Privy Council Appeal No. 118 *of* 1923.

Oudh Appeal No. 6 *of* 1921.

Musammat Farid-un-nisa - - - - - - - *Appellant*

v.

Munshi Mukhtar Ahmad and another - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH JULY, 1925.

Present at the Hearing:

LORD SUMNER.
LORD BLANESBURGH.
SIR JOHN EDGE.
MR. AMEER ALI.
LORD SALVESEN.

[*Delivered by* LORD SUMNER.]

The plaintiff-appellant, having sued to recover possession of a residence and agricultural land at or near Ahmadpur, the Subordinate Judge of Bara Banki passed a decree in her favour against two of the defendants, who are now respondents to this appeal. In the Court of the Judicial Commissioner of Oudh this decree was set aside and the suit was dismissed. The plaintiff had executed a *wakfnama*, covering the property and appointing the respondents *mutawallis* of the *wakf*, and accordingly the claim is in substance to set the deed aside.

At the time of the execution the plaintiff was a married woman, illiterate, childless and *purdahnashin*. She and her husband, Sheikh Karim-ud-din, were Mohammedans. Most of the property in question had been given to her upon her marriage by her maternal grandfather, but the residence, known as the mahal, and some *sir* land, both in the village of Ahmadpur, came to her

by inheritance. Since her marriage she had lived there continuously, and, although during the earlier part of their married life her husband was generally absent on Government service, he had retired, and for some years had resided entirely at Ahmadpur. He suffered from incurable disease, had become nearly blind, and was otherwise crippled and incapable, but his mind was not in any way affected.

The defendants, the *mutawallis*, who were in possession, relied upon the *wakfnama* as their title. Its gist was to divest the plaintiff of the whole of her property, which became vested in them, but it reserved to her a life stipend of Rs. 34 per mensem, and another of Rs. 33 per mensem to her husband, and also gave her the right to continue to reside in "The Mahal" for life, the *mutawallis* being bound to keep it in repair, as well as to pay the stipends. They were two brothers, sons of a sister of the plaintiff's husband, to whom he was much attached. Their Lordships do not think it is sufficiently made out that they or either of them had acted as men of business for the appellant, and they put this point aside, but she was on friendly terms with them. It is said that she was at enmity with her own relations, for reasons that do not appear to reflect on her. At any rate, she virtually lived apart from and saw little of them, nor had she, in fact, any support or advice from their side.

Very shortly after the marriage the management of the property was assumed by the plaintiff's husband, her father, who had previously managed it, being now dead, and he continued to manage it as long as he lived. He employed the necessary *karindas* and others for the purpose, and directed the disposition of the rents and profits. Over and above his salary he was himself a man of little or no means. His wife never took part in the management, nor was she shown to have had any business knowledge or experience. From time to time, under the direction of her husband, she executed *muktarnamas* and other documents for estate purposes, but she relied on him entirely as to their necessity and purport. Sums for her personal and household purposes were paid to her with fair regularity, and they seem to have been, though modest, probably sufficient; but she did not direct the whole even of the household expenditure, and her own outlays were on various occasions criticised by her husband and even censured as improvident. There is this to be said for him, that the estate was encumbered and, when he took up the management, much embarrassed, but in time he considerably improved its position. The *wakfnama* enumerates sundry charges outstanding upon it, amounting in all to about Rs. 12,800, with an annual interest of Rs. 730, for the service and discharge of which the *mutawallis* were to provide, and the total value of the property, when settled by the deed, was from Rs. 40,000 to Rs. 50,000, and the income about Rs. 2,500.

The respondents recognised that the burden of proof was on them (*Tacoordeen Tewarry's* case, L.R. 1, I.A. 206) and they accordingly set about to prove her intelligent execution of the deed,

its contents having been read and explained to her both upon and after execution. It was not, however, contended that she had had any legal advice about it or any consultation with her own relations. She, on the other hand, raised two answers, the first, that she executed it under actual undue influence of her husband, which dominated her choice and will, and the second, that, when she executed it, she had had no explanation of its nature and contents, but throughout believed it to be an instrument needed for the routine management of the estate, such as she had constantly executed before. A contention, that she had never executed it and that the thumb-mark which it bears is not hers, has not been persisted in.

The probabilities are not unequally balanced. She was a conforming and sincere Mohammedan, though not shown to have been of any exceptional piety. Her husband was a leper, and, even if he lived, as she says she was sure that he would, his management of the estate, at any rate, was nearing its end. The estate was no easy matter to deal with, and the assurance of an income, similar to that which she had hitherto enjoyed, and the continued use of her old home for life, might seem to be a desirable arrangement. She had nothing against the young men who were named as *mutawallis*. They were well known to her, and, as to her own people, it is not pretended that she felt either duty or inclination towards them. A gift of her property to God, with a modest provision for herself and her husband during life, was no bad thing, even though she herself was only about thirty years of age.

On the other hand, her husband had been manager of his wife's property so long that he might quite probably regard it as his own, and certainly he so treated it. He, at least, could not have failed to foresee his death at no distant date, as actually befell within the year. He had no great opinion of his wife's prudence or moderation, and the idea that her property might pass away from him and his must have been repulsive to him. Security for his own last days and a provision for his widow, coupled with some acquisition of merit by the performance of a pious act, must have made the idea of a *wakf* attractive to him. Though burdened with religious obligations, the property would, at any rate, be kept in his family.

There is a third probability. It is that the appellant may have been fully acquainted with the scope of the deed, have fully concurred in the creation of the *wakf* for which it provided, and have executed the *wakfnama* freely and with understanding, but have changed her mind, for, after a few months of widowhood and pilgrimage, she married again.

After the fullest examination of the evidence, voluminous even for a case of this kind, their Lordships are of opinion that the *wakfnama* was not executed under actual undue influence of the husband, and that, both before its execution and also shortly after its execution, when it came to be registered, its contents were

read over to the appellant and were to some extent explained to her. In what terms that explanation was given the evidence does not show, and its sufficiency becomes the real issue on this appeal.

As for the case of actual undue influence, the husband was not present when the deed was registered, and there is nothing but mere suggestion, derived from the character of the transaction and his marital relation to her, to show that, when it was executed, his will operated on hers at all. In her evidence she declared with spirit that, had she known what the real import of the deed was, she would have refused entreaties and defied threats, and would never have given the smallest portion of her property to him or his relations. There is a ring of truth about this, which must prevail over the ingenious suggestion that, in the circumstances of the case, she must be deemed, all unknown to herself, to have been chronically under the hypnotic suggestion or control of her husband, while believing and even glorying in her fancied independence.

Again, their Lordships are not prepared to reject the evidence that the *wakfnama* was explained to the lady before it was executed. It was open to much criticism, and the learned Subordinate Judge refused to believe it, but the evidence had been recorded by his predecessor and he had not seen the witnesses. Their Lordships agree with the learned Judges of the Judicial Commissioner's Court that there is no sufficient ground for its rejection. Taking it, however, as it stands, the question remains whether it goes far enough to satisfy the burthen of proof which rests on the respondents.

The deed was registered on the 3rd November, 1914. A month or six weeks previously the appellant's husband, Karim-ud-din, being then unable to write or read, sent for his nephew, a young man named Jamal-ud-din, and dictated to him a *wakfnama* word by word. This took five or six hours. The appellant was not present, and Karim-ud-din sent the young man into the house to ask her what salaries she wished to have inserted in the deed. To this she replied by asking whether Karim-ud-din was getting him to write the draft. All this, which is deposed to by Jamal-ud-din, a witness called by the respondents, seems to point to some previous communication on the subject between the husband and the wife, but what it was is not known.

During the previous three years the plaintiff had spoken on several occasions of creating some *wakf*, but full details of her scheme were never given, and once at least she was dissuaded from doing anything at all. Such details as are given show that her ideas then differed substantially from the scheme of the *wakfnama* which was ultimately executed. When Jamal-ud-din told her that a draft was being prepared she proceeded to say (i) that the salaries for herself and her husband were to be within Rs. 100 per mensem; (ii) that certain other things were to be provided for in the deed, namely, that the *rajabi* and *maulud*, which she had celebrated, were to continue to be celebrated as before, that at

Moharram *majlis* and *sabils* were to be continued, that other ritual acts should also be performed, and that a *musjid* at Ahmedabad, which her mother's father had built and she herself had always caused to be cleaned and repaired, should be cleaned and repaired as before ; (iii) that a plot of land, which she had given to a certain Kabir-ud-din for a house should not be included in the *wakfnama* at all. All this Jamal-ud-din says that he reported to Karim-ud-din, who agreed to the provisions required. He was then sent back to the appellant to ask whether some provision should be made for payment to the *mutawalli*, to which she replied that one-third of the Rs. 100 provided for her husband and herself should be paid to him as his pension. Jamal-ud-din then completed his task and, as far as he remembers, the draft then provided for all the matters which the appellant had required. He placed it in her custody, and to her question replied that all her requirements had been provided for. He did not see the plaintiff again till after the registration of the *wakfnama*, nor did he see the draft again either. In fact, it was never put in evidence, nor did any witness prove that the draft, as it left the hand of Jamal-ud-din, was ever compared with the fair copy which the plaintiff ultimately executed. The evidence is merely that one, Mustafa Husain, a brother-in-law of the defendants, engaged a person named Wazir-ud-din to make a fair copy of this draft, because he could write a good hand, and, on getting the draft from the plaintiff, read it over and he says, apparently from memory two years afterwards, that this draft and the draft ultimately executed were the same, except for the mention of a debt to Wazir-ud-din of Rs. 400 for procuring the necessary stamped paper, a matter only arranged after Jamal-ud-din's draft was prepared.

All this is absolutely denied by the plaintiff, but, as the whole of her evidence cannot be true, and as the evidence given by Jamal-ud-din and Mustafa Husain is confirmed by other witnesses, their Lordships accept this story generally.

The form of the deed itself thereupon becomes of some importance. It is lucidly and logically drafted, with much more of a lawyer's phraseology and orderly arrangement and much less of a laymen's irrelevance and colloquialism, than such deeds in India often contain. It differs, however, from the account given by Jamal-ud-din in several particulars, and no one suggests that, between the time when he gave her his draft and the time when Wazir-ud-din read over his fair copy to her before she executed it, she was ever told of any departure from the terms, in which her wishes had originally been expressed.

The following differences are material. Clause 2 states that the plaintiff appoints the first defendant, " whom I have brought up and treated as my son," to the office of *mutawalli*, and continues " from to-day I have put Mukhtar Ahmad and Iftikhar Ahmad in possession of the said property as *mutawallis*." As a matter of fact, this admittedly was an after-

thought. Mukhtar Ahmad, the first defendant, on hearing of the *wakf* (though not from the plaintiff) said that, as he was busy, he wished his younger brother Iftikhar to be joined as a *mutawalli*. Accordingly this was done, and as, by a subsequent clause, No. 12, each *mutawalli* was to have Rs. 33 per mensem, the sum of Rs. 100, which the plaintiff had fixed to cover the stipends of herself, her husband, and the one *mutawalli*, whom alone she had in view, now became an aggregate of monthly stipends of Rs. 133.

Clause 20 specified how " the *mutawalli* " was to expend the surplus income, after payment of Government revenue, the expenses mentioned, and all other necessary expenses as to the management. He was to do so " after taking into consideration the then existing circumstances of the *wakf* property and as to what sum is reasonable to spend, when and on one or more of the following purposes "—twelve in number. These purposes, except " repairs of the mosque in Ahmadpur," are expressed in general terms. The last sweeps in " other expenses on pious objects, which may come up." Subsequent provisions give further powers " beside these expenses . . . to spend money or [Query " on "] anything without the permission of the authority for the time being having power to interfere with the affairs of the *wakf*," and " if any of the objects mentioned in clause 20 is void in law the *mutawalli* shall spend the money on any other legal object " (clause 21). Among the twelve objects particularly named there occur quite generally some of the pious purposes named by the appellant to Jamal-ud-din, though one is omitted. In no case is there mention of the continuance of those ceremonies, which the appellant herself had performed. The objects supported by the *mutawalli* under these denominations might in his discretion be wholly divorced from those which the plaintiff had prescribed, and might be entirely unconnected with her or her place of residence in Ahmadpur. The question at once arises, " Was the appellant ever really made aware of these discrepancies, and did she assent to them ? "

As a formally valid instrument the *wakfnama* itself is not impugned, and their Lordships therefore do not criticise it. The real question is, whether the appellant was so made cognisant of its contents and purport that it can be said, that the respondents have discharged the onus of showing that she understood it so as to make it her deed.

The law of India contains well-known principles for the protection of persons, who transfer their property to their own disadvantage, when they have not the usual means of fully understanding the nature and effect of what they are doing. In this it has only given the special development, which Indian social usages make necessary, to the general rules of English law, which protect persons, whose disabilities make them dependent upon or subject them to the influence of others, even though nothing in the nature of deception or coercion may have occurred. This is part of the law relating to personal capacity to make binding transfers or settlements of property of any kind. That the instrument here is a *wakfnama* is a

mere accident, and the general and well-settled law of *wakf* is not in question. The case of an illiterate *purdahnashin* lady, denuding herself of a large proportion of her property without professional or independent advice, is one on which there is much authority. Independent legal advice is not in itself essential (*Kali Buksh Singh's* case, 41 I.A. 23). After all, advice, if given, might have been bad advice, or the settlor might have insisted on disregarding it. 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 (*Wajid Khan's* case, 18 I.A. at p. 148 ; *Sunitabala Debi's* case, 46 I.A. at p. 278). The appellant clearly had no such advice, nor is it contended that she had. If, however, the settlor's freedom and comprehension can be otherwise established, or if, as is the respondents' case here, the scheme and substance of the deed were themselves originally and clearly conceived and desired by the settlor, and were then substantially embodied in the deed, there would be nothing further to be gained by independent advice. If the settlor really understands and means to make the transfer, it is not required that someone should have tried to persuade her to the contrary. 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 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 (*Sudisht Lal's case*, 8 I.A. 43 ; *Sham Koer's* case, 29 I.A. 131 ; *Sajjid Husain's* case, 39 I.A. 156). Further, the whole doctrine involves the view that mere execution by such a person, although unaccompanied by duress, protest or obvious signs of misunderstanding or want of comprehension, is in itself no real proof of a true understanding mind in the executant. Evidence to establish such comprehension is most obviously found in proof that the deed was read over to the settlor and, where necessary, explained. If it is in a language which she does not understand, it must, of course, be translated, and it is to be remembered that the clearness of the meaning of the deed will suffer in the process. The extent and character of the explanation required must depend on the circumstances. Length, intricacy, the number and complexity of the dispositions, or the unfamiliarity of the subject-matter, are all reasons for requiring an increased amount and efficiency of explanation. Thus a matter not likely to attract the attention of the executant in itself ought not to be relied on as binding, unless her attention has been directly drawn to it (*Sham Koer's* case, 29 I.A. at p. 137). So if the deed, as presented for execution, differs substantially, either by way of addition or of omission, from the scheme and details which the intending settlor has previously laid down, the discrepancy ought to be clearly pointed out and its nature and effect should be fully described, unless, which must be rare, the difference is so obvious that even a person in

the settlor's position must perceive and appreciate it for herself. If the description and explanation have been partial or erroneous, or have not been given at all, the question will then arise, as it arises wherethere has been no independent legal advice, whether, if proper information had been given, it would have affected the mind of the executant in completing the deed. On the other hand, the doctrine cannot be pushed so far as to demand the impossible. The mere declaration by the settlor, subsequently made, that she had not understood what she was doing obviously is not in itself conclusive. It must be a question whether, having regard to the proved personality of the settlor, the nature of the settlement, the circumstances under which it was executed, and the whole history of the parties, it is reasonably established that the deed executed was the free and intelligent act of the settlor or not. If the answer is in the affirmative, those relying on the deed have discharged the onus which rests upon them. Of course fraud, duress and actual undue influence are separate matters.

In the present case it is quite clear that certain matters were not brought to the appellant's notice before the deed was executed, or at all. Not only was a second *mutawalli* with an additional salary introduced into the draft which was executed, but it made no provision for the settlor's desires as to the maintenance and repair of the mosque in Ahmadpur and as to the various religious ceremonies mentioned by her to Jamal-ud-din, beyond including them among the objects on which the *mutawallis* might expend the *wakf* funds, if and so far as they thought proper. As the deed stands, the *mutawallis* could decline to continue any of the special pious observances which the appellant desired to continue, and could leave her to maintain them herself out of her diminished income and to die in the knowledge that, with her, these objects would have no one left to care for them.

Their Lordships cannot regard these matters as insignificant or such as the plaintiff could reasonably be supposed not to insist upon. She was a woman of property, who had lived all her married life in her own family-house, hard by, as it would seem, to the mosque erected by her relations. Hers had been a lonely and restricted existence. Karim-ud-din, as a husband, was in many respects a very disappointing person. His own means were small, and for many years his official duties caused him to reside at a distance. She was herself piously disposed, and it was eminently natural in such a woman under such circumstances that she should attach importance to the instructions, which she gave to her husband through Jamal-ud-din. Her piety may well have manifested itself primarily in her care for the mosque, which her family had founded, and for the celebration of the observances to which she herself had diligently attended. If she had really appreciated that in none of these cases was that perpetual continuance assured, which was evidently dear to her mind, their Lordships are far from being satisfied that she would have patiently submitted to her disappointment and have accepted intelligently and without a word the

surrender of her own preferences to the discretion of the *mutawallis*. The only prudent and probable conclusion is that, as the words were read over to her, she failed, very naturally, to observe the change. She would hear mention of the mosque and of nearly all the ceremonies by name, and would easily miss the difference between the inclusion of these objects in the powers of the *mutawallis* and the prescription of these objects as obligatory charities to be maintained by the *mutawallis* in any event. They are confirmed in this view by observing that, until a late stage in the argument before the Board, this precise discrepancy between the first draft of the *wakfnama* and its ultimate form had not attracted the attention of anybody, either in the Courts below or on this appeal. No doubt, where so many other points were in contest, this one might well pass unobserved, but this circumstance only makes it the more likely that the appellant could not herself detect what has, in fact, eluded the vigilance of counsel and judges during two protracted hearings. It is not proved when or by whom the original draft was remodelled. There is no evidence that Wazir-ud-din so much as knew that the appellant had given any particular instructions before the scheme was put into writing, and he could not draw the appellant's special attention to something that he never knew. Upon the story told by the respondents' witnesses there never was any chance that those, who explained the deed, should point out these matters, and it is certainly not enough to say that, if the appellant cared about them, she should herself have asked about them, especially as the form of the deed was such as might well have misled her into taking it for a provision of all that she desired. From this point of view the appellant's subsequent action does not assist the respondents. Registration and mutation were promptly asked for by those interested in supporting the deed, and the plaintiff herself attended the proceedings without protest. These circumstances are in themselves very favourable to the respondents' case, but the registering officer, who says that he read and explained the deed to her, knew as little of the above-mentioned discrepancies as did Wazir-ud-din, and the appellant's answers are quite consistent with her being in ignorance of a change, of which no one had informed her. As the respondents have to bear the onus of bringing home to her mind the actual import of the deed, they cannot rely on the fact that the appellant's own evidence is untrustworthy, for it is by the evidence of their own witnesses alone that this defect is established, and by that evidence they must stand. The conclusion that they have failed to discharge the burthen of proof is one arrived at not out of any consideration for this lady in particular, but in defence of those strict rules which have been laid down for the protection of the defenceless in India, and it is a matter of obligation upon their Lordships to be strict and unwavering about it. They will accordingly humbly advise His Majesty that the appeal should be allowed, and that the decree passed by the learned Subordinate Judge should be restored with costs here and in both Courts below.

In the Privy Council.

MUSAMMAT FARID-UN-NISA

v.

MUNSHI MUKHTAR AHMAD AND ANOTHER.

DELIVERED BY LORD SUMNER.

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