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Judgment 3, 1966

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

No. 32 of 1964

ON APPEAL FROM

THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

B E T W E E N

1. COAST BRICK & TILE WORKS LIMITED
2. KANJI MEGHJI SHAH
3. SHARDABEN RATILAL SHAH
4. KESHAVLAL KANJI SHAH
5. RATILAL KANJI SHAH
6. ZAVERCHAND SOJPAL JETHA and
7. HIRJI RAMJI SHAH

Appellants

- and -

1. PREMCHAND RAICHAND LIMITED and
2. SHAH MEGHJI MULJI LIMITED

Respondents

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APPELLANTS' C A S E

RECORD

1. This is an appeal, with the leave of the Court of Appeal for Eastern Africa, by the Appellants from a Judgment of that Court dated 5th March 1964, dismissing with costs their appeal from the judgment and decree of the Supreme Court of Kenya dated 16th March 1962 and pronounced in an action entitled "Civil Case No. 1629 of 1960" between the first Respondent Premchand Raichand Limited (hereinafter called "Premchands") as Plaintiff and the present Appellants as Defendants, together with the Second Respondents hereto, as the Ninth Defendants, in the Action and the Second Respondents in the Court of Appeal. p.90 p.71 p.79

2. In that Action, which was a mortgage suit, Premchands sought to enforce against the first-named Appellant, a limited liability company registered in Kenya (hereinafter called "the Company") a registered First Charge, dated 31st January 1956, and granted to Premchands by the Company over certain land belonging to the Company at Changamwe Miritini in the Coast District of p.121

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Kenya, near Mombasa, to secure payment by the Company to Premchands of the sum of Shs.1,000,000, monies advanced by Premchands and interest thereon at the rate of 16 per centum per annum, of which there were due thereon at the date of the suit a balance of Shs. 960,000 for principal and Shs. 116,093/34 for interest, making an aggregate of some Shs. 1,076.093/54.

3. Premchands further claimed against the 2nd to the 8th Defendants, hereinafter called collectively "the Sureties", enforcement of their covenants contained in the said Charge by way of suretyship for the Company's indebtedness thereunder. The 6th Defendant was never served and took no part in the action or the appeal, except as a Defendants' witness (D.W.3) at the trial.

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4. As against the 9th Defendant, Premchands claimed no relief, but joined that Defendant in its capacity as second mortgagee (pursuant to the Mortgage Suits Procedure Rules of Court) under a registered Charge dated 28th March 1956 and ranking as a Second Charge, over the same lands of the Company as were charged by the First Charge, to secure payment of an advance to the Company of Shs. 200,000 and interest thereon at the rate of 12 per centum per annum.

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5. The action was tried with witnesses at Nairobi by the learned Acting Chief Justice Rudd, who on 16th March 1962 gave judgment in favour of Premchands holding that they were entitled to the usual preliminary mortgage decree with costs. Accounts having been taken by the Court, it was certified that there was due to Premchands on account of principal, interest and costs, calculated up to 1st May 1962, the sum of Shs. 1,303,641/02, and that the principal sum of Shs. 960,000 should carry interest at the rate of 12 per centum per annum from 2nd May 1962 until realization, and it was ordered that in default of payment of the said sum of Shs. 1,302,641/02 together with subsequent interest and costs the mortgaged property should be sold and the net proceeds paid into Court; and that if the net proceeds of sale were insufficient, Premchands should be at liberty to apply for personal decrees for the amount of the balance against the Sureties (the 2nd, 3rd, 4th, 5th, 7th and 8th Defendants)

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jointly and severally. No such personal decrees have been made.

6. It was further ordered that the Company should pay the 9th Defendant its costs of the suit. p.81

7. In dismissing the Appellants' appeal to the Court of Appeal against the said judgment and decree, the said Court awarded Premchands the costs of the appeal certified for two counsel, and further ordered that the Appellants pay to the Second Respondent (the 9th Defendant) its costs of the appeal limited to an instructions fee of Shs. 500 and a fee for attendance for one day. pp.113-114

8. Premchands were at all times material to the action ~~and to the appeal therein~~ carrying on in Kenya among other businesses the business of moneylending, and were duly licensed to carry on such business, pursuant to the Money-Lenders Ordinances of Kenya. pp.30,34 & 43.

9. The relevant Ordinances which were in force during the material period comprised the Money-Lenders Ordinance, Chapter 307 of the Revised Laws of Kenya, 1948, as amended by the Money-Lenders Amendment Ordinance, 1959, (Chapter 56 of 1959) which was enacted to have retrospective effect as from 1st January 1933. Those Ordinances were subsequently consolidated and now appear as Chapter 528 of the Revised Laws of Kenya, 1962.

10. The Company was at all times material to the action carrying on business as manufacturers of building materials, having a factory and premises situate on the mortgaged land of which it was the registered proprietor in fee simple, its title being duly registered in the Registry of Titles at Mombasa, maintained pursuant to the Registration of Titles Ordinances (formerly Revised Laws of Kenya, 1948, Chapter 160, now Revised Laws of Kenya, 1962, Chapter 281). p.165 p.133

11. Of the Sureties, the 2nd, 3rd, 4th and 5th Defendants were, but the 6th, 7th and 8th Defendants were not, at any material time, directors or shareholders in the Company.

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12. Towards the end of the year 1955, the Company was in serious need of additional finance. Its Changamwe land was already subject to a registered Charge in favour of the National Bank of India Limited to secure bank advances amounting to Shs. 300,000 or thereabouts. One of the directors of the Company, the 2nd Defendant (hereinafter called "Kanji") met one Hemraj Nathubhai Shah (hereinafter called "Hemraj") a director of Premchands, and said that the Company wished to borrow Shs. 1,000,000, and took him to see the Company's factory premises on the Changamwe land, which were thought to be worth some Shs.3,000,000. Hemraj apparently then agreed on behalf of Premchands to make an advance, upon security, and there was a discussion as to the kind of security that Kanji was to give, which Hemraj described as "a mortgage (of the land) and blank transfer of 1,500 shares in the Company and personal guarantees of shareholder (sic) and directors of the brick factory and security of some good business people", but according to Hemraj no agreement was then reached. Hemraj told Kanji to write him a letter presumably to convey his proposals.

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pp.43-44

13. Accordingly, on 29th November 1955, Kanji wrote on behalf of the Company a letter to Premchands signed by himself as Chairman and by the 6th Defendant Bharmal Raishi Shah (who as stated above took no part in the action except as a witness), purporting to record that "at my request you have considered to advance to (the Company) a sum not exceeding Shs. 1,000,000, and in consideration of this I hereby undertake to get executed in the proper manner by the Company all the papers, such as a Debenture on the assets of the above Company, Deposition of the title deeds free from all encumbrances of the properties belonging to the said Company, joint and several guarantees of each and every shareholder both present and future of the said Company and the Deposition of the Share Certificates of all the Shareholders together with the Blank transfers thereof together with a resolution passed in the Directors meeting that they will not object to transfer of the shares when it is required to do so and such other papers which are necessary to secure the above loan..." (Exhibit P.9). This letter may have been drafted in one of Premchands' advocates.

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14. After the receipt of this letter (Exhibit P.9), some further discussion took place between Hemraj and Kanji, as a result of which there came into existence an instrument of guarantee dated 1st December 1955 (Exhibit P.10, hereinafter called "the Guarantee") which was brought by Kanji to Hemraj. This instrument appears to have been prepared on a standard printed form, with the names of the parties and figures filled in with typewriting, and is signed by eight persons, namely the seven Sureties and a further Surety, one Harilal Kanji, who did not execute the Charge as a Surety and was not made a Defendant to the action. p.135 p.44 p.136

15. This Guarantee was expressed to be given in consideration of Premchands allowing the Company certain business or credit facilities, for which the other contracting parties bind themselves jointly and severally as sureties but so that the total amount to be recovered from them thereunder should not exceed in the whole the sum of 50,000 East African pounds (equivalent to Shs 1,000,000), together with such further sum for interest charges and costs incurred in respect of the premises or of the Guarantee as should accrue up to the date of payment. The Guarantee was not stamped by Premchands contemporaneously, but was stamped (with a penalty) on 1st February 1962, just before the trial of the action. p.136 p.49

16. The Appellants submit that it should be inferred that the Guarantee was prepared by Premchands themselves, on one of their standard forms, and submitted to Kanji for due signature by the proposed sureties. Hemraj admitted that he received it duly completed from Kanji on 30th November or 1st December 1955, and said: "When (Kanji) brought Exhibit 10 I agreed to give him a loan of Shs. 1,000,000 at 16 per cent interest per annum. As security they gave Exhibit 10 and they were to give a mortgage on the Changamwe property Plot 500 buildings and the 1,500 shares belonging to (Kanji) ..... On 1st December 1955, I gave a cheque for Shs. 200,000 in favour of (the Company), this Exhibit 11 is the cheque". p.44 p.44

17. Thereafter Premchands made the following further payments by cheque by way of advance to the Company - pp.44-45

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| | | | | |
|---|---|---|---|---|
| 1955 | December | 5th | Shs. | 200,000 |
| | " | 9th | " | 50,000 |
| | " | 23rd | " | 50,000 |
| 1956 | January | 11th | " | 50,000 |
| | " | 16th | " | 100,000 |
| | | | | 450,000 |
| Add Advanced 1st December 1955 | | | " | 200,000 |
| Total advanced prior to 31st January 1956, being the date of the Charge - | | | Shs. | 650,000 |

18. Between 1st December 1955 and 31st January
p.44 1956 Premchands instructed their Advocates (Messrs. Cumming & Miller) to draw the Charge (Exhibit P.2). For the purposes of drawing the Charge, those Advocates had to obtain the deeds of the property which was to be charged from the National Bank of India, who themselves held those deeds under their own registered charge securing the Company's overdraft, standing at a figure of Shs. 300,000 or thereabouts as aforesaid. That Charge was not discharged by the Bank until 10th February, 1956, in consequence of Premchands having paid to the Bank on 6th February 1956 the sum of Shs. 300,000 by way of further advance to the Company, making a total advance of Shs.950,000 (P.W. 6, p.45, Exhibits P. 18, P. 29, P. 30).
p.148 The final Shs. 50,000 was advanced on 24th February, 1956, making up the total of Shs. 1,000,000.

p.121 19. The form of Charge (Exhibit P.2) having been drawn by Premchands' Advocates was delivered to the Company, and was thereafter executed by the Company and by the seven Sureties, and was returned to Premchands. The evidence does not show the date or dates of such execution, nor how and when the Charge was delivered to the Company and returned by it to Premchands.

20. The Charge purports to have been executed by the Company by the affixing of its common seal, in the presence of its officers in accordance with
p.193 Article 114 of its Articles of Association, (Exhibit P.37), namely, the 2nd, 4th and 5th Defendants, who were respectively two of the directors and the secretary of the Company. Such

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affixing of the seal was not however attested by any witnesses, as was conceded by the Respondents.

21. The execution of the Charge by the seven Sureties purports to have been effected in two groups, comprising the 2nd, 3rd, 4th and 5th Defendants, and the 6th, 7th and 8th Defendants respectively.

22. The signatures of the first group purport to have been witnessed by Ishwarbhai Shamalbhai Patel (P.W.1), an Advocate and Commissioner for Oaths, and by Mohanlal Meghji Shah (D.W.1). These two witnesses were in conflict, in that Mr. M.M. Shah (D.W.1) denied that Mr. I.S. Patel (P.W.1) was present at any time when those sureties signed. The 3rd Defendant also denied that Mr. I.S. Patel was present when she signed (D.W.2). p.37 p.56 p.60

23. The signatures of the second group purport to have been witnessed by one J. J. Patel (also an Advocate, who was not called as a witness) and by Jagjiwan Ranchhod Pavagadhi (P.W.3). The 6th Defendant (Bharmal Raishi Shah) and the 8th Defendant (Hirji Ramji Shah) both denied that Mr. J.J. Patel was present when they signed (D.W.3, D.W.4). p.40 pp.62, 64

24. With the exception of Kanji (2nd Defendant), none of the Sureties came into any direct personal contact or made any direct agreement with Premchands or with Hemraj or any person on Premchands' behalf throughout the entire transaction. The acts of the six Sureties other than Kanji were confined to signing the Guarantee (Exhibit P.10) and the Charge (Exhibit P.2) and (in the single case of the 6th Defendant, B.R. Shah) also countersigning the letter dated 29th November 1955, (Exhibit P.9). Accordingly, none of the Sureties other than Kanji made any request to Premchands for any advance to be made to the Company, other than as may be held to be expressed or implied in or imported by the Guarantee or the Charge, and no consideration moved from Premchands to them or any of them. p.47

25. For the purposes of the application of the Money-Lenders Ordinances, previously referred to in paragraph 9 hereof, it was conceded by Premchands at the trial and in the Court of Appeal p.36

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that "the transaction" was one of the lending of money by Premchands who were at the material time carrying on business as registered moneylenders, and that if the Money-Lenders Ordinances applied to the transaction, it was invalid and unenforceable for failure to comply with the statutory requirements of those Ordinances. It was however contended, as hereinafter appears, that "the transaction" was excluded from the application of those Ordinances by the terms of section 3(1)(b) of the Money-Lenders Ordinance, Chapter 307 of 1948.

p.2 26. By their Plaint, dated 21st September 1960, Premchands pleaded -

(1) That the Charge dated 31st January 1956, was given "in consideration of the sum of Shs. 1,000,000 lent and advanced by the Plaintiff to the Company at the request of the Company and of the Sureties, .... to secure to the Plaintiff payment of the said sum of Shs. 1,000,000 paid to the Company and interest thereon at the rate of 16 per centum per annum from the 1st day of February 1956." (paragraph 13). It will be recalled that up to that date, the total actually advanced was Shs. 650,000 (paragraph 17 hereof).

(2) That "in terms of the Charge and for the said consideration the Company and the Sureties jointly and severally agreed (inter alia) to repay the said sum of Shs. 1,000,000 by certain prescribed instalments and to pay interest thereon at the said rate," (paragraph 14), which rate was admitted to have been later reduced from 16 per cent to 12 per cent (paragraph 17).

(3) That repayments of principal had been made, to the extent of Shs. 40,000, and payments had been made on account of interest amounting in the aggregate to Shs. 538,321/20, leaving outstanding Shs. 960,000 in respect of principal and Shs. 116,093/34 in respect of arrears of interest up to 31st August 1960, payment of all of which was alleged to have been demanded but not received.

(4) That no relief was claimed against the Ninth Defendant, the Chargee under the Second Charge.

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(5) The specific relief claimed against the other Defendants has already been summarised in paragraphs 2 and 3 hereof.

27. By their Re-Amended Defence dated 28th November 1961 the Defendants (other than the 2nd, 6th and 9th Defendants) pleaded (in so far as is now material) - p.12

(1) that the Plaintiff was a licensed money-lender carrying on business as such;

(2) they put the Plaintiff to proof of the lending of the sum of Shs. 1,000,000;

(3) that the sum lent was not lent pursuant to any moneylending transaction where the security for repayment of the loan and/or interest thereon was effected by "execution of a legal or equitable mortgage upon immovable property or of a charge upon immovable property or of any bona fide transaction of moneylending upon such mortgage or charge", within the meaning of section 3 (1)(b) of the Money-Lenders Ordinance (viz. Chapter 307 of 1948).

(4) that since no mortgage had been executed or was in contemplation when the loans totalling Shs. 650,000 (viz. those made prior to 31st January 1956) were made, the loan did not fall within section 3(1)(b), and was accordingly not a lending excluded from the operation of that Ordinance.

(5) Alternatively, the provisions of section 3(1)(b) apply only -

(a) to an actual and not a fictitious loan, and the supposed loan of Shs. 1,000,000 on 31st January 1956 was fictitious;

(b) where the sole security for repayment of the loan and/or interest thereon is a mortgage or charge on immovable property, and do not apply where in addition to such a mortgage or charge, there were other securities, in the form of the personal covenants of the sureties, and the deposit of share certificates with blank signed transfers thereof.

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(6) Since the provisions of section 11 of the Ordinance (relating to the making of a note or memorandum of the loan) had not been complied with either in respect of the Company or in respect of the Sureties in their capacity as "borrowers", the loan and the security therefor were unenforceable against the Company and the Sureties.

(7) That the Sureties did not request the loan nor was the money lent by their complicity or by agreement with them, and there was no consideration for their suretyship.

p.17 28. The 2nd Defendant (Kanji) delivered a separate Re-Amended Defence and a counterclaim dated 28th November 1961. The Defence was identical with that delivered by the 1st, 3rd, 4th, 5th, 7th and 8th Defendants; by the Counterclaim he claimed the delivery up of the certificates of his 1,500 shares in the Company and the blank signed transfers thereof, and an injunction to restrain the Plaintiff from dealing with them.

p.23 29. The 9th Defendant delivered an Amended Defence dated 30th January 1962 referring to its Second Charge aforesaid and asserting its rights as Second Chargee.

p.26 30. By their Reply dated 23rd December 1960 to the ~~Re-Amended~~ Original Defences of the 1st, 2nd, 3rd, 4th, 5th, 7th and 8th Defendants, Premchands joined issue thereon, and pleaded (so far as is now material) further or in the alternative;- that

(1) that the security for repayment of the loan and interest thereon was effected by execution of a legal or equitable mortgage upon immovable property or of a charge upon immovable property;

(2) further or in the alternative that the transaction was a bona fide transaction of money-lending upon such mortgage or charge, namely that sued upon;

(3) accordingly by virtue of section 3 of the Money-Lenders Ordinance, the provisions of the Ordinance did not apply to the

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transaction, no note or memorandum was required and the Charge was not rendered unenforceable.

31. They also delivered a Defence to the 2nd Defendant's Counterclaim dated 20th December 1961, generally traversing all the allegations therein, except that they admitted that pursuant to the Charge dated 31st January 1956, the 2nd Defendant deposited with them a blank signed transfer of his shares, but did not deposit any share certificate. p.28

32. Admissions of fact were sought by the 1st, 2nd, 3rd, 4th, 5th, 7th and 8th Defendants from Premchands, and material facts admitted on 18th January 1962 were that Premchands were licensed moneylenders for the years 1955 to 1960, and that no note or memorandum complying with section 11 of the Money-Lenders Ordinance was made or signed by the Defendants for the alleged loan, and that no copy of any such note or memorandum was delivered to the Defendants. p.29 p.33

33. On the trial of the action before the learned Judge, Premchands adduced evidence on the material issues to the effect summarised above,

(1) as to the initiation of the loan negotiations, the bringing into existence of the letter (Exhibit P.9), the Guarantee (Exhibit P.10) and the Charge (Exhibit P.2).

(2) as to the lending of the money by instalments.

(3) as to the attestation of the signatures of the Sureties on the Charge.

34. No evidence was adduced as to any attestation of the execution of the Charge by the Company, and Mr. J.J. Patel, the attesting witness to the signatures of the 6th to 8th Defendants, was not called as a witness. No evidence was adduced as to any direct negotiations or agreement made between Premchands and the 3rd to 8th Defendants.

35. The Defendants were given leave during the trial to raise the question of attestation of the signatures as an issue, although it had not been specifically pleaded. pp.55-56

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p.36 36. Premchands conceded at the trial that if the transaction did not fall within section 3(1)(b) of the Ordinance, it was unenforceable against all the Defendants and that if attestation was needed to enforce the Charge against the Company, it was unenforceable.

37. The learned Judge in his judgment made or purported to make findings of fact, of which the following are relevant to this appeal. As to "the transaction", he said;

pp.73/74 "What happened was that at the end of November or the beginning of December 1955 it was agreed that a million shillings would be advanced by the Plaintiff on the personal security of the Defendants 2 to 8 inclusive plus a first mortgage on the First Defendant's land plus deposit of shares and blank transfer. The title deeds were surrendered and upon that agreement certain moneys were advanced in December and the interest on this money was paid for that month. Other moneys were advanced in January 1956 and the balance of the million shillings was paid in February 1956. Some of this money was paid direct into a bank to discharge a previous mortgage so that the Plaintiff could obtain a first mortgage. I find that this all formed one transaction flowing from the original agreement to lend a million shillings in all, and that Exhibit 2 was the formal expression of that agreement and that the execution of such an instrument was a term of that agreement."

38. As to the Money-Lenders Ordinance point, he said,

p.74 "I find that this complete transaction was a moneylending transaction, whereby the repayment of the money advanced with interest was secured by a mortgage or charge on immovable property and that the whole transaction was a bona fide transaction of moneylending upon a mortgage of immovable property. On this finding I hold that, subject to the mortgage being proved to be valid and effective, the transaction is exempt from the provisions of the Money-Lenders Ordinance."

38A. As to "due execution", the learned Judge

pp.75-76 found ~~(3)~~ that the Charge was executed by the Company in accordance with its Articles of Association.

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39. As to the dispute about the facts in relation to attestation of the signature of the Sureties on the Charge, in the submission of the Appellants he refrained from making any conclusive findings of fact, either - p.76

(1) as to the conflict between the evidence of Mr. I.S. Patel (P.W.1.) and that of Mr. M.M. Shah (D.W.1.), as to the presence of Mr. I.S. Patel at the time when the 2nd to 5th Defendants signed the Charge: or p.37 p.56

(2) as to the conflict between the evidence of Mr. J.R. Pavagadhi (P.W.3.) and that of ~~Mrs. Shardaben~~ Smt. Hira Kanji (D.W.2A) and Mr. B.R. Shah (D.W.3.) as to the presence of Mr. J.J. Patel when the 6th to 8th Defendants signed the Charge; p.40 p.60 p.62

40. The learned Judge appears to have refrained from making such findings of fact because of his view of the law, namely, that the signatures of the Sureties did not require attestation as a matter of law, which in the Appellants' submission was erroneous. p.76

41. With respect to the matters of law decided by the learned Judge, those which were relevant to this appeal were as follows:-

(1) (a) the exemption from the statutory provisions of the Money-Lenders Ordinance conferred by section 3(1)(b) thereof was not confined to transactions where the security consisted solely of a mortgage or charge upon immovable property; for this, he relied upon dicta of the Court of Appeal for Eastern Africa in S.N. Shah v. C.M. Patel and Others (1961) E.A. 397 (hereinafter referred to as "Shah v. Patel"), and Buganda Timber Company Limited v. Mulji Kanji Mehta (1961) E.A. 477 (hereinafter referred to as "the Buganda Timber case"); pp.72-73

(b) that (in so far as this was a matter of law, or of mixed fact and law) the whole course of events described in paragraphs ~~11~~ 37 and 38 above was "one complete transaction", for the purposes of the application of section 3 (1)(b); pp.73-74

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(2) (a) that the statutory requirements regarding the attestation of the execution of the Charge by the Company derived from section 58 of the Registration of Titles Ordinance (Chapter 160 of 1948, now Chapter 281 of 1962) under which the Charge was registered, as contended by the Plaintiffs, and not from section 59 of the Indian Transfer of Property Act (Revised Laws of Kenya, 1962, Vol. XI, Group 8, at p.30) as contended by the Defendants. The relevant distinction between the two enactments was at the material time that -

(i) Section 58(1) of the Registration of Titles Ordinance provided (so far as material) that every signature to an instrument requiring to be registered should be attested by inter alia an advocate, but by subsection (3), the provisions of the section should not apply to any instrument executed under its common seal by a Company within the meaning of the Companies Ordinance (e.g. the Company in this case). That section was amended in 1959 by the insertion of a new subsection (4), providing that "an instrument executed by a company within the meaning of the Companies Ordinance shall be executed by means of the Company's common seal affixed in accordance with the memorandum and articles of association."

(ii) Section 59 of the Indian Transfer of Property Act provided that where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

(b) that the execution of the Charge by the Company, not being regulated by the Indian Transfer of Property Act, although prima facie regulated, as a registered Charge, by the Registration of Titles Ordinance, was not in fact regulated thereby, being excluded by subsection (3) of section 58 thereof, and accordingly required no attestation whatsoever.

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(c) that in any event the fact that the Charge had been registered under that Ordinance raised a presumption of due execution which could only be rebutted by pleading and proving lack of execution within the framework of the Ordinance; in support of this view, the learned Judge cited the case of Govindji Popatlal v. Nathoo Visandjee (1962) E.A. 372, a decision of the Judicial Committee, affirming a decision of the Court of Appeal for Eastern Africa, to the effect that the Registration of Titles Ordinance overrode the requirement of the Indian Evidence Act, 1872, that a registered instrument shall be proved by the evidence of an attesting witness. pp.78-79

(3) that no attestation was required by law in the case of the signatures of the Sureties, being signatures in a personal capacity. The learned Judge did not at this point identify the specific law which he was applying, but from the subsequent passage, summarised under (2) above, it must be inferred that he was referring to the Registration of Titles Ordinance. p.76

(4) the learned Judge made no finding of law in relation to the Defences of the Sureties based on the absence of consideration for the Guarantee.

42. In the light of his said findings of fact and law, the learned Judge held that Premchands were entitled to succeed, and made the orders referred to in paragraphs 5 and 6 hereof against the Defendants other than the 6th and 9th Defendants.

43. By their Memorandum of Appeal to the Court of Appeal for Eastern Africa dated 19th May 1962, the Defendants other than the 6th and 9th Defendants sought to set aside the whole of the judgment and decree on the grounds therein set out, of which there were initially 30, but of which a number were abandoned at the opening of or during the hearing of the appeal, namely grounds 1 to 5, 7, 8, 11 and 18. Ground 6 was in the event confined to the question of the costs of the 9th Defendant (2nd Respondent). pp.84-90

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pp.91 & 92

44. The substantial grounds of the Appeal as argued at the hearing were summarised in the judgment of the learned Vice-President hereinafter referred to and were as follows:

(a) that the moneylending transaction was not taken out of the scope of the Money-Lenders Ordinance by section 3 and was unenforceable;

(b) that the mortgage was invalid for lack of attestation of its execution by the Company and for defective attestation of its execution by the Sureties, and such invalidity was not cured by its registration under the Registration of Titles Ordinance;

(c) that there was no consideration in the case of some, if not all, of the Sureties.

45. The judgment of the Court of Appeal (Gould, V.P., Newbold, J.A., and Crabbe, J.A.) dismissing the appeal, and awarding costs as set out in paragraph 7 hereof, was delivered on 5th March 1964 by Gould, V.P., with whose judgment, Newbold, J.A., and Crabbe, J.A. concurred.

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p.113

p.91

46. The learned Vice-President proceeded rightly as the Appellants submit, on the basis that Premchands were at the material time carrying on the business of moneylending, and that unless the provisions of the Money-Lenders Ordinance did not apply to the transaction by virtue of the operation of section 3(1)(b) thereof, their action must fail.

pp.92-96

47. The learned Vice-President reviewed the events relating to the transaction as established in evidence and found by the learned Judge. In

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the light of that review, he held that "there was ample justification for the finding of the Acting Chief Justice that the events in question all formed one transaction flowing from the original agreement to lend a million shillings in all. By this, I understand him to mean that the mortgage over the land and factory was always intended to be included in the security, and the loan from the first was to be Shs. 1,000,000." The passage referred to comes from pp. 73-74 and is cited in paragraph 37 hereof.

48. The "transaction", thus held to be all one, is described by the learned Vice-President as commencing with the approach by Kanji to Hemraj in November 1955, and terminating in the advance of the final sum of Shs. 50,000 on 24th February 1956. The Appellants submit that either -

(a) this is an erroneous view, in that "the transaction", as it initially took shape, was intended to be and was in fact an advance or a series of advances, upon the terms of the letter (Exhibit P.9) but on the security only of the Guarantee (Exhibit P.10), at a time when no legal mortgage had been drawn up, and no equitable mortgage had been created, and that there were in reality a series of transactions, some of which clearly cannot fall within any of the types of transactions contemplated by the Legislature in section 3(1)(b) of the Money-Lenders Ordinance; or

(b) that a transaction of the duration in time and the complexity described by the learned Vice-President cannot be regarded as a transaction or transactions of the types contemplated by the said section 3(1)(b).

49. The conclusion that all that happened between the parties to the letter, to the Guarantee and to the Charge (who were not in fact identical) constituted one transaction, namely the giving of the eventual Charge securing the monies already lent and to be lent, was in the Appellants' submission a necessary though erroneous foundation for the learned Vice-President's approach to the crucial question, as to the proper construction of section 3 of the Ordinance, and the types of transactions to which it was intended to apply and does apply.

50. The Appellants submitted that the construction of the section presented difficulties, to the solution of which a survey of the historical development of the money-lending legislation of Kenya was of assistance, with particular reference to the fact that no enactment in the form of section 3 of the Money-Lenders Ordinance is to be found anywhere else in the money-lending legislation of the British Commonwealth, except in

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section 22 of the Money-Lenders Ordinance (1951) of Uganda (Chapter 31 of 1951). From this survey, the Appellants sought to deduce that the object of the Legislature in enacting section 3(1) (a) and (b) and (2) was to confer exemption from the Money-Lenders Ordinance upon transactions which were restricted entirely to the lending of money on the security (a) of chattels (subject to a restriction on the interest charged) or (b) of a legal or equitable mortgage or charge on land.

p.99 51. The learned Vice-President rejected this submission (erroneously, as the Appellants contend) and held that there was nothing in the history of the legislation that ought to be treated as showing that section 3 means anything but what it says.

p.96 52. He then proceeded to the construction of the section, which he had already held might properly be qualified by the requirement that "bona fides" should apply to the whole of it. He cited Shah v. Patel, (already referred to in paragraph 41(1) (a) hereof) a decision of the Court to which he was a party and said: "this Court held that the exemption provided by the section was not affected by the fact that there might be other security for the loan in addition to the immovable property. That finding is binding on this Court and it follows that it is not material in the present case that a blank share-transfer form was handed to the mortgagor or that there were guarantors".

53. In Shah v. Patel, the learned Vice-President, sitting as one of the Judges of Appeal, had (at pp. 409-410) expressed the view that the purpose of the Ordinance as a whole was to protect persons from moneylenders, and that therefore the object of section 3(1)(b) was to remove land-owners from the protection of the Ordinance as persons not in need of protection. Neither the learned President O'Connor, nor the learned Vice-President Forbes, expressed any similar or analogous views as to the object of the section or subsection.

54. In the submission of the Appellants, that decision was not an authority binding the Court to hold that the word "the security" meant in relation

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to the facts of the instant case "part of the security", and is in fact properly to be confined to its own facts, namely a case where there was a further advance, or a renewal of an existing advance, upon an existing mortgage or charge over immovables, which differ significantly from the facts of the instant case. That this is the proper evaluation of Shah v. Patel, is, in the submission of the Appellants, established by the later decision of the Court (Sinclair, P., Gould, V-P., and Crawshaw, J.A.) in Govindji Popatlal v. Premchand Raichand (1963) E.A. 69, to which the learned Vice-President was himself a party, and where Crawshaw, J.A. delivering the leading judgment, (at p.70) observed (at p.75) of Shah v. Patel that "it is not really relevant as it relates to a further loan on a security previously created to secure an earlier loan." This decision was cited to the Court by the Appellants on this appeal, but is not referred to in the judgments.

55. When the learned Vice-President considered the Appellants' submissions as to the limited authority of Shah v. Patel, having cited from the Buganda Timber case (also referred to in paragraph 41(1)(a) hereof) the dicta of the learned President (at pages 403-4) as to the position where there is a renewal of an unenforceable charge, he appeared, as the Appellants contend, so to qualify the assistance to be properly derived from Shah v. Patel, as to render that decision inapplicable to the instant case. p.101

56. The learned Vice-President further failed, in the submission of the Appellants, properly to take into his consideration the principal dicta in the Buganda Timber case which he had himself cited. In that case, the Court (O'Connor, P., Gould, J.A., and Newbold, J.A.) in construing the provisions of section 22(1)(c) of the almost identical Uganda Ordinance, referred to in paragraph 50 hereof, held that the words "where the security ... is effected" "point to a mortgage or charge which effectually creates a security and not to some instrument which requires the execution of another instrument to make it effectual or to an instrument, whether it be a mortgage or charge, which is ineffectual as a security, by reason of being unregistered," (per O'Connor, P. at p.479). That passage was approved

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and applied by the Court, in relation to sections 3(1)(b) of the Kenya Ordinance, in Govindji Popatlal v. Premchand Raichand (1963) E.A. 69, already cited in paragraph 54 above. In that case, Crawshaw, J.A., had further held (at p.75) that the burden was on the Respondent to prove that the transaction fell within section 3(1)(b). The learned Vice-President had (at p.76) expressed his agreement on the money-lending point.

56. If however Shah v. Patel was properly held to be binding on the Court, to the extent and in the manner relied upon, the Appellants contend that that case was wrongly decided. The Appellants in particular contend that the suggested explanation by the learned Vice-President in Shah v. Patel (at pp.409-410) as to the Legislature's reason for the exemption of moneylending transactions secured upon charges over land, namely that "land-owners" did not require protection, should be rejected, as unmaintainable in relation to any society, but in particular in relation to an Afro-Indian society comprising very many small proprietors of farming land, who as borrowers might be regarded as peculiarly in need of statutory protection.

57. The Appellants further contend that if the expression "the security" does not mean "the totality of the security" (as they submit that it does), any moneylending transaction of any magnitude, comprising perhaps several species of securities, would be brought within section 3(1)(b) and exempted from the provisions of the Ordinance, by the lender including in, or subsequently adding to, his portfolio of securities a charge on a small plot of land. In this context, it is to be borne in mind, in their submission, that both parts of subsection (1) contain identical opening words, which should be construed as having the same meaning, and as directed to the same or an analogous object. If therefore the word "security" in paragraph (b) means "part of the security", it must have the same meaning in paragraph (a), which would imply that under the latter paragraph part of the security might be a chattels transfer at the statutory rate of interest, and another part at more than the statutory rate, or (reading the two paragraphs together) a moneylending transaction

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might be in part on the security of a mortgage on land, and in part on the security of a chattels transfer at more than the statutory rate of interest; in such a case, it might be impossible to say which element in the security determined whether the transaction fell within or without the Ordinance.

58. The Appellants supported their arguments as to the proper canons of construction to apply to the section by reference to the strictness of construction applied to moneylending statutes generally, and contended that a strict construction should be applied to those exemption provisions, the application of which it was incumbent on the money-lender to prove, but the learned Vice-President erroneously rejected these submissions as constituting inter alia a non sequitur. p.96

59. The learned Vice-President further rejected the Appellants' argument that the use of the present tense in section 3(1) of the Ordinance carried the requirement that the giving of the security should be contemporaneous with the loan. In so far as Shah v. Patel decided the contrary, the Appellants say it was erroneously decided and point out that unless this requirement is imposed there would be a period of uncertainty as to whether the loan was within the Ordinance or not, and that in some cases a loan which was invalidated by the operation of section 11 of the Ordinance (see paragraph 32 hereof) might be later taken out of the Ordinance by the giving of some trifling real security. p.100

60. On the second main ground of appeal, namely that founded on the lack of, or the defects in, the attestation of the execution of the Charge, the learned Vice-President dealt first with the position of the Company. It was not sought to be contended that the officers of the Company were "attesting witnesses" to the affixing of the seal, and accordingly if attestation was required by statute, there was none. pp.101-104

61. The learned trial Judge, as noted in paragraph 41(2) hereof, had held, on this point, that a limited company was outside the attestation provisions of either of the statutes there cited, namely the Registration of Titles Ordinance,

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section 58, and the Indian Transfer of Property Act, section 59, and accordingly required no attestation for its due execution of an instrument.

62. During the hearing of the appeal, the First Respondents (Premchands) applied for the leave of the Court to take what the Appellants then contended, and still contend, to be a new point, namely that although section 58 of the Registration of Titles Ordinance applied to the exclusion of section 59 of the Indian Transfer of Property Act, yet the Registration of Titles Ordinance did not in the event apply so as to impose any attestation obligation, for a company cannot "sign" an instrument within the meaning of section 58(1) of that Ordinance. The Appellants objected to leave being given to take that point, but the Court, erroneously as they submit, allowed it.

pp.103-104 63. The learned Vice-President appears to accept this proposition as excluding from the attestation provisions of section 58(1) any execution of an instrument by a company, provided that such execution was by means of the Company's common seal, and accordingly held that attestation had not been requisite for the Company's execution of the Charge.

64. The Appellants argued, and still contend, that any such construction of the word "signature" as excludes the "signature" by a company by means of the affixing of its common seal is objectionable on several grounds, namely -

(1) that the purpose of attestation, whether (as under the Indian Transfer of Property Act) by two witnesses, who may be laymen, or (as under the Registration of Titles Ordinance) by one of a specified number of public or professional officers, who if they possess a seal of office must affix it, is to ensure a degree of certainty and solemnity in transactions affecting registered or registrable land or charges.

(2) that the raising of the standard of attestors in the latter enactment emphasises this purpose, a fortiori having regard to

the "conclusive sanctity of the register", once an apparently valid instrument has been registered therein.

(3) that there is no inherent difference for this purpose between a human being and a company.

(4) that Section 59 of the Indian Transfer of Property Act, which was re-enacted unchanged in 1962 and which has been quoted in paragraph 41(2)(b) hereof, provides that a mortgage can be effected only by a registered instrument signed by the mortgagor. This section must be taken to apply to limited companies, and accordingly if the word "sign" excluded execution under seal, a company could not make a valid mortgage at all.

(5) That in any event, however, by section 3(1) of the Interpretation and General Provisions Ordinance, 1956, (Revised Laws of Kenya, 1962, Chapter 2) "person" is defined as including "company" and "sign" as including "mark".

(6) If the words "sign" or "signature" in the Indian Transfer of Property Act include a company's execution under seal, but in the Registration of Titles Ordinance do not, a serious conflict would arise between the two parallel enactments, and the proper construction must be that the words have the same meaning in both enactments.

65. Accordingly the Appellants submit that the learned Vice-President was in error in excluding from his consideration the applicability of the Indian Transfer of Property Act, and that his ruling that the execution by a company of any instrument intended to be registered requires no attestation cannot stand. In so far as he expressly or impliedly founded his ruling as regards execution by the Company, by reference to his subsequent views on attestation as regards the Sureties, the matter is dealt with below in relation thereto, in paragraphs 66 to 77.

66. The learned Vice-President initially approached p.105

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the question of the attestation of the signatures of the Sureties on the basis that although they were in fact signatures to an instrument requiring to be registered, yet, (as he said): "There is nothing in the Ordinance which requires a personal covenant to repay money or a guarantee of payment to be registered. The Ordinance concerns itself with land, and the contract entered into by the Sureties in the present case does not touch the land, in which they have no rights. It is only the security over the land which requires to be registered, and I think the Registrar of Titles would be justified in not insisting upon attestation of Sureties in terms of section 58."

67. The Appellants contend that this approach was erroneous on several grounds, viz.

(1) the case did not concern the registration of an instrument which did not itself concern land, but an instrument which did, and on which there were signatures by all the parties, both those of the debtor - mortgagor and of the debtors - sureties, which prima facie are "signatures" within the meaning of section 58(1);

(2) it is incorrect to say that the Sureties had no rights over the land; their rights as sureties included -

(a) the right of subrogation to the position of the mortgagee in respect of any payment made, whether of principal, interest or insurance;

(b) the right to redeem and/or to require the Company to redeem;

(c) the right to be joined as parties to any action to enforce the Charge.

(3) if itis correct law that no attestation of the signatures of Sureties is required, then the Registrar would not be entitled to refuse registration by reason of non-attestation thereof, and would have no discretion whether to insist or not to insist thereon.

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68. The learned Vice-President sought to support his view as to the absence of any statutory necessity for the attestation of signatures of sureties by a reference to their liability in any event in this case on their covenants for payment contained in the Charge. This was an erroneous reference, in the Appellants' submission, in that the action was pleaded and conducted by Premchands as a mortgage suit, by way of enforcement of a registered Charge, and not solely to enforce any such covenant for payment. p.106

69. The learned Vice-President further sought to support his view as to attestation of the Sureties' signatures by reference to the learned Judge's findings of fact thereon (referred to in paragraphs 38 and 39 hereof), as to which the Appellants contended that the learned Judge had refrained from making any such findings. The learned Vice-President however appears to have erroneously assumed that the Court had the right to make such conclusive findings of fact itself, even where the trial Judge had not. pp.106-108

70. He refers to the late introduction of the Defence founded on no attestation or defective attestation, and appears to criticise the learned Judge for having allowed its admission, although (as the latter had said in his judgment) he had offered the Plaintiffs an adjournment if they wanted one. He also appears to criticise the Appellants for having opposed the Plaintiffs' application to call Mr. J.J. Patel, and the Plaintiffs for having failed to press their application. In the absence of any cross-appeal, the Appellants contend that such considerations were wholly irrelevant and may reasonably be inferred to have affected the learned Vice-President's approach to these points. p.109 p.74

71. The Appellants submit that it was the duty of the Plaintiffs in the action to prove their case sufficiently, and that on such crucial matters as attestation, the onus, if there be one, lies on the party seeking to enforce the instrument in question. Accordingly, both the learned Judge and the learned Vice-President were in error in erecting an onus as to proof or lack of proof of due attestation, and in then holding that that onus lay on the Appellants and that they had failed to discharge it.

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pp.109-110

72. The learned Vice-President then sought still further to support the suggested onus of proof as to attestation or no attestation by reference to the doctrine of the sanctity of the register under enactments of the "Torrens" type, as established in East Africa and other parts of the Commonwealth, to which the learned trial Judge had himself briefly referred.

pp.78-79

73. It had been strenuously contended by Premchands, both below and in the Court of Appeal, that the effect of the doctrine of the sanctity of the register extended beyond the protection of third parties dealing with the land so as even to preclude the parties to the instrument itself from challenging its validity. In so far as the learned Vice-President accepted this proposition, as a ground (whether substantive or regarded from the point of view of onus) for rejecting the Appellants' objections in respect of attestation, whether as to the Sureties' signatures or (as referred to in paragraph 60 hereof) as to the execution by the Company, the Appellants contended and still contend that it was erroneous.

74. In support of their contention, the Appellants relied upon the decision of the Judicial Committee in Gibbs v. Messer (1891) A.C. 248, P.C., which related to the Victorian Transfer of Land Statute, 1866, a statute under the "Torrens" system and directly analogous to the Kenya Registration of Titles Ordinance. The case concerned an allegation of the forgery of an instrument which had been registered, and Lord Watson held, at p.257, that: "Although a forged transfer or mortgage which is void at common law, will, when duly entered on the register, become the root of a valid title in a bona fide purchaser by force of the statute, there is no enactment which makes indefeasible the registered right of the transferee or mortgagee under a null deed"; see also at pp.254-255.

75. Commenting on that decision, the editor of Hogg on "Australian Torrens System and Statutes" (1905) (an authority from which the learned Vice-President himself quoted at p.111) at p.830 said that the observations of Lord Watson "apply equally to the Torrens Statutes generally", and

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that "although expressly decided on facts which constituted gross fraud, the principle laid down that the purchaser can only rely on his registered vendor having a good title and must satisfy himself that his vendor's title is being as effectively as possible transferred to himself, applies equally to cases where, apart altogether from fraud, the vendor's title is not being effectively transferred;" those observations were accepted by the editor of Thoms' "Canadian Torrens System", (1962) 2nd edition, at pp.317 and 689.

76. In so far as the view of the learned Vice-President was founded upon, or in his opinion supported by, the decision of the Judicial Committee in Govindji Popatlal v. Nathoo Visandjee (1962) E.A. 372, P.C. affirming the decision of the Court of Appeal for Eastern Africa, reported at (1960) E.A. 361, the Appellants submit that that case turned not on a question of the validity of the instrument, but on the mode of proof thereof, and that the question whether the validity of a registered instrument can be challenged as between the parties thereto was not intended to be decided, and was not decided, therein at all; the Appellants further submit that the sanctity of the register which is enacted for the protection of third parties cannot possibly be violated by disputes between the vendor and purchaser or the mortgagor and mortgagee themselves. pp.103 & 109-111

77. Accordingly, the Appellants submit that as between the parties to a registered instrument, those parties are not precluded by the fact of registration from disputing the validity of the instrument for want of or defect in statutory requirements, such as attestation, and that in so far as the learned Vice-President's judgment on either of the points on attestation was influenced by any contrary view, it cannot be supported.

78. With respect to the third main ground of appeal, namely that there was no consideration in the cases of some, if not all, of the Sureties who joined in the Charge, the learned Vice-President dealt with this at pp.112-113. He appears there to have proceeded on two propositions -

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(1) that there were mutual covenants in the Charge, on the one hand by the Sureties and on the other hand by the Chargee, the covenant by the latter being to refrain from calling in the mortgage monies.

(2) that "the Sureties all of whom had signed the original Guarantee (Exhibit P.10) must have known the position, and their signatures on the mortgage would imply a request for payment at least of the remainder of the agreed advance, providing consideration for their covenant".

The Appellants submit that both those propositions are erroneous, for the following reasons.

79. As to (1):

(a) the Charge expressly recites a pre-existing agreement between the Chargor and the Chargee, whereby the Chargee "has at the request of (the Chargor) agreed to lend it the sum of Shs. 1,000,000 and upon having repayment thereof with interest at the rate hereinafter mentioned secured in manner hereinafter appearing". Accordingly, the advance by the Chargee, being already agreed upon, could not be relied upon as consideration either as to the whole of the sum agreed to be advanced or as to any part thereof.

(b) by the terms of the Charge, the Chargee's covenant to refrain from calling in the money must be regarded as part of the agreement to lend, and equally cannot be relied upon as consideration.

(c) to import into the construction of the Charge evidence outside its written terms is to infringe the terms of section 91 of the Indian Evidence Act, which is part of the law of Kenya and which reads:-

"When the terms of a contract or grant or any other disposition of property have been reduced to the form of a document, and in all cases in which any matter is required by

laws to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract grant or disposition of property or of such matters except the document itself".

(d) regarded therefore within its own bounds, the Charge does not show any consideration moving to the Sureties, nor any request by them to Premchands to make any advances to the Company.

80. As to (2):

(a) The original Guarantee (Exhibit P.10) on which the learned Vice-President relies, is not the document sued upon, nor does it form any part thereof, so as to be incorporated therewith for the purposes of its admissibility under section 91 of the Indian Evidence Act, supra.

(b) That Guarantee is not in itself a request for an advance of Shs. 1,000,000, or for any specific sum. The fact that the parties thereto included one, Harilal Kanji, who did not execute the Charge and was not sued as a Defendant in the action, precludes it being treated as exactly co-extensive with the Charge in its Suretyship aspect.

(c) There was no evidence that any of the Sureties who were sued, with the exception of Kanji, (2nd Defendant), knew anything whatsoever about the dates or amounts of any advances actually made whether between the dates of the Guarantee and the Charge or after the Charge.

(d) Any reliance on the terms of the Guarantee for the purpose of supplementing the deficiencies of the terms of the Charge would contradict the recitals in the Charge.

81. The Appellants accordingly submit that there was no consideration for the covenants of any of the Sureties - Defendants, alternatively for the covenants of any except Kanji (2nd Defendant), and that the learned Vice-President wrongly rejected their appeal on that ground.

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82. The Appellants accordingly pray that the order of the Court of Appeal dated 5th March 1964 dismissing their appeal should be set aside, and that there should be substituted an order allowing the appeal, and setting aside the judgment and decree of the Supreme Court dated 16th March 1962, and dismissing the action.

83. As to the costs of the proceedings, the Appellants submit that:-

(1) as to the costs of the trial of the action, they should be awarded their costs against the Plaintiffs (1st Respondents here and below), such costs to include the costs of the 9th Defendant which the 1st Defendant was ordered to pay, the order for the last mentioned costs in favour of the said 9th Defendant not to be disturbed;

(2) as to the costs of the appeal to the Court of Appeal, they should be awarded their costs of the appeal against the 1st Respondents below, such costs to include the costs of the 2nd Respondent (9th Defendant) which the Appellants were ordered to pay, the order for the last mentioned costs in favour of the said 2nd Respondent not to be disturbed.

(3) As to the costs of this appeal, these should be awarded to the Appellants against the 1st Respondents here.

84. The Appellants submit that the order of the Court of Appeal ought to be set aside or varied and the judgment and decree of the learned trial Judge should be set aside, and judgment be entered for the Appellants allowing the said appeal below and dismissing the action, for the following (among other)

R E A S O N S

(1) BECAUSE the transaction of money-lending, and the Charge dated 31st January 1956 given to secure such lending, were not a transaction within the meaning of section 3(1)(b) of the Money-Lenders Ordinance of Kenya.

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(2) BECAUSE the said transaction and the said Charge were accordingly not exempted from the provisions of the said Ordinance, and those provisions (other than the said section 3(1)(b)) applied to it.

(3) BECAUSE the said transaction and the loan or loans made thereunder and all securities therefor were and are void illegal and unenforceable under the said Ordinance and should be set aside.

(4) BECAUSE by virtue of the provisions of the said Ordinance, neither the 1st Defendant (the Company) nor the 3rd, 4th, 5th, 7th or 8th Defendants were or are under any liability to the Plaintiffs (the 1st Respondents).

(5) BECAUSE the said Charge was not duly attested so far as concerns its execution by the 1st Defendant (the Company), as required by section 58 of the Indian Transfer of Property Act, which is part of the law of Kenya.

(6) BECAUSE the Court of Appeal was wrong in holding that for the purposes of such execution by a limited company, the requirements as to attestation were prescribed not by the said Act, but by section 58 of the Registration of Titles Ordinance.

(7) BECAUSE the Court of Appeal was wrong in holding that upon applying the provisions of the said section of the said Ordinance to the execution of an instrument by a limited company, no attestation of such execution was required.

(8) BECAUSE the Court of Appeal was wrong in holding that no attestation of the signatures of the Defendants as Sureties to the Charge was requisite under section 58 of the said Ordinance, on the ground that such signatures were not signatures to an instrument requiring to be registered within the meaning of the said section.

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(9) BECAUSE the Court of Appeal was wrong in holding itself to be entitled to make findings on questions of fact relating to the attestation or non-attestation of the Charge, when the trial Judge had refrained from making such findings.

(10) BECAUSE the Court of Appeal misdirected itself as to the nature and weight of the evidence, on which it sought to make such findings of fact.

(11) BECAUSE the Court of Appeal was wrong in holding that there was an onus of proof upon the Appellants to show that the Charge was not duly attested by the 1st Defendant (the Company) or by the other Defendants as Sureties, such onus being imposed by virtue of the registration of the Charge under the said Registration of Titles Ordinance.

(12) BECAUSE the Court of Appeal was wrong in holding that a presumption arose in favour of due attestation by virtue of such registration of the Charge under the said Ordinance.

(13) BECAUSE the Court of Appeal was wrong in holding that the Appellants had failed to discharge such onus of proof (if any) as properly lay upon them.

(14) BECAUSE the Court of Appeal was wrong in holding that the registration of an instrument under the said Ordinance precluded the parties to such instrument from disputing its validity whether in respect of attestation or otherwise.

(15) BECAUSE the Court of Appeal was wrong in holding that there was consideration moving to all or any of the Sureties for their signatures to the Charge.

(16) BECAUSE the Court of Appeal was wrong in holding, contrary to the terms of section 91 of the Indian Evidence Act, which is part of the Law of Kenya, that the terms of the Charge could, so far as concerns the proof of any such consideration, properly be

supplemented by reference to the pre-existing letter or Guarantee or any other extrinsic evidence.

(17) BECAUSE the Court of Appeal was wrong in holding that consideration for the Sureties' signatures to the Charge could be sufficiently extracted from the covenants of the parties therein contained.

(18) BECAUSE the trial Judge and the Court of Appeal were wrong in finding in favour of the Plaintiffs (1st Respondents) and in ordering the enforcement of the Charge and the covenants for payment therein contained against any of the Defendants.

(19) BECAUSE for these reasons and by reason also of the matters hereinbefore set out in the Case, the Court of Appeal for Eastern Africa was wrong -

(i) in dismissing the appeal;

(ii) in affirming the judgment and decree of the trial Judge;

(iii) in ordering the Appellants to pay the Plaintiffs' (1st Respondents') costs of the appeal, and the costs of the 9th Defendant (2nd Respondent).

J. T. MOLONY

MUIR HUNTER

No. 32 of 1964

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL FROM

THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

B E T W E E N

1. COAST BRICK & TILE WORKS LIMITED
2. KANJI MEGHJI SHAH
3. SHARDABEN RATILAL SHAH
4. KESHAVLAL KANJI SHAH
5. RATILAL KANJI SHAH
6. ZAVERCHAND SOJPAL JETHA and
7. HIRJI RAMJI SHAH

Appellants

- and -

1. PREMCHAND RAICHAND LIMITED and
2. SHAH MEGHJI MULJI LIMITED

Respondents

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APPELLANTS' C A S E

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GOODMAN, DERRICK & CO.,
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