Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mussumats Azeezoonnissa and Ehsan Beebee v. *Baqur Khan from the High Court of Judicature, North-Western Provinces, Agra; delivered February 24th*, 1872.

PRESENT:

SIR JAMES W. COLVILE.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

THIS Appeal arises out of a suit brought by the present Respondent against the Appellants for the recovery of the possession of a village named Burehta, under a title which was originally a mortgage title, but which may be taken to have been made absolute by foreclosure.

The suit was resisted by the Appellants, the then Defendants, on the ground that they never executed the mortgage deed in question. That is the substantial issue in the case, that it was executed neither by them nor by any person duly authorised to execute it on their behalf. The Zillah Judge who tried the case in the first instance found that the Plaintiff had wholly failed to make out his case, and dismissed the suit. The Plaintiff then appealed to the High Court in Agra, and the learned Judges who heard that Appeal reversed the decision of the Zillah Judge and found in favour of the Plaintiff; and it is against that Decree that the present Appeal is brought.

What was the foundation of the Judgment of the High Court? The learned Judges begin by saying, "We do not mean to find that the Plaintiff's "case is free from doubt; but the admitted

" facts, and some reasonable presumptions, lead " us to conclude that the Plaintiff had at least " proved a sufficient *primâ facie* case, and that " the Defendants not having adduced such " evidence in answer to it as they might fairly " be expected to do, there should be a Decree " against them." Therefore, the Judgment assumes that the Plaintiff had made out a *primâ facie* case, and that the Defendants had failed to make a sufficient answer to that case.

It is, then, desirable in the first instance to consider what was the *primâ facie* case, which, in the opinion of the learned Judges, had been proved. The case of the Plaintiff was that on the 22nd of January 1857, in consideration of an advance made by him to the Defendants they had executed to him a bond hypothecating another village named Nundsenee; that finding he had not got the security which he intended to have, namely, a mortgage by conditional sale, he applied to them for further security, and that after some dispute it was agreed that the instrument upon which he sued should be given to him in substitution of the other, which was in fact, though not actually cancelled, treated as being superseded and made of no effect by the second transaction.

It appeared by the evidence, and it was not contested at the Bar, that both these instruments were executed by Mahomed Alee, the husband of the Appellant, Ehsan Beebee, and each document appears to have been registered on the day on which it was executed, not at Cawnpore, the place where the Defendants resided, and where the transaction of advance, if any advance was made, is alleged to have taken place, but in Futtehpore, the district in which the village of Burehta is situated.

So far, no doubt, the Plaintiff proved his case. But he failed to show that either at the time of the registration, or at any subsequent time any mooktearnamah authorising the exe-

cution of those deeds by Mahomed Alee, as agent of the Appellants, was produced or verified, or proved in any way. No mention of such an instrument is made in the endorsement of registration upon either mortgage, all that therein appears being that Mahomed Alee was identified, and that upon such identification the deeds were registered.

Again, what is the account which the Plaintiff gives of the advance and of the transaction? He alleges that this Mahomed Alee was not only the manager on behalf of his wife and her sister — of their property — but that he had some employment under a person described as the Rajah of Rusdharree; that in that capacity he wanted to obtain a loan of Rs. 16,000, to be applied in paying off a mortgage upon Mouzah Rusdharree belonging to the Rajah; that he, the Plaintiff, agreed to advance Rs. 8,000, part of this money, on the security of the Appellants villages, and that the remaining Rs. 8,000 were to be advanced by one Rae Chund, a banker in Cawnpore; and that in some way or other the Appellants were to have a counter security upon Mouzah Rusdharree. There is no evidence whatever that any such transaction ever really took place, except the deposition of the Plaintiff himself. None of the subscribing witnesses to the execution of the first bond, which was the only occasion on which money is alleged to have passed, were called. Two persons were called by the Plaintiff, who alleged that they were creditors of the ladies. They gave a wholly different account of the transaction, representing that the ladies were about to change their residence, and to leave Cawnpore, that they owed to one of these persons Rs. 1,000, and to the other Rs. 451, and that these debts were paid out of the Rs. 8,000 advanced. Neither of them professed to have seen the ladies; and neither of them spoke to the execution of the first bond in his presence. They left it uncertain where the first bond was

executed; their testimony pointing to its execution at Futtehpore, and not at Cawnpore where the ladies were living.

Then only one of the subscribing witnesses to the second instrument was called, and he, too, did not profess to have been present at its execution, or to have seen any power of attorney under which it was executed; nor does his evidence fix the place of its execution; or show under what authority it was executed.

Their Lordships, therefore, considering that these ladies are Purdah women, are of opinion that the High Court was in error in considering that a *primâ facie* case had been made out at all. The witnesses differ from the Plaintiff as to the nature of the transaction, they are not consistent as to the execution of the instruments, and not one of them pretends to prove the authority under which they purported to be executed. That authority was either a written authority, or if such a thing would suffice, it was a verbal authority. No written authority is produced or proved. If there was a verbal authority it lay upon the Plaintiff to prove that verbal authority; and not upon the Defendants to show that Mahomed Alee acted without their authority.

If, then, there has been any error in not calling Mahomed Alee, that is a fault of which the Plaintiff and not the Defendants should suffer the consequences, because it was clearly the Plaintiff's business to establish the authority under which he says he took the conveyance of this village from a person purporting to be an agent on behalf of the Purdah women, who were the real owners of the village. But either falsely in order to excuse himself, or truly, he has alleged on the face of his plaint that Mahomed Alee is dead. He, therefore, cannot be heard to say that the Defendants are in fault for not calling Mahomed Alee, even supposing that it lay upon them and not upon him to call that person.

Their Lordships have not omitted to consider

some documentary evidence relied upon by the plaint, viz., the petitions put in by Mahomed Alee in 1858 and afterwards in 1860. In 1858 Mahomed Alee seems to have either truly or untruly alleged that these instruments, though executed by him never were really delivered to the Plaintiff; that they remained with him until the advance should be actually made, and that during the disturbances consequent upon the mutiny at Cawnpore his house had been plundered, and these and other documents had been taken away. It is perfectly clear that at that time the documents were in the hands of the Plaintiff. He put in a counter petition. The case was heard in a summary way by the Sessions Judge, who said that the parties must try their rights in a civil action, and dismissed the criminal charge. That statement of Mahomed Alee was either true or false. If it were true, there is an end of the Plaintiff's case. But if it were false, there is nothing whatever upon the face of the petition to connect that proceeding with the Defendants, except the mere statement of Mahomed Alee. The High Court seems to have assumed that because Mahomed Alee said he presented that petition on behalf of the Defendants, it must be taken to have been presented by their authority, and that they were therefore concurring with Mahomed Alee in an attempt upon a suggestion of that which was false, to escape from the consequences of this deed, and to get back the documents from the Plaintiff. But there is really no more proof of Mahomed Alee's having acted as their agent in that case than there is of his agency in the original transaction; and, therefore, the inference which the learned Judges drew from the mere presentation of the petition appears to their Lordships to be unwarranted.' The same observation applies, perhaps even more strongly, to the petition put in by Mahomed Alee in 1860, as an intervener in the foreclosure proceedings.

Therefore, taking the whole evidence produced

by the Plaintiff, their Lordships must dissent from the conclusion of the learned Judges of the High Court that any *primâ facie* case had been made out; and they consider that the suit, being one brought against Purdah women, upon a deed alleged to have been executed by them, wholly failed, inasmuch as there was no proof that the women had ever signed the deed, or that it had been ever signed by any person authorised by them; and that their Lordships, if they affirmed that judgment, would be going against the whole course of cases that have been decided in India and at this Board in respect of transactions to which Purdah women are parties.

It has perhaps by anticipation been stated that even had a *primâ facie* case been proved, their Lordships would not have concurred with the learned Judges in thinking that the case should be decided against the Defendants because they had failed to call Mahomed Alee (if Mahomed Alee is still in life), in order to prove either that he did not deliver this deed as he says he did not, or that he did not act in that transaction as their agent. They have given by the mouth of Amjud Alee evidence far more satisfactory than any statement of so untrustworthy a person as Mahomed Alee, that that person was not their general manager or their manager at all, and that there is no reason to suppose that he acted in the transaction in question under any special authority from them.

For these reasons their Lordships are of opinion that, without relying upon the evidence that has been given of the bad character of the Plaintiff, or of the fact that he is a person, as he certainly seems to have been, not likely to have had the means of making the advance which he says he made, the judgment of the Zillah Judge was correct, and they will humbly advise Her Majesty to allow this Appeal, to reverse the judgment of the High Court, and in

lieu thereof to direct that the Appeal to that Court be dismissed, and the judgment of the Zillah Judge affirmed with costs, and that the Respondent should also pay the costs of this Appeal.