

16, 1950

22

No. 33 of 1949

In the Privy Council.

UNIVERSITY OF LONDON
W.C.1.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

1951
31246
INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN

M. R. M. M. N. NADARAJAN CHETTIAR (Defendant)

Appellant JUL 1953

AND

CHANDRASEKERA HERAT MUDIYANSELAGE RAN

UNIVERSITY OF LONDON
W.C.1.

MENIKA WIJEYWARDENE TENNEKOON

INSTITUTE OF ADVANCED
LEGAL STUDIES

10 WALAUWA MAHATMEE and DON HENRY

WIJEYWARDENE TENNEKOON BANDARA

MAHATMAYA (Plaintiffs)

- Respondents.

Case for the Appellant.

RECORD.

1. This is an appeal from a judgment and decree dated the 18th February, 1948 of the Supreme Court of Ceylon dismissing with costs the Appellant's appeal from the judgment and decree of the District Court of Colombo dated the 25th March, 1946, which ordered the Appellant to pay to the Respondents the sum of Rs.33,095.56 with legal interest thereon from that date until payment in full thereof and costs. p. 91. p. 88.

20 2. The appeal arises out of money-lending transactions between the Appellant as lender and the Respondents (who are wife and husband) as borrowers, and involves questions depending on a proper construction of the Money Lending Ordinance, being Chapter 67 of the Legislative Enactments of Ceylon, 1938 Revision (hereinafter called "the Ordinance"), and on the proper deduction from facts proved in evidence. A copy of the Ordinance is in the pocket of the record.

30 3. The Appellant is registered under the Business Names Ordinance as carrying on since the 16th June, 1929 a business in Colombo the general nature of which is described as moneylender and dealer in tea and in tea coupons. The Respondents own property in Ceylon including over 600 acres of rubber plantations, 3 acres of tea plantations, 55 acres of coconut plantations, 100 acres of paddy fields, four houses in Ratnapura, one house in Colombo, 500 acres of jungle land in Kukulkorale, and a plumbago mine in the Ratnapura district. p. 167, ll. 12-41. p. 40, l. 33-p. 41, l. 18. p. 51, ll. 24-38.

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p. 41, ll. 17-22.

p. 36, ll. 33-40.

p. 36, ll. 17-30.

p. 113, l. 5.

p. 114, ll. 27-31.

p. 114, ll. 35-38.

p. 116, ll. 18-21.

p. 47, ll. 3-16.

p. 47, ll. 17-24.

p. 36, ll. 33-41.

pp. 98-111.

p. 47, l. 25-p. 49,
l. 16.

p. 116, ll. 24-27.

p. 117, ll. 2-4.

p. 36, l. 37-p. 38,
l. 40.

p. 98, ll. 8-43.

p. 99, l. 38.

p. 102.

p. 105.

p. 109, l. 26.

p. 110, ll. 34-40.

p. 112.

p. 38, l. 18.

p. 38, l. 41-p. 39,
l. 39.

pp. 131-140.

p. 39, ll. 32-34.

4. From 1925 the Respondents were developing their properties with borrowed money, borrowing from one man to pay off another. In June, 1936 the Respondents were introduced to the Appellant by a broker with a view to the Appellant lending the Respondents Rs.50,000. In 1934 other moneylenders (Messrs. Keell and Waldock) had sued the Respondents and another for Rs.37,712.24 and obtained judgment on the 20th July, 1934. The amount of interest and costs does not appear. The Respondents paid Rs.14,071.94 by the 25th June, 1935, and on the 28th February, 1936, made a further payment of Rs.34,326.10 through the State Mortgage Bank. That Bank had been asked to lend the Respondents Rs.85,000 on a mortgage of 258 acres of rubber plantations, but the Bank only advanced Rs.35,000 on the security of 148 acres, as it regarded the title to the remaining 110 acres as doubtful. The Respondents then employed a broker to find someone to lend them money on the 110 acres. The Appellant was approached and the Respondents asked him to lend Rs.50,000. The Appellant lent the Respondents Rs.46,000 on the 11th July, 1936, on the terms of a bond, lease bond and agreement of that date. The security in addition to a mortgage of the 110 acres included a second mortgage on the land mortgaged to the State Mortgage Bank, and other security. On the 21st July, 1936 the Respondents made a further payment of Rs.13,032.75 on account of the judgment debt to Messrs. Keell and Waldock, and on the 5th May, 1937, satisfaction of the judgment was entered on a settlement the terms of which do not appear from the record.

5. The bond, lease bond and agreement gave effect to the agreed terms upon which the loan was made. The bond bound the Respondents in the sum of Rs.46,000 with interest at 12 per cent. per annum payable on demand secured by a first mortgage of properties described in schedule "A" and a second mortgage of the properties described in schedule "B." The lease bond let to the Appellant the rubber plantations and buildings on lands described in schedules for 33 months from the 1st August, 1936 and thereafter until the rubber coupons received by the Appellant from the Rubber Controller in respect of such plantations should be sufficient to repay the Rs.46,000. The agreement provided that the Appellant should sell the rubber coupons at the ruling market price and credit the proceeds, less the usual brokerage and other charges and a commission of 6 cents on every pound of rubber represented by the coupons, in liquidation of the debt on the bond.

6. Of the Rs.46,000 the Appellant retained Rs.1,000 as interest in advance, and Rs.45,503.68 were applied in discharge of the Respondents' debts and expenses. The balance of Rs.286.32 was paid to the second Respondent in cash.

7. On the 19th February, 1938 the Respondents, being again in financial difficulties, obtained a further loan from the Appellant of Rs.52,000 on the terms of a new bond, lease bond for 5 years, and agreement in terms similar to the like documents of the 11th July, 1936. Out of the Rs.52,000 the balance due to the Appellant on the earlier transaction, amounting to Rs.7,002.47, was retained by the Appellant.

8. In January, 1940, the Respondents found they could borrow money elsewhere on more favourable terms, and, after correspondence, the Respondents on the 9th March, 1940 paid Rs.28,283.10 in full settlement of the Appellant's claims. On the 4th April, 1940, the Appellant returned to the Respondents all the relevant deeds and discharged bonds. The Appellant submits that by reason of this settlement of all outstanding accounts between the parties the Respondents ceased to be "the borrower or surety or other person liable" at whose instance the court may re-open a money-lending transaction.

p. 39, l. 40.
pp. 150-152.
p. 166, ll. 1-17.
p. 166, l. 20-p. 167,
l. 10.

10 9. On the 1st July, 1940 the Respondents began an action claiming under the Ordinance—

p. 10.

(A) that the court might re-open the transaction between the Respondents and the Appellant since the 11th July, 1936 and take an account of the sums of Rs.46,000 and Rs.52,000 and re-open the account if any between the Respondents and the Appellant ;

p. 13, l. 41.

20 (B) the payment of (i) Rs.4,069.23, being the difference between the alleged net proceeds of the sale of rubber coupons and the amount alleged to be due for capital and interest on the first bond ; (ii) Rs.7,002.47 alleged to have been wrongly retained by the Appellant in making the second loan for the purpose of discharging the first bond ; (iii) Rs.26,154.60 alleged to have been paid in excess of the amount properly recoverable under the second bond, amounting together to Rs.37,226.30 or alternatively the sum found due to the Respondents on the taking of the account.

p. 14, l. 2.
p. 12, ll. 18-28.

p. 14, l. 3.
p. 12, ll. 29-31.

p. 14, l. 4.
p. 13, ll. 31-33.

30 10. Twenty-four issues were framed in the action, of which issue (19) raised the question whether the Respondents could maintain the action to re-open the transactions on the bond as no sums were claimed to be due to the Appellant when the action was brought. This issue was dealt with as a preliminary issue, and after argument, the learned District Judge on the 4th August, 1941 gave judgment by which he answered issue (19) in the affirmative.

p. 17, l. 11-p. 19,
l. 2.

p. 18, l. 20.

p. 19, ll. 2-27.

pp. 26-32.
p. 32, l. 24.

40 11. The learned District Judge held that no relief could be claimed under section 2 (1) of the Ordinance because these were not "proceedings . . . taken in any Court for the recovery of any money lent . . . or the enforcement of any agreement or security made or taken . . . in respect of money lent." He then considered whether the Respondents were assisted by section 2 (2) and stated that were the matter at large he would be inclined to hold that they were not. The Court of Appeal in England, in *Saunders v. Newbold* (1905) 1 Ch. 260, had, however, expressed the view that section 1 (2) of the English Money-lenders Act, 1900 (63 and 64 Vict. c. 51) which corresponds to section 2 (2) of the Ordinance, applies even to a case where the loan has been repaid. Although he considered the observations of the Court of Appeal to be *obiter dicta*, the learned District Judge thought that he should follow them. He held that there was no jurisdiction other than that under section 2 (2) of the Ordinance, which enabled the court to re-open the transaction.

p. 26, l. 36.

p. 27, ll. 3-31.

p. 27, l. 32-p. 30,
l. 13.

p. 30, ll. 14-32.

p. 30, l. 33-p. 32,
l. 23.

p. 34, l. 22-p. 35,
l. 23.
p. 35, l. 31.

12. On the 29th June, 1942 the Supreme Court dismissed with costs the Appellant's appeal from the determination of issue (19), and the case therefore proceeded to trial on the issues regarding the Respondents' right to an accounting.

pp. 63-70.
p. 63, l. 38-p. 64,
l. 14.
p. 64, ll. 15-47.
p. 65, l. 1-p. 66,
l. 7.

13. On the 9th April, 1943 the learned District Judge delivered his judgment. He found that the Respondents were so desperately in need of money that they were prepared to obtain a loan on any terms and that the Appellant took advantage of their necessity. The learned judge noted that, both in the first lease and the contemporaneous agreement, the period of 30 months had been altered to 33 months. The learned judge then found that the first bond, lease bond, and the agreement were all parts of one money-lending transaction in 1936. The learned judge then considered the 1938 dealings and found that the Respondents, being again financially embarrassed, had no option but to go to the Appellant again and borrow money on his own terms, and that the second bond, lease bond and agreement were all parts of this one money-lending transaction. He also held that part of the money then lent was retained by the Appellant against money due on the first bond, thus linking the 1936 and 1938 transactions together. 10

p. 66, ll. 8-37.

p. 66, l. 38-p. 67,
l. 14.

14. The learned District Judge then dealt with circumstances in which the Respondents without protest paid and settled the Appellant's claim and received all the deeds duly discharged, treating as irrelevant the terms on which they borrowed the money with which to pay. The court had been held to have jurisdiction to entertain the claim, and this jurisdiction in his view enabled the court, when a debtor has proved an excessive return to the creditor and that the transaction was harsh and unconscionable or substantially unfair, to deal with allied transactions. He held that both the 1936 and the 1938 transactions were harsh and unconscionable and substantially unfair and the total return excessive. Interest at 12 per cent. was not excessive, but the commission of 6 cents per coupon pound, said to equal 24 per cent. per annum or more, in his opinion could not stand and should be repaid. The learned judge also held that the transactions had been induced by undue influence, and that the doctrine of estoppel did not apply to proceedings under the Ordinance. Accordingly, the issues relating to the right to an account were answered in favour of the Respondents, and an account was directed, allowing the Appellant interest at 12 per cent. per annum. The question of costs was left over till final decree. 20

p. 67, l. 14-p. 68,
l. 41.

p. 68, l. 42-p. 69,
l. 4.

p. 69, ll. 4-8.

p. 69, ll. 9-29.

p. 69, l. 30-p. 70,
l. 3.

pp. 70-73.

p. 74.

p. 75.

p. 77.

15. The Appellant appealed to the Supreme Court, and the District Court postponed the accounting until the appeal was decided. The Supreme Court dismissed the appeal with costs, and refused an application for conditional leave to appeal to the Privy Council on the ground that their decision was not a final order. 40

pp. 79-86.
pp. 87-88.

p. 88, ll. 29-34.

16. An account was then taken, and by a judgment dated the 25th March, 1946 the learned District Judge held that the Appellant was only entitled to interest on the money actually paid to the Respondents. Judgment was accordingly given for the Respondents for Rs.33,095.56 with interest until payment in full, and costs.

17. An appeal by the Appellant to the Supreme Court was dismissed with costs on the 18th February, 1948 and the Appellant duly applied for and was granted leave to appeal to the Privy Council from the judgment and decree of the Supreme Court.

p. 91.

pp. 92-96.

18. The Appellant submits that on the preliminary issue as to jurisdiction, the learned District Judge correctly interpreted section 2 (1) of the Ordinance, but wrongly considered that the Respondents could obtain relief under section 2 (2). It is clear that the Respondents deliberately decided to pay off the loan and obtain the discharge of the security. Knowing all the facts, with legal advice, and without any pressure, the Respondents on the 9th March, 1940 paid to the Appellant Rs.28,233.10 (being the amount shown to be due in the account rendered by the Appellant) in full settlement of the Appellant's claim. The Appellant submits that thereupon the transactions were closed by a valid settlement of account, and that each of the Respondents then ceased to be a borrower, or surety or other person liable, and that the Ordinance gives the District Court no jurisdiction to set aside the settlement and to re-open the transactions.

p. 52, l. 34-p. 53, l. 10.

p. 166, ll. 6-8.

p. 152, ll. 6-15.

19. The Appellant further submits that the courts below failed to have any regard to many important facts. The Respondents owned considerable revenue-producing property, and since 1925 had pursued a policy of developing and extending their estates with borrowed money. Whenever they were pressed for payment they preferred to borrow elsewhere rather than to realise any of their assets. It was clear that when the price of rubber was high, loans could be repaid very quickly; and that from 1925 onwards the Second Respondent had had great experience in the use for development of money borrowed from moneylenders. The Respondents' assets had been greatly increased by the use of borrowed money. There was no evidence sufficient to establish that either in 1936 or in 1938 the Respondents were in great financial difficulties. No evidence was given of any attempt to sell any asset, and, in the Appellant's submission, the only proper deduction from the evidence is that the Respondents regarded it as a reasonable business risk to borrow on what terms were available rather than to sell any part of their revenue-producing estates. Moreover, the security offered to the Appellant included a second mortgage and a mortgage on property the title to which had been rejected by the State Mortgage Bank, and to which there was no right of access. Furthermore, the record shows that the Respondents resisted just demands by other persons and fought prolonged actions, which, however, were always settled with borrowed money in preference to allowing security to be enforced or to selling assets. The learned District Judge found that, instead of realising their assets and paying off their creditors, the Respondents in 1938 wanted to borrow more money. The Appellant submits that this was because experience had shown them that to do so was profitable, and that this finding (which was demonstrably right) negatives the view that the bargains were harsh and unconscionable and unfair or were induced by undue influence. The Appellant submits that the evidence shows that the wills of the Respondents were not dominated by the Appellant. The return to the Appellant from

p. 40, l. 33-p. 42, l. 8; p. 43, ll. 10-23; p. 51, ll. 16-37.

p. 41, l. 28.

p. 47, l. 10-p. 48, l. 24.

p. 39, ll. 1-14; p. 42, ll. 20-41, p. 44, ll. 23-37; p. 46, ll. 11-12; p. 47, l. 2; p. 97; pp. 113-127.

p. 66, ll. 10-12.

commission of 6 cents per coupon pound of rubber provided, it is submitted, only a reasonable protection against a heavy fall in the value of the mortgaged rubber plantations.

p. 68, l. 44-p. 69,
l. 8.

20. The Appellant further alternatively submits that the 12 per cent. interest allowed by the learned District Judge in his judgment of the 9th April, 1943 should have been allowed at 12 per cent. of the capital sums loaned, namely Rs.46,000 and Rs.52,000 and not as 12 per cent. on the money owing from time to time as the learned judge's successor in office held in his judgment of the 25th March, 1946.

pp. 87-88.

21. The Appellant accordingly submits that the decree of the 10 Supreme Court of Ceylon dated the 18th February, 1948 was wrong and should be reversed and that the Respondents' claim should be dismissed with costs for the following amongst other

REASONS

1. BECAUSE the District Court had no jurisdiction to set aside the settlement of accounts between the parties or to re-open closed transactions.
2. BECAUSE the learned District Judge wrongly construed section 2 (2) of the Ceylon Ordinance.
3. BECAUSE the transactions between the parties were not 20 harsh and unconscionable nor were they substantially unfair.
4. BECAUSE the return received by the Appellant was in the circumstances proved in evidence not excessive.
5. BECAUSE the evidence negatived the view that the transactions were induced by undue influence.
6. BECAUSE 12 per cent. interest should have been assessed on the capital sums lent.

FRANK GAHAN.

In the Privy Council.

ON APPEAL
from the Supreme Court of Ceylon

BETWEEN

M. R. M. M. N. NADARAJAN
CHETTIAR (Defendant) - - *Appellant*

AND

CHANDRASEKERA HERAT
MUDIYANSELAGE RAN MENIKA
WIJEYWARDENE TENNEKON
WALAUWA MAHATMEE, and
DON HENRY WIJEYWARDENE
TENNEKON BANDARA
MAHATMAYA (Plaintiffs) - - *Respondents.*

Case for the Appellant

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