APPELLATE CIVIL.

Before Holmwood and Chapman JJ.

1914

July 27.

ABDUL MAJEED

v.

KHIRODE CHANDRA PAL.*

Interest—Contract Act (IX of 1872) ss. 16, 74—Undue influence, presumption of—Penalty—Excessive and usurious interest—Duty of the Court.

Where there is ample security, the exaction of excessive and usurious interest in itself raises a presumption of undue influence which it requires very little evidence to substantiate. The attempt to conceal the real rate of interest, by describing it as one pice in the rupee per mensem or as in the present case Rs. 5 per mensem, is evidence of an intention to get the better of the debtor. The law lays down that there must be a footing of complete equality between debtor and creditor and they must be, so to speak, at arm's length to make a bargain, which is in itself harsh and unconscionable, enforcible at law.

Carringtons, Ld. v. *Smith* (1), *In re a Debtor* (2) referred to.

Where there is ample security, an excessive rate of interest has been held to be anything over ten per cent. Where there is no security, no rate of interest can be considered excessive. There can be no standard rate on personal loans and where the parties are reasonably on terms of equality a Judge cannot do better than adopt what they themselves have agreed on, though, of course, when that is not the case he has to judge what is reasonable, as best he can and under all the circumstances.

Where the contract is for a temporary accommodation, the stipulation that interest is to run at Rs. 5 a month is one which necessitates the payment of interest not at 60 per cent. per annum, but at Rs. 5 in each month and a stipulation that in default of 12 months' instalments of interest, compound interest would begin to run is in the nature of a penalty. However

* Appeal from Appellate Decree, No. 533 of 1913, against the decree of R. N. Dutt, District Judge of Noakhali, dated Sept. 19, 1912, confirming the decree of Ambika Charan Mozumdar, officiating Subordinate Judge of Noakhali, dated Nov. 30, 1912.

(1) [1906] 1 K. B. 79. (2) [1903] 1 K. B. 705

technical this may be, it is the duty of the Courts in India to enforce the letter of the law against obviously harsh and unconscionable bargains of this nature.

The exploitation of the necessitous, of the careless and inexperienced is a trade to be extirpated in the interest of the whole community as contrary to individual morality, as well as to public policy.

Muthu Krishna Iyer v. *Sankaralingam Pillai*(1), *Samuel* v. *Newbold*(2): *Kesavulu Naidu* v. *Arithulai Ammal* (3) referred to.

SECOND Appeal by Abdul Majeed and others, the defendants.

This appeal arises out of a suit to recover Rs. 1,300—being the principal (Rs. 80) and interest due on a mortgage bond alleged to have been executed by the principal defendants (1, 2, 3) in favour of the plaintiffs on the 1st of Jaishta 1312. According to the terms of the bond, the defendants were to pay interest for the said sum at the rate of Rs. 5 per cent. per month; to pay up the entire money, principal and interest, within the month of Ashar of the said year; to pay the interest for each year within the said year; otherwise the interest on arrears was to be treated as principal carrying interest thereon at the aforesaid rate of Rs. 5 per cent. per month as compound interest. The bond was duly registered.

The defendant No. 4 was a *pro formâ* defendant. The mortgaged properties Nos. 1, 2, 3, and 4 were under a previous mortgage to him and he had obtained a decree for a heavy sum. The plaintiff, therefore, put in a separate prayer for the purpose of attaching the other immovable properties of the principal defendants before judgment.

The defendants admitted the loan and the execution of the bond, but they submitted that they were illiterate persons to whom the bond was never read over or

(1) (1912) I. L. R. 36 Mad. 229. (2) [1906] A.C. 461.
(3) (1912) I. L. R. 36 Mad. 533.

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explained. They denied having made any contract for payment of interest on interest.

The circumstances under which the money was borrowed were these. The three defendants had bid successfully at an auction sale and had deposited the earnest money. But they were in urgent need of Rs. 80 to complete the sale. They, therefore, applied to defendant No. 4 for a loan of Rs. 80 for one month. The defendant No. 4, representing himself as their patron, got a bond written out by his son Raj Kumar in the plaintiff's name, at an interest of Rs. 5 per cent. per month, for a term of one month and gave the required loan.

The stipulation for payment of interest on interest was inserted without their knowledge or consent and therefore the defendants challenged the plaintiff's claim for interest as excessive, illegal and fraudulent. But the previous malik of the auction-purchased land having deposited money, the auction purchase of the defendants became null and void. Hence the defendant No. 1, on withdrawing the money from the Court and with the object of taking back the bond, on satisfaction of the entire claim by making payment of the entire sum of Rs. 88 (inclusive of Rs. 8 as interest), brought the plaintiff to the house of Harish Chandra Pal, and in the month of Sraban 1312 offered payment of the aforesaid sum of Rs. 88 to the plaintiff in the presence of Harish Chandra Pal and wanted back the bond. Thereupon the plaintiff agreed to take interest at the rate of Rs. 2-8 per cent. from the month of Sraban 1312 in place of Rs. 5 per cent. per month, and on accepting Rs. 8, on account of interest, requested the defendants to re-pay the sum of Rs. 80 at an interest of 2-8 per cent. per month. Thus the defendants, induced by the plaintiff and Harish Chandra Pal, to accept the aforesaid arrangement, brought back the

principal sum of Rs. 80 without discharging the debt.

The defendants, therefore, submitted that since Sraban 1312, the plaintiff was not entitled to more than 2-8 annas per cent. per month.

The defendants submitted that it was a very hard and unconscionable bargain.

The Subordinate Judge of Noakhali decreed the suit with costs. The District Judge dismissed the appeal. Hence this Second Appeal.

Babu Ramesh Chandra Sen, for the appellants, contended that the bargain was a hard and unconscionable one. The defendants were illiterate persons and the bond was never read over or explained to them. Even assuming that defendant No. 1 was quite capable of taking care of himself, the Appellate Court has omitted to consider the case of defendants Nos. 2 and 3 and has not recorded any findings whether they understood the contents of the bond or whether it was read over to them. The security given was a very excessive one, and that in itself raises a presumption of undue influence. Apart from this presumption, the bond itself shows that it was a hard and an unconscionable transaction and that the plaintiff, a professional money-lender, took advantage of the position of the defendants. They were badly in want of money at the time. They required it to complete their purchase at an auction sale. Further, it was the case of the defendants that they actually wanted to pay off their entire debt in Sraban 1312, but they were persuaded by the plaintiff and Harish Chandra Pal not to do so, the plaintiff promising to reduce the interest from Rs. 5 to 2½ per cent. per month. The lower Appellate Court has erred in holding that the defendant could not prove the agreement of Sraban

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1312. It was a fresh contract for payment of interest at 2½ per cent. The agreement to pay compound interest on interest due was in the nature of a penalty, and therefore unenforceable: *Kali Prosonno Bhattacharjee* v. *Protap Singh Pathar* (1), *Dhanipal Das* v. *Maneshar Bakhsh Singh* (2), *Muneshar Bakhsh Singh* v. *Shadi Lall* (3), *Miaian Patari* v. *Abdul Jabbar* (4).

Babu Gunada Charan Sen, for the respondent. The contract was made by the parties with their eyes open. The Court will not make a contract for them. If they chose to pay a heavy rate of interest, it was their lookout. There is no evidence to show that any fraud was practised on the defendants. It has been found by both the Courts that the defendant No. 1 was a very intelligent person who could not easily be deceived or over-reached. The Courts below have rejected the story of the reduction of interest. The bond is not a hard and unconscionable bargain. Despite the fact that the defendants had the opportunity of paying off their debt, they did not do so. Upon the facts, both the Courts have found against the defendants. This is not a case for relief upon the grounds of the bargain being hard and unconscionable: *Sundar Koer* v. *Rai Sham Krishen* (5).

Cur. adv. vult.

HOLMWOOD AND CHAPMAN JJ. This appeal arises out of a suit brought by the plaintiff to recover Rs. 1,300, being principal Rs. 80 and interest Rs. 1,220 on a mortgage bond executed by three defendants on 1st Jaishta 1312.

(1) (1912) 17 C. L. J. 221.
(2) (1906) I. L. R. 28 All. 570.
(3) (1909) 13 C. W. N. 1069.
(4) (1906) 10 C. W. N. 1020.
(5) (1906) I. L. R. 34 Calc. 150.

The transaction was an unusual one, and the facts found require to be carefully stated as well as the circumstances which are admitted in connection with the giving of the mortgage bond and recited in the bond itself.

It appears that Abdul Majeed, defendant No. 1, mortgaged 6 annas of a raiyati jote in which his brother, defendant No. 2, was also interested, while defendant No. 3, a relative, mortgaged three six-annas shares of jotes and an eight-annas share of a howla belonging exclusively to him.

The three defendants had bid successfully at a sale of the land of one Nagorbashi Kundu and had deposited the earnest money. They were in immediate need of Rs. 80 to complete the purchase and applied to the former creditor of defendant No. 3, one Harish Chandra Pal, who had a mortgage on properties 1 to 4, on which he has, according to the plaint, recently got a decree for a heavy claim, and by him they were introduced to the plaintiff, another money-lender. The Rs. 80 was obviously only required as a temporary accommodation, and the security given was worth over Rs. 3,000 for the property No. 5 was sold under Harish Chandra Pal's decree for Rs. 650, and there are three similar jotes and a larger taluki interest also mortgaged, yet interest at 60 per cent. with compound interest was agreed to. The defendants' story is that the land they had purchased was released from sale by deposit of the decretal money by the original owner, and they therefore tendered the principal Rs. 80 and Rs. 8 interest to the plaintiff, who took the Rs. 8 and persuaded defendant No. 1 to let the principal sum stand over on promising to forego compound interest and to reduce the simple interest by half. This story has been disbelieved by the lower Courts as far as the payment of Rs. 8 and

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the oral agreement is concerned, but no finding has been come to as to the probability of the defendants having desired to pay off the debt when they had the money.

The lower Court has also held that no fraud was practised on the defendants, because defendant No. 1 is a very clever man and able to take care of himself and entered into the bond with his eyes open. But here the lower Court has fallen into the error of not considering the position of defendant No. 3, who had a far larger interest in the property mortgaged than anybody else and who is an ordinary cultivator.

Every presumption must be made in his favour, and the lower Court appears to have erred in not applying the doctrines of undue influence and penalty very strictly to his case. The trend of modern decisions is to hold that the Courts have ample powers under the amended Contract Act to go behind hard and unconscionable bargains on the ground that where there is ample security the exaction of excessive and usurious interest in itself raises a presumption of undue influence which it requires very little evidence to substantiate. Further, it has been held that the attempt to conceal the real rate of interest by describing it as 1 pice in the rupee per mensem, or as in the present case Rs. 5 per mensem, is evidence of an intention to get the better of the debtor, and the law seems to be that there must be a footing of complete equality between debtor and creditor and they must be, so to speak, at arm's length to make a bargain which is in itself harsh and unconscionable, enforceable at law. We may refer to the case of *Carringtons, Limited* v. *Smith* (1) and the discussion at page 87 of the meaning of the terms "harsh and unconscionable." It is pointed out that in *In re A*

(1) [1906] 1 K. B. 79.

Debtor (1) the M. R. and Cozens Hardy L. J. each say that under the section of the Money Lenders Act, which deals with harsh and unconscionable bargains, the interest charged might be so excessive as of itself to render the bargain harsh and unconscionable. This does not mean that if only it is shown that a high rate of interest has been charged by a money-lender a Judge has complete power at his discretion to make a new contract for the parties. But it may mean that a very high rate of interest might raise a presumption that that rate had been extorted by conduct harsh and unconscionable, or it may mean that the same circumstances which showed that the rate was excessive might and often would show that the transaction was harsh and unconscionable. At the end of the judgment of Cozens Hardy L. J., he expressly says that the Court must have regard to all the circumstances of the case, and this, says Channell J., is the proposition upon which the whole matter turns.

Now, under the amended section 16 of the Contract Act this question of a harsh and unconscionable bargain can only be considered in reference to undue influence—where there is ample security an excessive rate of interest has been held to be anything over ten per cent., where there is no security no rate of interest can be considered excessive. There can be no standard rate on personal loans, and where the parties are reasonably on terms of equality a Judge cannot do better than adopt what they themselves have agreed on, though of course when that is not the case he has to adjudge what is reasonable as best he can under all the circumstances.

Applying these principles to section 16 and to the case before us, we think that a presumption of undue influence could arise from the fact that a security of

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over Rs. 3,000 with a mortgage already on it for a much smaller amount was given for a loan of Rs. 80, and although on the findings of fact of the lower Courts such a presumption would in no way help defendant No. 1 nor possibly his brother defendant No. 2, who is his co-sharer in property No. 5, it certainly applies in full force to defendant No. 3, against whom there is finding that he knew what he was doing and who gave the greater part of the security without any idea that 60 per cent. compound interest would be running against him for six years. We must take it from the terms of the bond that the intention of the parties was to pay Rs. 5 a month interest for a few months until the small principal of Rs. 80 was paid off. And we cannot believe that no attempt was made by defendant No. 3 to pay this money, and there is no finding whatever against him in either of the judgments.

Further, the contract being for a temporary accommodation, the stipulation that interest was to run at Rs. 5 a month was one which necessitated the payment of interest not at 60 per cent. per annum but at Rs. 5 in each month, and a stipulation that in default of 12 months' instalments of interest, compound interest would begin to run at 60 per cent. is in the nature of a penalty.

However technical this may be, we think it is the duty of the Courts in India to enforce the letter of the law against obviously harsh and unconscionable bargains of this nature. The contract failing therefore as regards defendant No. 3 and being a joint mortgage, it equally fails against the other defendants.

Our view upon both these points has recently been propounded by the Madras High Court. In the case of *Muthu Krishna Iyer* v. *Sankaralingam Pillai* (1),

(1) (1912) I. L. R. 36 Mad. 229.

the question of penalty was dealt with and the remarks of Sadasiva Iyer J. in making the reference to the Full Bench have our entire concurrence. If we may respectfully say so, it is a masterly exposition of the intentions of the Legislature in India and a complete answer to the somewhat timid reluctance of the Courts in the earlier decisions to take a more extended view of their powers under section 74 of the Contract Act. We entirely agree that "the exploitation of the necessitous, of the careless and inexperienced is a trade to be extirpated in the interest of the whole community as contrary to individual morality as well as to public policy."

At the risk of repetition, we cite the words of Lord Loreburn L. C. in *Samuel* v. *Newbold* (1). "In my opinion this contention cannot be maintained, nor ought a Court of Law to be alert in placing a restricted construction upon the language of a remedial Act. The section means exactly what it says, namely, that if there is evidence which satisfies the Court that the transaction is harsh and unconscionable, using those words in a plain and not in any way technical sense, the Court may re-open it, provided, of course, that the case meets the other condition required. These are only illustrations, and, as in the case of fraud, it is neither practicable nor expedient to attempt any exhaustive definition. What the Court has to do in such circumstances is, if satisfied that the interest or charges are excessive, to see whether in truth and fact and according to its sense of justice the transaction was harsh and unconscionable. We are asked to say that an excessive rate of interest could not be of itself evidence that it was so. I do not accept that view. Excess of interest or charges may of itself be such evidence, and particularly if it be unexplained. If no

(1) [1906] A. C. 461.

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justification be established, the presumption hardens into a certainty."

Now, in the case before us, no explanation whatever is offered of the harsh and unconscionable interest charged in a case where the fullest security covering the loan forty times over was given, and no explanation is given why the money-lender whom the defendants apparently trusted handed them over to another shark who was able to ruin them entirely. It was the opinion of the Full Bench that the amendments in the Indian Law of Contract went further in the direction of relief against harsh and unconscionable bargains than those of the English Money Lenders Act, and that therefore the *dicta* of English Judges under that Act might be accepted; and Sadasiva Ayar J. summed up the judgment of the Full Bench by saying: "I do not intend to go further than I have done in my reference order into all the English and Indian cases in which learned Judges have, by the use of refined subtle language and the examination of variously worded tests and principles, tried to persuade themselves that they were acting on any other principles in giving relief against *primâ facie* unconsionable bargains except the one intelligible principle that the provision relieved against was unconscionable in the view of ordinary men of the world possessing the usual quantum of common sense."

Having found that there is technically a penalty in the bond before us, we propose to go behind the contract as to interest and to refuse compound interest altogether.

But we would go further in reference to section 16, which was dealt with in the case of *Kesavulu Naidu* v. *Arithulai Ammal* (1).

(1) (1912) I. L. R. 36 Mad. 533.

The learned Chief Justice points out that the Judge in the Court of Appeal below found against fraud as in this case and does not find that there was undue influence, but he assumes for the purposes of the appeal before him, as we must assume in this appeal, that it is open to the High Court to deal with the case as if there had been a plea of undue influence raised. In the end, the learned Judges held that the presumption arising from the unconscionable nature of the bargain for 60 per cent. interest had been rebutted and gave the plaintiff a decree; but the principle that such a presumption would arise was upheld, and on the facts found in this case we cannot say that it has been rebutted.

The parties were not at arm's length. The defendants needed the money on the spot—their own moneylender took advantage of them and made them over to a confederate, who by representing that the loan was a temporary one at 5 per cent. per mensem, was enabled to pile up 60 per cent. compound interest by not asking for payment. Had it been open to us to go into the facts, we should probably have been able to find that only Rs. 88 was due having been tendered, but we are precluded from doing this in second appeal. We can only find that having regard to the very large security given, to the ignorance and want of knowledge of defendant No. 3, and to the conduct of the parties, even if defendant No. 1 has no defence, it must certainly be held that defendant No. 3 did not enter into a valid contract to pay 60 per cent. compound interest. The contract being one and indivisible, we must go behind it as a whole and give reasonable interest, which we fix at 30 per cent. simple interest as that was what defendants themselves were prepared to admit. This will work out at Rs 80 principal, and interest for 7 years 6 days Rs. 168-6-5.

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There will, therefore, be a mortgage decree for Rs. 248-6-5 with costs to the plaintiff in proportion to his success. The defendants Nos. 1 and 2 will get no costs on the amount disallowed. The defendant No. 3 will get costs on the sum disallowed, in proportion to the amount of his security.

S. K. B.

CRIMINAL REVISION.

Before Jenkins C.J., and Teunon J.

1914

Sept. 9

SAROJBASHINI DEBI

v.

SRIPATI CHARAN CHOWDHRY.*

Public Nuisance—Encroachment on public pathway—Application to District Magistrate by letter—Reference of applicant by letter to Civil Court—Subsequent petition to the Subdivisional Magistrate regarding the same pathway—Issue of conditional order—Appearance of opposite party and claim of title to the path—Dropping proceedings without taking evidence—Criminal Procedure Code (Act V of 1898), ss. 133, 137.

When a Magistrate makes a conditional order under s. 133 of the Criminal Procedure Code against a party who appears and shows cause, he is bound, under s. 137, to take evidence as in a summons case. It is open to him thereafter to consider whether there is a complete answer to the case, or whether it is not a proper one for reference to the Civil Court.

ON the 29th November 1911, one Ram Lal Chowdhry and others wrote to the District Magistrate of the 24-Parganas alleging that Sripati Charan Chowdhry and others, opposite party, had encroached upon a public pathway, and praying for the removal of the encroachment. A reminder was sent to the Magistrate on the

*Criminal Revision No. 1154 of 1914, against the order of H. P. Duval, Sessions Judge of 24-Perganas, dated June 4, 1914.