

*Privy Council Appeal No. 91 of 1936*

*Bengal Appeal No. 72 of 1932*

Sunil Kumar Kerr - - - - - *Appellant*

*v.*

Sisir Kumar Kerr and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM  
IN BENGAL

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 10TH NOVEMBER, 1939

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*Present at the Hearing :*

LORD THANKERTON

SIR GEORGE RANKIN

SIR PHILIP MACDONELL

[*Delivered by* LORD THANKERTON]

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The only question in this appeal is whether two mortgages executed by the executors of Thakur Das Kerr are binding on the estate of Thakur Das Kerr and on the properties which are the subject of the mortgages. The issue arises in a suit filed by the appellant and respondents Nos. 1 and 2 on the 31st August, 1929, for construction of the will of Thakur Das Kerr and for certain declarations, including a declaration that the said mortgages are invalid, inoperative and nullities and do not in any way bind the estate of the testator. Respondents Nos. 5 and 6, who alone appear in the appeal, are the representatives of the mortgagee under the first of the two mortgages. This appeal is against the judgment and decree of the High Court of Judicature at Fort William in Bengal, in its appellate jurisdiction, dated the 7th December, 1934, which, as regards the declaration in question, affirmed the judgment of the said High Court in its ordinary original civil jurisdiction, made by Ameer Ali J., and dated the 18th January, 1932, which dismissed the suit as regards the said declaration.

The testator died on the 5th October, 1919, leaving a will dated the 16th December, 1917, and a codicil dated the 16th April, 1919, the latter of which is not material. He was survived by a widow, four sons and three grandsons. Respondents Nos. 3 and 4 are two of the sons, and are the executors of the will. The three grandsons are sons of respondent No. 4 and are the appellant and respondents Nos. 1 and 2.

At the time of his death, the testator was the owner of a printing, publishing and bookselling business which he had started and carried on successfully under the name of

R. Cambray & Company for about 25 years. In addition to a share in ancestral property in his village of Nalkora, he died possessed of zemindari property outside Calcutta in Baraset and Bashirat sub-Divisions, house property in Calcutta, Government Promissory Notes, War Stock, and shares in railways, banks and various companies, all of which he had acquired out of the profits of the business.

The house property in Calcutta consisted of,

(a) Nos. 11A and 11/1 Halder Lane, which were used as the family dwelling-house, and in which the printing was done until 1915.

(b) No. 3 Halder Lane, to which the printing press was transferred when it was acquired in 1915.

(c) Nos. 5 and 6 Halder Lane, which were acquired in 1913 and 1911 respectively, and which were let.

The main business was carried on in hired premises in Hastings Street, with a branch in College Square.

The material provisions of the will are as follows,

“(2) I appoint my sons Dhirendra Chandra Kerr and Narendra Chandra Kerr to be the executors of this my Will with full authority to carry on the printing, publishing and bookselling business now carried on by me under the name and style of R. Cambray & Co.

“(7) I will and direct that my sons with their respective families (if any) shall be entitled to reside in my said house at Bowbazar and at the ancestral house at Nalkorah in such manner as they may choose and to be maintained out of the income of my estate in the manner prevalent in my lifetime. If any of my sons or their widows do not reside in either of my said houses he or she will not be entitled to maintenance of my estate.

“(8) I will and direct that my said sons Dhirendra Chandra Kerr and Narendra Chandra Kerr shall receive a monthly sum or allowance of Rs.52 and 50 respectively as remuneration for looking after the management of my estate.

“(10) I further will and direct that my executors shall be authorised in their absolute discretion to employ my sons Satyendra Chandra Kerr and Sailendra Chandra Kerr in the management of my estate and give each of them while so employed a salary or allowance of Rs.15 rising to Rs.30 a month according to ability. My said son Sriman Satyendra will not be entitled to any allowance if he refuses to be employed as aforesaid. My youngest son Sriman Sailendra besides the allowance provided herein being further entitled to a sum of Rs.1,000 towards his marriage.

“(15) I further declare it to be my express will and intention that after paying the annuities and meeting the expenses hereby directed as aforesaid the residue of the income of my estate shall be invested in Government Promissory Notes or in purchasing profitable property in the vicinity of my said Bowbazar house or of my said ancestral house at Nalkourah and the said Government Promissory Notes or the property as the case may be shall form a part of my estate.

“(16) I further declare it to be my express will and intention that the monthly sum or salary hereby directed to be paid to my sons shall on their respective deaths be payable to their respective male descendants then alive in equal shares if more than one.

" (18) I lastly give devise and bequeath the rest and residue of my estate in equal shares to the male descendants of my sons living at the death of my last surviving son, those in whose descent from me a living ancestor shall intervene being excluded by the others."

The will was duly proved, and respondents 3 and 4, as executors, took possession of the estate and carried on the business.

On the 11th April, 1927, respondents 3 and 4, as executors, executed a mortgage in favour of Sreemutty Indira Ghosh, whom respondents 5 and 6 now represent, of the five properties in Halder Lane, to secure a sum of Rs.65,000 with interest at 9 per cent. The mortgage, after a reference to the will, contained the following recital:—

" Whereas by the said will the testator authorised the said mortgagors to carry on the printing, publishing and bookselling business carried on by the testator in his lifetime under the name and style of R. Cambray & Co., in Calcutta and elsewhere, and whereas the said mortgagors are about to enter into contracts with the Governments of three Presidencies, namely, Bombay, Madras and Allahabad and also local Government for the exclusive licence to publish and issue verbatim reprint of the Indian Law Reports from the year 1921 to 1925, and whereas to fulfil the said contracts the mortgagors are in need of Rs.65,000."

On the 3rd September, 1927, the executors executed a first mortgage of the goodwill and connection of R. Cambray & Co. and the book debts outstanding and the stock in trade thereof and a second mortgage of the Halder Lane properties in favour of respondent No. 7, to secure a sum of Rs.7,500 with interest at 10 per cent. This mortgage contained recitals similar to those in the first mortgage.

In fact, the printing and publishing of the reprints were carried out at a new branch at Madras, mainly owing to the cheaper cost of printing in Madras.

Both the Courts below have decided, on the terms of the will and the evidence, that these immoveable properties were so connected with the business by the testator that the executors were entitled to mortgage them for the purposes of the business. It is true that Ameer Ali J. lays stress rather on the terms of the will but the Appellate Court clearly relied on the evidence as to the testator's practice in treatment of his estate. Jack J., in whose judgment Lort-Williams J. concurred, said:

" In this case the evidence shows that the testator pooled all his liquid funds together and mixed up the accounts of his property with those of his business, taking the expenses connected with both from the common fund. It is true that though he mortgaged promissory notes for the purposes of the business, he never mortgaged his immoveable properties for that purpose. Except his ancestral properties, the remainder of his house properties including those in Calcutta, had been purchased from the profits of the business, and in one of the houses a printing press had been established. It is admitted that had funds been required for the protection of his house properties in an emergency, the executors would have been entitled to take them from the business. The beneficiaries of both the business and the house properties were the same and the executors were appointed managers of both. In these circumstances, it is difficult to say that the Calcutta house properties could be regarded as quite unconnected with the business so as not to be available in order to raise funds for the business when required."

These decisions settled not only that the mortgagees got a good title, but that, in a question with the beneficiaries, the executors were entitled to mortgage the properties.

At the hearing before the Board, the appellant put forward a contention to the effect that, at the date of the mortgage, the executors had assented to the trusts as regards both the business and the immoveable properties, which had thereby become vested in them as trustees, and that, accordingly, the powers conferred on executors by section 307 of the Succession Act, 1925, were no longer available to them. Whether this consequence would result from assent need not here be determined. The question of assent, in such circumstances, is a question of fact, and this question had not been put in issue or maintained in the Courts below; their Lordships are not satisfied that the evidence already taken establishes beyond doubt that the facts, if fully investigated, would have supported the plea, and therefore, in accordance with the practice of this Board, they are unable to entertain this plea at this late stage. *Connecticut Fire Insurance Company v. Kavanagh*, [1892] A.C. 473, at p. 481. It follows that, when they granted these mortgages, the executors, in a question between the estate and the mortgagees, must be taken to have had the powers conferred by section 307 of the Succession Act, and only two questions arise for consideration. Firstly, having regard to section 307 (2) (i), was any restriction on the statutory power imposed by the will in this case, and, secondly, had the mortgagees constructive notice of any defect in the proposed exercise of the power, so as to put them in bad faith?

On the first point, their Lordships are unable to find in the will any restriction imposed on the statutory power of disposal. On the second point, it is necessary to assume, contrary to the judgments below, that, in a question between the executors and the beneficiaries, the executors were not entitled to use the immoveable properties for the purposes of the business. If so, did the mortgagees know, or were they so put on their enquiry that constructive knowledge must be imputed to them, that the executors were not so entitled?

There is no evidence that the mortgagees knew anything outside the terms of the will and the recital in the mortgage. These told them nothing as to the starting of a new branch at Madras, and nothing as to the testator's practice, at the time of his death, with regard to treating the properties as connected with the business. Indeed, the will suggests that they are to be managed as one unit for the benefit of one set of beneficiaries. But, the question must be whether the proposed lenders had a duty to enquire into facts outside the will as they existed immediately prior to the testator's death. Their Lordships are unable to hold that the mortgagees had any such duty, and the nature of the enquiry held in the present case and the decisions below, show how impracticable it would be for any such enquiry to be made

by an intending lender. In their Lordships' opinion, much of the usefulness of the statutory power conferred by section 307 on executors in India would be nullified, if such a duty of enquiry was imposed on parties dealing with executors.

Their Lordships are therefore of opinion that the mortgagees got a good title from the executors and it becomes unnecessary to consider whether the ground of decision of the Courts below was justified, but their Lordships are not to be taken as indicating any contrary opinion.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs and that the judgments appealed from should be affirmed.

In the Privy Council

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SUNIL KUMAR KERR

*v.*

SISIR KUMAR KERR AND OTHERS

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DELIVERED BY LORD THANKERTON

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