16/1950

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No. 33 of 1949.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CEYLON.

BETWEEN

M. R. M. M. M. N. NADARAJAN CHETTIAR — *Appellant*

AND

CHANDRASEKERA HERAT MUDIYANSELAGE RAN MENIKA WIJEYEWARDENE TENNEKOON WALAUWA MAHATMEE, and DON HENRY WIJEYEWARDENE TENNEKOON BANDARA MAHATMAYA — *Respondents.*

Case for the Respondents.

RECORD.

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

2. 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 reopened, that they were harsh and unconscionable, that they had been induced by undue influence; 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.

3. The Respondents' case was as follows. In 1936 the Respondents, who were the owners of a rubber estate in Ceylon called the Akamuna Estate and of other lands, were in serious financial embarrassment, owing to the continued low price of rubber which had prevailed since 1928. A number of creditors demanded payment and commenced proceedings, and in particular certain creditors named Keell and Waldock obtained, on the 20th July 1935, a judgment against the Respondents on a bond on the Estate. On the 31st July 1935 they obtained an order to sell the mortgaged property to become effective on the 31st July 1936. The Respondents endeavoured to raise money from the State Mortgage Bank p. 36, l. 15. p. 36, l. 25. p. 36, l. 31.

but were unable to raise sufficient for their needs: their credit was exhausted and they were so desperately in need of money that they were prepared to borrow money on any terms.

p. 36, l. 35. In June 1936 the Respondents were introduced to the Appellant, who is a money-lender. The Appellant, after inspecting the Estate and p. 37, l. 25. having the title examined, first said that he would advance money without p. 54, l. 30. interest on the security of the rubber coupons receivable from the Rubber Controller on which he would receive a rebate of 6 cents per pound. The p. 54, l. 40. Respondents agreed to these terms. Subsequently, however, the Appellant alleged that he had no money available and that he would himself have to borrow and consequently that the Respondents would have to pay, p. 54, l. 44. in addition to the rebate, 12 per cent. interest. The Respondents, under pressure, agreed to these terms.

4. In order to give effect to the agreement reached between the Appellant and the Respondents three Deeds and an Agreement were Exhibit P.2, p. 98. drawn up all dated 11th July 1936. First there was a Mortgage Bond No. 1624 securing a loan of Rs.46,000 on the Estate with interest at 12 per cent. per annum. Second there was another deed No. 1625 not Exhibit P.3, p. 105. produced at the trial. Third there was a deed No. 1626 by which the Respondents leased the mortgaged property to the Appellant, the sum p. 38, ll. 4, 20. of Rs.46,000 being expressed as rent. As originally drafted the deed p. 55, l. 30. No. 1626 provided for a lease of 30 months from the 1st August 1936, but at the last moment, just before execution, the Appellant once again increased his demands and altered the term to thirty-three months. The Respondents were obliged to agree. Under the terms of the Lease the Appellant was to be in possession and had the right to receive from the Rubber Controller the rubber coupons in respect of the property until the expiry of the thirty-three months or for a further period until the Appellant recovered the full amount of the advance. If at the end of the thirty-three months the coupons did not amount to the sum advanced, the Appellant might remain in possession until such time as he could Exhibit P.4, p. 109. obtain sufficient coupons to make good the deficiency. By the Agreement the Appellant agreed to sell the rubber coupons at the market price and after payment of brokerage and a commission of 6 cents per pound to himself to credit the balance to the Respondents' account in reduction of the amount owing on the Bond No. 1624. If the Bond No. 1624 was paid off before the expiry of the thirty-three months, the Appellant was nevertheless to be entitled to the benefit of the Lease for the full thirty-three months.

p. 11, ll. 3, 38–41. 5. In 1938 the Respondents were again in difficulty. Although the p. 12, l. 18. amount borrowed on the Bond No. 1624 had been more than repaid, the p. 39, l. 18. Appellant refused to cancel the Lease and the Respondents had accordingly p. 11, l. 18. again to have recourse to the Appellant. On the 19th February 1938 the Exhibits P.9, p. 131 P.10, p. 139. Respondents executed a further Bond (No. 4664), a further lease (No. 4666) P.11, p. 146. and an Agreement. The Bond was for a sum of Rs.52,000 with interest at 12 per cent. Of this sum the Appellant deducted Rs.7,002.47 as the p. 11, l. 44. balance claimed to be due on the Bond No. 1624, Rs.19,000 as the amount p. 12, l. 1. due on a Bond No. 423 of the 24th July 1936 in favour of a third party, Rs.10,158.65 on other accounts and paid the balance of Rs.15,838.88 to

the Respondents. The Lease was in similar form to the 1936 Lease except that the term provided for was five years. By the Agreement the Appellant received similar rights with regard to the coupons to those conferred by the 1936 Agreement, but it was provided that after the 31st July 1939 he should not receive more than 347,000 coupon pounds if the sum of Rs.52,000 and interest should be fully paid. p. 11, l. 22. p. 11, l. 28.

6. On the 9th March 1940 the Respondents, after raising Rs. 60,000 elsewhere paid off the Appellant's debt. The amount claimed by the Appellant to be due and which the Respondents paid was Rs.28,202.35. p. 12, l. 32. p. 40, l. 18. p. 12, l. 36.

7. On the 1st July 1940 the Respondents filed their Action claiming relief under the Money Lending Ordinance, 1918 (Revised Statutes c. 67). The Respondents claimed :— p. 10.

(A) that on the Bond No. 1624, even on the basis that the Appellant was entitled to both interest at 12 per cent. and to the commission of 6 per cent., the Appellant had received from the sale of the rubber coupons Rs.4,069.23 more than the amount he was entitled to receive and that, being in a position to dominate the Respondents' will, he had wrongfully retained the sum of Rs.7,002.47 out of the money advanced by him in 1938. On this account the Appellant owed the Respondents Rs.11.071.70 ; p. 12, ll. 20–27. p. 12, l. 28. p. 13, l. 30.

(B) that on the Bond No. 4664, on the same basis, the Appellant had received from the sale of the rubber coupons only Rs.2,047.75 short of the full amount which he was entitled to receive, whereas he had, in 1940, exacted the sum of Rs.28,202.35 as the price of discharge of the Bond. On this account the Appellant owed the Respondents Rs.26,154.60. p. 12, l. 42. p. 13, ll. 4–7. p. 13, l. 31.

The Respondents claimed that both transactions were harsh and unconscionable and procured by undue influence, and that they ought to be re-opened. p. 13, l. 13. p. 13, ll. 20–23.

8. The trial came on before R. F. Dias, J., as District Judge on the 28th March 1941. By agreement between the parties 23 issues (largely of fact) were stated on which the finding of the Judge was required. A further issue (No. 19) was added by the direction of the Judge on the Appellant's request, although the Respondents objected to it as not having been pleaded by the Appellant. This issue was as follows :— p. 17, l. 12. p. 18, l. 36. p. 18, l. 41.

(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 ? p. 18, l. 20.

9. The issue No. 19 having been added, it was agreed that it should be decided as a preliminary point of law, and argument was accordingly addressed by Counsel. The argument of the Appellant, which was in the nature of a demurrer, was based upon the terms of the Money Lending Ordinance, and particularly of Section 2 (2).

10. The relevant provisions of the Ordinance are, for convenience of reference, set out in full :—

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 recognised principle of law or equity the Court would give relief ;

* * * * *

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 [by a money-lender] 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, [where proceedings are taken for the recovery of money lent,] 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.

* * * * *

(5) Nothing in this section shall be construed as derogating from the existing powers or jurisdiction of any court.

3. In the exercise of its powers under the last preceding Section the Court shall have regard to the lapse of time, the conduct of the party praying for relief, and any other equitable considerations that the justice of the case may require to be taken into account, but the provisions of the Prescription Ordinance shall not apply to any claim for relief under the said Section : Provided that in any case in which any amount claimed at any time to be due has been settled in account, no repayment or re-adjustment of the

account shall be ordered in respect of any sum paid or allowed in account at a date exceeding six years before the date of the application to the Court for relief.

* * * * *

6. (1) A transaction is said to be induced by " undue influence," within the meaning of Section 2 of this Ordinance, where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other, and uses that position to obtain an unfair advantage over the other.

(2) Where a person who is in a position to dominate the will of another enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

11. Section 2 (1) is substantially identical with Section 1 (1) of the English Money Lenders Act, 1900 (63 & 64 Vic. c. 51) and Section 2 (2) is in identical terms to Section 1 (2) of the Act, apart from the words printed above in brackets, which appear in the Act but not in the Ordinance.

12. The argument for the Appellant was that no action lay under Section 2 (2) to re-open a transaction once that transaction had been closed, that this sub-section presupposes an existing liability of a borrower, and that the only proceedings which can be brought under that section are *quia timet* proceedings when a borrower, apprehensive of being sued, takes the initiative in applying for relief. p. 19, l. 31. p. 22, l. 32.

13. On the 4th August 1941 the learned trial Judge delivered a considered judgment on the preliminary issue No. 19. After pointing out that Section 2 of the Ordinance had been substantially taken over from the English Act, and stating that if the matter had been at large he would have been inclined to accede to the Appellant's argument, he proceeded to an examination of the English case of *Saunders* v. *Newbold*, 1905 1 Ch. 260, 1906 A.C. 461. That case was an action brought by a moneylender in which the borrower asked for relief under Section 1 (1) of the Act. In addition, at the trial, Kekewich J. allowed the defendant to re-open a previous transaction which had been closed. The Court of Appeal, while upholding the claim for relief under Section 1 (1), refused to allow the defendant to re-open the previous transaction on the ground that it was a separate transaction which could only be re-opened by a counter-claim or a separate action. The Court, however, examined the legal basis for a claim to re-open a closed transaction under Section 1 (2), expressed the opinion that such a claim would lie, and by their order expressly preserved the right of the defendant to bring an action to re-open the previous transaction if so advised. After an exhaustive discussion of the judgment of the Court of Appeal, the learned Judge came to the conclusion that although the observations of the Court of Appeal were strictly *obiter dicta* (since the Court had decided that it could not entertain a claim under Sub-section (2) in the absence of pleading) yet, since the p. 26, l. 6.

Court of Appeal had in fact considered the sub-section, he ought to follow the interpretation which they had placed upon it. He quoted a passage from the Judgment of Vaughan Williams L.J. which reads as follows :—

> " It is true that Section 1 (2) provides that any Court in which proceedings *might be taken* by a moneylender may, at the instance of the borrower or surety or other person liable exercise the like powers as may be exercised in an action by a moneylender for the recovery of money lent (i.e. under Sub-section (1)) ; and in our judgment this sub-section (i.e. Sub-section (2)) applies *even to a case where the loan has been repaid.* This limitation is not a limitation to cases in which the moneylender has an unsatisfied cause of action, or there is someone liable to be sued ; the limitation is only to a Court in which proceedings might be taken by a moneylender for the recovery of the money lent. Given such a Court—i.e. given a Court having jurisdiction—that Court may exercise *at the instance of the borrower* the powers given by Section 1 (1). Such powers clearly govern a power to order *repayment by the moneylender.*"

and referred to the construction placed by Vaughan Williams L.J. on the word " liable." This word, he held, could not be read as meaning " liable in fact " :—

> " So to read it would be to exclude from the powers of the Court given under Sub-section (2), the power which the Court clearly has under Sub-section (1) to order repayment by a moneylender."

Following this expression of opinion the learned Judge rejected the Appellant's argument and held that he had jurisdiction to entertain the action.

p. 32, No. 6. p. 34, No. 7.

14. The Appellant appealed against the judgment of the trial Judge on the ground that it was wrong in law. The appeal came on before the Supreme Court (Sir John C. Howard, K.C., C.J., Hearne and de Kretser, JJ.) on the 29th June 1942 and was dismissed and the judgment of the trial Judge was affirmed. The Appellant did not apply for leave to appeal to His Majesty in Council against the judgment of the Supreme Court.

15. The action thereupon proceeded upon the facts, and was tried by R. F. Dias, J., on the 9th March 1943 and following days. The Male Respondent gave evidence and witnesses were called on behalf of the Respondents. The Appellant did not give evidence and relied only on documentary evidence. On the 9th April 1943 the learned trial Judge gave judgment in favour of the Respondents and directed that an account be taken of the transactions between the Appellant and the Respondents.

p. 63, No. 10.

16. The learned trial Judge in his judgment made the following findings of fact :—

p. 64, l. 2. p. 69, l. 32.

(A) That the Respondents were, in July 1936, indebted to sundry creditors and judgment debtors.

p. 69, l. 33.

(B) That the Respondents were, in February 1938, in acute financial distress and were obliged to obtain from the Appellant a further loan.

(C) That the transaction of 1936 represented by the Bond, the Lease, and the Agreement of 11th July 1936 was a single money lending transaction and similarly of the transaction of 1938. p. 69, ll. 34–5.

(D) That the Appellant wrongfully claimed that Rs.28,202.35 was due to him on Bond No. 4664 on the 26th February 1940 and wrongfully refused to discharge the Bonds numbered 1624 and 4664 unless that sum was paid. p. 69, ll. 37–8.

(E) That the transactions referred to in (C) were harsh and unconscionable. p. 69, l. 39.

(F) That the said transactions were induced by the undue influence of the Appellant. p. 69, l. 31.

17. On the issue whether the transactions were harsh and unconscionable the learned Judge said :—

" The defendant knew of the necessity of the plaintiffs. They had to find a large sum of money by a certain date. The security of a mortgage at 12 per cent. was ample security for the money that was lent. The defendant having seen the land, realised that he had an opportunity of squeezing the plaintiffs so as to give him greater advantages. It seems to me that both the transactions of 1936 and 1938 were harsh and unconscionable and substantially unfair, and that the total return to be received by the defendant having regard to the sufficiency of the mortgage at 12 per cent. was excessive. I do not think 12 per cent. interest is excessive, but the commission of 6 cents per coupon pound cannot stand and must be repaid. Counsel for the defendant has stated that if a conversion is made into a rate per centum per annum, it would come to 24 per cent. for the full period and 34 per cent. for a shorter period." p. 68, l. 43.

And on the issue of undue influence :—

" The plaintiffs, however, attack the transactions on a further ground. They say that these transactions have been induced by undue influence under Section 2 (1) (*b*). ' Undue influence ' has been defined for the purpose of this Section. I think the plaintiffs have proved that the relations subsisting between them were such that the defendant was in a position to dominate the will of the plaintiffs, and that he did in fact use that position to obtain an unfair advantage, not once but twice. It is only necessary to call to mind the manner in which the terms in 1936 were increased by degrees until even at the time when the deeds were to be executed, the defendant kept on increasing his demands. Then in 1938 when the plaintiffs wanted to pay and settle him in February, 1938, the defendant took advantage of the situation to put them off on the ground that P3 was still current, and in effect compelled them to borrow from him again under P9, P10, P11." p. 69, l. 9.

18. The Appellant appealed to the Supreme Court against the judgment of the learned trial Judge on the grounds (*inter alia*) that the Judgment was contrary to the weight of evidence, that the finding that p. 70, No. 11.

the Appellant exercised undue influence was wrong and not justified by the evidence, and that the Judge was wrong in finding that the transactions were harsh and unconscionable.

p. 75, No. 13. 19. On the 25th July 1944 the appeal came on before the Supreme Court (Sir John C. Howard, K.C., C.J., and Keuneman, J.) and was dismissed and the judgment of the learned trial Judge affirmed.

p. 76, No. 14. 20. The Appellant on the 23rd August 1944 applied for conditional leave to appeal to His Majesty in Council against the judgment of the Supreme Court, but on the 12th September 1944 his petition was dismissed p. 77, No. 15. p. 78, No. 16. by the Supreme Court (Sir John C. Howard, C.J., and Wijeyewardene, J.) on the grounds that the Order appealed from was not a final Order.

pp. 80–1. 21. The action was then proceeded with in the District Court on the account directed. The Appellant filed a Statement of Accounts showing that Rs.26,131.42 was due from the Appellant to the Respondents. The Respondents filed a Statement of Accounts and also a Statement of p. 86. Objections to the Appellant's Statement of Accounts showing that Rs.33,095.56 was due to the Respondents. The case on consideration of these Statements came on before W. Sansoni, J., in the District Court p. 87. on the 25th March 1946. The learned Judge found that the Statements filed by the Respondents were not challenged and that the only issue was whether the Appellant was entitled to interest on the whole principal amounts referred to in the Bonds (Rs.46,000 on the Bond No. 1624 of 1936, and Rs.52,000 on the Bond No. 4664 of 1938) as from the date of the Bonds, or only on the actual amounts lent as from the dates on which they were respectively lent. After referring to the method actually adopted by the parties the learned Judge found in favour of the latter p. 88, No. 23. method. On this basis he gave judgment in favour of the Respondents for Rs.33,095.56.

22. The Appellant appealed against the judgment of the District p. 89, No. 24. Court on the ground that interest ought to have been paid to the Appellant on the full amounts stated in the Bonds. The appeal came on before the Supreme Court (Sir John C. Howard, K.C., C.J., and Sir F. J. Soertsz, p. 91, No. 25. K.C., J.) on the 18th February 1948 and was dismissed.

p. 93, No. 27. 23. On the 11th May 1948 the Appellant obtained conditional leave to appeal to His Majesty in Council, and, having given security, was p. 95, No. 29. granted final leave on the 2nd July 1948.

24. The Respondents submit that the only question to be considered on this appeal is the question of law stated in the issue No. 19, namely whether there was jurisdiction to re-open the money-lending transactions after payment had been made and the transactions closed. On the issues of fact there was ample evidence to support the findings of the trial Judges, and their findings were unanimously concurred in by the Supreme Court.

25. On the question of law the issue is whether the observations of the Court of Appeal in *Saunders* v. *Newbold* as to the meaning and application of Section 1 (2) of the Act ought to be applied to a case arising

under Section 2 (2) of the Ordinance. The Ordinance was enacted in the year 1918, i.e. thirteen years after the relevant provision of the English Statute had been authoritatively interpreted by the Court of Appeal. The Respondents' first submission is that when the legislature of Ceylon decided to introduce this portion of English law into the law of the Island, it must be presumed to have intended to bring with it the interpretation already attached to one of its provisions. That interpretation can accordingly only be set aside by the legislature and must be followed by the Courts. Secondly, if it should be necessary to do so, the Respondents would submit, with respect, that the observations of the Court of Appeal were correct. It is true that no claim under Section 2 (2) of the Money Lenders Act, 1900, was properly before the Court, but it was necessary for the Court, in order to do justice between the parties, to state precisely what remedies were available and under what procedure. The precise point arising in the present case was fully argued and a considered statement of the opinion of the Court of Appeal was made. The House of Lords (1906 A.C. 461, *sub nomine Samuel* v. *Newbold*) did not in terms consider the Section but expressed no dissent from anything in the judgments of the Court of Appeal, and Lord Loreburn, L.C. (p. 467) expressly said :—

> " I also agree with the Court of Appeal that the order is to be without prejudice to the right of the defendant to bring any action in respect of the transactions of July 1903 "

thereby impliedly concurring with the view which the Court of Appeal took of Section 1 (2) of the Act. The view which the Court of Appeal took of the law has never in the subsequent 44 years so far as the Respondents are aware, been criticised or disregarded.

26. The Respondents further submit that any other interpretation of the Section would narrow the scope of the Act beyond its manifest purpose and intention. They respectfully draw attention to the following passage from the judgment of Vaughan Williams, L.J. :—

> " Moreover, one must not forget that the Money-lenders Act, 1900, is an amending Act, amplifying the powers heretofore exercised by the Court of Chancery ; and it is clear that the Court of Chancery did not allow the fact of repayment to prevent the re-opening of a transaction entered into by a borrower whom the Court deemed from the circumstances of the case unable to protect himself."

In fact Courts of Equity before the Act was passed frequently re-opened on a borrower's action transactions which were closed.

27. The Respondents therefore submit that the judgments of the trial Judges and of the Supreme Court were right and ought to be affirmed for the following amongst other

REASONS

(1) BECAUSE there was jurisdiction under Section 2 (2) of the Money-lenders Ordinance to re-open the transactions of the 11th July 1936 and the 19th February 1938 notwithstanding that they were closed.

(2) BECAUSE there was ample evidence on which the Judge could find that the return to be received by the creditor was excessive and that the transactions were harsh and unconscionable.

(3) BECAUSE there was ample evidence on which the Judge could find that the transactions were induced by undue influence as defined by Section 6 of the Ordinance.

(4) BECAUSE the findings of the Judge on the evidence was correct.

(5) BECAUSE the Judge was right in holding that the Appellant was entitled to interest only upon sums actually advanced and not upon the nominal amount of the Bonds.

(6) BECAUSE the judgments of the trial Judges and of the Supreme Court were right and ought to be affirmed.

R. O. WILBERFORCE.

No. 33 of 1949.

In the Privy Council.

ON APPEAL

from the Supreme Court of Ceylon.

BETWEEN

M. R. M. M. M. N. NADARAJAN CHETTIAR - - *Appellant*

AND

CHANDRASEKERA HERAT MUDIYANSELAGE RAN MENIKA WIJEYEWARDENE TENNEKOON WALAUWA MAHATMEE, and DON HENRY WIJEYEWARDENE TENNEKOON BANDARA MAHATMAYA *Respondents.*

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