CALCUTTA HIGH COURT

Fateh Chand Mahesri

Vs

Akimuddin Chaudhuri

(R.C. Mitter,J)

28.08.1942

JUDGMENT

R.C. Mitter, J.

1. The respondent, Akimuddin Choudhury borrowed from the appellant Fateh Chand Rs. 7000 and as security for repayment of that loan executed a mortgage (EX. 1) in favour of the latter on 31st May 1921. The recital in the mortgage instrument is that he required the money for purchasing landed property (jotes). In fact he employed Rs. 6200 in purchasing landed property, namely shares iv Jote No. 491. Fateh Chand had a share in that jote (No. 491). So he and Akimuddin became cosharers in the same. The former instituted a suit for partition of the said jote. That suit ended in a compromise. By that compromise Akimuddin agreed to purchase Fateh Chand's share for Rs. 2000 and to pay him a further sum of Rs. 330 on account of mesne profits and costs of the suit. The conveyance was executed but Akimuddin could not pay in cash. Ostensibly for securing the said amount of Rs. 2330 he executed a mortgage (Ex. 2) in favour of the latter on 30th November 1925. The mortgage instrument provided for payment of interest at 15 per cent, per annum with yearly rests. Fateh Chand instituted a suit on both those mortgages. At the appellate stage a consent decree was passed in his favour for Rs. 27,350 on 9th January 1935. That decree was eventually put into execution and Fateh Chand purchased the mortgage properties. That sale was confirmed on 24th July 1939. On 7th December 1940 Akimuddin made an application for reopening the compromise decree under Section 36, Bengal Money-Lenders Act, 1940. As proceedings in relation to the mortgage suit were pending on 1st January 1939, it is admitted that that Act applies. Fateh Chand resisted the said application on two grounds. He stated that the loan of Rs. 7000 advanced on the security of the first mortgage was a commercial loan and the sum secured by the second mortgage was not a loan within the meaning of the said Act. The learned Subordinate Judge has overruled both these objections. He has re-opened the decree and has found that only Rs. 8453-14-0 was recoverable. He allowed payment by installments.

2. Fateh Chand has preferred this appeal against the said decision. His advocate, Dr. Basak, reiterates the two objections which his client had preferred in the lower Court. He does not take objection to the correctness of the amount, save in one respect, but objects to the number of instalments granted, in case it be held that the judgment-debtor is entitled to relief under the Bengal Money-Lenders Act. The first question therefore is whether the loan of Rs. 7000 was a

commercial loan. In support of that contention Dr. Basak places reliance upon the statement of Akimuddin made in his written statement in the mortgage suit and on the previous depositions of Akimuddin's son. His case is that the loan was taken to start a tea garden. I do not think that on the materials on the record I can hold that the loan was a commercial loan. In order to determine whether a loan is a commercial loan the material question would be what was the intention at the time when the loan was taken. If there is no indication in the instrument on which the loan was advanced it would be legitimate to make inferences from the user to which the money was put to immediately or shortly after the loan was advanced and from other facts and circumstances of the ease. This has been laid down in *Guru Pada Bhowmik v. Upenddra Nath Dhur*[1] I agree with that decision.

3. In the case before us the mortgage instrument does not give any indication that the lands which the borrower intended to buy with the money advanced was to be used for any commercial venture, e.g., for being turned into a tea garden. The lands which were purchased were capable of being used for other purposes, e.g., for growing paddy and jute or for grazing cattle and in fact they were used for those purposes. In the written statement filed in the mortgage suit Akimuddin stated that the sum of Rs. 7000 was not a loan advanced to him. His case there was that he and Fateh Chand had agreed to be partners in a tea garden to be started by them. For that purpose Akimuddin was to purchase in his name lands which would be suitable for tea plantation and after the tea garden was made, he and Fateh Chand would share the costs incurred for making the garden half and half and the said sum of Rs. 7000 was to be adjusted against the share of the money payable by Fateh Chand. If that defence had been given effect to there would have been an end to Fateh Chand's mortgage suit, so far as rupees 7000 was concerned. Akimuddin did not, however, appear at the trial to support his written statement and an ex parte mortgage : decree was passed against him. I do not think that the statement made in that written statement that lands were purchased with the said money with a view to start a tea garden can be used by Fateh Chand as an admission by Akimuddin. Apart from the fact that the statement was a purposive statement, statements in a written statement cannot be dissected for the purpose of finding out an admission.

4. The statement made in the depositions of Akimuddin's son is to the effect that the lands were purchased by Akimuddin from out of the sum of Rs. 7000 advanced to him I by Fateh Chand for the purpose of making them into tea plantation and grazing grounds. Those depositions were given in connection with the proceedings for settlement of the terms of the sale proclamation where the interest of the judgment-debtor was to have a larger sum inserted in the sale proclamation as the estimated value of the property. Those statements were also purposive statements. The high estimate of price given by that witness on that basis was not accepted by the Court. Apart from thai consideration, those statements would not bring the case within the term 'commercial loan' as defined in the Act. To be a commercial loan the money must be borrowed with the intent of using the whole of it, for a commercial venture. That test is not fulfilled even if we accept the statements of Akimuddin's son. I accordingly hold that it has not been established that the sum of Rs. 7000 which formed the subject-matter of the first mortgage was a commercial loan. I have already stated that the second mortgage was executed ostensibly to secure the unpaid price of the property sold by Fateh Chand to Akimuddin and the costs of the suit and mesne profits payable by the latter to the former under the compromise. The question is whether the said transaction, namely, the mortgage is hit by the Bengal Money-Lenders Act. If it was to secure a loan, then only it would be hit otherwise not. To determine the said question the

definition of the word 'loan' as given in that Act must be considered. That term is defined thus: Loan means an advance, whether of money or in kind, made on condition of repayment with interest and includes any transaction which is in substance a loan.

5. In my judgment the first part of the sub-section gives the primary meaning of the word 'loan.' "Loan means etc." - and the second part enlarges that primary meaning. "The word include" observed Lord *Watson in Dilworth v. Newzealand Commissioner of Stamps*[2] is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute, and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also things which the interpretation clause declares that they' shall include.

6. To be a loan according to its primary sense there must be (1) an advance of money or in kind - actual handing over at the time of the transaction; (2) a condition of repayment and (3) that with interest (as defined in Section 2, Sub-section (8) of the Act). Ordinarily the presence of the first and the second elements would make the transaction a loan but as the object of the Bengal Money-Lenders Act is to control money-lending it keeps no concern with non-interest bearing loans. To be a loan which would come within the Act the stipulation for payment of interest (a term which is given a wide latitude by its definition) is sine qua non. If the Legislature had left the definition of loan at what it is in the first part of that sub-section, renewed bonds in favour of a money-lender given for the original advance and the interest that had accrued thereon would not have come within the term loan, but those are the very transactions which require the closest amount of watch. To enlarge therefore the ordinary meaning of the words used in what I have called the primary definition of the term loan, and especially that of the word advance, the Legislature has added the last part to the definition of the term loan. 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 a 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.

7. Judged in the light of these principles it cannot be said in every case that a bond ostensibly securing the unpaid price would not be regarded as a loan within the meaning of the Act. I cannot therefore fully agree with the observations made in Saradindu Sekhar v. Lalit Mohon if, as it is contended before us, they mean to lay down that in no circumstances can a bond ostensively given for securing the unpaid price be regarded as one for a loan. In that case, however, the transaction did not amount to a loan as defined in the Act, as no interest was payable under the terms of the bond. In my opinion, the right principle has been formulated in the case in Kunja Behary v. Satyendra Nath Dass . No doubt the observations are obiter, but I agree with them. I will now examine the facts of the case we have before us. Fateh Chand Mahesri is admittedly a money-lender. The interest which is provided for in Ex. 2, is the interest which he usually charged in money-lending transaction. 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 account he entered the transaction as a loan transaction. The unpaid price was shown in those 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. The learned Subordinate Judge was therefore right in his conclusions.

8. The learned Subordinate Judge has however overlooked the terms of Section 36, Sub-section 2(a). We think that the appellant is entitled to the costs which had been awarded to him by the decree which has been reopened. That sum namely Rs. 1818-2-6 has to be added to the sum of Rs. 8453-14-0. We think that the learned Subordinate Judge has been very liberal in the matter of instalments. In modification of his order we direct the amount found to be payable by the respondent to the appellant, namely Rs. 10,272-0-6 to be paid in four equal annual instalments - the first instalment to be paid within the last date of Chaitra 1349 and the others within the month of chaitra of each succeeding year. In default of payment of any one instalment Section 36(2)(e) of the Act will operate. Each party to bear his costs of the appeal. The costs of the respondent's portion of the paper book to be assessed and the same must be paid by the respondent to the appellant.

Sen, J.

9. The question involved in this appeal is whether the provisions of the Bengal Money-Lenders Act will apply so as to allow the scaling down of the dues under two mortgages executed by one Akimuddin Choudhuri in favour of Fateh Chand Mahesri. The Court below has held that the dues under both the mortgages are liable to be reduced by reason of the provisions of the aforesaid Act. Fateh Chand Mahesri appeals. The facts are these : On 31st July 1921 Fateh Chand Mahesri advanced Rs. 7000 to the respondent Akimuddin Chaudhuri on a mortgage. The loan bore interest at 15 per cent, per annum with yearly rests. On 30th November 1925 Akimuddin executed another mortgage in favour of the aforesaid Fateh Chand for a sum of Rs. 2330, interest was fixed at the same rate as in the first mortgage. Fateh Chand brought one suit on both the mortgages and obtained an ex parte decree. An appeal was taken to this Court and on 31st January 1933 a decree on compromise was passed. The dues on both the mortgages were consolidated and fixed at Rs. 27,850-9-3. Thereafter certain payments were made but eventually the mortgaged property was put up for sale and purchased by the decree-holder on 20th August 1937. An application was made to have the sale set aside. The application was granted by the Court of first instance but refused by this Court. Thereafter the sale was confirmed on 24th July 1939 and the execution case was dismissed on part satisfaction on 15th September 1939. The respondent then applied for relief under the Bengal Money-Lenders Act on the ground that the mortgagee by his decree is getting more than twice the amount of the original loans and that the interest payable under the mortgages is in excess of that permitted by the Act.

10. It is admitted that the mortgagee is getting more than twice the amount of the original loans and that the interest allowed by the decree is in excess of that permitted by the Act. It is also established that on 1st January 1939 execution proceedings were pending for the realisation of the mortgage dues. The objection of the decree-holder is two-fold and shortly stated is this : (1) The loan on the mortgage of 31st May 1921 was a commercial loan and therefore the Money-Lenders Act has no application. (2) The mortgage of 30th November 1925 is not affected by the aforesaid Act as it was not based on a loan as defined in the Money-Lenders Act. I shall now

consider the first objection. The appellant argues that the loan was taken by Akimuddin for the purpose of buying land for starting a tea garden, that this was a commercial purpose and that consequently this was a commercial loan. The Court below has held that the evidence to establish that the money was borrowed entirely for commercial purposes is not satisfactory and has rejected this contention of the appellant. I entirely agree with this view. A commercial loan means a loan advanced to a person to be used solely for commercial purposes : vide Section 2(4), Bengal Money-Lenders Act. The I mortgage deed says nothing about any commercial purpose. It says, merely, that the loan was taken for the purpose of purchasing jotes. This is certainly not a commercial purpose. In his written statement in the mortgage suit, Akimuddin made a statement that he and Maheswari were partners in an enterprise for starting a tea garden and that no money was due to the plaintiff from him as the dues between the parties had been adjusted. This statement is relied upon by the appellant for his case that the loan was a commercial one. Now the written statement was disbelieved in the mortgage suit which was decreed in favour of the appellant. No reliance can be placed on that document. Further, there is no clear statement therein that the defendant took the advance solely for the purpose of starting a tea garden. Next, reliance is placed on certain statements made by Akimuddin's son in the application to set aside the sale in execution of the mortgage decree. These statements certainly do not show that the loan was a commercial one because they show that the money was taken for buying land not only for a tea garden but also for grazing. Now grazing is not a commercial purpose; it cannot therefore be said that the money was borrowed solely for commercial purposes.

11. The only other evidence on the point is that of the appellant who says that the respondent told him at the time of the loan that the money was wanted for a tea garden. The learned Judge has not relied on this statement and I see no reason to differ from his view. I agree with the Court below that the loan on this mortgage was not a commercial loan. The Bengal Money-Lenders Act therefore applies to this loan. I now take up the second point for consideration. It is argued that the mortgage of 30th November 1925 was not based on a loan as defined in the Bengal Money-Lenders Act. Certain admitted facts will now have to be stated. The respondent purchased from the appellant a certain share in a jote for Rs. 2000. He also owed the respondent Rs. 330 which had been awarded as costs against him in a partition suit. He was unable to pay the appellant these two sums and executed a mortgage in favour of the appellant for the sum of Rs. 2330 mortgaging the purchased property and other properties. The interest fixed was 15 per cent, with yearly rests and the amount was payable in the month of Chaitra of the year of the mortgage. The question which arises is whether this sum of Rs. 2330 to secure which the mortgage was effected represents a loan as defined in the Bengal Money-Lenders Act. Section 2(12) which defines a loan is in the following terms:
2(12) "Loan" means an advance, whether of money or in kind, made on condition of repayment with interest and includes any transaction which is in substance a loan but does not include, etc.

12. Dr. Basak for the appellants interprets this definition thus : He says that three essential elements must be present in order to constitute a transaction a loan, viz., (1) an advance of money or in kind; (2) a condition of repayment; (3) a stipulation that the repayment will be with interest. If any one of these elements is absent the transaction would not be a loan. When asked to give a meaning to the words "and includes any transaction which in substance is a loan" he said that these words merely meant this : even if the transaction is disguised in any way it will nevertheless be a loan if the above named three elements are actually present. According to him these words amount to a direction to the Court that it should look to the substance of the

transaction and not merely to its form. He contends that there must always be an actual advance of money or in kind by the lender to the borrower and that there is no place in the definition for anything which is not an actual advance even though it may be in substance an advance. In other words, he says that the definition does not contemplate a notional advance. He proceeds to show that in the present case there was no actual advance of money by Mahesri to Akimuddin and argues that consequently the transaction cannot be a 'loan' although the other two essential elements are present.

13. I am unable to accept this interpretation of Section 2(12), Money-Lenders Act. If this interpretation be accepted one must hold that the words "and includes any transaction which is in substance a loan" add nothing to the first part of the definition, that they are there merely for the purpose of directing the Court to look to the substance and not to the form. Now it is always the duty of the Court to look to the substance and not merely to the form and I cannot conceive that the Legislature in using these words merely wished to remind the Court of its duties. To accept Dr. Basak's view would be to construe these words as a piece of useless surplusage or a piece of unnecessary legislative advice to the Court. To me it is clear that this is not the correct view. The use of the words "and includes" clearly indicates that something is being added to the first part of the definition. The words extend the definition contained in the first part by including transactions other than those which strictly comply with the terms of the first part. What has to be seen is whether the transaction taken as a whole is one which substantially satisfies the requirements of the first part of the definition. There need not be an actual advance by the one person to another; a notional advance would be sufficient if taking all the circumstances into consideration the transaction substantially represents an advance made by one person to another with a condition that it should be repaid with interest. Dr. Basak next argues that even if this interpretation be adopted there is in this case no advance even in substance. Here again I am unable to agree. To decide whether a transaction represents a loan all the surrounding and contemporaneous circumstances must be borne in mind. For the land purchased by him and for the costs of the partition suit Akimuddin owed Mahesri Rs. 2330. He could not pay this amount and to secure the payment of this debt he executed this mortgage.

14. If there was nothing more it might have been argued that there was no advance of any kind whatsoever. I quite appreciate that a debt is not necessarily a loan. But here there are other circumstances. The amount was to be repaid with interest at 15 per cent, with yearly rests. This rate is the same as that which was payable on the undoubted loan advanced in respect of the earlier mortgage. The payment of the debt was secured by the mortgage not only of the property purchased but other properties were also required to be mortgaged. The mortgagee was by profession a money-lender. From these facts one has to gather whether the mortgage was merely for the purpose of securing the payment of the money due or whether it represented the ordinary investment of money for gain by a money-lender of the, status of Mahesri. The fact that Mahesri is a money-lender, the fact that additional property other than the property purchased was mortgaged and the fact that the usual rate of interest for mortgage loans was charged taken together lead me to treat the transaction substantially as an investment of money by a money-lender in a loan repayable with interest. It seems to me quite clear that Mahesri was not merely trying to secure the payment of the purchase money and the costs, but that he was investing his money as a money-lender for the purpose of earning interest. The fact that Mahesri did not go through the futile formality of advancing the money and taking it back does not in my opinion make the transaction any the less a loan.

15. Dr. Basak referred us to Saradindu Sekhar v. Lalit Mohon which was a case of bond executed as security from the payment of the purchase money due as the price of certain land purchased by the defendant. It was held that the amount due on the bond was not a loan. The judgment is very short and there is no discussion regarding the meaning of the words "and includes any transaction which is in substance a loan" all that is said is that a debt is not necessarily a loan or a transaction which is in substance a loan. This case is distinguishable from the present one in some respects. The most important distinction is that no interest was payable under the bond. This fact was quite enough for disposing of the case, as an essential element to make a transaction a loan is the stipulation for the payment of interest. I do not consider that the learned Judges in that case wished to lay down that in no circumstances could purchase money for which a bond is executed represent a loan. If that was intended I would respect, fully disagree from that view. On behalf of the respondent our attention was drawn to Kunja Behary v. Satyendra Nath Dass . The facts of that case were different but the question now raised was considered and discussed and a view similar to that taken by me was expressed by Mukherjee J. at p. 1123 where he says: Again the vendor might be a money-lender himself and might take a bond for the unpaid purchase money from the purchaser at a usurious rate of interest and this might afford room for argument that in substance he had advanced the money to the purchaser to pay off the price of goods due to him in order to obtain the advantages of a loan at such rates. No such consideration however applies to the facts of the present case.

16. For the reasons given above I hold that the Bengal Money-Lenders Act will apply to both the mortgage transactions and concur in the order passed by my learned brother.

Cases Referred.

1('42) 46 C.W.N. 774
2(1899) 1899 A.C. 99 at p. 105