SUPREME COURT OF INDIA

Radha Kissan Chamria

Vs.

Keshardeo Chamria

C.A.No.284 of 1955

(S. R. Das, C.J.I., S. J. Imam, P. B. Gajendragadkar and A. K. Sarkar, JJ.)

24.05.1957

JUDGEMENT

SARKAR J.-

1. The point involved in this appeal is a very short one. It is whether the appellants are entitled to relief under the Bengal Money Lenders Act (Bengal Act 10 of 1940). Section 30 of that Act provides as follows:

"Notwithstanding anything contained in any law for the time being in force, or in any agreement.

(1) no borrower shall be liable to pay after the commencement of this Act-

(a) any sum in respect of principal and interest which together with any amount already paid or included in any decree in respect of a loan exceeds twice the principal of the original loan,

(b) ....

(c) ....

Whether such loan was advanced or such amount was paid or such decree was passed or such interest accrued before or after the commencement of this Act,"

The appellants contend that they are borrowers and are being made to pay in excess of the limit prescribed by this section in respect of a loan to them and this they are not liable to do. The question that arises on this contention is whether what the appellants are sought to be made liable to pay is in respect of a loan within the meaning of the Act.

2. The litigation out of which this appeal arises started in 1923 and the proceedings in it have been exceedingly numerous. For the purpose of this appeal, however, it is necessary to refer to a very few of those proceedings. The respondent Durga Prasad Chamria purchased at a Court sale in execution of a decree a property in Howrah in West Bengal for a sum of Rs. 8,61,000. He paid 1/4th of the price, namely Rs. 2,15,250 on July 14,1920, which perhaps was the date of the purchase and the balance, Rs. 6,45,750, on August 20,1920.

Later on in the same year an agreement was arrived at between him and the appellants Radha Kissen Chamria and Moti Lal Chamria and their mother Anardeyi Sethani since deceased for the sale of the

property to the latter for the same sum at which he had purchased it himself, namely, Rs. 8,61,000 but with interest at 6 3/4 per annum with annual rests calculated on the instalments paid by him in respect of the price for the purchase from the respective dates of payment thereof as earlier stated and the costs incurred by him in connection with the purchase together with interest at a similar rate.

The purchase not having been completed by Radha Kissen, Moti Lal and Anardeyi with sufficient dispatch the respondent Durga Prasad on June 21, 1923, instituted a suit being Title Suit No. 61 of 1923 in the Court of the Additional Subordinate Judge, Howrah against the purchasers for specific performance of the agreement for the purchase. That suit was compromised and a decree was passed on April 19, 1926, in terms of the agreement arrived at between the parties. The compromise decree is set out below:

1. The defendants shall pay to the plaintiff the moneys paid by the plaintiff for purchase of Rurmull Goenka's Howrah property as shown in Schedule A hereunder as also the expenses actually incurred by him for such purchase and the confirmation thereof with interest up to payment or realisation at the rate of nine annas per Rupees one hundred per Sambat month from the respective dates of payment by the plaintiffs with yearly rests the rest being calculated according to Sambat Mit up to the Thirty First December in each year.

The payment of the moneys mentioned above shall be made by the following instalments:

(a) The sum of money in the hands of the Receiver in this suit shall be paid at once to the plaintiff.

(b) The sum of Rupees Four Lacs Twenty Five Thousand to be paid on the execution of these presents.

(c) Thereafter the sum of Rupees Thirty Five Thousand shall be paid every month on the Twenty first day of each month commencing from the 21st day of April, one Thousand Nine Hundred and Twenty Six. The first of such payment being made on the Twenty First day of April one Thousand Nine Hundred and Twenty Six up to Seventeen months from the 21st April, 1926 and the balance due shall he paid in the Eighteenth month from the said 21st April, 1926 so that the decree shall be fully paid within Eighteenth month from the 21st April, 1926.

2. In default of payment of any instalment on the dates aforesaid or within seven days thereafter the balance then remaining unpaid under the decree shall become forthwith payable.

3. Until satisfaction of the decretal amount the said property shall remain charged with payment thereof. But the plaintiff will be at liberty at his option to have the decree executed without enforcing the charge.

4. It is declared that the said property shall belong to Anardeyi Sethani from the date of the decree.

5. The Receiver appointed in this suit will be discharged at once and will pass his accounts before this Court.

6. Each party will bear his or her own costs and expenses of an incidental to this suit.

The Schedule 'A' above referred to.

Date of payment by the Plaintiff Amount.

14th July,1920 Rs. 2,15,250-0-0

20th August,1920. 6,45,750-0-0

Total Rs. 8,61,000-0-0

3. On March 17,1932, after large sums had been paid under the decree the respondent Durga Prasad transferred it to the respondent Keshardeo. On October 10,1936, Keshardeo as the assignee commenced a proceeding in execution against Radha Kissen, Moti Lal and Anardeyi. This proceeding was registered as the Execution Case No. 68 of 1936. Anardeyi Sethani died on July 17, 1941, and the appellant Sew Kissendas Bhattar was brought on the record in her place in Title Execution Case No. 68 of 1936 as the executor of her will.

After assignment, Keshardeo himself was paid large sums under the decree, but the decree had not been satisfied in full. On December 11,1950, the respondent Keshardeo, alleging that a sum of Rs. 4,57,321-3-9 was still due under the decree, made an application in Title Execution Case No.68 of 1936 for executing it by the arrest and detention of the appellants Radha Kissen and Moti Lal.

The appellants while not disputing that under the decree as it stood moneys were still due by them contended that the decree could not further be executed against them under S. 30 of the Bengal Money Lenders Act which had come into force in September 1940, as they had already paid more than twice the amount of the original claim in respect of which the decree had been passed.

It is not in dispute that prior to the application last mentioned a total sum of Rs. 17,68,507 had been paid under the decree. This was Rs. 46,507- 4- 8 in excess of double the sum of Rs. 8,61,000 mentioned in the decree. The appellants also claimed under the Act a refund of this excess. The contentions of the appellants were rejected by the Trial Judge. The appellants then went up in appeal to the High Court at Calcutta but the appeal also failed. From the judgment of the High Court this appeal to us has been preferred.

4. The question is whether the appellants are entitled to the benefit of S.30 of the Bengal Money Lenders Act. Section 30 states that no borrower shall be liable to pay any sum in excess of the limit therein specified. The appellants have, therefore, first to establish that they are borrowers. The term borrower has been defined in sub-s. (2) of S. 2 of the Act as follows :

"Borrower" means a person to whom a loan is advanced and includes a successor-in-interest or surety;"

We are not here concerned with a successor-in-interest or a surety. The appellants have, therefore, to show that they are persons to whom a loan was advanced. Section 30 also says that the protection given by it is in respect of a loan. So again the appellants have to establish that they are being made to pay moneys in respect of a loan advanced to them.

5. Now a "loan" has been defined in S. 2(12) of the Act the relevant portion of it is in the following terms:

"loan means in advance whether of money or in kind, made on condition of repayment with interest and includes any transaction which is in substance a loan."

This is admittedly not a case of an advance in kind. Nor is it a case in which there was an actual advance of money. Mr. Chatterjee appearing for the appellants, therefore, concerned himself in establishing that his clients were being made to pay moneys in respect of "a transaction which is in substance a loan" to them.

6. The first question is what is the transaction in this case which is in substance a loan? On this question all that Mr. Chatterjee said was that the consent decree was itself such a transaction. He said that what had happened was that there was the agreement for sale under which Durga Prasad as the vendor was entitled to receive the stipulated price from the purchaser Radha Kissen, Moti Lal and Anardeyi and the compromise decree was really a transaction by which Durga Prasad agreed to treat the moneys due to him on account of price as a loan by him to the purchasers and repayable as such at a certain rate of interest and in a certain number of instalments.

We agree with the learned Judge of the High Court that there is no evidence of any agreement between the parties leading to the compromise decree. Both the Courts below have held that there was no agreement as stated by Mr. Chatterjee. That is a question of fact and we in this Court are unable to disturb such a concurrent finding of fact. The agreement contained in the compromise decree itself is, of course, there.

But looking at its terms we are unable to hold, as the High Court was unable to do, that it shows that the price due was by agreement treated as a loan by the vendor to the purchasers. Mr. Chatterjee was unable to contend that in every case where an unpaid vendor leaves the purchase money outstanding and agrees to accept it later with interest, the transaction amounts in substance to a loan. He said that the facts of each agreement had to be looked at to find out whether the agreement amounted in substance to a loan.

Here we have no other facts than those appearing on the face of the compromise decree and these facts do not, in our view, amount to an agreement to convert the outstanding purchase money into a loan by the vendor to the purchasers. All that we have here is an agreement by the vendor to accept payment of a portion of the moneys payable under the agreement for sale immediately and the balance in certain instalments and to be paid interest on the purchase money at the same rate which was provided in the agreement for sale.

The compromise decree, no doubt, vested the property agreed to be sold in one of the purchasers and created a charge on it for the purchase money unpaid for the time being. The vendor under the agreement for sale had thus been converted into an unpaid vendor who had conveyed to the purchasers the property agreed to be sold and had been given a charge on the property for the unpaid purchase money. An unpaid vendor who has transferred the property has a similar charge under S. 55 (4) (b) of the Transfer of Property Act.

The only thing that was new in the compromise decree was that the moneys were payable in a number of instalments instead of at once. That cannot show that the price due had become a loan. The compromise decree does not in our opinion therefore alter the intrinsic nature of the moneys due to the vendor. They were and remained unpaid purchase moneys and had not at all been converted from that character into a loan.

7. In support of his contention Mr. Chatterjee referred us to two decisions of the High Court at Calcutta. The first was Fateh Chand Mahesri v. Akimuddin Chaudhury, 47 Cal W n 52: (AIR 1943 Cal 108) (A). We are unable to see that this case helps Mr. Chatterjee. What had happened there was

that the respondent Akimuddin had borrowed from the appellant Fateh Chand Rs. 7,000/- and as security for the repayment of that loan had executed a mortgage in favour of the latter.

He had employed a large part of this loan in purchasing shares in a certain jote. Fetch Chand himself had a share in that jote. As a result of the purchase by Akimuddin, he and Fateh Chand became co-sharers. Subsequently, Fetch Chand filed a suit for partition of the jote and that suit ended in a compromise. By that compromise Akimuddin agreed to purchase Fateh Chand's share in the jote for Rs. 2,000/- and to pay a further sum of Rs. 330/- on account of mesne profits and the costs of the suit.

Pursuant to the compromise a conveyance was executed in favour of Akimuddin by Fateh Chand but Akimuddin could not pay the amounts payable by him in cash. For securing these sums he executed a mortgage in favour of Fateh Chand. The mortgage covered other properties besides the shares purchased. Later, Fateh Chand brought a suit on both the mortgages and obtained a decree. Subsequently, in July 1939, he purchased the mortgaged properties in execution of that decree.

Thereafter, the Bengal Money Lenders Act was passed and Akimuddin promptly made an application for re-opening the compromise decree and for reliefs under that Act. The question arose whether the second of the two mortgages, (Ex.2) was in respect of a loan. The Court held that that mortgage was in substance a loan. In his Judgment Mitter J., observed as follows:

If in a transaction there is no actual advance but only a notional advance- what a Court of law would deem to be an advance - with a view to earn interest, the transaction would be regarded as loan for the purpose of the Act. A renewed bond where interest is capitalised would thus be a loan although at its execution no money is actually advanced. In order to determine the question whether a particular transaction amounts to a loan, the substance and not the form must be looked to and the facts and circumstances attending it must be taken into consideration. If the conclusion be that it was really an interest bearing investment it would be a loan."

Having set out the tests for determining what made a transaction in substance a loan the learned Judge proceeded to examine the facts of the case to see if the tests were satisfied and observed as follows:

"I will now examine the facts of the case we have before us, Fateh Chand Mahersi is admittedly a money lender. The interest which is provided for in Ex.2 (Mortgage for securing Rs. 2,330) is the interest which he usually charged in money lending transactions. It is 15 per cent. per annum with yearly rests- a rate which he charged in his first mortgage (Ex.1) for Rs. 7000 which admittedly represented a loan transaction. In his books of accounts he entered the transaction as a loan transaction. The unpaid price was shown in these accounts to have been wiped off by the advance from the loan account. In these circumstances I think that it can be held that the price was paid off by a notional advance made by Fateh Chand to Akimuddin, the real intention of the former being investment of money at his usual rate of money-lending. I accordingly hold that the mortgage Ex. 2 amounts in substance to a loan transaction.

Mitter J., therefore, was clearly led to the conclusion to which he arrived by consideration of the fact that the parties had treated the moneys secured by the mortgage as a loan and not as unpaid price which they originally were. This was clearly established by the fact that Fateh Chand had made entries in his accounts showing that the purchase money due to him had been paid off and the same amount had become due to him on a loan.

It may be that when money is due from one party to another not on an advance actually made but on other accounts a debt comes into existence but, as said by Sen J., in this very case a debt is not necessarily a loan. The parties, however, may agree to treat the money as a loan and then the transaction may in substance be a loan for the purpose of the Bengal Money Lenders Act. But there is no such agreement here. There is nothing to show that it had been intended that the original character of the moneys, namely, as unpaid price had been changed into a loan. In our view, therefore, Fateh Chand's case does not assist the appellants.

8. The other case on which Mr. Chatterjee relied, namely, Nimrode Barani Debya v. Sisir Kumar Mukherjee, 47 Cal W N 205: (A I R 1942 cal 616) (B) does not carry the matter further.

In that case the petitioners predecessors-in-interest owed some money to the opposite party on account of the price of the sale of some land. The purchase money was discharged partly in cash and partly by a promissory note. The note was renewed from time to time and the last renewal was by the petitioners themselves. The question was whether the last promissory note represented in substance a loan transaction. Hendeson J., who delivered the judgment in this case observed as follows:

"The real nature of the present transaction was that the purchase money was paid partly in cash and partly by the hand-note. If the real cause of action in the present case were merely the unpaid purchase money with a reasonable rate of interest, it would have been paid off long ago. It is not the case of the seller being willing to take part payment but the case of a seller insisting upon full payment partly in cash and partly in something else. I am, therefore, of opinion that this transaction was in substance a loan."

Here also, therefore, the judgment proceeded on the basis that the original debt was not a loan and was only a part of unpaid purchase money but the parties had treated the purchase money as paid off in its entirety and the amount equivalent to the unpaid purchase money as being due by the purchaser to the vendor by way of a loan. On such basis, the transaction may in substance be a loan. We have already stated that there is no evidence of such treatment in this case.

We find nothing here to show that the moneys originally due as price had come to be treated as a loan. The appellants, therefore, cannot contend that they are "borrowers" or are being made to pay in respect of a "loan" as these terms are defined in the Act. They cannot, therefore, claim any benefit under S. 30 of the Act.

9. In the result this appeal fails and it is dismissed with costs.

Appeal dismissed.

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