

(1914) 03 CAL CK 0007
In the Calcutta High Court
Case No : L.P. Appeal No. 95 of 1913

Badiatannessa Bibee

APPELLANT

Vs

Ambika Charan Ghosh

RESPONDENT

Date of Decision : 27-03-1914

Acts Referred:

Citation : (1914) 03 CAL CK 0007

Judgement

Jenkins, C.J.—This is an appeal from a judgment of Mr. Justice Sharfuddin who has confirmed the decree of the lower Appellate Court by which the previous (sic) the Munsif had been reversed. (sic) is one brought by a mortgagee (sic) and his wife on a mortgage (sic) against the man we (sic), for this appeal has merely to do with the right of the mortgagee, the Plaintiff, against the wife.

2. The transaction was one from which the wife derived no direct benefit for herself, as she was giving a mortgage by way of security for her husband. In these circumstances it is contended on behalf of the wife that she being a Mahomedan purdanashin lady is not bound by the mortgage.

3. It was said by the Privy Council in Gireesh Ch. Lahorey v. Bhugobutty Debia 13 M. I. A. 419 (1870), that the committee has always been careful to see that deeds taken from purdah women have been fairly taken, that the party executing them has been a free agent, and duly informed of what she was about. The burden of establishing this rests on him who claims against the purdanashin lady ; so that what we have to see is whether on the findings of the lower Appellate Court such a case has been made out.

4. I have said that the lady herself derived no direct benefit from the transaction, and we have it in evidence that when a similar transaction of an earlier date was proposed, the lady, at that time living with her husband's father and brothers, under their advice repudiated the execution by her of a document which has been represented to us as having been somewhat similar in effect.

5. At the time when this document was executed, the lady was living with her

husband, and it is found as a fact by the lower Appellate Court that she evidently acted under the influence of her husband in consenting to mortgaging her house for her husband's debt. The learned Judge goes on to say that "though this would have rendered the transaction invalid as between husband and wife, he did not think that it affected the validity of the mortgage so far as the Plaintiff was concerned, as he acted in good faith."

6. Now, the Plaintiff is a muktear and he was present on the only occasion when the contents of the document were read, and, it is said, explained to her. Who was the person who read the document and explained it ? The husband--the husband whose undue influence procured the execution of the document by his wife. Who was present when this reading and explanation took place ? Among others the mortgagee, so that we not only have the fact that all that is shown is a reading and explanation of the document by the husband but the knowledge of the mortgagee that that was the means whereby it could be suggested that she was a free agent and duly informed of what she was about.

7. In my opinion it is impossible in these circumstances to accept the view that the undue influence of the husband had nothing to do with the matter. The mortgagee himself must have known the influences under which the lady came to sign the document. What the explanation is that was given to the lady we do not know ; but I should not expect a very critical questioning or a very elaborate explanation, between one who exercised undue influence, and another, over whom he exercised it.

8. It may be, as has been suggested before us, that sec. 16 of the Contract Act, as it now stands, requires that the undue influence should proceed from a party to the suit and that the language of the section is in this respect narrower than of the section for which it was substituted. I do not wish to express any definite and conclusive view on this point at present, but the undue influence which may affect a purdanashin lady's understanding of a document may proceed from a third party. In the very instructive judgment of Lord Moulton in *Kanhaya Lal v. The National Bank of India, Ltd.* 17 C. W. N. 541 (1913), it is made clear that the word "coercion" and, by parity of reasoning, the other words which have a special definition for the purposes of Chap. II of the Contract Act, are not by that definition deprived of the wider meaning that they may otherwise possess for other purposes.

9. This case is in its circumstances similar to that which came before their Lordships of the Privy Council in *Bank of Montreal v. Stuart* [1911] A. C. 120. It was held there, in circumstances substantially undistinguishable from the present, that the lady was not bound by the transaction into which she purported to enter with the creditor of her husband for the benefit of her husband ; and, their Lordships came to that conclusion, although the lady in her evidence repudiated the suggestion that there had been undue influence.

10. It appears to me that the findings in this case fall short of establishing that

the mortgage was fairly taken or that the lady executing it was a free agent duly informed of what she was about. I have already stated the situation in which the document was explained to her ; and, if I may adopt the language of another judgment of Lord Moulton, Lord Justice Moulton, as he was at that time, in *In re Coomber* [1911] 1 Ch. 723 at p. 730, I would say that it has not been shown that any independent person free from any taint of the relationship, or of the consideration of interest which would affect the act, has clearly put before the lady what are the nature and consequences of the act, and the advice, if advice was given, was certainly not removed entirely or at all from the suspected atmosphere : nor had the lady an opportunity of learning, from the clear language of an independent mind, precisely what she was doing. In this view of the case it appears that while we cannot uphold the judgment of Mr. Justice Sharfuddin and the decree of the Subordinate Judge, it will be unprofitable to send back the case, and we must, therefore, reverse the decree of the lower Appellate Court so far as it relates to Defendant No. 2 and restore the decree of the Munsif so far as it relates to that Defendant. As between the Plaintiff and Defendant No. 2, the Plaintiff must bear her costs of this litigation in all the Courts.

Chatterjee, J.

I agree.