

*Privy Council Appeal No. 169 of 1924.*

*Patna Appeal No. 8 of 1924.*

Musammat Barkatunnissa Begum - - - - - *Appellant*

*v.*

Debi Bakhsh and another - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL DELIVERED THE 10TH FEBRUARY, 1927.

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*Present at the Hearing :*

LORD PHILLIMORE.

LORD SINHA.

LORD BLANESBURGH.

SIR JOHN WALLIS.

[*Delivered by* SIR JOHN WALLIS.]

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This is an appeal from a decree of the High Court of Patna varying the decree of the Subordinate Judge of Gaya, and giving the first plaintiff a mortgage decree as prayed. Debi Baksh, the first plaintiff, a minor, suing through his mother, the second plaintiff, as his guardian and next friend, and his deceased father. Chainsukh Mal, formed a joint Hindu family carrying on business as money-lenders and cloth merchants; and the plaint alleged that the plaintiff's father had advanced Rs. 7,500 to the defendant from the joint family funds and taken from the defendant the mortgage sued on, which is dated the 11th November, 1912, in the name of his wife, who was therefore joined as second plaintiff. The circumstances which gave rise to the transactions were stated as follows. In November, 1906, it was alleged, the first plaintiff's father had advanced Rs. 2,763 to the defendant, of which 2,500 was to bear interest at twelve annas per cent. per mensem, and 263 not to carry interest, in consideration of her granting him a Zarpeshgi lease of certain lands for nine years at an annual jumma or rent of Rs. 263, of which Rs. 225, being 9 per cent., on the advance of

Rs. 2,500, was to be retained by the lessee, and the balance of Rs. 38 was to be paid to the defendant. Under a lease of this nature the loan of Rs. 2,763 would have been payable at the expiry of the term of nine years, and the lessee would have been entitled to continue in possession on the same terms until it was paid. It was alleged, however, that in 1911 the first plaintiff became desirous of surrendering the lease and recovering the loan for certain reasons, and that the defendant agreed to accept the surrender in consideration of the first plaintiff lending her Rs. 7,500 on mortgage at 15 per cent. and compound interest, out of which sum the first plaintiff was to be paid what was due to him in respect of the Zarpeshgi advance, Rs. 2,374 was to be applied in paying out an execution-creditor of the defendant, one Gendan Singh, and the balance was to be paid to the defendant, who required it for the conduct of suits which had been brought against her by Musammat Qamrunnissa, and by her against Amirul Hasan, her husband's nephew. It was further alleged that after discharging the Zarpeshgi debt and paying out the execution-creditor, the balance left, Rs. 2,647, was paid to the defendant in cash.

The defendant filed a written statement in which after denying that she had executed the mortgage or that it had been executed as required by s. 59 of the Transfer of Property Act, she pleaded as follows: "Your petitioner is a Pardanashin lady, and is quite illiterate. She has certainly no capacity to understand transactions. She has long been separate from her husband. Her son, Saiyed Ithad Hussan, alias Baratu, has got a weak intellect and is unable to enter into transactions. It has been admitted by the plaintiffs that Rs. 2,500 bore interest 12 annas per mensem. Had your petitioner really entered into transactions she would not certainly have agreed to pay interest at one rupee four annas per cent. per mensem on the said amount. From this it is evident that your petitioner did not certainly understand transactions. The plaintiffs are not at all entitled to get interest at more than 12 annas per cent. per mensem even if the mortgage bond be proved to be genuine."

Issues were framed on these pleadings, and the Subordinate Judge found on the first issue that the bond had not been duly executed as a mortgage, as he did not believe the attesting witnesses called for the plaintiffs, who spoke to seeing the defendant execute it. On the second issue he found that the consideration was proved as alleged in the plaint. On the third issue he found that the defendant did not understand the terms of the bond and its legal effect, and that they were not explained to her. On the fourth issue, whether the rate of interest and time of payment were unconscionable and penal, the Subordinate Judge observed the defendant would not have executed the deed if she had had independent advice and it had been explained to her, and he further held that her need for an advance put the plaintiffs in a

position to dominate her will and that they had used it to obtain an unfair advantage.

He therefore refused to grant a mortgage decree or allow compound interest at the rate in the bond, but gave the plaintiffs a decree for the amount claimed with simple interest at 9 per cent.

The plaintiffs appealed to the High Court, and Das, J., who delivered the judgment of the Court, found that there was not sufficient reason for disbelieving the witnesses who spoke to the execution of the suit mortgage. Undue influence, he held, had not been proved. The fact that the defendant wanted money was not enough to put the plaintiffs in a position to dominate her will. He also found that the interest charged in the bond was not unconscionable, as it was the usual rate of interest charged on that class of transactions. With regard to the fact that the transaction was one with a Pardanashin lady, he held that the document had been duly read and explained to her, and that it was a case in which it was not necessary that she should have had independent advice. The only question was as to the rate of interest, and that he found was settled after negotiation with the defendant herself. The appeal was accordingly allowed, and the decree varied by giving the plaintiffs a mortgage decree.

In their Lordships' opinion the finding of the Subordinate Judge that the mortgage was obtained by undue influence, on the ground that, owing to the defendant's need of money, the plaintiffs were in a position to dominate her will and used their power to obtain an unconscionable advantage was clearly erroneous. The mere fact that the borrower is in need of money does not put a moneylender, to whom she applies for an advance, in a position to dominate her will within the meaning of s. 16 of the Indian Contract Act. The only questions then that remain for consideration are: (1) was execution of the mortgage the free and intelligent act of the defendant? and (2) was its execution by the defendant duly attested by witnesses who themselves saw her execute it as required by s. 59 of the Transfer of Property Act?

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 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 *Faridun-nisa v. Mukhtar Ahmad* (52 I.A. 342, at pp. 350-352).

In their Lordships' opinion the way in which the present case should be approached is indicated in the following passage from that judgment.

"The mere declaration by the settlor, subsequently made, that she had not understood what she was doing, obviously is not in itself conclusive. It must be a question whether, having regard to the proved personality of the settlor, the nature of the settlement, the circumstances under which it was executed, and the whole history of the parties, it is reasonably

established that the deed executed was the free and intelligent act of the settlor or not. If the answer is in the affirmative, those relying on the deed have discharged the onus which rests upon them. Of course, fraud, duress, and actual undue influence are separate matters."

First of all, as to the transaction itself, it is said to have been so unfair that the defendant would never have entered into it if she had understood it, and therefore it may be inferred it was not explained to her. Instead of paying 9 per cent. simple interest on Rs. 2,500 under the lease, she was to pay 15 per cent. compound interest on Rs. 2,478·15 under the mortgage, and was also to allow the plaintiffs to take water from the lands which had been under lease to them for their own lands, which apparently were lower than the defendant's lands. But, first, as pointed out by Das, J., the plaintiffs under the Zarpeshgi lease were not merely getting 9 per cent. on Rs. 2,500; they were obtaining a lease at an annual jumma or rent which, after deducting the interest due to them, calculated at 9 per cent., only left Rs. 38 payable to the defendant, so that in substance, in consideration of this advance, they were to enjoy the demised lands until the expiration of the term, and thereafter till repayment for an annual payment to the defendant of Rs. 38. As an advance on Zarpeshgi lease is more troublesome to the lender than an advance on simple mortgage at 15 per cent. compound interest, which, as found by the learned judges, are the usual terms of lending money, it is not likely that the first plaintiff's father would have entered into the transaction unless he expected it to be at least as profitable as lending money on simple mortgage on the usual terms.

If the transaction be looked at in another way, it is not the fact that the defendant has merely had to pay 15 per cent. compound interest instead of 9 per cent. simple interest. As against the increased rate of interest she immediately became entitled to the full rents and profits of the demised land instead of to the Rs. 38, which was all she was receiving under the lease. This would be a point which would be calculated to appeal to a lady in the position of the defendant.

It was also suggested that the plaintiffs wanted to give up the lease because they were making a loss. This was denied by the plaintiffs' agent, Phulchund, whose evidence on this point is uncontradicted. It was only natural that after Chainsukh's death Phulchund, his brother-in-law, who was in sole management on behalf of the first plaintiff, would have found it difficult to attend to the lease as well as to the family business.

As regards the right to take water there is nothing about it in the mortgage deed or the plaint, and Phulchund, who spoke to it, was not cross-examined as to its extent. The plaintiffs had apparently been making a certain use of the defendant's sources for their own lands without objection during the lease, and would have been in a position to go on doing so till the expiration of the lease. It is not shown that the cultivation of

the defendant's lands was in any way prejudiced thereby, and it does not seem unreasonable for the plaintiffs to have stipulated that they should have a licence to go on doing so during the continuance of the mortgage which replaced the lease. On the whole there does not seem to have been any such unfairness in the plaintiffs' terms as to make it likely that the defendant would have rejected them if they had been explained to her.

The plaintiffs' evidence however, is that not only were the terms of the deed repeatedly explained to the defendant, but that she took part in the negotiations and knew all about them.

As to the way in which the transaction came about, the mortgage deed itself contains recitals purporting to be made by the defendant herself, that the second plaintiff, as guardian of the minor first plaintiff, had sent word through her brother and agent Phulchund to the defendant, through her agents, that she was anxious to surrender the lease, as she was a Pardanashin lady and could not properly manage the leasehold properties, and that the defendant, as she was in need of money, agreed to the surrender on condition that the plaintiff should make her a further advance of Rs. 5,500 and take a mortgage bearing interest from the defendant covering both the fresh loan and the money remaining due on the lease.

The deed then goes on to recite that these terms having been accepted, the defendant wrote a hukumnama, dated the 6th November, 1912, affixing her signature and seal, and delivered it to the second plaintiff, and that the second plaintiff paid the defendant the arrears of rent due under the lease, in accordance with the wasilbaki dated the 12th Kartick 1320 (corresponding to the 6th November, 1912). This wasilbaki, which is Exhibit 8, bears the defendant's signature by the pen of her son Baratu, and also her seal, and, as will be observed, is dated six days before the execution of the suit mortgage.

The evidence of Phulchund, the second plaintiff's brother, entirely bears out these recitals, and shows further that the preparation of the draft and the fair copy and the execution were in no way hurried. He deposed that, after Chainsukh's death they could not manage the village, and, as Baratu wanted a loan for his mother, he agreed to lend money at from 1-8 to Rs. 2 per mensem, on condition the defendant accepted the surrender of the lease. He said he also wanted water for Jaipur. Baratu told his mother and she sent for Phulchund, who asked if she agreed to these terms. She said she agreed to pay Rs. 1-4 interest, to take back the lease, and to grant water. She also agreed to compound interest with yearly rests. Baijnath Sahib and a Miah and Baratu were present when the rate of interest was settled. Then, in cross-examination, he said that he recognised the defendant when the talk about interest was going on. He proposed higher interest and compound interest. She higgled and settled Rs. 1-4, and also agreed to compound interest, saying "I agree since you

get compound interest only if I default in payment for one year." Baratu and a Mahomedan servant were present at the spot.

As to the preparation of the draft, in his examination in chief, he said that two days after the agreement the draft mortgage deed was prepared by Mukhtar Yabar Hussain, Baratu called him, and caused the draft to be prepared. At the same time the witness asked for and obtained the wasilbaki already referred to, Ex. 8. Baratu, he says, signed the name of the defendant and put her seal to it in his presence. The draft was read over and the defendant agreed to its recitals. She wanted Rs. 100 (for the purchase of the stamp), and he gave them to her. In cross-examination he said he did not show the draft to anyone on his own behalf. He approved of it as there was nothing to object to. Yabar Hussain read it over to him and to the defendant. Two days afterwards it was fair copied and left in the possession of the defendant, and two or three days after it was executed.

In further cross-examination he said that when Yabar came the first time, Baratu called out the defendant and the defendant, in clear words, directed him to prepare the draft, saying that the village had become hers and that she wanted a loan. He also stated that, when the deed was fair copied, Baratu again called out his mother. Chedi Ram, the plaintiff's gomashtha, and first witness, also speaks to the deed being fair copied and read out to the defendant. In cross-examination, he says, Baratu came to the shop and Phulchund sent Baratu and himself to call Yabar, and the deed was then fair copied in his presence in the defendant's house. Later on, he says, Phulchund was present and the deed was read out to the defendant after it had been fair copied, and it was left with Baratu.

Coming now to the evidence of execution, three of the witnesses who attested the deed were called and spoke to having seen the defendant execute it, and they are supported by Phulchund who was also present. The witnesses who had all been employed in the plaintiffs' business say they knew the defendant, as they had often seen and spoken to her when they took clothes to her house for inspection and sale in the usual way in India. They also say that they saw and heard on these occasions that it was she herself who gave directions as to the execution of the document, that it was read over to her and she said it was all right.

The first witness, Chedi Ram, says she stood behind a wooden jhilmili (or door with moveable bars, like a Venetian blind), whereas the other witnesses say she stood behind a chick or bamboo purdah, which one witness says was only nominal. The witnesses gave their evidence eight years after the transaction, and the learned judges of the High Court came to the conclusion, with which their Lordships agree, that the discrepancy was not sufficient to invalidate their testimony. Chedi Ram, the plaintiff's gomashtha, said the defendant and her son, Baratu, are clever persons and understand business and litigation. Phulchund also deposed that the defendant is a very shrewd woman and had the deeds she

executed read over to her two or three times before execution. Baratu also is a very clever man. They both understand affairs and litigation.

For the appellant some reliance was placed on the evidence of Mr. Warasat Hassain, a vakil, who had been the defendant's manager on a monthly salary of Rs. 100 and was called by the plaintiffs to prove the execution of the lease. He said in substance, that the defendant was purdah to him and that he had not seen her either when she executed the lease in question or other documents, nor had he seen clothdealers selling to her directly. He could not recollect if she gave directions from inside for attestation in the hearing of the witnesses. He was not asked as to the evidence of the previous witness, that the defendant was a very clever woman, but as regards Baratu, he said he was over thirty years of age, and was a man of very little reading. He seemed to be a weak-minded man, and the witness did not consider him capable of understanding litigation and supervising law suits. This witness was obviously anxious to help the defendant as far as he could, and his evidence does not contradict the rest of the plaintiff's evidence as regards this particular transaction.

In support of the defendant's case we have only the evidence of the defendant herself, which is obviously untrustworthy and entirely lacking in the corroboration which might have been expected. If the three witnesses did not really see her execute the deed, some of the other attesting witnesses might have been called to speak to this. With reference to her case that she was incapable of understanding transactions and that her son Baratu, who according to the plaintiffs' case, helped in negotiating the loan, was a fool, some independent evidence of his want of capacity might have been given and he might have been called to enable the court to judge. If he was not called, there was doubtless good reason for it. As regards her own alleged incapacity her answers in cross-examination suggest that she understood very well the bearing of most of the questions put to her, and was determined not to make any admission which would affect her case. The story that she signed whatever deeds were put before her by her servants and never troubled to inquire what became of the consideration which she admitted having received at the time of registration, is wholly incredible, having regard to her proved personality which according to the judgment cited is one of the factors to be taken into account in a case of this kind. The defendant is a Mahomedan lady who inherited from her mother a large estate which put her in a position of unusual independence. She was the sole wife of her husband, and when he formed an irregular connection with another woman she left him, and brought a suit against him for alleged mismanagement of her properties. On his part he tried unsuccessfully to make her return by suing for restitution of conjugal rights and then divorced her.

This certainly suggests that she was a lady of strong personality, and not at all likely to have left all her business in the hands

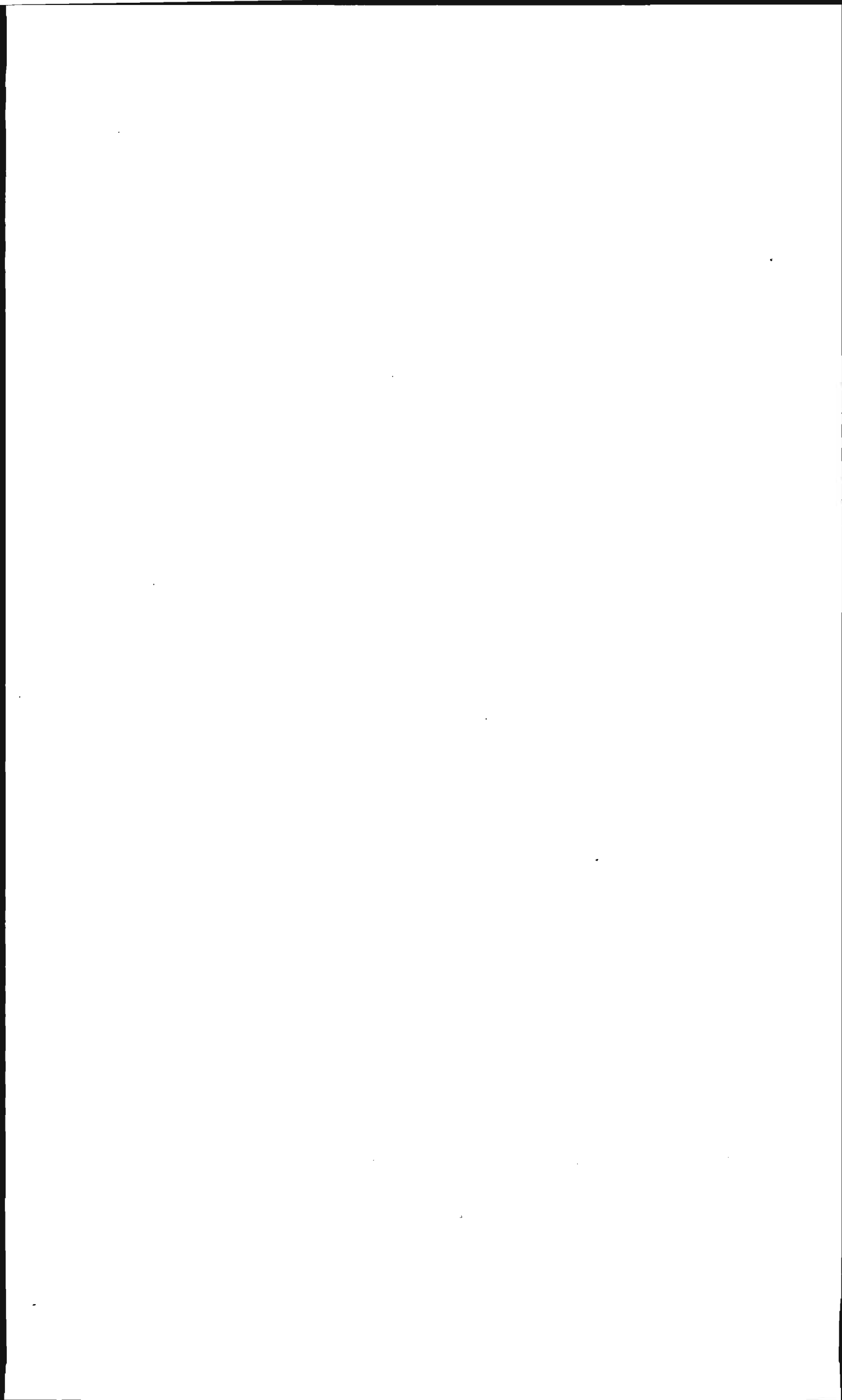
of her servants, signed all the documents they put before her without explanation, and allowed them to do what they liked with the money paid to herself when the deeds were registered.

That she did not do so is further shown by her evidence in the suits for which she borrowed money on this deed. She was cross-examined as to her statement in Amir's case that Baratu never signed documents for her after Amir had left her, and the suit mortgage and wasilbaki Ex. 8 were filed in that case to contradict this. She was also questioned as to her deposition in that case. "I would not have admitted execution of the bonds executed after Amir left me without understanding the nature of the transaction and of the document and the amount of the debt, and the name of the creditor." The last statement is quite inconsistent with her present case.

In their Lordships' opinion the plaintiffs have discharged the onus of showing that the deed was the defendant's free and intelligent act. The transaction when rightly understood was comparatively simple. The defendant was to get the further advance which she needed for the purposes specified and was to get back her lands and she was to execute a mortgage for the full amount of her indebtedness bearing interest at 15 per cent. with compound interest and yearly rests, the usual terms for such transactions and to give the plaintiffs certain water facilities by which it is not suggested she was prejudiced in any way in the seven years which elapsed between the execution of the deed and the filing of the plaint. The terms were negotiated between the plaintiffs and the defendant herself assisted by her son. There was no undue haste. The wasilbaki, which was given when the draft deed was prepared, is dated the 6th of November and the deed was not executed until the 12th. The draft was read over to her then, and the fair copy was read over to her when it was made a few days later, and was again read over to her before execution and there can be no doubt in their Lordships' opinion that she fully understood it.

The attestation has been duly proved in their Lordships' opinion as already stated, and therefore the appeal fails and should be dismissed with costs and their Lordships will humbly advise His Majesty accordingly.





In the Privy Council.

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MUSAMMAT BARKATUNNISA BEGUM

2.

DEBI BAKHSH AND ANOTHER.

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DELIVERED BY SIR JOHN WALLIS.

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