

they must succeed. The burden of proving the want of consideration rests originally on the defendants, but it is urged that when it is conceded in the plaint that the plaintiffs are the subbharnadars in possession of the mortgaged property and when the plaintiff's case is that at least part of the consideration money was for payment of rent, then the question would arise whether there was a special contract whereby the duty of paying this public charge devolved on the mortgagor, because the mortgagee in possession is bound under the law to pay rent in absence of the contract. There is no evidence on the record that there was any special contract or that the rent was payable for some other land. Therefore, it is a moot question whether the evidence is sufficient for a decree in favour of the plaintiffs. All these aspects have not at all been considered by the trial court or by the learned Subordinate Judge in appeal.

In the result the appeal is allowed. The judgments and decrees of the Courts below are set aside and the suit remanded to the trial Court for decision according to law after giving an opportunity to both the parties to adduce evidence. The costs to abide the result.

FAZI ALI, J.—I agree.

*Appeal allowed.
Case remanded.*

APPELLATE CIVIL.

Before Wort and James, JJ.

MUHAMMAD SADIK KHAN

v.

MASIHAN BIBI.*

1929.

May, 14, 15.

Pardanashin lady, transaction by—onus to prove that the lady understood it lies on the person dealing with her—

*Appeal from Appellate Decree no. 1440 of 1926, from a decision of Babu Pramatha Nath Bhattacharji, Subordinate Judge of Palanau, dated the 24th August, reversing a decision of Babu Ramesh Chandra Sur, Munsif of Palanau, dated the 6th March, 1926.

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person relying on the transaction, whether bound to show that the deed was explained—bona fide transfer for value, onus to prove the plea of, on whom lies—Specific Relief Act, 1887 (Act 1 of 1887), section 27(b).

Although in the case of a transaction entered into by a pardanashin lady the onus is always on the person relying on it to prove not only that the deed was of the lady but that she understood the transaction which she was entering into, it is not necessary in every case that the person relying on the transaction should show affirmatively that the deed was explained to her.

Mussammat Barkatunnissa Begum v. Debi Balchsh(1), *Farid-un-nissa v. Mukhtar Ahmad*(2) and *Ruhulla v. Hassanalli Degumia*(3), relied on.

The onus of proving the plea of bona fide transfer for value without notice within the meaning of section 27(b), Specific Relief Act, 1887, is on the person seeking to take advantage of the exception as embodied in that section.

Ramdeni Singh v. Gumani Raut(4) and *Hemchandra De Sarkar v. Amiyabala De Sarkar*(5), followed.

Appeal by the plaintiff.

The facts of the case material to this report are stated in the judgment of Wort, J.

Sir Sultan Ahmad and *D. P. Sinha*, for the appellant.

Sambhu Saran, for the respondents.

WORT, J.—This appeal arises out of an action in which the plaintiff claimed the right of three defendants with regard to certain property and in the alternative claimed specific performance of a contract for sale of that property. No question arises in this appeal of the plaintiff's alleged right to pre-empt as the Courts below have found that on the facts

(1) (1926-27) 81 Cal. W. N. 698, P. C.

(2) (1925) I. L. R. 47 All. 708, P. C.; 52 I. A. 842.

(3) (1927-28) 82 Cal. W. N. 929, P. C.

(4) (1929) 10 Pat. L. T. 308.

(5) (1921) I. L. R. 52 Cal. 121.

the necessary preliminaries not having been gone through the plaintiff is not entitled to succeed on that question. The matter which comes before this Court is whether the plaintiff was entitled to a decree for specific performance.

The suit succeeded before the learned Munsif; but the learned Subordinate Judge allowed the appeal in dismissing the plaintiff's claim in the following circumstances.

The defendants-vendors, that is defendants 2 and 3, were pardanashin ladies and had entered into this contract, so it was alleged by the plaintiff, for the sale of this property.

The defendants in their defence admitted that the deed bore their thumb-impression but denied that it was their contract. On this question both the Courts below have come to the conclusion that the defendants did execute this contract and, therefore, that point, so far as the defendants' case is concerned, failed and fails in this Court. But as I have already stated they were pardanashin ladies and the learned Subordinate Judge in appeal came to the conclusion that they did not fully understand the purport of this contract. It is important, however, to notice the language of the learned Judge's judgment in this respect. Sir Sultan Ahmad who appears for the appellant argues that the learned Subordinate Judge has misdirected himself on an important question of law, and consequently the judgment ought to be set aside. The learned Subordinate Judge in his judgment states:

"There is nothing in the evidence adduced by the plaintiff to show that the contents of the agreement were explained to the defendants 2 and 3 or that they understood them."

He goes on to say:

"It is now a settled proposition of the law that no document executed by a pardanashin woman can be accepted as valid unless it

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is shown that the document was not only read over to the woman, but that its contents were also explained to her and that she understood the same."

Then he says :

"There is no evidence on the plaintiff's side to show that the contents of exhibit 1 were explained to the defendants 2 and 3."

In one view of the passages to which I have referred, it would appear that the learned Subordinate Judge has stated the law correctly and he has certainly stated the law correctly in so far as his statement is concerned to the effect that, these ladies being pardanashin ladies, it had to be shown that they understood the nature and the effect of the contract which they were entering into. But it is argued that the learned Judge has misdirected himself in coming to the conclusion which he appears to have come that in order to show that the ladies understood what they were doing it was necessary for the plaintiff to show that the document was explained to them. That is the controversy which arises in this case. On behalf of the respondents it is contended that unless it can be shown affirmatively that the document was in fact explained to these ladies, the plaintiff's case must fail; and it is further argued that, on these findings of fact by the Subordinate Judge, as there was no evidence that the agreement was explained or that they understood it, the appeal must necessarily fail. A number of authorities have been relied upon by both parties in support of their contentions on this important question.

On behalf of the appellant, in the first place, the case of *Musammat Barkatunnissa Begum v. Debi Bakhsh*⁽¹⁾ has been referred to.

In that case Sir John Wallis observed as follows :
"As regards the duty of persons who take transfers from pardanashin ladies to show that they not merely executed the document, but that they understood what

(1) (1926-27) 31 Cal. W. N. 693, P. C.

they were doing, the law has been laid down in numerous decisions of this Board, and most recently in the judgment delivered by Lord Sumner in *Farid-un-nisa v. Mukhtar Ahmad*(1).”

As Sir John Wallis points out, the law on this question has been elaborately discussed in a number of cases before the Judicial Committee of the Privy Council.

In *Farid-un-nisa v. Mukhtar Ahmad*(1) an illiterate pardanashin lady executed a deed by which she gave in wakf the whole of her property reserving small monthly sums of money for the maintenance of herself and her husband. The Judicial Committee of the Privy Council decided that, upon the evidence in the case, as the onus which was undoubtedly on the person relying on the document had not been discharged, the document was not binding upon the lady. Now, the discussion of the law upon this matter commences on page 710: “Further the whole doctrine involves the view that mere execution by such a person although accompanied by duress, protest or obvious signs of misunderstanding or want of comprehension, is in itself no real proof of a true understanding mind in the executant. Evidence to establish such comprehension is most obviously found in proof that the deed was read over to the settler and, where necessary, explained.”

Without further discussion of the other authorities which have been quoted, in my judgment, it quite clearly lays down that although the onus is upon the plaintiff to show that it was not only the deed of the pardanashin lady but that she understood the transaction which she was entering into, yet it depends on proof of that and the general circumstances of the case. It is to be noticed that in the judgment to which I have referred, the words used are “and, where necessary, explained”. The argument on

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(1) (1925) I. L. R. 47 All. 708; 52 I. A. 342.

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behalf of the respondents is that it must be affirmatively shown in all cases that the document was explained to the defendants. In my judgment, quite clearly, such a bald statement of the law cannot be supported. Obviously each case must depend upon its own circumstances. It is to be noticed that in the majority of the cases which were relied upon by the respondents they were deeds, similar to the one which is the subject-matter of the decision in *Farid-un-nisa v. Mukhtar Ahmad*⁽¹⁾, in which a pardanashin lady had conveyed away the whole of her property.

Another authority which is relied upon by the learned Advocate for the respondents is the case of *Ruhulla v. Hassanalli Degumia*⁽²⁾. The passage relied upon is as follows: "It is however undisputed that in the case of a disposition of property by a pardanashin lady an onus is cast on the person relying on the disposition to establish that the transaction is one which the disponent thoroughly comprehended and deliberately and of her own free will carried out."

But in a later part of the judgment Lord Atkin says: "While it is important to maintain the principles of law laid down for the protection of pardanashin ladies, it is also important, as expressed in the judgment of this Board in *Kali Bakhsh Singh v. Ram Gopal Singh*⁽³⁾, not to transmute such a legal protection into a legal disability".

To sum up, in my judgment, what is the law on this case undoubtedly it is for the plaintiff to show that the transaction (entered into by a pardanashin lady) which he seeks to enforce was a transaction which the person entering into it thoroughly understood; but to say that it is necessary for the plaintiff to give definite evidence in all cases that the document was explained to her is, in my opinion, a

(1) (1925) 1. L. R. 47 All. 703, P. C.; 52 I. A. 342.

(2) (1927-28) 32 Cal. W. N. 929.

(3) (1913-14) 41 I. A. 23 (31).

statement of the law which is not warranted by the authorities. It depends, as I have already stated, upon the circumstances of each case. There may be a transaction of some considerable complications in which it would be necessary not only to read over but to explain in detail the purport and effect of that deed but where we have in a case of this kind a simple transaction of a sale for a consideration which has been found to be adequate, it seems to me that the explanation which is necessary becomes minimised and may in certain circumstances, and I do not say that this is a case of that kind, disappear altogether as indicated in the words of Lord Sumner in the case of *Farid-un-nisa v. Mukhtar Ahmad*⁽¹⁾ where he uses the expression "and, where necessary, explained". In my opinion, therefore, in so far as the learned Judge has come to the conclusion that it was necessary for the plaintiffs to show affirmatively that this document was read over and explained to the defendants 2 and 3, he has made a statement of the law which is too wide. Undoubtedly, to repeat myself, it is necessary for the Court to be satisfied that the defendants understood the effect of this deed; but that conclusion may be arrived at not only from the evidence of the plaintiff or his witnesses but from the general circumstances of the case and the learned Subordinate Judge in this case has to determine whether in the circumstances he can be satisfied that the ladies in this case understood the transaction which they entered into with the plaintiff. In my opinion this case ought to go back to the learned Subordinate Judge for him to come to a conclusion on this point.

Now, there is a second point—the contract in this case is sought to be enforced against defendant no. 1. Defendant no. 1 is a subsequent transferee and it is pointed out by the Advocate on behalf of the respondents that under section 27 of the Specific Relief Act a contract can be enforced against a subsequent transferee except a transferee for value who has paid his

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(1) (1925) I. L. R. 47 All. 708, P. C.; 52 I. A. 342.

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money in good faith and without notice of the original contract. In this case there is evidence—as I understand on both sides—some evidence on the part of the defendants and some evidence on the part of the plaintiff, as to whether the defendant no. 1 had notice of the plaintiff's contract. The learned Munsif in dealing with this point has stated that there was no evidence on the part of the defendant to establish that she obtained the property in good faith without notice and so far as that point is concerned the defendant's case has failed. It is argued on behalf of the respondents that the learned Munsif placed the onus wrongly on the defendant. This matter was not argued before the learned Subordinate Judge for the simple reason that I have already stated that he set aside the decision of the learned Munsif on other grounds. Whatever my own views may be with regard to this matter undoubtedly there is a decision of this Court on this point. The case to which I refer is *Ramdeni Singh v. Gumani Raut*(¹). The decision of this Court in that case was that the onus was on the party who sought to take advantage of the exception contained in the later part of section 27, sub-section (b), and to that purpose reliance was placed upon the decision of *Hemchandra De Sarkar v. Amiyabala De Sarkar*(²). As it is important in the circumstances to decide this question also the case will be remanded to the Subordinate Judge on both points: first, as to whether the ladies understood the transaction which they had entered into, and, secondly, whether the defendant no. 1 was the person who paid his money in good faith and without notice of the original contract within the meaning of section 27, sub-section (b), of the Specific Relief Act and he will consider the decision in *Ramdeni Singh v. Gumani Raut*(¹). As the question of onus may arise, the learned Judge will place the onus upon the defendant no. 1 to establish that question. The question

(1) (1929) 10 Pat. L. T. 308.

(2) (1921) I. L. R. 51, Cal. 121

of onus may not arise having regard to the fact that there is evidence, whatever it is worth, on behalf of the plaintiff and of the defendants.

In those circumstances the case will be remanded to the lower appellate Court and the costs of this appeal will abide the result of the hearing in the Court below.

JAMES, J.—I agree.

Appeal allowed.

Case remanded.

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APPELLATE CIVIL.

Before Fazl Ali and Chatterji, JJ.

NIRMAL KUMAR

v.

SURJAN DUSADH.*

1929.

May, 7, 8,
24.

Ejectment—resumption, suit for, whether can be maintained by a co-sharer landlord—absence of notice to quit—suit, whether can proceed—declaration, court not bound to grant unless cloud thrown on plaintiff's title.

A suit for resumption cannot be successfully maintained by a co-sharer landlord without the other landlords joining as co-plaintiffs in the absence of anything to show that the other co-sharers intended to determine the grant.

Gopalram Mohuri v. Dhakeshwar Pershad Narain Singh⁽¹⁾, *Ghulam Mohiuddin Hossain v. Khairan*⁽²⁾ and *Ganodannessa Bibi v. Maksedannessa Bibi*⁽³⁾, followed.

*Appeal from Appellate Decree no. 871 of 1926, from a decision of J. Chatterjee, Esq., District Judge of Shahabad, dated the 7th April, 1926, reversing a decision of Pandit Ram Chandra Misra, Munsif of Arrah, dated the 30th April, 1925.

(1) (1908) I. L. R. 35 Cal. 807.

(2) (1904) I. L. R. 31 Cal. 786.

(3) (1911) 11 Ind. Cas. 84.