Privy Council Appeal No. 106 *of* 1945

Patna Appeal No. 30 *of* 1943

Mahasay Amar Nath Ghosh - - - - - - *Appellant*

v.

Rai Bahadur Sukhraj Rai and others - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD JUNE, 1947

Present at the Hearing :

LORD SIMONDS
MR. M. R. JAYAKAR
SIR JOHN BEAUMONT.
[*Delivered by* LORD SIMONDS]

This is an appeal from the judgment and decree of the High Court of Judicature at Patna of the 18th December, 1942, which dismissed the appellant's appeals and allowed certain cross-objections of the respondents from a judgment and mortgage decree of the Subordinate Judge of Bhagalpur on the 8th April, 1940.

The relevant facts can be very shortly stated. The respondents are members of a joint Hindu family governed by the Mitakshara School of Hindu Law. The appellant's father had, from the year 1918 onwards, from time to time borrowed substantial sums from the respondents. The first loan was on the 10th July, 1918, in the sum of Rs.51,000. Ultimately on the 19th May, 1930, a mortgage bond was given by the appellant's father to cover not only all previous loans, but a large sum which was then freshly borrowed. This bond carried interest at the rate of Rs.7-8-9 per cent. per annum with annual rests.

It is necessary to refer only to two provisions of the mortgage deed. It provided that the due date of payment should be March, 1945, but it further provided by Clause 10 that, in the event of the borrower failing to pay the entire sum of interest and compound interest for two consecutive years, the mortgagee should have the option to file a suit on the basis of that indenture, either for compound interest and interest alone, or for all that was due to him for principal and interest.

Default, as the respondents alleged, having been made in the payment of the interest, this suit was instituted on the 27th February, 1936. A number of defences were taken, but substantially the matters in issue related to whether the appellant was entitled to any, and if so what, relief under the provisions of the Bihar Money-Lenders (Regulation of Transactions) Act, 1939, which will be referred to in this judgment as " the Act." Apart from relying upon the Act, the appellant maintained that the suit was premature in that there had been no default under Clause 10 of the mortgage deed, and, therefore, the respondents had no right to institute the suit.

In regard to this point, their Lordships observe that it appears that in the course of the proceedings before the High Court it was abandoned. What the High Court had to say about it appears at page 74 of Part I of the Record: " Mr. P. R. Das who appeared for the appellant did at first contend that the learned judge was wrong in holding that the mortgage suit was not premature. He argued that as the due date was March, 1945, the suit could not have been brought as it was in February, 1936. It was pointed out to Mr. Das, however, that this point had not been taken in the memorandum of appeal and further that the valuation of his appeal made it clear that it was never the intention of the appellant to take such a point. The grounds of appeal are confined only to questions of interest under the Bihar Money-Lenders Act. If the appellant desired to challenge the whole decree, a court fee on the decretal amount would have to be paid. There is no substance whatsoever in the contention that the suit was premature, and Mr. P. R. Das did not ask for any amendment of the memorandum of appeal and very wisely abandoned the contention."

Since the appeal was launched to His Majesty in Council, a further fee has been paid so as to make good the default of the appellant in that respect, but their Lordships are satisfied that it would not be right for them to allow this appeal to proceed upon a point which was so clearly abandoned in the court below. They must however add that, having heard the matter to some extent argued by the appellant's Counsel, they see no reason to doubt that the point was wisely abandoned in the High Court in India.

Turning now to the questions which have been raised under the Act, it is necessary in the first place to refer to sections 7 and 8.

Section 7 provides: " Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any agreement, no Court shall, in any suit brought by a money-lender before or after the commencement of this Act in respect of a loan advanced before or after the commencement of this Act or in any appeal or proceedings in revision arising out of such suit, pass a decree for an amount of interest for the period preceding the institution of the suit, which, together with any amount already realised as interest through the Court or otherwise, is greater than the amount of loan advanced, or, if the loan is based on a document, the amount of loan mentioned in, or evidenced by such document."

Section 8 provides: " In any suit brought by a money-lender before or after the commencement of this Act in respect of a loan advanced before the commencement of this Act or in any appeal or proceedings in revision arising out of such suit, the Court may exercise all or any of the following powers:—(*a*) re-open the transaction, take an account between the parties, and relieve the debtor of all liability in respect of any interest in excess of nine per centum simple per annum in the case of a secured loan and twelve per centum simple per annum in the case of an unsecured loan." Then there are further powers set out in other sub-paragraphs of the section.

The contention of the appellant, which failed in the Courts in India, was that the Subordinate Judge, having in the exercise of his discretion decided to re-open the transaction, that is to say, re-open the mortgage bond of May, 1930, was not at liberty so to exercise his discretion as to allow any higher rate of interest than nine per cent. upon a secured loan or twelve per cent. upon an unsecured loan; that is to say, having once exercised his discretion in re-opening the transaction, it was after that fettered, so that he was tied to the rates of interest mentioned in the section.

Their Lordships are clearly of opinion, as were the Courts in India, that this is inconsistent both with the plain meaning of the words used and, indeed with the plain commonsense of the matter, for it would be a ridiculous position if the judge, thinking it right in the exercise of his discretion to re-open the transaction, but thinking further that the rate of interest in the case of a secured loan of nine per cent. or in the case of an unsecured loan of twelve per cent. was less than might fairly be imposed, were to be placed in the dilemma that he must either decline to open the transaction, so that a higher rate of interest is charged than he thinks

fair, or he must open the transaction and impose a lower rate of interest than he thinks fair. It is clear that the Act admits, as one would expect it to do, the exercise by the judge of a discretion to impose any rate of interest which he thinks fit, subject only to this, that it is not to be less than nine per cent. in one case or twelve per cent. in the other.

A further point is taken by the appellant, again a point upon which the Courts in India were in agreement. The mortgage bond of May, 1930, itself represented the consolidation of a number of previous loans, all of which were unsecured. It is argued that, inasmuch as they were by the deed of May, 1930, secured, the learned judge, in estimating the interest, was bound to treat the previous interest which ran while the loans were unsecured as if they were secured. For that there is no warranty whatever in the language of the Act. Their Lordships can add nothing to what has been said in the Courts in India upon it.

The next point which is raised is one upon which the High Court reversed the decision of the Subordinate Judge. Section 11 of the Act provides: "Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any contract between the money-lender and the person to whom the loan was advanced, the court may, subject to the provisions of section 12, direct at any time on the application of the judgment-debtor, after notice to the decree-holder, that the amount of any decree passed before or after the commencement of this Act, in respect of a loan, including any decree in a suit relating to a mortgage by which a loan is secured, shall be paid in such number of instalments and subject to such conditions and on such dates as it considers fit."

Section 12 provides: "Before fixing the instalments referred to in sections 10 and 11, the Court shall take into consideration the circumstances of the judgment-debtor, the amount of the decree and the capacity of the judgment-debtor to pay the instalments on the due dates."

The jurisdiction of the Court under those sections was invoked, but before it could be invoked it was necessary for the Subordinate Judge to do something, which is his duty in respect of every judgment debt and for which no particular rule is prescribed by this Act, namely, to fix the rate of interest upon the decretal amount. The learned judge fixed a rate of interest of two per cent.

Their Lordships wish to say nothing more about that except that, in the circumstances of the case, there appears to be no justification whatever for fixing so low a rate of interest, and they see no reason for altering the rate of 6 per cent. which in this case the High Court has thought a proper rate to fix.

The Subordinate Judge, having, as their Lordships have now held, improperly fixed a rate of interest of two per cent., was then able to prescribe that the principal sum should be paid off by certain instalments. It is clear from his own judgment that, if instead of fixing a rate of interest of two per cent. he had fixed it even as low as four per cent., he would have found it impossible, having regard to the revenue of the debtor's estate, to have prescribed repayment by instalments. Their Lordships share the view entertained by the High Court that, the rate of six per cent. being fixed, there is no ground upon which a repayment by instalments can fairly be prescribed. Upon this point also their Lordships find themselves in entire concurrence with both the reasoning and the conclusion of the High Court.

The next point was taken under section 7, which has already been read. It is a matter of figures. It is clear under the terms of the section that the decretal amount may not be "for an amount of interest for the period preceding the institution of the suit which, together with any amount already realised as interest through the Court or otherwise, is greater than the amount of loan advanced." It is suggested that it appears upon the

face of the decree that a larger amount by way of interest has been ordered than the section justifies. Figures have been put forward by one side and the other. Having examined them, their Lordships are satisfied that the High Court's decree does not infringe the provisions of section 7 of the Act. That point therefore also fails.

Finally it was urged that in regard to a sum of Rs. 98,000, which appeared on the face of the decree, some adjustment ought to be made. In regard to that, their Lordships would only say that this is not the moment at which an objection of that kind should be taken. They cannot accept the suggestion that it was impossible, if there was a clear mistake upon the figures, to bring the matter to the notice of the High Court which passed the decree.

The sum of the matter is that at all points this appeal fails and their Lordships will humbly advise His Majesty that it should be dismissed accordingly. The respondents may add their costs of this appeal to their security.

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DELIVERED BY LORD SIMONDS

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