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3, 1966

Appeal No. 32 of 1964.

J. THE OFFICE OF THE
IN 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 AND TILE WORKS LIMITED
- 2. KANJI MEGHJI SHAH
- 3. SHARDABEN RATILAL SHAH
- 10 4. KESHAVALAL KANJI SHAH
- 5. RATILAL KANJI SHAH
- 6. ZAVERCHAND SOJPAL JETHA
- 7. HIRJI RAMJI SHAH Appellants
- and -
- 1. PREMCHAND RAICHAND LIMITED
- 2. SHAH MEGHJI MULJI LIMITED Respondents

CASE

For the above-named PREMCHAND RAICHAND LIMITED
(Respondent No. 1 in this Appeal)

20 1. This Appeal is brought by leave of the Court
of Appeal for Eastern Africa at Nairobi granted on
3rd July 1964 against an Order of that Court
(Gould V.-P., and Newbold and Crabbe JJ. A.) made
on 5th March 1964 dismissing with costs an Appeal
from a Preliminary Decree for Sale of Her Majesty's
Supreme Court of Kenya at Nairobi (Rudd Acting C.J.)
on 16th March 1962 whereby the learned Acting
Chief Justice ordered (inter alia) that in default
of payment of the sum of Shillings 1,302,641/02
30 declared to be due to the Respondents Prenchand
Raichand Limited by the Appellants and the
Respondents Shah Meghji Mulji Limited or any one
or more of them the mortgaged property should be
sold and the proceeds applied to payment of the
said sum and the balance if any applied to payment
of the sun declared to be due to the Respondents
Shah Meghji Mulji Limited.

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pp. 115-6
p. 114
pp. 79-82

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2. The Respondents Premchand Raichand Limited were the Plaintiffs in the action, and are hereinafter called "the Mortgagees". They were licensed moneylenders and the mortgagees under a Charge dated 31st January 1956 (hereinafter called "the Charge") of 17.74 acres of freehold land at Changanwe Miritini near Mombasa in Kenya together with the factory and other buildings thereon (hereinafter called "the Property"), of which the registered proprietors and mortgagors were the first named Appellants Coast Brick and Tile Works Limited (hereinafter called "the Company"). The Company were the first Defendants in the action. The Charge was made to secure a loan of Shs. 1,000,000/- by the Mortgagees to the Company, together with other security hereinafter referred to. The other Appellants were the second third fourth fifth seventh and eighth Defendants in the action. They were parties to the Charge as sureties, and are hereinafter referred to collectively as "the Sureties", and individually by their first names. The Sixth Defendant in the action was also such a surety, but he was not served, and the action did not proceed against him.

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LEGAL STUDIES

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pp. 200-204

3. The Respondents Shah Meghji Mulji Limited (hereinafter called "the Second Mortgagees") were the ninth Defendants in the action. They were the second mortgagees of the Property under a later Charge dated 28th March 1956 (hereinafter called "the Second Charge"). The Second Mortgagees were joined in the action as Defendants by reason of their interest in the Property, but there was no issue in the action between them and any other party.

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4. The main questions arising in this Appeal are:-

(1) Whether the concurrent findings of fact by the acting Chief Justice and the Court of Appeal that the dealings between the parties concerned formed one complete money lending transaction secured (inter alia) by a mortgage or charge on immovable property were correct.

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(2) Whether such money lending transaction was exempt, as both Courts below held, from the requirements of the Money-lenders Ordinance (Cap. 307 of the Laws of Kenya Revised Edition 1948) because it fell within

section 3 thereof which so far as material reads:-

"3. (1) The provisions of this Ordinance shall not apply -

(a).....;

10 (b) to any money-lending transaction where the security for repayment of the loan and/or interest thereon is 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 money-lending upon such mortgage or charge."

20 (It was and is common ground between the parties that the requirements of section 11 of the Money-lenders Ordinance were not complied with, and that unless the transaction fell within section 3 (1) (b) the action by the Mortgagees could not succeed).

(3) Whether the Charge was, contrary to the decision of both Courts below, invalid for lack of attestation of its execution by the Company as the mortgagor and/or by the Sureties.

(4) Whether the decision of the Courts below that there was good consideration for the suretyship of each of the Sureties was correct.

30 5. The Moneylenders Ordinance and the Registration of Titles Ordinance (Cap. 160 Laws of Kenya Revised Edition 1948) are in a pocket of the Record herein.

Copies of the sections of Indian Acts which are immediately relevant appear in the Appendix to this case.

40 6. The history of the circumstances surrounding the making of the Charge on 31st January 1956 appears from the documents in the Record and from the evidence of Hemraj Nathubhai Shah a director of the Mortgagees (hereinafter called "Hemraj"). He was called as a witness by the Mortgagees. The Appellants called no witness on this aspect of the case.

pp.43-52

7. On 29th November 1955 Kanji (the second Appellant) a director and the manager of the Company, met Hemraj in Monbasa and together

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they inspected the Property. Kanji told Henraj that it was already mortgaged to the National Bank of India Limited (hereinafter called "the National Bank") as security for a loan of about 300,000/-. Henraj told Kanji that the Mortgagees would be prepared to lend Shs. 1,000,000/- to the Company, if the mortgage to the National Bank was discharged and the Property mortgaged to the Mortgagees, and if guarantees were obtained from good sureties. Henraj gave to Kanji a form of guarantee to be executed by such sureties. 10

pp.135-6 8. On the same day a letter was sent by the Company (signed by Kanji and the Sixth Defendant) to the Mortgagees formally requesting a loan of Shs. 1,000,000/- and offering security for such a loan.

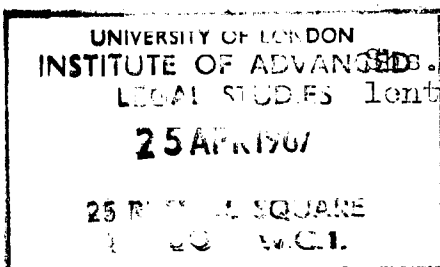
p.44
p.136-9 9. On 1st December 1955 Kanji and Henraj met again in Nairobi. Kanji handed over the guarantee form completed and signed by each of the sureties, by the sixth Defendant and by one Havilal Kanji (who did not subsequently become a party to the Charge). Henraj agreed that the Mortgagees should lend Shs. 1,000,000/- with interest at 16 per cent per annum. The security for this loan was to be the guarantee already completed, a mortgage of the Property, and a blank transfer of 1,500 shares in the Company owned by Kanji. The terms of repayment of the loan by instalments were agreed as later set out in the Charge. 20

p.122
p.139 Henraj gave Kanji a cheque for Shs. 200,000/- drawn by the Mortgagees in favour of the Company, and instructions were given to Messrs. Carring and Miller, advocates acting for the Mortgagees, to draw up the appropriate mortgage. 30

10. Prior to the execution of the Charge on 31st January 1956, the Mortgagees paid further sums by cheque to the Company as follows :-

p.139	5th December 1955	Shs.	200,000/-	
p.140	9th December 1955	Shs.	50,000/-	
p.141	23rd December 1955	Shs.	50,000/-	40
p.142	11th January 1956	Shs.	50,000/-	
p.142	16th January 1956	Shs.	100,000/-	

By 31st January 1956 the Mortgagees had paid 650,000/- to the Company out of the total sum lent of Shs. 1,000,000/-.



10 11. On 10th December 1955 the National Bank wrote to the Company stating that they had been instructed by Messrs. Cuming and Miller acting for the Mortgagees to forward the title deeds for any immovable property held on behalf of the Company which Messrs. Cuming and Miller undertook to hold in trust for the National Bank. Prior to 1st January 1956 the Mortgagees made a further sum of Shs. 300,000/- available at their bank for release at any time to pay off the loan by the National Bank to the Company.

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12. The Company paid interest up to 31st December 1955 on the sums paid prior thereto totalling Shs. 500,000/-, and up to 31st January 1956 on the sums paid prior thereto totalling Shs. 650,000/-, and also on the sum of Shs. 300,000 made available at the bank of the Mortgagees.

pp.141,142

pp.143,144

13. The Charge was executed on 31st January 1956. It was recited therein that

pp.121-7

20 (1) The Company was the registered proprietor of the Property,

(2) The Mortgagees had at the request of the Company agreed to lend the sum of Shillings one million and upon having repayment thereof with interest thereon secured as therein set out, and

(3) The Sureties had agreed to join in the Charge as sureties for the Company.

30 The Charge provided (inter alia) that in pursuance of the recited agreements and in consideration of the sum of Shillings one million then paid to the Company by the Mortgagees (the receipt whereof the Company thereby acknowledged) the Company and the Sureties jointly and severally agreed (inter alia) to repay the sum of Shillings one million with interest at 16 per cent per annum from 1st January 1956 by ten quarterly instalments of Shillings 100,000/- beginning on 31st October 1956, and that as between themselves and the Mortgagees the Sureties were to be treated as principal debtors together with the Company, but as between the Appellants themselves the Sureties were to be treated as sureties for the Company.

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14. The common seal of the Company was affixed to the Charge in the presence of Kanji, Keshavlal and Ratilal, who signed as witnesses thereto. The Charge was signed by each of the Sureties (and by the sixth Defendant). Mohanlal Meghji

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- p.56 Shah (who gave evidence for the Appellants and is hereinafter called "Mohanlal") and
- p.37 Ishwarbhai Shamalbai Patel (an advocate of the Supreme Court, who gave evidence for the Mortgagees and is hereinafter called "Ishwarbhai") signed as witnesses to the signatures of the Appellants Kanji, Shardaben, Keshavlal and Ratilal as such sureties. Similarly Jagjiwan Ranchhod Pavagadhi (who gave evidence for the Mortgagees and is hereinafter called "Jagjiwan") and J.J. Patel (another advocate of the Supreme Court) signed as witnesses to the signatures of the Appellants Zaverchand and Hirji and of the sixth Defendant. 10
- p.144 15. On 6th February 1956 the Mortgagees sent a cheque for Shs. 300,000/- to the National Bank for the account of the Company, and on receipt of
- p.145 this cheque the National Bank executed a Memorandum of Discharge of their mortgage on the Property. On 27th February 1956 the discharge of the National Bank's mortgage and the Charge were registered on the Certificate of Ownership of the Property in the Registry of Titles under the Registration of Titles Ordinance (Cap. 160 Laws of Kenya Revised Edition 1948). 20
- pp.128,133
- p.91 16. The question whether such registration fell to be considered under the Registration of Titles Ordinance, or under the Land Titles Ordinance (Cap. 159 Laws of Kenya Revised Edition 1948), remained in issue throughout the trial and until the fourth day of the hearing of the appeal before the Court of Appeal for Eastern Africa when it was conceded by Counsel for the Appellants that the registration fell to be considered under the Registration of Titles Ordinance. 30
- pp.143-4 17. A blank share transfer form signed by Kanji was handed to Hemraj for the Mortgagees. On 24th February 1956 the final cheque for
- p.148 Shs. 50,000/- was sent by the Mortgagees to the Company. On 13th March 1956 the Charge was duly
- p.149 registered in the Companies Registry. 40
18. Default was made by the Company in payment both of principal and interest. It was agreed between the Mortgagees and the Company that the rate of interest should be reduced to 12 per cent per annum from 1st January 1959.
- pp.1-9 19. The action was commenced by the written Plaintiff of the Mortgagees dated 21st September 1960, by which the Mortgagees prayed (inter alia) that

accounts be taken of the sums due from the Company, and from the Sureties, for principal interest and costs, and that in default of payment of the amount found due the Property should be sold and the proceeds applied towards payment of the amount due to the Mortgagees and the balance if any applied to payment of the amount due to the Second Mortgagees.

- 10 20. The written Statement of Defence of the Appellants other than Kanji dated 29th November 1960 was amended on 14th March 1961 and re-amended on 28th November 1961. The contentions raised in this defence which were pursued at the trial included (inter alia) the following:
- (1) That neither Shs. 1,000,000/- nor any part thereof was lent pursuant to a money-lending transaction falling within section 3 (1) (b) of the Money-lenders Ordinance, p.12
- 20 (2) that sums totalling Shs. 650,000/- were unsecured, unenforceable and not bona fide loans (even after incorporation in the Charge) falling within section 3 (1) (b), p.12
- 30 (3) that payments totalling Shs. 350,000/- were not made contemporaneously with or after execution of a charge or intended as bona fide loans to be made immediately upon execution of a charge within section 3 (1) (b), p.12-3
- (4) that the loan of Shs. 1,000,000/- on 31st January 1956 was fictitious and therefore not within section 3 (1) (b), p.13
- (5) that section 3 (1) (b) only applies where the sole security for repayment of the loan and/or interest is of the type specified in section 3 (1) (b), p.13
- (6) that there was no consideration for the suretyship of the Sureties. p.14
- 40 21. By their Defence the Appellants other than Kanji also contended (inter alia)
- (1) that in addition to the sums totalling Shs. 650,000/- a further Shs. 300,000/- were loaned prior to 31st January 1956 alternatively that the Mortgagees were precluded from asserting that such Shs. 300,000/- were loaned on some later date, p.13

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- p.15 (2) That the Charge was void for lack of power to lend money in the objects of the Mortgagees or for lack of power to borrow money in the objects of the Company,
- p.15 (3) that there was an agreement between the Mortgagees and the Appellants whereby the obligations and promises evidenced by the Charge or other earlier transactions (if any) of a legal character (if any) sued upon were completely dispensed with or remitted within section 63 of the Indian Contract Act 1872 (Act IX of 1872). 10
- These contentions were not pursued at the trial.
- pp.17-22 22. The written Statement of Defence of Kanji was dated 3rd December 1960, amended on 14th March 1961 and reamended with the addition of a Counterclaim on 28th November 1961. The Defence was in like form to that of the other Appellants.
- pp.21-2 By his Counterclaim Kanji prayed (inter alia) for the return of 1,500 shares certificates and blank signed transfers. 20
- pp.23-5 23. By their written amended Statement of Defence dated 30th January 1962 the Second Mortgagees contended (inter alia) that they were entitled to an account of the amounts due to them from the Company, and from the Appellants Kanji, Keshavlal and Ratilal as sureties, under the Second Charge, and to payment out of the proceeds of sale of the Property of the sum found to be due to the Second Mortgagees. 30
- pp.26-8 24. By their Reply dated 23rd December 1960 the Mortgagees joined issue with the written statements of Defence of the Appellants. By their Defence to pp.28-9 the Counterclaim of Kanji dated 20th December 1961 the Mortgagees admitted the deposit of one blank share transfer, denied that any share certificate had been deposited with them, and joined issue on the other contentions in the Counterclaim.
- pp.35-70 25. The action came on for trial before the Honourable Acting Chief Justice Rudd on 6th, 7th, 8th, 9th, 12th, 13th and 14th February 1962. Evidence was called on behalf of the Mortgagees and on behalf of the Appellants, and exhibits were put in by the Mortgagees, by the Appellants, and by the Second Mortgagees. 40

26. On the fourth day of the trial (9th February

1962) Counsel appearing for the Appellants raised for the first time since the Charge was executed on 31st January 1956 the contentions that execution of the Charge by the Company, and by each of the Sureties, had not been proved, that such execution in each case required attestation by two attesting witnesses, that there had been no such attestation, and that in any event the Mortgagees had not proved any such attestation. The Mortgagees objected to these contentions being raised at that stage on the ground that they had not been pleaded. The learned Acting Chief Justice overruled this objection and permitted these contentions to be raised without amendment to the pleadings, though indicating to the Mortgagees that he would allow an adjournment if one was required.

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27. The learned Acting Chief Justice reserved his judgment which he delivered on 16th March 1962. He held that the transaction was not taken outside section 3 (1) (b) of the Money-lenders Ordinance merely because the security did not consist solely of a mortgage or charge on immovable property, following the decisions of the Court of Appeal for Eastern Africa in S.M. Shah v. C.M. Patel and others /1961/ E.A. 397 and Buganda Timber Company Limited v. Mulji Kanji Mehta /1961/ E.A. 477, 479F. He found that there was one transaction of moneylending flowing from the original agreement to lend Shs. 1,000,000/-, that the Charge was the formal expression of that agreement and that execution of such an instrument was a term of that agreement. He found that the complete transaction was

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pp.72-3

pp.73-4

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(a) a money lending transaction whereby the repayment of the money advanced with interest was secured by a mortgage or charge on immovable property, and

(b) a bona fide transaction of moneylending upon a mortgage of immovable property.

He held accordingly that such transaction fell within section 3 (1) (b) of the Money-lenders Ordinance and was exempt from the requirements of that Ordinance.

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28. The learned Acting Chief Justice considered at length the evidence in regard to execution and attestation of the Charge. He found that the signatures of the Sureties had been proved. As to attestation of the signatures of the Appellants Kanji, Shardaben, Keshavlal and Ratilal as sureties, he stated that there was evidence for the Appellants

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pp.37-9 p.76 pp.40-1	that these four Appellants did not sign in the presence of both attesting witnesses, but that he thought it was probable that these Appellants with Mohanlal (one of the two attesting witnesses) signed in the presence of the other attesting witness Ishwarbhai. As to attestation of the signatures of the Appellants Zaverchand and Hirji and the sixth Defendant as sureties, he stated that he believed the evidence of Jagjiwan that these sureties signed in the presence both of J.J. Patel and of Jagjiwan himself. He held however that attestation of the Appellants' signatures as sureties was not necessary as a matter of law.	10
p.76		
p.75-6	29. As to execution by the Company, the learned Acting Chief Justice found that execution of the Charge by affixing the common seal of the Company in the presence of two directors and the secretary (Kanji, Keshavlal and Ratilal) in accordance with Article 114 of the Articles of Association of the Company had been proved. He found that the Property and the Charge thereon were registered under the Registration of Titles Ordinance, not under the Land Titles Ordinance. He held that the provisions in regard to attestation of instruments requiring to be registered under the Registration of Titles Ordinance in section 58 of that Ordinance overrode the provisions of section 59 of the Indian Transfer of Property Act 1882 (IV of 1882) and that an instrument executed by a company registered under the Companies Ordinance (Cap. 288 of Laws of Kenya Revised Edition 1948) in accordance with its articles of association was executed with sufficient formality for the purposes of section 58 of the Registration of Titles Ordinance. He held further that registration under the Registration of Titles Ordinance raised a presumption of due execution, and found that the Appellants had failed to prove that the Charge was not properly executed.	20
p.193		
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pp.77-8		30
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p.79	30. The learned Acting Chief Justice accordingly held that the Mortgagees were entitled to the usual preliminary mortgage decree for sale with costs. The preliminary decree for sale was given on 16th March 1962, the amount due to the Mortgagees up to 1st May 1962 being found on the taking of the accounts to be Shs. 1302641/02.	
pp.79-82		
pp.82-3	31. The Appellants filed notice of their intention to Appeal to the Court of Appeal for Eastern Africa on 24th March 1962. Their	50

Memorandum of Appeal dated 19th May 1962 raised thirty separate grounds of appeal which covered substantially the points argued before the learned Acting Chief Justice. Of the grounds of appeal those numbered 1 - 5, 6 (save in respect of costs), 7, 8, 10, 11, 17, and 18 were abandoned by Counsel appearing for the Appellants in the course of his opening speech, and that numbered 14 was so abandoned on the fourth day of the hearing of the appeal in the course of the speech of Counsel appearing for the Mortgagees.

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32. The appeal came on for argument before the Court of Appeal for Eastern Africa at Nairobi (The Honourable Vice President Sir Trevor Gould, and the Honourable Mr. Justice Newbold and the Honourable Mr. Justice Crabbe, Justices of Appeal) on 27th, 28th, 29th, 30th and 31st January 1964, and judgment was given on 5th March 1964 dismissing the appeal with costs.

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33. The principal judgment was delivered by the learned Vice-President, with whom both the learned Justices of Appeal agreed. The learned Vice-President considered the evidence as to the money lending transaction at length, and stated that he had no doubt whatever that there was ample justification for the finding of the learned Acting Chief Justice that the events in question all formed one transaction of money-lending flowing from the original agreement to lend Shs. 1,000,000/- in all. He held that the fact that there was other security for the loan besides the Charge did not take the transaction outside section 3 (1) (b) of the Money-lenders Ordinance and that the transaction was by virtue of section 3 (1) (b) exempt from the requirements of that Ordinance.

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pp.94-5

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34. The learned Vice-President confirmed the finding of the learned Acting Chief Justice that the Charge was duly executed by the Company in accordance with its Articles of Association. He agreed with the Acting Chief Justice that section 58 of the Registration of Titles Ordinance overrode section 59 of the Indian Transfer of Property Act 1882 in respect of instruments requiring registration under that Ordinance (following the decision of the Judicial Committee in Govindji Popatlal v. Nathoo Visandi [1962] E.A. 372), and that an instrument executed by a company in accordance with its articles of association was sufficiently executed for the purposes of that Ordinance.

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pp.103-4

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p.106	35. The learned Vice-President confirmed the finding of the Acting Chief Justice that the signatures of the Sureties on the Charge had been proved. He held that the signatures of the Sureties did not require attestation under section 58 of the Registration of Titles Ordinance, since the contract entered into by each of the Sureties was a personal covenant to guarantee the repayment of the loan and was separate from the security over the Property which required to be registered under that Ordinance. He further confirmed the findings of the Acting Chief Justice that it was probable that the signatures of the Appellants (Kanji, Shardaben, Keshavlal and Ratilal) were attested by an advocate of the Supreme Court (Ishwarbhai), and that the evidence of Jagjiwan that the signatures of the Appellants Zaverchand and Hirji were attested by another such advocate (J.J. Patel) was to be believed, and held that such attestation was sufficient within section 58 (1) (a) (iv) of the Registration of Titles Ordinance. He further held that by reason of the registration of the Charge under the Registration of Titles Ordinance and because in this case no allegation of invalidity was made from the date of the Charge (31st January 1956) until at the trial after the Mortgagees' case was closed, the onus was on the Appellants to prove that the Charge was not duly executed and attested and he found that this onus had not been discharged.	10
p.108		
p.108		
p.108		
pp.108-9		20
p.112	36. The learned Vice-President held that there was good consideration for the covenants by the Sureties to guarantee repayment of the moneys lent and interest thereon.	30
	37. The Contentions of the Respondents may be summarised as follows:	
	(1) The findings of fact of the learned Acting Chief Justice having been confirmed in every respect by the Court of Appeal for Eastern Africa the Appellants ought not now to be allowed to re-open any of such findings of fact.	40
	(2) On the evidence of Hemraj as to the history of this transaction, and having regard to the fact that the Appellants did not call Kanji or any other witness on this aspect of the case, there was	

clearly one bona fide transaction of moneylending under which Shs. 1,000,000/- were lent by the Mortgagees to the Company; and the allegation by the Appellants (raised for the first time in their written Statements of Defence) that the Charge was a sham concealing a number of separate transactions was not supported by any evidence.

10 (3) The aforesaid transaction of money-lending was one in which security for repayment of the loan and interest was effected by execution of a charge on immovable property and was therefore exempt from the provisions of the Money-lenders Ordinance.

20 (4) The decision of the Court of Appeal for Eastern Africa in Shah v Patel /1961/ E.A. 397 (approved by the same Court in Bugunda Timber v. Mulji Kanji Mehta /1961/ E.A. 477) on section 3 (1) (b) of the Moneylenders' Ordinance, that for a moneylending transaction to be exempt from the requirements of that Ordinance it is not necessary that the security should consist solely of a mortgage or charge on immovable property, was right and should be affirmed.

30 (5) Registration of the Charge under the Registration of Titles Ordinance raised a presumption of due execution, and the onus was on the Appellants to show that the charge was not duly executed: this onus was the heavier because the allegations of non-execution and non-attestation were raised for the first time over 6 years after the date of the Charge: and this onus was not discharged.

40 (6) By reason of section 1 (2) thereof the provisions of the Registration of Titles Ordinance as to execution and attestation of documents required to be registered thereunder override the provisions of any other Ordinance or Indian Act in force in Kenya, and the decision of the Judicial Committee in Govindji Popatlal v. Nathoo Visandi /1962/ E.A. 372 should be followed.

50 (7) Under section 58(3) of the Registration of Titles Ordinance execution by the Company by affixing its seal in accordance

RECORD

with Article 114 of its Articles of Association was sufficient, and the Appellants have accepted by the abandonment of grounds numbered 1 - 5 in their Memorandum of Appeal to the Court of Appeal for Eastern Africa that due execution in accordance with Article 114 has been proved.

(8) The signatures of each of the Sureties on the Charge is established by the evidence. 10

(9) The contract entered into by each of the Sureties was a personal covenant to guarantee repayment of the loan and was separate from the security over the Property which required to be registered under the Registration of Titles Ordinance, and the signature of each of the sureties thereto did not require to be attested.

(10) In any event, attestation of the signature of each of the Sureties by an advocate of the Supreme Court (either Ishwarbhai or J.J. Patel) within section 58 (1) (a) (iv) of the Registration of Titles Ordinance was established by the evidence. 20

38. In the submission of the Mortgagees the judgment of the Court of Appeal for Eastern Africa was right and ought to be affirmed, and this appeal ought to be dismissed, with costs, for the following among other 30

R E A S O N S

(1) BECAUSE the Supreme Court of Kenya and the Court of Appeal for Eastern Africa made concurrent findings of fact in favour of the Mortgagees;

(2) BECAUSE there was one bona fide transaction of moneylending under which Shs. 1,000,000/- were lent by the Mortgagees to the Company, evidenced by the Charge, and flowing from the original agreement between Hemraj and Kanji acting on behalf of the Mortgagees and the Company respectively; 40

(3) BECAUSE this transaction fell within section 3 (1) (b) of the Money lenders Ordinance and was accordingly exempt from the requirements of that Ordinance;

(4) BECAUSE the charge was duly executed by the Company and the Sureties and attestation in so far as required by law was established;

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(5) BECAUSE there was good consideration for the covenants of the Sureties guaranteeing repayment of the moncoys lent and interest thereon;

(6) BECAUSE the judgments of the Supreme Court of Kenya and the Court of Appeal for Eastern Africa were right,

R.J. PARKER

R.C. SOUTHWELL

APPENDIX

Indian Transfer of Property Act 1882 (IV
of 1882)

59. 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.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

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Indian Evidence Act 1872 (I of 1872)

68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

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73. In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person, may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

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JUDICIAL COMMITTEE OF THE
IN THE PRIVY COUNCIL

ON APPEAL FROM THE COURT OF
APPEAL FOR EASTERN AFRICA

No. 32 of 1964

COAST BRICK AND TILE WORKS
LIMITED and OTHERS

- and -

PREMCHAND RAICHAND LIMITED
and ANOTHER

C A S E

for the above-named PREMCHAND
RAICHAND LIMITED

COWARD CHANCE & CO.
St. Swithin's House,
Walbrook,
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