Privy Council Appeal No. 33 *of* 1949

M. R. M. M. M. N. Nadarajan Chettiar - - - - - *Appellant*

v.

Chandrasekera Herat Mudiyanselage Ran Menika Wijeyewardene Tennekoon Walauwa Mahatmee and Another - - *Respondents*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST JUNE, 1950

Present at the Hearing:

LORD PORTER
LORD OAKSEY
LORD RADCLIFFE
SIR JOHN BEAUMONT
SIR LIONEL LEACH

[*Delivered by* SIR JOHN BEAUMONT]

This is an appeal from a judgment of the Supreme Court of Ceylon dismissing on the 18th February, 1948, an appeal from a judgment of the District Court of Colombo dated the 25th March, 1946.

The action was brought by the respondents, who are husband and wife, as plaintiffs, against the appellant, who is a money-lender, as defendant, to have certain money-lending transactions re-opened and for an account. The learned trial judge decided that the transactions ought to be re-opened, that they were harsh and unconscionable, and that they had been induced by undue influence. He directed an account to be taken between the respondents and the appellant, and on the account being taken found that the appellant ought to repay to the respondents the sum of Rs.33,095.56 and entered judgment accordingly.

So far as is necessary for the determination of this appeal the history of the matter is as follows. In the year 1936 a loan was made by the appellant to the respondents upon security and on certain terms as to repayment. In the year 1938 there was a further money-lending transaction between the parties, and it is conceded that the loans of 1936 and 1938 formed one money-lending transaction.

On the 9th March, 1940, the respondents, after raising Rs.60,000 elsewhere, paid off the sum claimed by the appellant which then amounted to Rs.28,202.35. It must be emphasised that this payment was made voluntarily at the instance of the borrowers, and the closing of the transaction was not brought about by the lender.

On the 1st July, 1940, the respondents filed the action out of which this appeal arises claiming relief under the Money Lending Ordinance 1918 of Ceylon (c. 67 of the Revised Statutes, 1938). The substance of the claim in the plaint was that the money-lending transactions of 1936 and 1938 should be re-opened, an account taken, and payment made to the plaintiffs of anything found to be due. The trial took place before R. F. Dias as District Judge of Colombo. A large number of issues were framed of which No. 19 was in the following terms:—

> "(19) Can Plaintiffs maintain this action to re-open the transactions upon Bonds Nos. 1624 of 11.7.36 and 4664 of 19.2.38, as no sums are claimed to be due to the Defendant thereon at the date of action? "

By agreement between the parties this issue was decided as a preliminary point of law, the learned judge assuming for the purposes of the argument that the facts stated in the plaint were correct. On the 4th August, 1941, in a considered judgment the learned judge answered issue No. 19 in the affirmative holding that the action of the plaintiff lay although the account had been closed.

The appellant appealed against the judgment of the trial judge and the appeal was heard by the Supreme Court on the 29th June, 1942, when such court dismissed the appeal, the learned judges, however, giving no reasons for their decision.

The action thereupon proceeded upon the facts and was tried by the learned District Judge on the 9th March, 1943, and following days. On the 9th April, 1943, the learned judge gave judgment in favour of the respondents and directed that an account be taken of the transactions between the appellant and the respondents on the basis of his judgment. The appellant appealed to the Supreme Court against the latter judgment of the learned District Judge and such appeal was dismissed by the Supreme Court on the 25th July, 1944, the learned judges again giving no reasons for their decision.

The action then proceeded in the District Court on the account directed and in the result the learned judge held the respondents (plaintiffs) to be entitled to the said sum of Rs.33,095.56 and gave judgment for that amount accordingly.

The appellant appealed against the last-mentioned judgment of the District Court and on the 18th February, 1948, the appeal was dismissed, the learned judges once more giving no reasons for their decision. The present appeal is against that decision which was the final judgment in the action.

Before the Board the appellant has challenged not only the answer to issue No. 19 which raises a question of law based on the construction of the Money Lending Ordinance, but the findings of the courts in Ceylon that the loans made to the respondents were harsh and unconscionable and induced by undue influence. In their Lordships' view there was ample evidence to support the finding of the trial judge, confirmed in appeal, that the loans of 1936 and 1938 were harsh and unconscionable, and their Lordships see no reason for departing from their normal practice of not interfering with concurrent findings of fact. In this view of the matter it is unnecesary to consider the arguments presented to the Board that there was no evidence to support the finding of undue influence. If the loans made by the appellant were in fact harsh and unconscionable, it matters not that the respondents were free from the influence of the appellant.

The important question which falls for determination is whether a borrower is entitled to relief under the Money Lending Ordinance in respect of money-lending transactions closed before the date of his application for relief. It is to be regretted that in considering this question, which is one of some importance, their Lordships have not the advantage of knowing the reasons upon which the judges in the Supreme Court acted in dismissing the appeal against the judgment of the District Judge of the 4th of August, 1941.

The question at issue turns upon the construction of section 2, sub-sections (1) and (2) of the Money Lending Ordinance, 1918, which are in the following terms:—

"2.—(1) Where proceedings are taken in any court for the recovery of any money lent after the commencement of this Ordinance, or the enforcement of any agreement or security made or taken after the commencement of this Ordinance in respect of money lent either before or after the commencement of this Ordinance, and there is evidence which satisfies the court—

(*a*) that the return to be received by the creditor over and above what was actually lent (whether the same is charged or sought to be recovered specifically by way of interest, or in respect of expenses, inquiries, fines, bonuses, premia, renewals, charges, or otherwise), having regard to any sums already paid on account, is excessive, and that the transaction was harsh and unconscionable, or, as between the parties thereto, substantially unfair; or

(*b*) that the transaction was induced by undue influence, or is otherwise such that according to any recognized principle of law or equity the court would give relief; or

(*c*) that the lender took as security for the loan a promissory note or other obligation in which the amount stated as due was to the knowledge of the lender fictitious, or the amount due was left blank,

the court may re-open the transaction and take an account between the lender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest, and charges as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable; and if any such excess has been paid or allowed in account by the debtor, may order the creditor to refund it; and may set aside, either wholly or in part, or revise, or alter any security given or agreement made in respect of money lent, and if the lender has parted with the security may order him to indemnify the borrower or other person sued.

(2) Any court in which proceedings might be taken for the recovery of money lent shall have and may, at the instance of the borrower or surety or other person liable, exercise the like powers as may be exercised under the last preceding sub-section, and the court shall have power, notwithstanding any provision or agreement to the contrary, to entertain any application under this Ordinance by the borrower or surety or other person liable, notwithstanding that the time for repayment of the loan or any instalment thereof may not have arrived."

Section 2 reproduces section 1 of the English Money Lenders Act, 1900 (63 & 64 Vict. c. 51), section 2 (2) of the Ceylon Ordinance being expressed in language identical with that of section 1 (2) of the English Act. The argument of the appellant is that relief under section 2 (1) can only be given in the course of a current transaction since the sub-section only comes into operation when proceedings are taken in any court for the recovery of money lent. Sub-section (2) is merely a counterpart of sub-section (1) enabling the borrower to claim relief without waiting for the lender to sue for his money, and even before the money is due, but the relief can only be claimed in the course of a current transaction since the court which can grant relief must be one in which proceedings might be taken for the recovery of money lent, and relief can only be granted at the instance of the borrower, surety or other person liable. If the loan has been repaid and the transaction closed, there is, so the argument runs, no money lent, no Court in which proceedings might be taken for the recovery of money

lent, and no borrower, surety or other person liable. Certainly there is force in this argument, and it must be conceded that if the section applies to closed transactions some words must be read into it to cover a claim in a Court in which proceedings might have been taken for the recovery of money lent if the money had not been repaid, at the instance of a former borrower, surety or other person who had been liable. The contention of the respondents is that some such words ought to be read into the section in order to give effect to the intention of the legislature to be gathered from a consideration of the Ordinance as a whole. It is suggested that the legislature can hardly have intended that a borrower, so long as a single instalment of his debt remains due, is to have the right to claim relief and open settled accounts, whilst, when the last instalment has been repaid, he is to lose all his rights. Further, that a literal construction of the sub-section would lead in many cases to very difficult questions as to whether a transaction was in fact closed, or whether the closure was a mere device to enable the money lender to escape liability, money lenders being notoriously a class skilled in adapting legal forms to their own advantage.

The learned District Judge in his judgment stated that had the matter been at large he would have felt disposed to accept the argument advanced on behalf of the money lender and to hold that the action of the borrower did not lie, but in deference to the decision of the English Court of Appeal in *Saunders* v. *Newbold* (1905 1 Ch. 260) he held that the plaintiffs could re-open a closed account. *Saunders* v. *Newbold* was a considered judgment of the English Court of Appeal in which the court expressed the view that a borrower was entitled to open a closed transaction under section 1 (2) of the Money Lenders Act. The court did not, in that case, give relief in the closed transaction since the borrower had made no application to the court so to do, but the court gave him liberty to make such an application if so advised. The decision of the Court of Appeal was affirmed in the House of Lords, but without any discussion on the construction of section 1 (2) of the Money Lenders Act, though the liberty granted to the borrower by the Court of Appeal was expressly saved. The learned District Judge considered that the opinion of the Lords Justices on the effect of section 1 (2) was really *obiter*, but this is of little consequence since the right of a borrower to re-open a closed transaction under section 1 (2) of the Money Lenders Act has been recognised in later cases in the English Court of Appeal (see *Part* v. *Bond* (XXII T.L.R. 253) and *Kerman* v. *Wainewright* (XXXII T.L.R. 295)).

Mr. Wilberforce for the respondents in the first instance contended that the legislature in Ceylon by employing in section 2 (2) of the Money Lending Ordinance the exact words used in the English Money Lenders Act, must be taken to have accepted the construction placed upon these words by courts of competent jurisdiction in England. He relied on the rule stated by Sir W. James, L.J. in *Ex parte Campbell* (L.R. 5 Ch. A. 703) that " Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without any alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them." This rule has been acted upon frequently in the English courts and was approved by the House of Lords in *Barras* v. *Aberdeen Steam Trawling and Fishing Co. Ltd.* (1933 A.C. 402). Probably in suitable cases the rule would be applied in Ceylon, as it has been in India (see *Strimathoo Moothoo Vijia and others* v. *Dorasinga Tever* (2 I.A. 169)). It is however, one thing to presume that a local legislature, when re-enacting a former statute, intends to accept the interpretation placed upon that statute by local courts of competent jurisdiction with whose decision the legislature must be taken to be familiar ; it is quite another thing to presume that a legislature, when it incorporates in a local Act the terms of a foreign statute, intends to accept the interpretation placed upon those terms by the courts of the foreign country with which the local legislature may or may not be familiar. There is no presumption that the people of Ceylon know the

law of England, and in the absence of any evidence to show that the legislature of Ceylon at the relevant date knew, or must be taken to have known, decisions of the English Courts under the Money Lenders Act, there is no basis for imputing to the legislature an intention to accept those decisions.

Mr. Wilberforce was on safer ground when he contended that it was the duty of courts in Ceylon to follow the decision of the English Court of Appeal on the construction of words identical with those used in a Ceylon Ordinance. In the case of *Trimble* v. *Hill* (L.R. 5 A.C. 342) the Board expresed this opinion:—

> "Their Lordships think the Court in the colony might well have taken this decision (i.e. a decision of the English Court of Appeal) as an authoritative construction of the statute. . . . Their Lordships think that in colonies where a like enactment has been passed by the Legislature the Colonial Courts should also govern themselves by it."

This, in their Lordships' view, is a sound rule, though there may be in any particular case local conditions which make it inappropriate. It is not suggested that any such conditions exist in the present case, and the courts in Ceylon acted correctly in following the decision of the English Court of Appeal.

For these reasons their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

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In the Privy Council

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DELIVERED BY SIR JOHN BEAUMONT

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