

PRIVY COUNCIL.

KALI BAKHSH SINGH AND OTHERS (DEFENDANTS) v. RAM GOPAL
SINGH AND OTHERS (PLAINTIFFS):

P. C.*
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October,
29, 30,
November, 27

[On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow.]
Pardanashin lady—Execution of deed—Suit for cancellation of deed—Onus of proof—Nature of proof required—Independent advice not absolutely necessary—Lady of strong will and in the habit of managing her affairs with considerable capacity for business—Undue influence—Natural affection.

In the case of a deed executed by a *pardanashin* lady the law protects her by demanding that the burden of proof shall in such case rest not with those who attack, but with those who rely upon, the deed; and it must be proved affirmatively and conclusively that the deed was not only executed by, but was explained to, and really understood by, the grantor. It must also be established that it was not signed under duress, but by the free and independent exercise of her will. *Sajjad Husain v. Wasir Ali Khan* (1) followed.

There is no absolute rule that a deed executed by a *pardanashin* lady cannot stand unless it is proved that she had independent advice. The possession or absence of independent advice is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue of whether the grantor thoroughly comprehended, and deliberately and of her own free will carried out, the transaction; and if, upon such a review of the facts—which include the nature of the thing done, and the training and habit of mind of the grantor, as well as the proximate circumstances affecting the execution—the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, then the deed ought to stand.

In a suit for cancellation of a deed of gift executed by a *pardanashin* lady the facts were that her husband had died long before, and her property (consisting of shares in a large number of villages) was managed by her mukhtar with whom she had formed an intimacy, the result of which was the birth of two illegitimate daughters, one of whom was alive at the date of the deed. The donee was the legitimate son of her mukhtar. The deed was found to be duly executed, attested by just the persons who would naturally be called upon for such a purpose, and registered in the usual way by the proper officer. The property given was about one half of her estate, and there was no question of her being impoverished by giving it. No undue influence was affirmatively proved. It appeared in evidence that the lady was strong-minded and had been in the habit for many years of managing her affairs, of entering up her accounts and of attending to business matters.

Held (reversing the decision of the Court of the Judicial Commissioner) that the evidence as to her strength of will and business capacity, and the fact that the deed was not, in the circumstances of her life, in any way an unnatural disposition of her property, went far, taken together with the other evidence in

* *Present*:—Lord SHAW, Lord Moulton, Sir JOHN EDGAR and Mr. AMESBURY.
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the case, to make it conclusive that the deed was granted by her as the expression of her deliberate mind and apart from any undue influence exerted upon it; and that had independent advice been obtained the lady would have acted just as she did. *Mahomed Bulesh Khan v. Hosseini Bibi* (1) referred to.

APPEAL from a judgement and decree (21st May, 1908,) of the Court of the Judicial Commissioner of Oudh, which reversed a judgement and decree (15th February, 1907,) of the Subordinate Judge of Rae Bareilly.

The plaintiff stated that one Bishunath Singh was the owner of shares in the property in suit, and during his life-time he transferred his rights in the property to his son Brij Mohan Singh, in whose favour mutation of names was made in the Revenue Courts; that Brij Mohan Singh died in 1882 leaving a widow named Balraj Kunwar, who succeeded to her husband's estate; that on the 24th of September, 1903, she executed a deed of gift of the property in suit in favour of Ganga Bakhsh Singh, the second defendant, whose father, Kali Bakhsh Singh, was her agent and trusted adviser; that Balraj Kunwar died in November, 1903, and on her death the first plaintiff Bhola Singh, the predecessor in title of the respondents, became entitled, as reversioner, to the property left by her; but mutation of names was made in favour of Ganga Bakhsh Singh in respect of such property.

The second plaintiff was a transferee of a portion of the property. The suit was brought on the 17th of September, 1906, against the defendants for possession of the property, the plaintiffs alleging that if the deed of gift, dated the 24th of September, 1903, was executed by Balraj Kunwar, it was not binding on her, and consequently not binding on them, on the ground that Balraj Kunwar had no independent advice and was besides incapacitated by illness from understanding the nature of the transaction.

The defence was that Bishunath Singh never gave any portion of his property to his son, with whom he was joint in estate; and, on the death of Brij Mohan Singh in 1882, Bishunath Singh became the sole owner of it; that Bishunath by deeds of gift, dated the 9th of April, 1890, and 30th of April, 1892, transferred the property to Balraj Kunwar, and in July, 1888, and September, 1890, he made wills in her favour leaving her portions of his property for her life, with remainder to one Surajpal Singh; that on the 27th

(1) (1888) 1 L. R., 15 Cal., 684; L. R., 15 I. A., 81.

of February, 1892, Balraj Kunwar made a will by which she left the property in suit to Bishunath Singh for his life with remainder to Surajpal Singh; that on the 24th of September, 1903, she made the deed of gift of the property in suit to Ganga Bakhsh Singh, the second defendant; and that if the last named deed were invalid, the property in suit passed to Surajpal Singh under the wills above mentioned, and the plaintiffs therefore had no right of suit in respect of it.

The material issues are stated in the judgement of the Judicial Committee. No issue was framed as to the wills which the defendants alleged to have been made by Bishunath Singh and Balraj Kunwar and their effect on the plaintiffs' right to the property in suit.

The Subordinate Judge found that the evidence of the plaintiff's witnesses that the health or the state of her mind incapacitated Balraj Kunwar from making an intelligent execution of the deed of gift, was quite unreliable; and held that she voluntarily executed the deed while in a sound state of body and mind, and after having its terms and effect explained to her, and that the deed was binding upon her; and made a decree dismissing the suit with costs.

An appeal by the plaintiffs to the Court of the Judicial Commissioner was heard by Mr. E. CHAMIER, Judicial Commissioner, and Mr. H. D. GRIFFIN, Second Additional Judicial Commissioner, who were of opinion that the matter in dispute between the parties was narrowed down to the three questions following, (1) whether Bishunath Singh made an effective gift of his property to his son Brij Mohan Singh, as alleged by the plaintiffs, in 1869; (2) (a) whether Balraj Kunwar executed the deed of gift of the 24th of September, 1906, and if so, (b) whether it was binding upon her; and (3) whether with reference to the wills of Bishunath Singh and Balraj Kunwar, the plaintiffs had any right to the property in suit.

On the first question the Subordinate Judge had held that the alleged transfer to Brij Mohan in 1869 had not been proved, and the Court of the Judicial Commissioner agreed with that finding. On the second question that Court dissented from the Subordinate Judge, being of opinion that it had not been proved that Balraj Kunwar had independent advice or understood the transaction, and

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therefore the deed of gift of the 24th of September, 1903, could not stand.

On this point the material portion of the judgement of the Judicial Commissioner (the Second Additional Judicial Commissioner concurring) was as follows:—

“The facts suggest that the deed of gift must have been procured by the influence of defendant No. 1. Balraj Kunwar was a young *pardanashin* woman in an advanced state of pregnancy cut off by her misconduct from the rest of her family. She was also ill, but the evidence as to this is vague. Defendant No. 1 was not bound to her in any way; he might have deserted her at any time, yet she made him a present of the best part of her property worth admittedly more than Rs. 25,000.

“It is needless to cite authorities to show that such a gift cannot stand unless it is proved that the lady had independent advice. Any intelligent and independent person would have told her at once that if she wished to benefit her paramour the proper thing to do was to make a will in his favour. There is no evidence whatever as to the origin of the deed of gift. The Registering Officer and the other witnesses who, it may be observed, are all friends or dependents of defendant No. 1, say that the deed was read out to her and explained to her. One knows from experience of these cases what explanation of this kind means. A deed couched in language which is for the most part unintelligible to an uneducated woman is read over to her and she is asked whether she understands it. She replies ‘yes’ and the deed is registered. In the present case the deed contains Persian words which it is safe to say the lady did not understand. It is easy for witnesses to add that the executant said she is executing it of her own pleasure (*ikhushi se.*) I doubt this part of the evidence, but even if it is true it does not avail the defendants. Defendant No. 1 was present at the time and what is wanted is evidence to rebut the presumption that the lady was acting under his influence. He did not come into the witness-box, and there is no evidence whatever that the lady was a free agent and understood the effect of the deed on her interests. According to the witness Mahabir, the Registering Officer told the lady that after the execution of the deed she would have no right left in Asaipur and Baradih. If he did so he was wrong, for she had a one anna share left. The fact that the gift relates to a 9 anna 8 pice share in the two villages and not to the whole of her share is curious. It may be that she thought she was making a will as she did in 1892.

“In my opinion it has not been proved that Balraj Kunwar had independent advice or understood the transaction and therefore the deed of gift cannot stand.”

In that view it became necessary to have a decision on question No. 3, and the case was accordingly remanded to the Subordinate Judge for a finding on that question.

After taking further evidence the Subordinate Judge held that it was proved that the wills of Bishunath Singh of 1888 and 1890

had been duly executed. As to the will of Balraj Kunwar of the 27th of February, 1892, he held that, assuming that she signed the will, it had not been proved that it was explained to her, or that she understood it, or that she had any independent advice, and that therefore the right of the plaintiffs to the property in suit was not affected by the wills of 1888, 1890, and 1892.

When the case again came before the Court of the Judicial Commissioner, the fresh evidence and the finding thereon of the Subordinate Judge were considered by the Judicial Commissioner (Mr. E. CHAMIER) and the Second Additional Judicial Commissioner (Mr. R. GREEVEN), and in the result they both concurred with the Subordinate Judge as to the will of Balraj Kunwar, which they found was duly executed by her.

Mr. CHAMIER said that from the general circumstances of the case he inferred that Balraj Kunwar was perfectly aware of the contents of the will, and that Bishunath Singh with respect to her occupied the position of an independent adviser; but as the Subordinate Judge had found that it was not proved that Balraj Kunwar understood the will, and as his learned colleague was strongly of opinion that the Subordinate Judge's finding was right, and as he (Mr. CHAMIER) was not satisfied the finding was wrong he was prepared to accept their view.

Mr. GREEVEN said that on a close examination of the evidence, he was of opinion that the defendants had failed to establish (1st) that the signature to the will was that of Balraj Kunwar; and (2nd) that, even if it were hers, she understood the nature of the document: and moreover he felt himself unable to infer, from the general circumstances of the case, that in this instance Bishunath Singh was an independent adviser.

The appeal was *disallowed*, and the suit decreed with costs in both courts.

On this appeal.—

DeGruyther, K.C., and *B. Dube*, for the appellants, contended that the evidence established the validity of the deed of gift, dated the 24th of September, 1903: it was read over, and its terms explained to the executant Balraj Kunwar, and it was voluntarily executed by her with full knowledge and understanding of its contents and of their effect. Her capacity to make such a deed

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was undoubted, and she had thus fulfilled all the requirements of a valid and operative deed. Though Kali Bakhsh was not examined he offered himself for cross-examination, but no questions were put to him. On the other hand, the respondents' witnesses were described by the Subordinate Judge who saw and heard them as quite unreliable. Reference was made to *Sajjad Husain v. Wazir Ali Khan* (1) and the cases there cited; and *Mahomed Buksh Khan v. Hosseini Bibi* (2). There was no proof of any undue influence over Balraj Kunwar. As to the influence caused by the confidential relation in which Kali Bakhsh stood towards her, *Coomber v. Coomber* (3) was referred to. Here, as in that case, there was no doubt some natural affection towards the donee and the deed was upheld without evidence of independent advice. Under the circumstances of the case, it was submitted that the deed of gift was not an unnatural or improbable disposition of her property by Balraj Kunwar. The onus of proving the deed to be invalid and of no effect was therefore on the respondents. The will of the 27th of February, 1892, was, it was also contended, valid, and in view of its provisions the respondents had no title to the property in suit.

Sir Erle Richards, K. C., and *Ross K. C.*, for the respondents, contended as to the deed of gift that it was invalid, and could not stand because it had not been shown that Balraj Kunwar had, in the matter of its execution, any independent advice, or understood the transaction. Reference was made to Trevelyan's Hindu law, page 490. As to the general law on the subject of the execution of deeds by *pardanashin* ladies, reference was made to section 111 of the Evidence Act (I of 1872); Ameer Ali's and Woodroffe's Law of Evidence (4th ed.) pages 584, 587; *Kanailal v. Kamini Debi* (4); *Sajjad Husain v. Wazir Ali Khan* (5); *Mahomed Buksh Khan v. Hosseini Bibi* (6); *Allcard v. Skinner* (7) per COTTON L. J.; and Pollock on Contracts (8th ed.), page 640, where the last named case was referred to. The onus of proof was on

(1) (1912) I. L. R., 34 All., 455 (462); (4) (1867) 1 B. L. R., O. C., 31 note. L. R., 39 I. A., 156 (160).

(2) (1888) I. L. R., 15 Calc., 684 (699); (5) (1912) I. L. R., 34 All., 455; L. R., 15 I. A., 81 (93). L. R., 39 I. A., 156.

(3) (1910) 1 Ch. D., 174; on appeal (6) (1888) I. L. R., 15 Calc., 684; (1911) 1 Ch., 723. L. R., 15 I. A., 81.

(7) (1887) L. R., 36 Ch. D., 145 (171).

those who relied on the deed, and benefited under it, and the Judicial Commissioner's Court had held that the appellants had not discharged that onus.

DeGruyther, K. C., in reply as to the contention that Balraj Kunwar had no independent advice referred to *Hakim Muhammad Ikram-ud-din v. Najiban* (1) as showing that there were circumstances (as for instance where the lady was fully capable of managing her own affairs) in which the want of independent advice was not fatal to the validity of the deed. In the present case the evidence showed that Balraj Kunwar had considerable business capacity. The opinion referred to in Trevelyan's Hindu law was not in accordance with any decision. The appeal, it was submitted, should be allowed.

1913, November 27th.—The judgement of their Lordships was delivered by Lord SHAW.—

This is an appeal from a judgement and decree of date the 21st May, 1908, of the Court of the Judicial Commissioner of Oudh, which reversed a judgement and decree of the Subordinate Judge of Rae Bareilly, dated the 15th of February, 1907.

The plaintiffs ask that a decree for actual and proprietary possession of certain shares in villages in pargana Salon be passed in their favour against the defendants, and for an account of mesne profits.

It is unnecessary to enter upon many details of the case. The portion of it which was laid before the Board consists in a demand for cancellation of a deed of gift, dated the 24th of September, 1903, executed by one Balraj Kunwar in favour of Ganga Bakhsh Singh, son of the appellant, Kali Bakhsh Singh.

This deed has been upheld by the Subordinate Judge, and has been declared invalid by the Court of the Judicial Commissioner.

It is important to observe what were the grounds for the cancellation of this deed. They are gathered together in the issues framed by the Subordinate Judge, and are as follows:—

“(1) Did the lady execute the deed of gift?

(2) Was it ‘written and completed without her knowledge? Was she able to understand’ the transaction?

(3) Was she of unsound mind at the time of the writing of the said deed?”

(1) (1898) I. L. R., 20 All., 447; L. R., 25 I. A., 137,

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The relation of the parties to the deed was, briefly stated, this :—Balraj Kunwar, who died two months after the execution of the deed of gift, was a *pardanashin* lady. She was possessed of a number of villages, or rather of shares therein, and she had become absolute owner thereof as the result of gifts made by one Bishunath Singh. At least six deeds of gift are produced, and there can be little doubt that the lady thoroughly understood this form of transaction. Her husband had died many years before, namely, in 1881, and her property was managed by Kali Bakhsh Singh, who was her *mukhtar*, and with whom she formed an intimacy, the result of which was the birth of two illegitimate daughters. One of these was alive at the date of the deed.

Ganga Bakhsh Singh was the legitimate son of Kali Bakhsh Singh, and the suggestion seems to be warranted which points not only to the affection which Balraj Kunwar had for Kali Bakhsh, but to the attachment which she had formed to the boy. The interests represented by the plaintiffs are derived from remote relationship to Brij Mohan Singh, the deceased husband, and to Bishunath Singh, the father-in-law of the lady.

Upon the issues as framed and the contentions of parties as pled, the Subordinate Judge, who manifestly conducted the case with great care, had no doubt. As to the plaintiffs' evidence he holds that it "is absolutely unreliable and seems to me a pure concoction." Reasons are given for this opinion, and the judgment upon this part of the case does not seem to be controverted in the Court of the Judicial Commissioner. In short, the attack upon the deed by the evidence led by the plaintiffs has failed.

As to the evidence tendered in support of it the matter stands thus : *ex facie*, it is duly signed and attested. It bears the signature of Balraj Kunwar, of the patwari, Lachman Prasad, and of three other witnesses, including the family priest. Above all, there is the certificate of Eunyad Husain, the Sub-Registrar of Salon, as to what occurred when the deed was produced by Balraj Kunwar before him at her residence. It is duly registered. There seems no reason to doubt the value of his testimony, which is believed in its entirety by the Subordinate Judge. Apart from the circumstances to be now mentioned, the deed appears to be

beyond suspicion, being attested by just those persons who would be naturally called in for such a purpose and being registered in the usual way by the proper officer.

Their Lordships incline to the opinion that the judgement of the Subordinate Judge would not have been reversed but for the controlling weight which was attached by the Court of the Judicial Commissioner to the fact that the lady in the transaction had not independent advice. The view, put briefly, adopted in that Court is this: The deed was executed in favour of the son of a paramour, and therefore, to all intents and purposes, in favour of the paramour himself, he also being a person who was her *mukhtar*. Although there is no direct evidence that he ever influenced her to make a gift in favour of his son, still, in the circumstances, the deed (so it is maintained) must fall, because the law makes an absolute demand that a person in such a situation should have independent advice. The absence of this element entitles a court of law to set the deed aside.

There are several circumstances which favour this conclusion. In the first place, the lady was a *pardanashin* lady, and the law throws around her a special cloak of protection. It demands that the burden of proof shall in such a case rest, not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by, the grantor. In such cases it must also, of course, be established that the deed was not signed under duress, but arose from the free and independent will of the grantor. The law as just stated is too well settled to be doubted or upset. It was expressly re-affirmed by this Board in the case of *Sajjad Husain v. Wazir Ali Khan* (1), and nothing that is now said can, or is intended to, disturb it.

In the next place, a fact which has given rise in their Lordships' minds to considerable difficulty, has been that Kali Bakhsh, the father of the donee and the *mukhtar* of the donor, was not examined as a witness.

This brief review is given by way of indication that the judgement now to be announced has been arrived at after a full

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balancing of the considerations both in fact and in law which affect the question to be determined.

The property conveyed by the deed of gift amounted, as the Board were informed, to about one-half of the lady's estate. It was not contended that her outward style or mode of life had thereby been changed, or that any impoverishment had occurred, the case being thus distinguished from those of donations of practically the entire property of the donor, of which the case of *Sajjad Husain* above referred to was an instance.

Their Lordships are satisfied on the salient features of the case as follows:—

1. As to the execution of the deed. The challenge of this has failed, and both the Courts below hold the execution to be properly and satisfactorily established.

2. As to the capacity of the grantor. Upon this subject the Courts below are also agreed in holding that competency is proved. In their Lordships' judgement, this is so, as after mentioned, in a special degree.

3. As to the deed being read over and explained. Again both Courts are agreed. But while the Subordinate Judge thinks that the explanation was thorough, the Judicial Commissioners appear to incline to the view that it was perfunctory. Upon this matter much depends upon whether the grantor of the deed was a person accustomed to business or to the management of affairs. It is upon this point that their Lordships find themselves in agreement with the Subordinate Judge. In doing so they found upon what is admitted, not only by him, but by the Court of the Judicial Commissioner. It appears that the lady had been in the habit for a considerable period of years of managing her affairs, of entering up her accounts, and of attending to business. Upon another part of the case it rather appears from the judgement of the Judicial Commissioner, Mr. CHAMIER, that the lady had much strength of will, and that her father-in-law, Bishunath Singh "used to obey Balraj Kunwar more than the latter obeyed him;" while with reference to the issue now under discussion, the same Judicial Commissioner says:—"It is proved by evidence adduced by the plaintiffs that Balraj Kuar signed her own accounts and looked after her own affairs." Their Lordships, in short, do not entertain

much doubt that this *pardanashin* lady was a capable woman, fully alive to the direction of her own interests, and well aware of what she was doing.

4. As to undue influence. Nothing of this kind is proved affirmatively, and the inference upon the subject must depend to a considerable extent upon the view which is taken as to the capacity of the grantor of the deed. The suggestion that Kali Bakhsh prompted a gift in favour of his son does not seem to rest upon anything more than that he was *mukhtar*, or held a power of attorney in regard to the management of her property. It is regrettable that the matter was left thus in the region of conjecture. There is no evidence of any kind that the *mukhtar* either mismanaged or overmanaged anything committed to his charge, or that in any particular regarding her affairs he withstood the lady or controlled her purposes. It is accordingly necessary to consider whether the facts of this case fall under the general and useful category of the principle which in the language of Lord Kingsdown in *Smith v. Kay* (1), "applies to every case where influence is acquired and abused, where confidence is reposed and betrayed." Their Lordships do not find themselves able to affirm that such abuse or betrayal occurred. It is no doubt true that the evidence in such a case would not require to have been very strong, but there is no evidence at all which would lead to the conclusion.

As stated, their Lordships incline to think that the judgement of the Subordinate Judge would have been affirmed by the Judicial Commissioners but for the view thus expressed:— "It is needless to cite authorities to show that such a gift cannot stand unless it is proved that the lady had independent advice."

In their Lordships' opinion there is no rule of law of the absolute kind here indicated. The possession of independent advice, or the absence of it, is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue of whether the grantor thoroughly comprehended, and deliberately and of her own free will carried out, the transaction. If she did, the issue is solved and the transaction is upheld: but if upon a review of the facts—which include the nature of the thing done and the training and habit of mind of the grantor, as

(1) (1859) 7 H. L. C., 750 (779).

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well as the proximate circumstances affecting the execution :- if the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, then the deed ought to stand. The present, in their Lordships' judgement, appears to be a case of that kind.

Their Lordships, as already mentioned, have fully in view the fact that the lady was a *pardanashin* lady, but the evidence as to her strength of will and business capacity, and the fact that the deed as granted is not in the circumstances of her life in any way an unnatural disposition of part of her property, go far, taken together with the evidence in this case, to convince them that the deed was granted by her as the expression of her deliberate mind and apart from any undue influence exerted upon it. In short, their view is that if independent outside advice, which is an essentially different thing from independent outside control, had been obtained, the lady would have acted just as she did. Much as their Lordships support and approve of the protection given by law to a *pardanashin* lady, they cannot transmute such a legal protection into a legal disability. She might, especially if the outside adviser had been a lawyer, have altered the shape or form of the transaction, but in substance and result she would have carried out the same purpose and will as are expressed by the deed under challenge. They refer to the judgement of Lord Macnaghten in *Mahomed Buksh Khan v. Hosseini Bibi* (1).

In these circumstances their Lordships will humbly advise His Majesty that the judgement and decree appealed from should be reversed and that of the Subordinate Judge of date the 15th of February, 1907, should be restored. The appellants will be entitled to the costs since the date of the last mentioned judgement and to the costs of this appeal.

Appeal allowed.

Solicitors for the appellants: *Barrow, Rogers & Nevill.*

Solicitors for the respondents: *T. L. Wilson & Co.*

J. V. W.

(1) (1888) I. L. R., 15 Cal., 684; I. R., 15 I. A., 81.