

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Srimati
Akikunnissa Bibi v. Rup Lal Das and another,
from the High Court of Judicature at Fort
William in Bengal; delivered 14th May
1898.*

Present :

LORD WATSON.

LORD HOBHOUSE.

LORD DAVEY.

SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

The Respondents in this appeal brought a suit against the Appellant on a mortgage bond dated a native date corresponding to the 3rd February 1882 and alleged to be executed by her to secure Rs. 30,000 money borrowed with interest at 15 annas per cent. per month ($11\frac{1}{4}$ per cent. per annum) and compound interest on default to be paid at the end of three years. The Appellant in her written statement denied the execution of the bond and the receipt of the consideration. She also said that she is a purda-nashin Mahomedan lady of respectable family not able to manage and superintend all her affairs and on many occasions her son Dewan Imdad Ali *alias* Nawab Meah transacts her business with her permission; that Imdad Ali and his intimate friend and relative Reza Karim Meah and others had previously created certain loans for their own purposes and afterwards under the pretext of repaying them had

fabricated the mortgage bond. The suit was heard before the Subordinate Judge of Dacca on the 21st April 1892. The mortgage bond was produced and appeared to be signed by the Appellant by mark her name being written "By the pen of Imdad Ali." It was endorsed by the Sub-Registrar as presented for registration on the 4th February 1882 and the execution admitted by the Appellant at her residence she being identified by Reza Karim. There were eight witnesses to the execution two of them being Chunder Kishore Roy and Imdad Ali. The first witness for the Plaintiff was Reza Karim. He deposed that the Defendant is his cousin, that he saw her and talked to her, and identified her before the Sub-Registrar for registration of the bond which was produced, he put his signature on the back of the bond and the Defendant having put a mark on it he wrote her name on the back of the bond by his own pen, that the Defendant made the impression of the seal on the back in the presence of the Sub-Registrar and admitted the execution of the bond and receipt of the money covered by it. He also said that Chunder Kishore is the mokhtar of the Appellant and had been so more than ten years, and Hara Kishore Roy is her dewan. The next witness was Dwarka Nath Chuckerbutty who was in the service of the Plaintiffs. He deposed that the bond was executed and registered in his presence, he presented it at the Registry office, the Appellant put her seal on it and made her signature by mark, her name was written by her son Nawab Meah, he and Chunder Kishore fetched the Rs. 30,000 from the Plaintiff's house, it had been arranged that the money should remain in deposit with the Plaintiffs and after the execution of the bond it was taken back and kept in deposit on the Appellant's account to pay her

debts with it, that after that Nawab Meah and Chunder Kishore paid off her debts and got evidence thereof and gave them to the Plaintiffs, that the Appellant was behind a purda, at first when he read over the bond to her from a little distance she said "I could not clearly understand it," afterwards her son Nawab Meah read over the document to her and explained it to her. The next witness was Mohini Mohun Basak an attesting witness. He said he had known the Appellant for 14 or 15 years or for a longer period, that he had talked to her and knew her voice, that he saw her put her seal and signature to the bond by mark, the money was fetched and shown to her, he was seated in the room on the west of the room where she was seated, there was a purda on the door between the two rooms, when she executed the bond the purda was lifted a little on one side and he saw through that opening, the Appellant had told him to procure a loan of the money and said that she would give him brokerage at 1 per cent., he acted as a broker and procured the loan.

The Appellant met this case by witnesses who deposed that at the time of the execution of the bond she was not at Dacca and others who deposed that she was on bad terms with Imdad Ali. The Subordinate Judge disbelieved these witnesses and said there could not be any doubt Reza Karim's evidence was fully true. He accordingly made a decree that in default of the principal money and interest and costs being deposited in Court on or before a day named the mortgaged property or a sufficient portion thereof should be sold and the proceeds thereof applied in payment. The Defendant appealed from this decree to the High Court at Calcutta which dismissed the appeal but it is in her favour that they said not without a doubt.

Chunder Kishore Roy and Imdad Ali who it has been mentioned are witnesses to the execution of the bond were not called by the Plaintiffs. The reason for this appears in the judgment of the Subordinate Judge and ought not to affect their case. He says that the Plaintiffs did their best to produce them as witnesses but without success, that Chunder Kishore and Hara Kishore who had been proved to have been present when the bond was executed although not discharged from the Defendant's service had mysteriously disappeared some time after the institution of the suit and it seemed to him "very likely that the Defendant had screened them with the object that the Plaintiffs might not avail themselves of their evidence. Imdad Ali in spite of all the efforts of the Plaintiffs will not appear to give his evidence."

The reasons given for the present appeal in the Appellant's case and in the argument before their Lordships are: 1. That the first Court committed a material error in refusing to allow the evidence of the Defendant to be taken on commission. 2. That the same Court misunderstood and misapplied the law relating to documents executed by purda-nashin ladies. The facts relating to the first reason can be briefly stated. The plaint was filed on the 9th April 1891 and the written statement on the 13th July 1891. On the 4th August 1891 the Defendant applied that the evidence of certain witnesses in the list filed by her and her own evidence might be taken by commission, some of the witnesses being females and others residing beyond the jurisdiction of the Court. It appears from the order sheet of the Court in the Record that on that day orders were made for commissions to take the evidence of the female witnesses and the witnesses who were out of the jurisdiction. No order was made as to the Defendant's evidence.

On the 2nd April 1892 the Defendant applied to be examined by commission at her present residence at Itna in the district of Mymensing beyond the jurisdiction of the Court, to which the Plaintiffs objected that she should be examined at her permanent residence in the town of Dacca. The Judge refused to issue a commission for her examination at Itna saying that he was not satisfied that she was ill or in such a state of health that she could not be removed to her own residence at Dacca without danger to her life. On the 6th May 1892 the Defendant made another application to be examined at Itna supported by an affidavit which application was refused the Judge saying that he had on previous occasions disbelieved the Defendant's plea of illness and still adhered to that opinion, that he was further inclined to believe that the Defendant did not mean to comply with the Court's order but was simply trying to put off the disposal of the suit.

By Section 578 of the Code of Civil Procedure (Act XIV. of 1882) it is enacted that no decree shall be reversed or substantially varied nor shall any case be remanded on account of any error defect or irregularity whether in the decision or in any order passed in the suit or otherwise not affecting the merits of the case or the jurisdiction of the Court. It is apparent in the judgment of the Subordinate Judge that if the Defendant had been examined and had given evidence in support of her written statement he would not have believed it and in their Lordships' opinion it could not reasonably have prevailed against the evidence given by the Plaintiffs. The High Court also appears to have thought so for it says at the end of its judgment it does not think the interests of justice would be served by sending the case back to have the evidence taken.

Whether the Subordinate Judge properly exercised his discretion when he refused to issue the commission need not be determined. Possibly it would have been prudent to issue it but their Lordships are of opinion that the want of the Defendant's evidence has certainly not affected the merits of the case.

As to the second ground of appeal they think the law has been neither misunderstood nor misapplied. They will humbly advise Her Majesty to dismiss the appeal. The Appellant will pay the costs of it.
