been instituted *bonâ fide*, the suit should be dismissed.

Bai Jiwi v. Narsingh Lal Bhai (1), *Dular Koer v. Dwarka Nath Misser* (2), *Babu Ram v. Mst. Kokla* (3), *Budh Singh v. Assa Singh* (4), and *Moonshee Buzloor Ruheem v. Shumsoonnisa Begum* (5), relied upon.

(1) (1927) I. L. R. 51 Bom. 329. (3) (1924) I. L. R. 46 All. 210.
(2) (1907) I. L. R. 34 Cal. 971. (4) 6 P. R. 1885.

(5) 1867 11 Moo. I. A. 615.