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bound, and that the mortgage was concluded alike by all of them. (His Lordships discussed the facts of the case and concluded,—)

It appears to me, therefore, that both on the question of law and on the merits, the plaintiff's case fails, and the appeal must be dismissed with costs.

[PRIVY COUNCIL.]

MUSSUMAT AZEEZOONNISSA AND ANOTHER (DEFENDANTS) *v.* BAQUR KHAN (PLAINTIFF).

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[On appeal from the High Court of Judicature, North-Western Provinces, Agra.]

Evidence—Execution of Document by Purdah Ladies—Agency—Burthen of Proof.

The plaintiff sought to make two purdah ladies liable on a document which he alleged had been executed by a third person as their agent. *Held* (reversing the decision of the High Court), strict proof of the agency must be given.

IN this case the respondent brought his action against the appellants (who were sisters) to obtain possession of a village called Burehta. His plaint was not very intelligible, but in his deposition he stated that the ladies borrowed Rs. 8,000 from him, and executed to him a bond, whereby they mortgaged to him their village Nundsenee, which bond was registered through Mahomed Alee their attorney, and that subsequently in lieu of that bond, they executed a deed of conditional sale of the property now sought to be recovered, dated 28th March 1857, which was to become absolute on default in payment. Mahomed Alee was the husband of one of the appellants. The bond was produced and purported to be signed "in the handwriting of Mahomed Alee," and to have been registered by him as the attorney of the appellants on the oaths of two persons (who were not now called as witnesses), but no power-of-attorney was produced. The substituted document purported to be similarly

* *Present* :—THE RIGHT HON'BLE SIR JAMES COLVILE, SIR M. SMITH, SIR R. COLLIER, AND SIR L. PEEL.

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signed and registered. Both ladies denied the execution of either of the documents or the authority of Mahomed Alee to execute them, and the issues were as to whether the deed was theirs or not In addition to giving his own evidence, the respondent called three witnesses, who spoke to the ladies having borrowed the money, and directed the document to be executed. He also filed a petition which had been presented by Mahomed Alee shortly after the mutiny, in which he alleged that the document now sued upon had, together with some other papers, been stolen from his house, the petition however alleging that, though the document had been executed, it had never been made over to the respondent in consequence of the money not having been paid. He also put in proceedings which he had taken in 1860 for a summary foreclosure of the property mentioned in the deed in question, and from these proceedings it appeared that both Mahomed Alee and the appellants had disputed the validity of the deed, but their objections could not be considered in that proceeding, the determination of them being matter for a regular suit. The appellants filed some documentary evidence for the purpose of showing that the respondent was a man of bad character, and they also called witnesses as to his antecedents; and one witness, Amjaud Alee, the son of one of the appellants and of Mahomed Alee, while admitting that the document was signed by his father, gave evidence to show that the ladies had nothing whatsoever to do with the transaction.

The Judge of Futtehpore in giving judgment stated that no witness had been called who knew the defendants, who were proved to be purdah ladies, and that the three witnesses, who had been called, were utterly untrustworthy. After pointing out that the witnesses for the defendants had proved that they were ladies of position, having no occasion to borrow money, and stating that the evidence satisfied him that the plaintiff was a man of bad character, the Judge concluded by stating that the suit appeared to be completely false, and that whatever transactions there might have been between the plaintiff and Mahomed Alee, they could not affect the case of the defendants, there being no proof that Mahomed Alee was their agent.

On appeal to the High Court, Morgan, C.J., and Pearson, J.,

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on the 19th December 1866, gave the following judgment, reversing the decree of the Court below :—

"The plaintiff's case is that the defendants (two Mahomedan ladies) having borrowed from him through Mahomed Alee (the husband of one of the defendants, and the brother-in-law of the other) Rs. 8,000' this loan was secured by mortgage-bond of the village Burehta, which bond is dated 28th March 1857. Foreclosure proceedings were afterwards taken, and it is not made to that appear such proceedings were irregular or defective. The present suit is to recover possession of the property from the defendants. The defendants deny that they borrowed the money, or gave the security, or authorized Mahomed Alee to give it: the Judge was of that opinion and dismissed the suit. His judgment proceeds on the ground that the evidence failed to show the execution of the deed on the receipt of the money by the defendants. Whether the plaintiff may have had transactions with Mahomed Alee or not, he considers it needless to inquire, there being no evidence to show any authority conferred on Mahomed Alee to bind the defendants. The Judge who decided the case did so upon evidence which had been taken by another Judge (who died before the hearing), and this was done without objection, and therefore it may be presumed with the consent of the parties. His position, so far as any advantage may be derived by a Court of first instance from seeing and hearing the witnesses, was not superior to that of a Court of Appeal. In addition to the grounds of his judgment above noticed, he relied much on the proved bad character of the plaintiff, and his want of means to advance the money, and also on the respectability and position and wealth of the defendants. We do not mean to find that the plaintiff's case is free from doubt, but the admitted facts and some reasonable presumptions lead us to conclude that the plaintiff had at least proved a sufficient *primâ facie* case, and that the defendants not having adduced such evidence in answer to it, as they might fairly be expected to do, there should be a decree against them. It may be presumed that the Registrar satisfied himself before registry of these bonds that they had been duly executed by a person duly empowered to execute them on the part of the ladies. They are purdah women, transacting business through agents. Who was their agent at the time of this transaction? It is said that the son of the defendant Ehsan Bibee and of Mahomed, was and had been the agent of the defendants for many years; but the proof of this fails, and there is evidence to show that Mahomed himself was at the time the defendants's agent. He so describes himself

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in 1858 in a petition transmitted to the Magistrate's Court, and, considering that the proceeding to which that petition related was public, and would probably be known to the defendants and to their alleged agent (the son of Mahomed Alee), there is reason to infer that the defendants knew Mahomed Alee to be acting as their agent, and authorised him to do so. The tenor of the petition leads to the inference that Mahomed Alee was thus acting as the ladies' agent, and that Amjaud was in concert and communication with him.

That petition related to this and another mortgage-bond, which the petitioner said had been returned to him in consequence of the non-payment of the loans by the plaintiff. But as on the Magistrate's proclamation the plaintiff produced the bonds said to have been stolen, there seems reason to believe that Mahomed Alee was attempting to defeat any claim the plaintiff might hereafter bring on the bonds. It is clear from what then occurred that the bond now in question (a registered bond) then existed in the plaintiff's hands, and that Mahomed Alee was aware of its existence. Its existence indeed is not denied, nor that it was given by Mahomed Alee, but it is said that no money was in fact advanced, and that Mahomed Ali being in no way authorised by the defendants could not by any act of his bind them.

It is important to observe that this person (Mahomed Alee), the defendants do not venture to call, either he is not to be found, or he is at a distance (at Hyderabad) upon some pretext, and cannot be called. His absence is not in our opinion by any means accounted for satisfactorily. We think the defendants were bound, coming forward at this late stage to dispute the original transaction, to examine him or to give full explanation of their omission to do so.

That he had dealings in this matter with the plaintiff is clear, and it is reasonable to infer whatever the plaintiff's character or position, that Mahomed Alee would not have entered into negociation for a loan of a considerable sum of money from a man who was not in a condition to advance the money; that money was advanced is at least *primâ facie* probable, the bond being found in the plaintiff's possession, and the defendants and Mahomed Alee being challenged without effect to show that they, and not the plaintiff, were entitled to it; that Mahomed Alee the husband of one of the defendants, was their agent and manager at the time of those transactions, there is also evidence to show. It is for the defendants under such circumstances to show that Mahomed Alee in his proceeding was acting in fraud of them and without their authority; and further that, if he was their agent, the plaintiff, and not themselves,

are to suffer for his fraud. The Judge appears to us to have overlooked the probabilities of the case, and not to have adverted to this consideration that at least a *prima facie* case having been made out, it was incumbent on the defendants, who had taken no steps to dispute this transaction in the earlier stages, or until they were sued for recovery of possession, to explain under what circumstances the husband of one of them, and apparently the agent of both, had acted in the transactions of 1857 and 1858, so as to entitle them to claim exemption from an obligation apparently contracted on their credit.

We reverse the judgment of the lower Court, and decree the plaintiff's suit with costs and interest at Rs. six per cent."

The ladies having appealed to Her Majesty in Council, the case now came on for hearing *ex parte*.

Mr. *Leith* and Mr. *Prichard* for the appellants contended that the ladies being purdah ladies, the case was absolutely without proof, and they relied upon the case of *Seetul Pershad* v. *Mussumat Doohlin Badam Konwur* (1).

Their LORDSHIPS delivered the following judgment :—

This appeal arises out of a suit brought by the present respondent against the apellants for the recovery of the possession of a village named Burehta, under a title which was originally a mortgage title, but which may be taken to have been made absolute by foreclosure. The suit was resisted by the appellants, the then defendants, on the ground that they never executed the mortgage-deed in question. That is the substantial issue in the case ; that it was executed neither by them, nor by any person duly authorised to executed it on their behalf. The Zillah Judge, who tried the case in the first instance, found that the plaintiff had wholly failed to make out his case, and dismissed the suit. The plaintiff then appealed to the High Court in Agra, and the learned Judges, who heard that appeal, reversed the decision of the Zillah Judge, and found in favor of the plaintiff ; and it is against that decree that the persent appeal is brought.

What was the foundation of the judgment of the High Court?

(1) 11 Moo. I A., 268.

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The learned Judges begin by saying:—"We do not mean to find that the plaintiff's case is free from doubt; but the admitted facts, and some reasonable presumptions, lead us to conclude that the plaintiff had at least proved a sufficient *primâ facie* case, and that the defendants not having adduced such evidence in answer to it as they might fairly be expected to do, there should be a decree against them." Therefore, the judgment assumes that the plaintiff had made out a *primâ facie* case, and that the defendants had failed to make a sufficient answer to that case.

It is, then, desirable in the first instance to consider what was the *prima facie* case, which, in the opinion of the learned Judges, had been proved. The case of the plaintiff was that, on the 22nd of January 1857, in consideration of an advance made by him to the defendants, they had executed to him a bond, hypothecating another village named Nundsenee; that finding he had not got the security which he intended to have, namely, a mortgage by conditional sale, he applied to them for further security, and that after some dispute it was agreed that the instrument upon which he sued should be given to him in substitution of the other, which was in fact, though not actually cancelled, treated as being superseded and made of no effect by the second transaction.

It appeared by the evidence, and it was not contested at the bar, that both these instruments were executed by Mahomed Alee, the husband of the appellant Ehsan Bibee, and each document appears to have been registered on the day on which it was executed, not at Cawnpore, the place where the defendants resided, and where the transaction of advance, if any advance was made, is alleged to have taken place; but in Futtehpore, the district in which the village of Burehta is situated. So far, no doubt, the plaintiff proved his case. But he failed to show that either at the time of the registration, or at any subsequent time any moktearnamah authorising the execution of those deeds by Mahomed Alee, as agent of the appellants, was produced or verified, or proved in any way. No mention of such an instrument is made in the endorsement of registration upon either mortgage, all that therein appears

being that Mahomed Alee was indentified, and that upon such indentification the deeds were registered.

Again, what is the account which the plaintiff gives of the advance and of the transaction? He alleges that this Mahomed Alee was not only the manager on behalf of his wife and her sister—of their property—but that he had some employment under a person described as the Rajah, of Rusdharree; that, in that capacity, he wanted to obtain a loan of Rs. 16,000, to be applied in paying off a mortgage upon Mouzah Rusdharree belonging to the Rajah; that he, the plaintiff, agreed to advance Rs. 8,000. part of this money, on the security of the appellants' villages, and that the remaining Rs. 8,000 were to be advanced by one Rae Chund, a banker in Cawnpore; and that in some way or other the appellants were to have a counter-security upon Mouzah Rusdharree. There is no evidence whatever that any such transaction ever really took place, except the deposition of the plaintiff himself, None of the subscribing witnesses to the execution of the first bond, which was the only occasion on which money is alleged to have passed, were called. Two persons were called by the plaintiff, who alleged that they were creditors of the ladies. They gave a wholly different account of the transaction, representing that the ladies were account to change their residence, and to leave Cawnpore, that they owed to one of these persons Rs. 1,000, and to the other Rs. 451, and that these debts were paid out of the Rs. 8,000 advanced. Neither of them professed to have seen the ladies; and neither of them spoke to the execution of the first bond in his presence. They left it uncertain where the first bond was executed; their testimony pointing to its execution at Futtehpore, and not at Cawnpore, where the ladies were living. Then only one of the subscribing witnesses to the second instrument was called, and he, too, did not profess to have been present at its execution, or to have seen any power-of-attorney under which it was executed; nor does his evidence fix the place of its execution; or show under what authority it was executed.

Their Lordships, therefore, considering that these ladies are purdah women, are of opinion that the High Court was in error in considering that a *prima facie* case had been made out at all.

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The witnesses differ from the plaintiff as to the nature of the transaction, they are not consistent as to the execution of the instruments, and not one of them pretends to prove the authority under which they purported to be executed. That authority was either a written authority, or if such a thing would suffice it was a verbal authority. No written authority is produced or proved. If there was a verbal authority, it lay upon the plaintiff to prove that verbal authority; and not upon the defendants to show that Mahomed Alee acted without their authority.

If, then, there has been any error in not calling Mahomed Alee, that is a fault of which the plaintiff, and not the defendants, should suffer the consequences, because it was clearly the plaintiff's business to establish the authority under which he says he took the conveyance of this village from a person purporting to be an agent on behalf of the purdah woman, who were the real owners of the village. But either falsely in order to excuse himself, or truly, he has alleged on the face of his plaint that Mahomed Alee is dead. He, therefore, cannot be heard to say that the defendants are in fault for not calling Mahomed Alee, even supposing that it lay upon them, and not upon him to call that person.

Their Lordships have not omitted to consider some documentary evidence relied upon by the plaintiff, *viz.*, the petitions put in by Mahomed Alee in 1858, and afterwards in 1860. In 1858 Mahomed Alee seems to have either truly or untruly alleged that these instruments, though executed by him, never were really delivered to the plaintiff; that they remained with him until the advance should be actually made; and that during the disturbances consequent upon the mutiny at Cawnpore, his house had been plundered, and these and other documents had been taken away. It is perfectly clear that at that time the documents were in the hands of the plaintiff. He put in a counter-petition. The case was heard in a summary way by the Sessions Judge, who said that the parties must try their rights in a civil action and dismissed the criminal charge. That statement of Mahomed Alee was either true or false. If it were true, there is an end of the plaintiff's case. But if it were false, there is nothing whatever upon the face of the petition to connect that proceeding

with the defendants, except the mere statement of Mahomed Alee. The High Court seems to have assumed that because Mahomed Alee said he presented that petition on behalf of the defendants, it must be taken to have been presented by their authority, and that they were therefore concurring with Mahomed Alee in an attempt, upon a suggestion of that which was false, to escape from the consequences of this deed, and to get back the documents from the plaintiff. But there is really no more proof of Mahomed Alee's having acted as their agent in that case than there is of his agency in the original transaction; and therefore, the inference which the learned Judges drew from the mere presentation of the petition appears to their Lordships to be unwarranted. The same observation applies, perhaps even more strongly, to the petition put in by Mahomed Alee in 1860, as an intervenor in the foreclosure proceedings.

Therefore, taking the whole evidence produced by the plaintiff, their Lordships must dissent from the conclusion of the learned Judges of the High Court that any *primâ facie* case had been made out; and they consider that the suit, being one brought against purdah women, upon a deed alleged to have been executed by them, wholly failed, inasmuch as there was no proof that the women had ever signed the deed, or that it had been ever signed by any person authorised by them; and that their Lordships, if they affirmed that judgment, would be going against the whole course of cases that have been decided in India and at this Board in respect of transactions to which purdah women are parties.

It has perhaps by anticipation been stated that even had a *primâ facie* case been proved, their Lordships would not have concurred with the learned Judges in thinking that the case should be decided against the defendants because they had failed to call Mahomed Alee, (if Mahomed Alee is still in life), in order to prove either that he did not deliver this deed as he says he did not, or that he did not act in that transaction as their agent. They have given by the mouth of Amjaud Alee evidence far more satisfactory than any statement of so untrustworthy a person as Mahomed Alee, that that person was not their general manager or their manager at all, and that there is no reason to

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suppose that he acted in the transaction in question under any special authority from them.

For these reasons their Lordships are of opinion that, without relying upon the evidence that has been given of the bad character of the plaintiff, or of the fact that he is a person, as he certainly seems to have been, not likely to have had the means of making the advance which he says he made, the judgment of the Zillah Judge was correct, and they will humbly advise Her Majesty to allow this appeal, to reverse the judgment of the High Court, and in lieu thereof to direct that the appeal to that Court be dismissed, and the judgment of the Zillah Judge affirmed with costs, and that the respondent should also pay the costs of this appeal.

Appeal allowed.

Agent for appellants: Mr. *Wilson.*

P. C.* 1872 *February* 3.

SARODA PROSAUD MU LICK, MANAGER OF SREENAUTH SANNYAL, A LUNATIC (PLAINTIFF) *v.* LUTCHMEEPUT SING DOOGUR AND ANOTHER (DEFENDANTS).

See also B.L.R. 62.

[On appeal from the High Court of Judicature at Fort William in Bengal].

Execution—Security by Manager—Act VIII of 1859, *ss.* 232, 235, & 245, 248—272, 284—287—*Attachment without Sale—Concurrent Orders for Attachment in different Districts.*

The plaintiff, as manager of the estate of her husband, a lunatic, obtained a decree and attached and became the purcahaser of the lands of the defendant in execution of the decree. The Judge required her to give security for the proceeds of the sale before he would allow actual possession to be given to her. The sale was confirmed, but several months elapsed before she found security, and mean-while the same lands were attached and purchased by other creditors under another decree against the said debtor, and possession was given to them. *Held* (reversing the decision of the High Court), the title of the plaintiff must prevail. The security was ordered for the protection of the lunatic against misappropriation by his manager; it was not a proceeding affecting the judgment-debtor. The second sale ought not to have been ordered or confirmed.

Under the Code of Civil Procedure, property may be attached without view to immediate sale.

A Court has power to send its decree for concurrent execution into several places, although in its discretion it may refuse to exercise such power.

* *Present*:—THE RIGHT HON'BLE SIR JAMES COLVILE, SIR M. SMITH, SIR R. COLLIER, AND SIR L. PEEL.