Privy Council Appeal No. 65 *of* 1938
Bengal Appeal No. 39 *of* 1936

The Bank of Khulna, Limited - - - - - - - *Appellant*

v.

Jyoti Prokash Mitra and others - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH JUNE, 1940.

Present at the Hearing:

LORD THANKERTON
SIR GEORGE RANKIN
SIR PHILIP MACDONELL

[*Delivered by* LORD THANKERTON.]

This is an appeal from a judgment and two decrees of the High Court of Judicature at Fort William in Bengal, dated the 24th June, 1936, which set aside a judgment and decree of the Subordinate Judge of Khulna dated the 29th September, 1934, and dismissed the appellant's mortgage suit.

The present suit was instituted by the appellant on the 31st March, 1930, for recovery of the principal and interest due under a mortgage deed dated the 18th March, 1925, executed by Nirod Bashini Mitra, a Hindu married woman, Bhuban Mohan Mitra, her husband, and Jnan Prokas Mitra, her eldest son, for a loan of Rs.28,000, on the security of certain agricultural lands and a dwelling house, all of which belonged to Nirod Bashini Mitra in her absolute title. The original defendants were Nirod Bashini Mitra as defendant No. 1, her husband as defendant No. 2, and her eldest son as defendant No. 3.

Defendant No. 1 died on the 18th March, 1932, and defendant No. 2 died on the 22nd October, 1933. They left three sons; the eldest son was defendant No. 3, and he has not appeared in the suit. The second son, Jyoti Prokash Mitra, defendant No. 1 and respondent No. 1 in this appeal, is the main contesting defendant. The third son, Jasho Prokas Mitra, is now insolvent, and the Official Assignee of Bengal appears in his interest as respondent No. 2 in this appeal. It is unnecessary, for the purposes of this appeal, to refer to the delays and vicissitudes of procedure which took place prior to the trial of the suit in August, 1934. The Subordinate Judge delivered judgment on the 29th September, 1934. He rejected the defendants' case as to fraud and undue influence, and other minor issues, and he held that Nirod Bashini was aware of the contract in the

mortgage deed so far as it related to the agricultural lands, but that she was not so aware as to the inclusion of her house property, and that the deed was not explained to her; he therefore held that the deed was binding on her so far as it related to the agricultural property, and granted a preliminary decree so limited on the 29th September, 1934, and a final decree was passed on the 30th November, 1934. From that decree the present respondent No. 1 appealed, and the present appellant also appealed.

On the 24th June, 1936, the High Court allowed the appeal of respondent No. 1 and dismissed the appeal of the appellant; they accordingly dismissed the suit. Hence the present appeal. The learned Judges agreed with the Subordinate Judge's findings of fact, and in particular that the deed had not been explained to Nirod Bashini, but they held that these findings must affect the deed as a whole, and the deed must be condemned as a whole.

It appears that on the 11th March, 1925, Nirod Bashini signed a form of application for a loan of Rs.28,000 from the Bank, to be secured on the agricultural properties in suit. It also appears that she required the money in order to send Rs.5,000 to her two younger sons in England without delay, and to give assistance to her husband and her eldest son in regard to criminal proceedings in which they were then involved. The Bank obtained a report by two of its directors as to the value of the security offered, which they estimated at Rs.48,000, and at a special meeting of the Bank on the 17th March, 1925, it was unanimously resolved that if her husband and eldest son joined in the mortgage bond and Nirod Bashini mortgaged the dwelling house of Khulna town along with the lands, the loan of Rs.28,000 would be granted. It appears from the evidence that the husband and eldest son were present at this meeting and that they were told to go and inform Nirod Bashini of the Bank's proposal, but there is no evidence that she was so informed. Apparently a draft of the mortgage deed on the basis of the Bank's terms was prepared that night, and on the following day, the 18th March, a fair copy was made and was executed by Nirod Bashini, her husband and her son. In view of the findings of both Courts, their Lordships find it unnecessary to review the evidence in detail.

After reference to the special meeting of the Bank at 5.30 p.m. on the 17th March, the Subordinate Judge says, "Then the bond was written in Nirod Bashini's house on the same night by the cashier of the Company Babu Hem Ch. Mitter. He admits in answer to Court's question that he himself did not show the deed (bond) to Nirod Bashini after it had been written. Thus on the 17th March (the date of the resolution) the proposal of the Company to include the house was not communicated to Nirod Bashini. As the bond was not shown after it was written, she could not know that her residence was also being included in the bond. The draft of the bond is not forthcoming and this throws doubt whether the house was inserted in the draft."

The learned Judge declined to accept Hem Chandra's evidence that, at the time of execution on the 18th March, the deed was read over to Nirod Bashini and that she nodded her head by way of consent, and he found that "the lady had no knowledge of the house property being included in the bond." He rightly comments on the fact that the Bank, in order to obtain a fifty per cent. margin of security on the loan of Rs.28,000, included the lady's own dwelling house—worth Rs.60,000—in addition to the lands valued at Rs.48,000, making a total value of Rs.1,08,000.

In their judgment the High Court state, "As regards the events antecedent to the execution the evidence of Hem Chandra Mitra, such as it is, does not suggest that prior to the putting up of the deed for execution anybody on behalf of the Bank or anybody at all had apprised Nirod Bashini as to what would be the terms of the loan. . . . Then there is the evidence relating to the execution. On this point the only evidence is that of Hem Chandra Mitra. He has said that he read over and explained the deed to the lady who was seated in an adjoining room; that Nagendra Babu asked him to read it and explain it to the executants but did not name any particular person; that he read the deed paragraph by paragraph together with the schedule, and as he finished each and asked Nirod Bashini she nodded her head in token of having understood it. The learned Judge was not satisfied from certain answers that the witness gave that the witness had the capacity to appreciate and explain the deed; but perhaps he judges the witness by too exacting a standard. But the learned Judge was also not satisfied with the demeanour of the witness, for in one part of the record he has put down a remark that the witness was concealing truth. He has observed in his judgment that the story of nodding is a fiction; and in the absence of more convincing evidence supporting the story we are unable to dissent from this conclusion." It may be observed that the deed was in English, and it is clear that the lady did not understand English, though it appears that she could "somehow sign her own name".

The appellant attempted to evade the effect of these concurrent findings of fact by a series of contentions, with which their Lordships will proceed to deal, but it may be convenient, in the first place, to recall certain of the passages in the well-known judgment of this Board delivered by Lord Sumner in *Farid-un-Nisa* v. *Mukhtar Ahmad,* (1925) 52 Ind. App. 342, at p. 350:—

> "The real point is that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act, of the person who makes it. . . . Again, the question arises how the state of the settlor's mind is to be proved. That the parties to prove it are the parties who set up the deed and rely on the deed is clear. They must satisfy the Court that the deed has been explained to and understood by the party thus under disability, either before execution, or after it under circumstances which establish adoption of it with full knowledge and comprehension."

The appellant's first contention was that Nirod Bashini was not a pardnashin woman within the strict sense, and was not entitled to the special protection afforded to women of that class. In their Lordships' opinion the appellant is not entitled to raise that question in this appeal. The question is one of fact; no issue was framed, and the point was not raised at the trial. The Subordinate Judge states, "We are here dealing with a pardnashin lady and the burden of proof is heavily upon the Bank to show that their action was fair and beyond question." It is equally clear that the High Court dealt with the case on the same footing. The appellant sought to attach a different inference to the statement of the High Court, viz.—"One matter that has to be referred to at the outset is the question whether the defendant No. 1 was such a person as is entitled to the special protection which the law of this country provides, namely that one who relies upon a deed executed by her should satisfy the Court that the same had been explained to and understood by her, or, in other words, that the transaction was explained to her and that she knew what she was doing. It is not disputed that she was a pardnashin lady, at least to the extent that Bengali ladies are so at this day." That this passage was not intended to suggest that the lady was outside the class entitled to special protection is placed beyond doubt by a later passage in the judgment which states, "No case of undue influence, it is true, has been made out, but the case, in our judgment, was one in which she was fully entitled to the usual protection that the law allows to persons whose disabilities make them dependent upon or subject to the influence of others." It may be said that there are thus concurrent findings on this question of fact, but their Lordships take the view that, in any event, the appellant, having failed to put the matter in issue at the trial, cannot be allowed to raise the question now. In the judgment of this Board in *Hodges* v. *The Delhi and London Bank Limited,* (1901) 27 Ind. App. 168, at p. 175, the following passage occurs:—

> "The term *quasi-pardanashin* seems to have been invented for this occasion. Their Lordships take it to mean a woman who, not being of the *parda-nashin* class, is yet so close to them in kinship and habits, and so secluded from ordinary social intercourse, that a like amount of incapacity for business must be ascribed to her, and the same amount of protection which the law gives to *parda-nashins* must be extended to her. The contention is a novel one, and their Lordships are not favourably impressed by it. As to a certain well-known and easily ascertained class of women, well-known rules of law are established, with the wisdom of which we are not now concerned; outside that class it must depend in each case on the character and position of the individual woman whether those who deal with her are or are not bound to take special precautions that her action shall be intelligent and voluntary, and to prove that it was so in case of dispute."

Their Lordships are of opinion that if the appellant intended to challenge the assertion by Nirod Bashini that she was of the pardnashin class, they were bound to put the matter in issue at the trial and thus to enable the respondents to

produce any evidence they had not only in support of the allegation that Nirod Bashini was a pardnashin woman, but also to show that, even if she was outside that class, the circumstances were such that the appellant was bound to take special precautions and to prove that it had done so, as suggested in the passage just quoted. Accordingly their Lordships are unable to entertain this contention of the appellant.

If then the appellant must accept the position of Nirod Bashini being a woman of the pardnashin class, and is bound by the concurrent findings of fact that she was not aware that her house at Kulna was included in the deed executed by her, it is difficult to avoid the conclusion of the High Court that the whole deed is affected. The appellant, however, attempted to maintain that the mortgage was severable, as found by the Subordinate Judge, and that it was binding as regards the agricultural lands, as to which Nirod Bashini was prepared to contract. With all respect to the learned Judge, it is irrelevant to say that if a mortgage deed confined to these lands had been presented to Nirod Bashini for signature, she would have signed it with substantial knowledge of its contents. No such deed was presented to her or executed by her—for the very good reason that the appellant declined to take such a deed. The findings in this case are that the execution of the mortgage deed of the 18th March, 1925, by Nirod Bashini was not her mental or conscious act, and there is no room for any semi-conscious act such as the learned Judge appears to have discovered. The cases cited by the appellant do not touch the present point. *Payne* v. *Brecon* (*Mayor of*), (1858) 3 H. & N. 572, and *Attwood* v. *Lamont*, [1920] 3 K.B. 571.

The appellant next maintained that Nirod Bashini, after the execution of the deed, had adopted it with full knowledge and comprehension. This contention was admittedly raised for the first time before their Lordships; clearly it involves a question of fact and should have been put in issue and investigated at the trial and the appellant cannot be permitted to raise the matter at this stage. The appellant was also bold enough to suggest that ignorance of the contents of the deed was not sufficient in the absence of proof of undue influence; such a view is inconsistent with, and would render largely nugatory, the burden of proof laid on the parties setting up the deed, as laid down in the decisions of this Board. The judgment in *Kali Baksh Singh* v. *Ram Gopal Singh*, (1913) 41 Ind. App. 23, states at p. 28,

> "In the first place, the lady was a pardanishin lady, and the law throws around her a special cloak of protection. It demands that the burden of proof shall in such a case rest, not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by, the grantor. In such cases it must also, of course, be established that the deed was not signed under duress, but arose from the free and independent will of the grantor."

If those founding on the deed fail to show that the grantor intelligently understood the deed, that is an end of the matter. It is only when they have established the grantor's intelligent understanding of the deed, that the question of undue influence having affected such intelligent understanding can arise. In this case the appellant has failed in the first step, and the second step does not arise.

Finally, the appellant submitted that, failing a mortgage decree, it was entitled to a decree against the representatives of Nirod Bashini for the moneys advanced under the mortgage. There is neither pleading nor an issue as to this alternative claim. The High Court held that further proof would be necessary before it could be held that the lady had received the consideration, and their Lordships are not prepared to differ from that view. To entertain this question, amendment of the pleadings and the trial of a further issue would be necessary, and their Lordships are not prepared, in this case, to permit the appellant to pursue that course at this late stage.

It follows that the appeal fails, and their Lordships will humbly advise His Majesty that it should be dismissed and that the judgment of the High Court should be affirmed. The appellant will pay the first and second respondents' costs in the appeal.

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In the Privy Council

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v.

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DELIVERED BY LORD THANKERTON

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