PRIVY COUNCIL

P. C.* 1936 May 15

LALA KUNDAN LAL AND ANOTHER (APPELLANTS) *v.* MUSAMMAT MUSHARRAFI BEGAM AND OTHERS (RESPONDENTS)

[On Appeal from the Chief Court of Oudh at Lucknow]

Attestation—Transfer of Property Act (IV of 1882), section 3—Amending Acts (XXVII of 1926 and X of 1927—'In the presence of the executant,' meaning of—Purdahnashin—*Intelligent assent to transaction, sufficiency of proof.*

Whether a witness has signed his name in the presence of the executant of a deed is in each case a question requiring full consideration of all the connected circumstances.

Where a *purdahnashin* lady who executed a deed was behind a thin curtain and could, if she had minded to do so, have seen the attesting witnesses signing, the signing can be said to have been in her presence.

Newton v. *Clarke* (1), referred to.

Where a *purdahnashin* lady mortgaged for Rs.12,500 one of five villages assigned to her by her husband in lieu of deferred dower, Rs.2,500 being required for the payment of revenue due by her and the balance (with the exception of Rs.546-6 which she received in cash) for discharge of her husband's debts and where her story that the deed was executed on a misrepresentation by her husband was disbelieved and the evidence established that she was well aware that she was executing a mortgage deed for Rs.12,500 and that as to the bulk of this sum she was doing so to discharge her husband's debts and not her own and the terms on which she and her husband lived made it quite likely that this was a willing sacrifice on her part.

Held, that the onus of proving her intelligent and free assent to the deed was discharged.

The law is not to be so interpreted or applied as to make it impossible for a *purdahnashin* to give security for her husband's benefit: this would be to convert a principle of protection into a disability.

Farid-un-nissa v. *Mukhtar Ahmad* (2), referred to.

Appeal (No. 92 of 1934) from a decree of the Chief Court (April 27, 1933), which reversed a decree of the Subordinate Judge of Partabgarh (September 7, 1931)

*Present: Lord ALNESS, Sir SHADI LAL and Sir GEORGE RANKIN.

(1) (1839) 2 Curtis 320; 163 E.R., 425.

(2) (1925) L.R., 52 I.A., 342, at p. 350 S.C., I.L.R., 47 All., 403.

The material facts are stated in the judgment of the Judicial Committee.

1936. *April 23 and 24. Dunne, K. C. for the appellants*: The lower courts are agreed as to the lady's having signed the deed. The question as to whether the attestation was in her presence was raised in the Chief Court. It was raised in the Subordinate Judge's Court. An issue was directed to it but it was not raised in the grounds of appeal to the Chief Court. It was only by finding that 'thin' meant 'thick' that the Chief Court could find that the lady could not see the attestation and that it was not in her presence.

The execution was an intelligent execution. The lady knew what she was doing. Fida Ali, who had the original draft of the deed, did not go into the box. There is no question of the genuineness of the loan. The plaintiff paid the Government revenue. The particular circumstances of the case must be taken into account. The lady was on affectionate terms with her husband. The property had been given to her by him. She knew his position. She also required money for herself. This was a transaction of such a nature that it was not necessary to prove independent advice. If a woman knows the exact nature of the transaction into which she is entering and enters into it willingly, the question of independent advice does not arise. The Registrar, who is independent, brought to her notice the nature of the transaction. Independent advice does not mean advice that will stop one entering into the transaction. It means only the explaining and making understood the nature of the transaction. The purdahnashin is free to enter into the transaction.

Majid, following: On the question of independent advice referred to *Sheoprasan Singh* v. *Munshi Nar Singh*, (1) and *Farid-un-nissa* v. *Muktar Ahmad* (2).

(1) A.I.R., (1932) P. C. 134, S.C. 36, C.W.N., 597.

(2) (1925) L.R., 52 I.A., 342, at p. 354 S.C., I.L.R., 27 All., 703.

1936

LALA KUNDAN LAL v. MUSAMMAT MUSHARRAFI BEGAM

De Gruyther, K. C. for the 1st respondent: The plaintiff must prove attestation even though execution is not denied. 'Attested' is defined in the same way in the Indian Succession Act as in the Transfer of Property Act. The words "Each of whom has signed the instrument in the presence of the executant" have been construed in England under the Wills Act. They were introduced into the Indian Acts with the knowledge that they had been definitely construed in England. In India the two witnesses need not be present at the same time. In England they must be. Reference was made to Jarman on Wills (6th ed.), Vol. II, p. 262. Appendix B, *Norton* v. *Bazett* (1), *In the goods of Killick* (2), *Newton* v. *Clarke* (3), *Jenner* v. *Finch* (4), *In the goods of Edward Coleman* (5).

The question here is not only the question of the purdah, whether it was thick or thin. It must be proved that the lady from the place in which she was sitting could have seen the witnesses at the place where they were when they signed. There is nothing to show where she was when the witnesses signed. 'In the presence of' means actual visual presence. *Brown* v. *Skirrow* (6).

The plaintiff must prove valid execution of the mortgage and necessity. *Shamu Patter* v. *Abdul Kadir Ravithan* (7) and *Lala Amarnath Sah* v. *Rani Achan Kuer* (8).

There is no evidence that the transaction was explained to the lady at any time before the time of execution.

[*Sir George Rankin*: She is said to have asked whether the document was in terms of the draft.]

De Gruyther: There is no evidence that the terms of the draft were explained to her. Neither of the attesting witnesses knows or speaks to anything that trans-

(1) (1856) 164 E.R., 569 and, on appeal, p. 1399.
(2) 3 S. and C., 674.
(3) (1839) 163 E.R., 425.
(4) L.R., 5, P.D., 106.
(5) 164 E.R., 674.
(6) L.R., (1902) p. 3.
(7) (1912) L.R., 39 I.A., 218 S.C., I.L.R., 35 Mad., 607.
(8) (1892) L.R., 19 I.A., 196 at p. 198 S.C. I.L.R., 14 All., 420.

pired regarding the mortgage before their arrival for the purpose of attestation. The Registrar was not called, nor Fida Ali nor the tutor. Reference was made to *Mirza Sajjad Hussain and another* v. *Nawab Wazir Ali Khan and others* (1), *Annoda Mohaini Roy Chowdhry* v. *Bhuban Mohini Debi and others* (2), *Farid-un-nissa* v. *Mukhtar Ahmad and another* (3) and *Thakurain Tara Kumari* v. *Mahraja Chandra Muleshwar Prasad Singh* (4).

[Lord ALNESS referred to *Kali Baksh Singh* v. *Ram Gopal Singh*. (5).]

Pringle following: Referred to the Evidence Act S. 68, Proviso. Execution in the section means due execution. There has been no admission here as to attestation. The lady says when she executed the deed there was no one present but her husband. As soon as it was established that there was a purdah, it was incumbent on the plaintiffs to prove that the lady could see the attestors.

The character of the husband was such that it was essential that it should be proved that the lady had independent advice. She was surrounded by her husband's people. Fida Ali was her husband's agent and afterwards became hers. *Badiatanessa Bibee* v. *Ambika Charan Ghose* (6).

Dunne, K. C. in reply: [Their Lordships having intimated that they did not desire to hear further arguments on the question of attestation.]

As regards independent advice what is required is that the purdahnashin should know the nature of the transaction she is entering into. The object is not that she should be warned or advised not to enter into the transaction. Here there can be no doubt the lady did know the nature of the transaction.

(1) (1912) 39 I.A., 156 S.C., I.L.R., 34 All., 455.
(2) (1901) L.R., 28 I.A., 71 S.C., I.L.R., 28 Cal., 546.
(3) (1925) L.R., 52 I.A., 342 S.C., I.L.R., 47 All., 703.
(4) (1931) L.R., 58 I.A., 450, S.C., I.L.R., 11 Pat., 227.
(5) (1913) L.R., 41 I.A., 23 S.C., I.L.R., 36 All., 81.
(6) (1914) 18 C.W.N., 1133.

1936

LALA KUNDAN LAL v. MUSAMMAT MUSHARRAFI BEGAM

[*Sir George Rankin*: Is it not necessary in a case like this, where she is paying her husband's debts, that she should have advice as to the wisdom of the transaction?]

Dunne: The lady had her brother who looked after her estate to advise her. It was admitted that her husband used no undue influence. If no one sets up a case of undue influence, the plaintiff is not bound to prove that there was independent advice. No case of undue influence was set up in the written statement.

The other respondents were not represented.

The judgment of the Judicial Committee was delivered by Sir GEORGE RANKIN.

The plaintiffs appeal from a decree of the Chief Court of Oudh dated 27th April, 1933, which set aside a preliminary mortgage decree granted to them by the Subordinate Judge of Kheri dated 7th September, 1931. The suit was brought on the 24th February, 1931, to enforce the terms of a registered mortgage deed dated 8th September, 1924. Defendant No. 1 Musammat Musharrafi Begam was the only contesting defendant and will be referred to herein as the defendant. She was described in the plaint as being of about 40 years of age. The date of her marriage does not appear but it appears that at the time of her marriage her husband Mohammad Abul Bashir Khan agreed to pay her dower of Rs.50,000.

By deed dated the 9th February, 1920, executed at a time when the defendant's husband had incurred a certain number of debts, though it is not shown that he was then insolvent, he transferred to her five villages in lieu of the promised dower. The villages, even if allowance be made for encumbrances subsisting thereon, appear to have been well worth the sum of Rs.50,000. The mortgage sued upon is dated the 8th September, 1924, and covers one only of the five villages—viz. Sheopuri. It is for the sum of Rs.12,500, Rs.8,500 being

received from the plaintiff Kundan Lal and Rs.4,000 from the plaintiff Ram Charan. In all some Rs.550 were paid in cash at the time of execution of the mortgage. Rs.3,332 went in satisfaction of a promissory note executed by the defendant and her husband in 1928. Rs.2,500 went in payment of Government revenue: of this sum approximately Rs.2,000 was due in respect of Government revenue upon the defendant's property. It is not necessary for the present purpose that their Lordships should make a more detailed reference to the particulars of consideration set forth at the end of the deed. The deed itself recites the deed of gift dated the 9th February, 1920, that the husband is liable for the amounts therein specified, and has not sufficient property left with him to pay the same, " and besides this the executant No. 1 also (that is the defendant) stands in need of Rs.3,055-6 for the payment of Government revenue and to meet her other necessary expenses, and the executant No. 1 wants to free the executant No. 2 (that is the husband) from his debt." The terms of the loan are that the money should be re-paid within six months with interest at 1 per cent. per month, and that if not paid on the expiry of six months the interest should be computed with six monthly rests. It is stated that there was already a mortgage on the property for Rs.14,000. The deed concludes "Executant No. 1 has fully understood the contents of the mortgage deed through her husband and has taken legal advice also for it. Executant No. 1 has in no way been deceived in executing this deed."

The scribe Behari Lal signed the deed as such. He was dead at the date of the suit. Mohammad Abdul Bashir Khan signed his name and put his thumb-mark. The defendant put her thumb-mark. The witnesses to the execution by both were Pandit Deo Nath and Badri Mahto, both of whom signed their names as witnesses. The document purports to have been registered on the

1936

LALA KUNDAN LAL v. MUSAMMAT MUSHAB-RANI BEGAM

P. C.

same date namely 8th September, 1924, at the residence of the defendant and her husband in village Behtia by one Niamat Ullah, Sub-Registrar, Lakhimpur. The Sub-Registrar has noted "The conditions laid down in this deed have been read out and fully explained to the lady executant." There is also an endorsement to the effect that execution and completion of the deed was admitted: in the case of the lady that she herself "admitted it from her own mouth in a loud voice from behind the screen in the *dalan* facing east inside her house and realised Rs.32-13-3 from Kundan Lal, mortgagee and Rs.512-7-9 from Ram Charan, mortgagee, in cash before me." It is stated that the lady was identified to the Sub-Registrar by Ali Mohammad Khan and Sheikh Ibadullah, who are described as nephew and tutor respectively. The endorsement is signed by the husband and the defendant's name is put thereto by the pen of Qadar Ali together with her thumb-impression. Ali Mohammad Khan and Sheikh Ibadullah have also affixed their signatures.

The defendant put the plaintiffs to proof of the mortgage deed and the two questions which arise for consideration upon this appeal are: (1) whether the plaintiffs have given sufficient proof of due attestation to satisfy the terms of section 3 of the Transfer of Property Act "and each of whom has signed the instrument in the presence of the executant." (2) whether the plaintiffs have given sufficient proof in the case of an illiterate purdahnashin lady that she thoroughly comprehended and deliberately of her own free will carried out the transaction.

By her written statement the defendant admitted the execution of the deed by herself, but pleaded that she was incapable of understanding any transaction and that she affixed her thumb-impression on the deed without understanding it and without obtaining independent advice at the instance of her husband who was actuated

with selfish motives and in the absence of witnesses. She made the case that her husband had represented to her that the deed was merely to raise money to the extent of some Rs.1,995 which was necessary to pay the Government revenue upon her own property. She pleaded that she had no knowledge that any other consideration money was being received beyond Rs.1,095-12. Acordingly issue No. 1 was framed as follows:

"Did the defendant No. 1 execute the mortgage deed in suit after understanding its import and its effect on her interest with independent advice and in presence of the attesting witnesses?"

The defendant was examined on commission and gave her evidence on the 2nd September, 1931, after the plaintiffs' witnesses had been heard by the learned Trial Judge. Her case was, and her evidence was, that her husband told her that it was necessary to raise a loan of about Rs.2,000 to pay Government revenue on her property; that in the zenana of their house he came to her with the deed in suit, said that he had managed to raise a loan, and took her thumb-mark on the document there and then, no one being present except themselves and some domestic servants. She admitted that the document was registered and said that she affixed her thumb-mark on that occasion inside the purdah, but denied that the document was at any time read over to her by any one. This case made by the defendant sufficiently explains the concluding words of issue No. 1 above set forth.

It was, however, obligatory upon the plaintiffs to give due proof of the mortgage deed and they claim to have done so by the evidence of the two attesting witnesses Deonath and Badri, who have been believed by both the Courts in India. They were called and deposed to the following effect: That on the 8th September, 1924, the defendant was in a room from which opened out a courtyard; that the room had what is called a tidwari,

1936

LALA KUNDAN LAL v. MUSAMMAT MUSHARRAFI BEGAM

P. C.

namely three door openings or arches leading to the courtyard; that a curtain was slung across one of them at least, namely the one behind which the defendant was. That her husband, the two witnesses, the two plaintiffs, Fida Ali, agent for the defendant and for her husband, Ibadullah and Ali Mohammad were present, being seated on a takhat or platform placed about $4\frac{1}{2}$ feet in front of the curtain. That the scribe Behari read out the deed and that the defendant then asked Fida Ali if that was the very deed a draft of which he had got prepared by Mr. Samiullah of Lakhimpur; that Fida Ali said "Yes" and that the defendant said she accepted what was written and put her hand out of the curtain at the request of Ali Mohammad and made her thumb-mark on the deed in sight of the witnesses. The evidence of Deonath and Badri is that the defendant's husband then signed and that thereupon they themselves signed as attesting witnesses. Both witnesses say that this was done in the presence of the defendant and her husband. Their evidence is that the Sub-Registrar who was in attendance was then brought forward; that he asked the defendant if she understood the purport of the deed, giving some explanation to the effect that Sheopuri was being hypothecated for Rs.12,500 repayable in six months with 1 per cent. per mensem interest; that he read out the deed to her and asked her if she accepted the terms; that she said 'yes'. The cash consideration of Rs.550 was paid in the presence of the Sub-Registrar by being given to Fida Ali, who gave them to the defendant by placing them inside the room where she was.

Before the Trial Judge no exception appears to have been taken to this evidence so far as regards the question of due attestation. The contention that even if the plaintiffs' witnesses be believed the signature of the witnesses was not put in the presence of the defendant by reason of the curtain or purdah was not raised in the Trial Court at all. The plaintiffs' witnesses were not

cross-examined to show that by reason of the purdah the defendant had no opportunity of seeing and noticing the attestation being carried out. The grounds of appeal to the Chief Court contain no such suggestion. Ground 4 is somewhat inconsistent with any such contention as it says that the Lower Court should have found that the executant is not liable for a larger sum than Rs.1,995-12 under the deed in suit. The learned Judges of the Chief Court, however, while saying that they saw no reason to reject the evidence of the plaintiffs' witnesses Deonath and Badri, took the view that the curtain which was described in the evidence as thin, was really thick, and that, as it was not shown that the defendant had her attention called to the fact that Deonath and Badri were signing the deed as witnesses, they could not be held to have signed the deed in her presence. Their Lordships are of opinion that this view cannot be sustained. Having regard to what was put to the plaintiffs' witnesses in cross-examination it was not reasonable that any such contention should be raised before the Appellate Court for the first time. No question whatever bearing upon this point was put to Deonath but in Badri's cross-examination the following passage appears:—"The curtain was very thin and the outsiders could not see the person inside."

The learned Judge who took the evidence down in English, though it was given by the witnesses in the Vernacular, refers in his judgment to this curtain saying "Ali Mohammad went inside the room in which defendant No. 1 was sitting behind a thin curtain." The learned Judges of the Chief Court had no substantial ground for supposing that the word "thin" was a mistake for "thick", nor was any reasonable enquiry directed at the trial to the question whether a person inside looking against the light could not see through the curtain. The whole object of the method employed in the staging of this ceremony was that the defendant,

1936

LALA KUNDAN LAL v. MUSAMMAT MUSHARRAFI BEGAM

P. C.

though her face should not be seen, should be made aware of what was being done. It is only reasonable to treat the evidence given by the plaintiffs as sufficient evidence for this purpose. A number of cases have been cited to their Lordships from the English reports where a similar question has been considered under the English Wills Act of 1837. Whether a witness signs his name in the presence of the executant is in each case a question requiring full consideration of the whole circumstances. Their Lordships think that the case of *Newton* v. *Clarke* (1) where the statute was held to have been satisfied, is as near to the present case as any of the English cases. It is clear enough that the defendant if she had been minded to see the witnesses sign could have done so even if she did not actually see them through the curtain. On this point, therefore, the appeal succeeds.

There remains, however, the important and difficult question whether the evidence given by the plaintiffs in this case was sufficient to show in the case of an illiterate purdahnashin woman that she gave an intelligent and free consent to the mortgage deed. The learned Subordinate Judge was of opinion upon a consideration of the defendant's evidence on commission that she was, though illiterate, of average intelligence and that the language of the deed was quite simple and intelligible to a lady of the type of the defendant. He was of opinion that the deed was read out and explained to her sufficiently and that she was sufficiently apprised of the fact that the bulk of the money borrowed was for her husband's debts. Fida Ali no doubt was her husband's agent as well as her own. The husband having died on the 7th April, 1927, Fida Ali continued as the defendant's agent. The learned Subordinate Judge was impressed with the fact that Fida Ali was not called at the trial as a witness. In the circumstances he did not think that it was necessary for the plaintiffs to produce evidence that the

(1) (1839) 2 Curtis 320, 163 E.R., 425.

defendant had independent advice, that is to say advice independent of her husband; and it is abundantly clear that she had advice independent of the mortgagees. The learned Judges of the Chief Court, however, took the view that it was unlikely that the appellant would be willing to mortgage her own property for her husband's debt, although she and her husband were on affectionate terms. They did not think the transaction was such as she could have intelligently entered into. Her question whether the deed conformed to the draft settled by the lawyer of Lakhimpur was taken by them to show that when the document was read out to her by the scribe she was not applying her mind to its contents. In the result they refused to find that there was intelligent execution by her of the mortgage deed in suit. Both Courts agree, however, in rejecting the defendant's story that she executed the deed in the zenana in the absence of any witnesses from outside and upon misrepresentation by the husband to the effect that it was a deed for Rs.2,000 only. Now there was certainly a burden upon the plaintiffs to establish that the effect of the deed was brought home to the mind of the defendant and the mere fact that the defendant's story of deception by her husband has to be rejected does not operate to discharge this burden. Nor is it discharged by mere proof of execution of the deed by her. On the other hand their Lordships cannot doubt upon the evidence that the lady was well aware that she was executing a mortgage deed; that she was executing it for a sum of Rs.12,500; and that as to the bulk of this sum she was doing so in order to discharge her husband's debts and not her own. The nature of the transaction, though in part altruistic, cannot be described as one which she could not intelligently have entered into, as the Chief Court thought. Having received a large property from her husband she may very well have thought that in addition to borrowing money which was required on her own account she would come to her husband's help to

1936

LALA KUNDAN LAL v. MUSAMMAT MUSHARRAFI BEGAM

the extent of some seven or eight thousand rupees. The terms upon which she and her husband lived make it quite likely that this should have been her settled determination and that the sacrifice, such as it was, was a willing sacrifice on her part. Lord SUMNER in giving the judgment of this Board in the case of *Farid-un-nissa* v. *Mukhtar Ahmad* (1) said:

P. C.

"Independant legal advice is not in itself essential: *Kali Bakhsh Singh's* case (2). After all, advice, if given, might have been bad advice, or the settlor might have insisted on disregarding it. The real point is, that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act, of the person who makes it: *Wajid Khan's* case (3), *Sunitabala Debi's* case (4), The appellant clearly had no such advice, nor is it contended that she had. If, however, the settlor's freedom and comprehension can be otherwise established, or if, as is the respondent's case here, the scheme and substance of the deed were themselves originally and clearly conceived and desired by the settlor, and were then substantially embodied in the deed, there would be nothing further to be gained by independent advice. If the settlor really understands and means to make the transfer, it is not required that someone should have tried to persuade her to the contrary. Again, the question arises how the state of the settlor's mind is to be proved. That the parties to prove it are the parties who set up and rely on the deed is clear. They must satisfy the Court that the deed has been explained to and understood by the party thus under disability, either before execution or after it under circumstances which establish adoption of it with full knowledge and comprehension: *Sudisht Lal's* case (5), *Shambati Koerji's* case (6), *Sajjad Husain's* case (7)."

As the defendant's evidence was given on commission their Lordships are in no worse position than the Chief Court in coming to a conclusion whether the view taken by the Trial Judge of the defendant's capacity to understand business was correct. They think the learned Trial Judge came to a very just estimate of the lady's ability and intelligence. They see no reason to doubt

(1) (1925) L.R., 52 I.A., 342 at 350. (2) (1913) L.R., 41 I.A., 23.
(3) (1891) L.R., 18 I.A., 144, 148. (4) (1919) L.R., 46 I.A., 272, 278.
(5) (1881) L.R., 8 I.A., 39, 43. (6) (1902) L.R., 29 I.A., 127, 131.
(7) (1912) L.R., 39 I.A., 156.

that the Sub-Registrar discharged his duty to the best of his ability and satisfied himself that the lady's free consent went with her act in executing the deed. The law is not to be so interpreted or applied as to make it impossible for a purdahnashin to give security for her husband's benefit: this would be to convert a principle of protection into a disability. It is clear enough that before the Trial Court learned counsel for the defendant made no case of undue influence by the husband. It is noticeable that apart from the untrue story of deception by the husband as to the amount of the loan which was being taken there is nothing in the defendant's evidence to indicate that unfair insistence, threats, overbearing conduct or other undue influence was used or attempted by him to obtain her signature to this deed. The Chief Court were not satisfied that her intelligent assent went with her execution of the deed. Their Lordships think, however, that the proof given was sufficient and that the learned Subordinate Judge took a correct view both of the law and of the facts. Their Lordships will humbly advise His Majesty that the appeal should be allowed, the decree of the Chief Court set aside and the decree of the Subordinate Judge of Kheri restored subject to the following modifications, namely, that in lieu of the 7th March, 1932, as the date when the defendants are to pay into Court the sum of Rs.31,540-3-9, the 7th September, 1936, should be substituted, and that in lieu of that sum the amount due on the 7th September, 1936, for principal and interest according to the mortgage deed together with the costs awarded by this judgment be inserted in the decree by the Chief Court. The defendant No. 1 must pay the plaintiffs' costs in the Chief Court and of this appeal.

Solicitors for the appellants: *Hy. S. L. Polak & Co.*

Solicitors for the 1st respondent: *Watkins* and *Hunter.*