1902

GOVINDA HAZRA v. PROTAP NARAIN MUKHOPADHYA.

of any rent to defendants Nos. 4 to 6." Whether he means proof of payment or evidence of payment in the proper sense may be a question. But if the latter, the statement is not borne out by the record, for our attention was called to the evidence of more than one witness that such payments had been made. I accordingly agree in thinking that the decree appealed against should be set aside, and the case remitted to the lower Appellate Court to be properly disposed of.

HILL J.

PRIVY COUNCIL.

SHAMBATI KOERI
v.
JAGO BIBI.

P. C.*
1902
May 6.
June 6.

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

Purdanashin lady—Execution of document by purdanashin—Non-production of mukhtarnama—Evidence—Insufficiency of evidence that deed was explained to her and that she understood it.

In a suit brought against a *purdanashin* lady on a mortgage bond which purported to be signed in her name "by the pen of Soonder Lal, son-in-law and "am-mukhtar," under a mukhtarnama, which was not produced :

Held, that secondary evidence of the mukhtarnama was on the facts put forward to account for its non-production inadmissible, but even if admissible, it was not sufficient to show that Soonder Lal had authority to execute the bond.

Although the bond was said to have been read out to the lady, it was not shown that it was explained to her or that she understood its conditions and effect: *Held*, therefore (affirming the decision of the High Court), that she was not bound by it.

Sudisht Lal v. *Sheobarat Koer* (1) followed.

APPEAL from a decree (9th July 1896) of the High Court at Calcutta, reversing a decree (30th March 1894) of the Subordinate Judge of Monghyr, in favour of the Plaintiffs—Appellants.

The representative of the plaintiff appealed to His Majesty in Council.

* *Present* :—LORDS MACNAGHTEN and LINDLEY, SIR FORD NORTH, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

(1) (1881) I. L. R. 7 Calc. 245 ; L. R. 8 I. A. 39.

1902

SHAMBATI KOERI v. JAGO BIBI.

The suit was brought on a mortgage bond. The plaintiffs' case as stated in the plaint was to the effect that the defendant Jago Bibi borrowed Rs. 27,000 on 3rd July 1883 for the purpose of paying off various creditors of her deceased husband, and that she then executed the mortgage bond, by which she hypothecated certain properties in favour of the plaintiffs.

The bond recited that there were debts due to various mahajans, amongst whom Babu Hurdeo Narain (the then head of the plaintiffs' family) is mentioned as being one; and that on account of the high rate of interest charged on them, it was necessary to liquidate them by borrowing money at a lower rate of interest, and that the loan had therefore been taken from the plaintiffs at the rate of 10 annas per cent. per month. The bond purported to be signed by Jago Bibi "by the pen of Soonder Lal, son-in-law and am-mukhtar." A memorandum was endorsed on it to the effect that registration had been effected by Soonder Lal "under a general power-of-attorney (No. 7) of this office," and that execution had been admitted by him.

The suit was brought on 14th April 1892 for Rs. 23,996 against Jago Bibi and certain other persons who had subsequently to the date of the bond purchased portions of the mortgaged properties.

The defence on behalf of Jago Bibi was that she never executed the mortgage bond; that at the time of the alleged execution she had gone to Benares; that the bond had been collusively got up by Soonder Lal and the plaintiffs; that there was no necessity for borrowing the money, nor did she authorize Soonder Lal to execute the bond or borrow any money by the execution of any mortgage on her property; that though Soonder Lal had received an am-mukhtarnama from her for the purpose of conducting the Court affairs, making collections of rent, and performing other necessary acts, yet he had no authority of the kind alleged by the plaintiffs; and that there were no debts left by her husband, which required payment.

The answer of the other defendants was to the effect that the consideration-money paid upon the conveyances executed by them was applied in part satisfaction of the mortgage bond, and that the plaintiffs released the prop rties purchased by them from the mortgage lien.

1902

SHAMBATI KOERI v. JAGO BIBI.

Issues were raised, of which the only one now material was :—

"Whether the defendant Jago Bibi executed the disputed mortgage bond dated 3rd July 1883 for proper consideration to the plaintiffs, and is she bound by the acts of her agent and son-in-law Soonder Lall ?"

The Subordinate Judge held that Soonder Lal had authority to sign the mortgage bond on behalf of Jago Bibi under the power conferred on him by the mukhtarnama and that he had also had her express permission to sign the document. He also held that certain debts due to various creditors were paid off from the money borrowed from the plaintiffs, and that the p'ea set up by Jago Bibi that at the time of the execution of the bond she was away at Benares was untrue. He decreed the suit against the defendant Jago Bibi.

A Divisional Bench of the High Court (GHOSE and HILL JJ.) on appeal reversed the decision of the Subordinate Judge and dismissed the suit.

In their judgment the High Court said—

"The Subordinate Judge has accepted the evidence adduced on behalf of the plaintiffs as altogether true. His judgment, however, is very short, and we are in no way satisfied that he really appreciated the difficulties that exist in the case. We may here point out two or three important mistakes that he seems to have fallen into. In the first place, he says that both the lady and Soonder Lal have wilfully withheld from the Court the original mukhtarnama. So far as the lady is concerned, there is no warrant for saying so. It is quite possible that the document is in the hands of Soonder Lal, but, as will be presently noticed there is nothing to show that the requisition of the Court to produce it was brought home to that individual.

"In the second place, the Subordinate Judge is of opinion, from the registration certificate on the back of the mortgage bond, that the mukhtar Soonder Lal was empowered by the general power-of-attorney (which, we may take it, was produced before the Registrar at the time) to sign the document on behalf of the lady. It, no doubt, shows that he was authorised to admit execution on behalf of the lady, and to get the document registered; but we are unable to take it any further, and say that it shows that there was authority in the mukhtar himself to sign the mortgage bond.

"In the next place, he states that the witnesses on behalf of the plaintiffs have proved that the debts due from Jago Bibi to Jumna Pershad, Kuman Das, Babu Hurdeo Narain and certain other creditors, were satisfied by the money raised by the bond, and that the khata books produced by the plaintiffs support the witnesses in this respect, whereas there is no evidence showing that any of these

1902

SHAMBATI KOERI v. JAGO BIBI.

debts did in fact exist, and that these creditors were, as a matter of fact, paid off. We need hardly say that the entries in the plaintiffs' *khata* books, avowedly made on the representation of Soonder Lal to whom the moneys were paid, standing by themselves can be no evidence of any payment to the creditors.

"The authority which Soonder Lal is said to have possessed under the power granted by the lady is a matter of all importance in this case, as also the question whether any debts were left by the lady's husband, and if money was required to pay off such debts. Upon these two important matters the judgment of the Subordinate Judge is incorrect.

"The evidence that has been adduced as to the general authority of Soonder Lal is altogether secondary, the original am-mukhtarnama not having been produced. And the question in the first place arises, whether the plaintiffs sufficiently accounted for the absence of the original, and whether they took all the means they had in their power to produce the original, so as to entitle them to adduce secondary evidence of the contents of the said instrument. Now there can be no doubt whatever that the original must be either with the lady or with Soonder Lal. The lady swears that it is not with her, but with Soonder Lal; and although this statement was made after the plaintiffs had closed their case, still it was incumbent on them to avail themselves of and exhaust all the means they had in their power to compel Soonder Lal to appear in Court and produce the document in question, if it be with him. No doubt they had subpœnaed him; no doubt they asked for a warrant being issued for his arrest; but it does not appear that any real attempt was made to serve the subpœna upon him personally, or that any effective steps were taken to bring home to that individual either the subpœna or the warrant. The warrant was returned unexecuted, because the serving peon was informed that Soonder Lal had gone away to Calcutta; but it was open to the plaintiffs to apply for the warrant being sent down to the proper authorities at Calcutta for execution. They did nothing of the kind, but allowed the matter to drop there. It appears upon the evidence that Soonder Lal was, at the time, holding an appointment under one Purusotim Lal, who has business both at Calcutta and Monghyr, and it is quite possible that in the course of his employment he would sometimes be in Calcutta and sometimes at Monghyr. It seems to us, therefore, that there was really no great difficulty in serving either the subpœna or the warrant upon Soonder Lal personally, if the plaintiffs were really in earnest. As regards the copy said to have been kept by the plaintiffs' servant, it would appear that certain witnesses on behalf of the plaintiffs were asked to speak to it; but the Subordinate Judge would not permit this to be done. In this matter, we think, he was wrong, because when he allowed secondary evidence to be given as to the contents of the document, we do not see why he refused to allow the witnesses to speak to the copy said to have been kept in the plaintiffs' *kothi*. The learned vakil for the respondents, however, did not tender this copy before us, and it is not now upon the record of this case. We are, therefore, unable to say any thing more about it or take any action upon it. This being the state of facts, can we say that the plaintiffs laid the foundation for the introduction of secondary evidence as to the contents of the mukhtarnama in this case? We do not think we can."

1902

SHAMBATI KOERI v. JAGO BIBI.

Assuming, however, that the secondary evidence was properly admitted, the High Court on consideration of it observed:—

"The evidence as to the authority of Soonder Lal is not, to our minds, in the absence of the original mukhtarnama, of a satisfactory character; but assuming that the mukhtarnama did contain authority to execute a document like the mortgage bond in question, it is not, in our judgment, sufficient to entitle the plaintiffs to a verdict in this case.

"The defendant is a purdanashin lady; and since the death of her husband she left the management of her affairs, including the management of the business of the shop which her husband had, to her son-in-law Soonder Lal. There is no evidence on the record to show that the mukhtarnama, upon which the plaintiffs rely, was explained to the defendant in any manner before she actually executed it, so as to enable her to comprehend exactly the extent of the power she was going to confer upon her son-in-law. It is not, as it seems to us, sufficient for the plaintiffs to prove that she put her mark (for it is said that her signature to the document was by mark); but that she thoroughly understood what the authority or the authorities were (and they were asserted to be practically unlimited) that she was going to confer on the mukhtar; and this the plaintiffs have not even attempted to do. See in this connection the case of *Sudhist Lal* v. *Sheobarat Koer* (1)."

They then considered the evidence as to the express oral authority said to have been given by Jago Bibi to Soonder Lal to execute the mortgage-bond in suit, and as to this they said:—

"This is all the evidence bearing upon the question of the express authority said to have been given by the lady to execute the document, and we are unable to say that it is at all convincing. It is noteworthy that though the mortgage bond is said to have been read out to the lady, there is no evidence that it was in any way explained to her, and that she really understood the conditions and effect thereof.

"We now turn to the evidence relating to the consideration said to have passed under the document.

"As we have already stated, no evidence has been adduced on the part of the plaintiffs to show that the debts, which the mortgage bond states it was necessary to liquidate, did as a matter of fact exist—much less that they were debts left by the lady's husband. The existence of these debts was distinctly challenged by the lady both in the written statement and in her evidence on oath; and it is very remarkable that, notwithstanding this challenge, the plaintiffs did not think it worth while to adduce any evidence bearing upon this matter. No doubt the evidence of the lady was given after the plaintiffs had closed their case; but the assertion had been distinctly made in her written statement that there were no debts due from her husband, and that there was no necessity whatsoever for the money being borrowed under the bond in question, so that the plaintiffs must have

(1) (1881) I. L. R. 7 Calc. 245; L. R. 8 I. A. 39.

1902

SHAMBATI KOERI v. JAGO BIBI.

known distinctly what the case was that they had to meet. The only real evidence upon this subject is given by Baldeo Narain, and he says that Jago Bibi herself, as well as Soonder Lal, said to Madan Mohun, the father of the plaintiffs Nos. 2 and 3, that there were debts due from her bearing interest at a high rate, and requesting him to lend her money at a lower rate of interest; that he was present when the conversation took place, and which was inside the *haveli*. Madan Mohun is dead, and no other person except Baldeo is stated to have been present when this negotiation is said to have taken place and the statement as to the existence of antecedent debts is alleged to have been made. The lady on her oath distinctly denies any such negotiation with Hurdeo Narain; and it will be observed that Baldeo does not say that the debts were debts left by the lady's husband, but that they were contracted by the lady herself. The witness then refers to certain jama-kharach books, and points out various entries showing payments made at different times to certain mahajans and to Jago Bibi. These sums, however, are admitted to have been paid to Soonder Lal, and that it was Soonder Lal who caused the names of the mahajans to be inserted. The witness in another part of his evidence adds that after the registration of the bond, Jago Bibi said "Make over the money to Soonder Lal. He would make payments to mahajans." His evidence is not very clear, whether it was he that was thus authorised to make the payment; but, however that may be, so far as he states that the lady authorised payment to be made to Soonder Lal, he is not supported by any other witness. It is said that one of the mahajans, whose debts it was necessary to pay off, was Hurdeo Narain, the head of the plaintiffs' family. But, then, as to this debt, there is no other evidence save and except the entries which Baldeo Narain has spoken to; and our attention has not been called to any other entries in the plaintiffs' books showing that any sum or sums of money had been previously advanced to the defendant or to her husband, which it was then necessary to repay."

And in concluding their judgment they said—

"The question is, whether the evidence is sufficient to justify us in holding that Soonder Lal was authorised either by a general power or by an express authority to borrow money on her behalf and to execute the mortgage bond in question.

"We must confess that the case is not free from difficulty; but after giving our best consideration to all the facts of the case, we have come to the conclusion that, though the plaintiffs' case may be true up to a certain point, *viz.*, that the mortgage bond was executed by Soonder Lal and that he received the money covered thereby, they have failed to prove all the facts that are necessary to be established before a verdict can be given against the lady."

Rattigan K. C. and *C. W. Arathoon* for the appellants contended that in the evidence it was shown that the mukhtarnama gave authority to Soonder Lal to execute the mortgage bond; that even if not, it was sufficiently shown that Jago Bibi gave express permission for the execution of the deed under which it was duly executed; and that it was explained to her and she

perfectly well understood its contents and effect. As to what it was necessary to prove in such cases, *Geresh Chunder Laheree* v. *Bhuggobutty Debia* (1) and *Mahomed Buksh Khan* v. *Hosseini Bibi* (2) were referred to.

The respondent did not appear.

The judgment of their Lordships was delivered by

SIR ANDREW SCOBLE. This suit was brought by the plaintiffs and present appellants, who represent a firm of mahajans at Ulao in Bengal, to enforce a mortgage bond alleged to have been executed in their favour by the respondent, Jago Bibi, for the purpose of paying off debts due by her deceased husband. Certain persons, who were purchasers of portions of the property included in the mortgage, were also made parties to the suit as originally constituted, but it is unnecessary to deal with their position in this appeal. The Subordinate Judge of Monghyr, who tried the case in the first instance, made a decree in favour of the plaintiffs, but this was reversed on appeal by the High Court of Bengal, and the present appeal is against that decision.

The mortgage bond in question bears date the 3rd of July 1883, and purports to be signed on behalf of the respondent "by the pen of Soonder Lal, son-in-law and am-mukhtar." Its registration at the District Registry is endorsed as having been effected by the same Soonder Lal "under a general power-of-attorney (No. 7 of 1881) of this office, and execution admitted by him." The material issue in both Courts was in these terms—

"Whether the defendant Jago Bibi executed the disputed mortgage bond dated 3rd July 1883 for proper consideration to the plaintiff, and is she bound by the act of her agent and son-in-law, Soonder Lal?"

The respondent Jago Bibi is a purdanashin lady who, on the death of her husband, inherited from him considerable property, including a zemindari and a banking business. There is no

(1) (1870) 13 Moore's I. A. 419.
(2) (1888) I. L. R. 15 Calc. 684; L. R. 15 I. A. 81.

1902

SHAMBATI KOERI v. JAGO BIBI.

doubt that after her husband's death the respondent, who can neither read nor write, executed a mukhtarnama or general power-of-attorney in favour of her son-in-law, Soonder Lal, and that this document was registered at the District Registry of the locality some time in 1881. But this document was not produced in either of the Courts below, and very perfunctory efforts appear to have been made to secure the attendance as a witness of Soonder Lal, in whose possession it was alleged to be. Nor was there any foundation made for putting in the authentic copy of it, which was recorded in the District Registry Office. But a copy alleged to have been made by one Chaturbhuj, a clerk in the plaintiffs' service at the time of the execution of the mortgage bond, was tendered in evidence, and rejected by the Subordinate Judge; and the only information before their Lordships as to the scope of the mukhtarnama is supplied by the statements of some of the plaintiffs' witnesses, who were allowed (very irregularly) to speak to their recollection of its contents. On the other hand, Jago Bibi stoutly affirmed that in the mukhtarnama which she gave "there was no authority to borrow money and execute bonds, and sell or mortgage properties. The mukhtarnama was executed for the purpose of collecting rent from villages and of looking after the affairs."

But it was contended that the absence of the mukhtarnama was of little consequence, as the respondent personally entered into the transaction with full information of what she was about. The evidence of the plaintiffs' witnesses on this point was believed by the Subordinate Judge, but was discredited by the High Court. The witnesses were, with one exception, in the service of the plaintiffs and persons before whom the respondent could not appear; and the one witness (Baldeo Narain) who, from his connection with the family, was able to positively identify her does not "remember whether he went to the house of Jago Bibi at the time when the draft was read out to her," and is not an attesting witness to the bond. Without accepting in every particular the appreciation by the learned Judges of the High Court of the evidence on this part of the case, their Lordships see no reason to differ from the general conclusion at which they arrived that, "though the mortgage bond is said

to have been read out to the lady, there is no evidence that it was in any way explained to her, and that she really understood the conditions and effect thereof."

It was further urged on behalf of the appellants that the object of the mortgage having been to "liquidate debts owing to various mahajans on account of the high rate of interest charged by them, by borrowing money at a lower rate of interest," the respondent had received consideration by the liquidation of these debts. But the only evidence offered on this point consisted of extracts from the plaintiffs' own books, and the creditors themselves were not called to support the entries. The respondent, by her written statement, denied that the debts mentioned in the bond were ever due by her or by her husband, and her evidence to the same effect was not shaken on cross-examination. The Subordinate Judge accepted the plaintiffs' story as to this part of the case; but the High Court held that "no evidence had been adduced on the part of the plaintiffs to show that the debts which the mortgage bond states it was necessary to liquidate did as a matter of fact exist—much less that they were debts left by the lady's husband." It is perhaps going too far to say there was no evidence: what there was, was exceedingly incomplete and unsatisfactory.

It is a well-known rule of this Committee that "in the case of deeds and powers executed by purdanashin ladies, it is requisite that those who rely upon them should satisfy the Court that they had been explained to and understood by those, who execute them." *Sudisht Lal* v. *Sheobarat Kunwar* (1). From the preceding observations it is, in their Lordships' opinion, clear that there is a want of satisfactory evidence of that kind in the present case. They will humbly advise His Majesty that this appeal ought to be dismissed and the decree of the High Court confirmed. The appellants must pay the respondent's costs of the appeal up to and including the lodging of her case.

Appeal dismissed.

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

J. V. W.

(1) (1881) L. R. 8 I. A. 39, 43; I. L. R. 7 Calc. 245, 250.