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ABDUL HAMID v. ABDUL AZIZ.

MYA BU, OFFG. C.J.

learned brother's definition of this term appears to me to be the only reasonable and practicable definition of the term, and is the most consistent with what appears to have been the intention of the framers of the scheme. With these remarks I concur in my learned brother's judgment.

CRIMINAL REVISION.

Before Mr. Justice Braund.

1934

Nov. 14.

V.A.S.M. CHETTYAR FIRM AND OTHERS *v.* KING-EMPEROR.*

Pawn-broker—Business of pawn-broking—Chettyar money-lender—Isolated instance of lending money on security of a chattel—Necessity for license—Burma Municipal Act (Burma Act III of 1898 and V of 1933), ss. 142 (renumbered 195), 148 (renumbered 202).

A pawn-broker is a person who lends money upon the security of pawns with sufficient frequency or system to constitute the business of a pawn-broker. There must be a series or repetition of acts of pawning.

Kirkwood v. *Gadd*, 1910 A.C. 422—*referred to.*

A Chettyar who habitually has lent money on the security of promissory notes or of land, and who is only proved in an isolated instance to have given a loan on the security of a chattel cannot be convicted of carrying on the business of a pawn-broker within s. 142 of the Burma Municipal Act, 1898. In order to constitute a Chettyar money-lender a pawn-broker there must be sufficient evidence of system to show that he lends money on pawn to an extent sufficient to constitute the business of pawn-broking. But, having regard to the nature of a Chettyar's business, slight evidence of system may, in a proper case, be sufficient for the purpose.

King-Emperor v. *Kanappa*, 4 L.B.R. 8; *Newman* v. *Oughton*, (1911) 1 K.B. 792; *P. Chettyar* v. *Taungdwingyi Municipality*, Cr. Rev. No. 1B of 1931, H.C. Ran.—*referred to.*

P. K. Basu for the applicant.

Tun Byu (Assistant Government Advocate) for the Crown.

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* Criminal Revision Nos. 628B, 629B, 630B of 1934 from the order of the Subdivisional Magistrate of Yenangyaung in Criminal Summary Trial Nos. 56, 58, 59 of 1934.

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V.A.S.M. CHETTYAR FIRM v. KING-EMPEROR.

BRAUND, J.—These are three connected cases which have come before this Court in its capacity as a Court of Revision.

In each of the three cases the applicant is a Chettyar firm, carrying on business at Yenangyaung. There is nothing on the record to show that the normal business of any of them differs in any way from the usual business of a Chettyar firm; that is to say, the lending of money upon promissory notes and upon the security of land.

The cases are of importance to the Chettyar community as a whole, because in each of them there has been proved by the Municipality of Yenangyaung a single instance only of a loan to a member of the public upon the security of a chattel, and it is sought by the Municipality upon that ground to involve the applicants in an offence under section 148 (renumbered 202) of the Burma Municipal Act, 1898, upon the footing that they are respectively carrying on business as "pawn-brokers" contrary to the provisions of that Act, and of the municipal bye-laws made thereunder.

Section 142 (renumbered 195) of the Burma Municipal Act, 1898, empowers the Municipal Committee, from time to time at a special meeting, to make bye-laws (*inter alia*)

"(1) for rendering licenses necessary for pawn-brokers and determining by public auction or otherwise the amount to be paid for any such license and the conditions subject to which they shall be granted and may be revoked",

and section 148 (renumbered 202), which I have referred to above, provides for a fine not exceeding five hundred rupees in the case of any contravention or failure to comply with any such rule or bye-law. This is a typical instance of bureaucratic legislation.

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The rules or bye-laws made by the Yenangyaung Town Committee in pursuance of the Act purport first to define a "pawn-broker" as "every person who carries on the business of taking goods and chattels in pawn for loans of money not exceeding Rs. 250 in any one transaction, provided that nothing in these rules shall apply to persons taking goods and chattels in pawn for loans exceeding Rs. 100 when the rate of interest or other profit does not exceed Rs. 15 per cent per annum." Rule 2 provides that "no one shall carry on the business of a pawn-broker within the Yenangyaung Town limits without a license from the Committee"; and the subsequent rules provide for the terms and conditions on which licenses are to be granted.

The only point relied upon before me by the applicants is that the applicants are not "pawn-brokers", and have done nothing to render themselves "pawn-brokers", within the meaning of the Burma Municipal Act, 1898; although a number of other points were taken at the hearing before the Subdivisional Magistrate. If they are not "pawn-brokers" within the meaning of this Act, then, whatever the definition purported to be given to the word "pawn-broker" by the bye-laws, the Act and the bye-laws have *ex hypothesi* no application to the applicants.

A "pawn-broker" I conceive to be a person who "carries on the business of pawn-broking". It implies one who systematically lends money upon the security of pawns; and "carrying on business" implies, in the words of Lord Loreburn L.C. in *Kirkwood* v. *Gadd* (1) "a series or repetition of acts". I prefer the tests of "frequency" and

(1) (1910) A.C. 422.

"method" to that of "profit"; for it is possible to conceive of many cases in which a course of dealing may well amount to a "business" without the object necessarily being profit or gain. But, as was pointed out by Lord James of Hereford in the same case, it is a question of fact in each case whether a "business" is being carried on, and each case must be determined by its own special circumstances.

In each of the present cases the Municipality has attempted to prove only one isolated instance of a loan upon the security of a chattel. In two of these cases there is nothing more; but, in the third, (that of V.A.S. Muthiah Chettyar) there is a casual statement by one of the defence witnesses that "all the Chettyar firms in Yenangyaung receive articles of gold, etc., on pawn". This witness has, I understand, no connection with or knowledge of the business of the applicant firms. No authority for this statement is given and, as I have said, the prosecution itself has made no attempt to prove any systematic dealing in pawns by the three applicants. I must, I think, in each case treat the Municipality as having proved no more than the three isolated transactions, which, indeed, are admitted.

In my judgment an isolated transaction of this kind does not constitute the person concerned a "pawn-broker" any more than an isolated loan by one man to another would constitute the former a "money-lender" in any technical sense. It is true that the business of a Chettyar is that of money-lending; and that, it can be urged, the lending of money upon the security of a pawn is only one form of a money-lender's business, while the lending of money upon the security of a promissory note or of land is another. It is said that whether you

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lend money on one form of security or another makes no difference; for in each case you are carrying on the same business by a varied method. That, however, I think, is a fallacy. For, in this country, there is a perfectly well understood and recognized division between the business of a Chettyar and that of a pawn-broker. Each has a separate and distinct business, though each concerns the lending of money. A "trainer" trains race horses, while a "jockey" rides them. They are not, surely, carrying on the same business because their respective avocations both happen to concern race-horses. In my judgment, therefore, unless there can be found some systematic course of lending upon pawns or such repetition as to amount to a reasonable inference that it forms part of the particular Chettyars' money-lending business to lend on pawns I do not think that his status as a pawn-broker within the Burma Municipal Act, 1898 and the rules thereunder is established. I find considerable support for this view in the English case of *Newman* v. *Oughton* (1) and in the case in this Province of *King-Emperor* v. *Kanappa Chetty and N.A.S.O. Somasundrum Chetty* (2) and it accords with the view expressed by his Lordship Mr. Justice Dunkley in this Court in Criminal Revision No. 1B of 1931.

For these reasons, therefore, the convictions by the Subdivisional Magistrate of Yenangyaung in Criminal Summary Trials Nos. 56, 58 and 59 of 1934 must, in revision, be set aside, and the fines upon the applicants repaid.

I should add, for the benefit of the Chettyar community, that this decision goes no further than

(1) (1911) 1 K.B. 792. (2) (1906) 4 L.B.R. 8.

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to hold that, in the particular circumstances of the present cases, the status of "pawn-brokers" has not been proved by the Municipality. It must not, however, be supposed that this decision has any application to a case in which a Chettyar firm can be shown to dabble in lending on pawn to an extent sufficient to constitute a "business", and it should be further appreciated that, in view of the kindred natures of the business of a money-lender and a pawn-broker, slight evidence only might be sufficient for that purpose.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

1934

Nov. 27.

M.K.M. CHETTYAR FIRM
v.
MAUNG THAUNG AND ANOTHER.*

Insolvency—Secured creditor—Right to sue to realize security—Leave of the Court—Provincial Insolvency Act (V of 1920), s. 28 (2), (6).

A secured creditor of an insolvent is entitled, notwithstanding s. 28 (2) of the Provincial Insolvency Act, to realize the security by filing a suit or otherwise in accordance with law without obtaining the leave of Court in that behalf.

B. N. Lang v. *H. Ismailji*, I.L.R. 38 Bom. 359 ; *Bai Kashi* v. *Chunilal*, 31 B.L.R. 1199 ; *Ex parte Hirst*, 11 C.D. 278 ; *Kalachand Banerji* v. *Jaganath*, I.L.R. 54 Cal. 596 (P.C.) ; *The Official Receiver, Coimbatore* v. *P. Chetti*, I.L.R. 48 Mad. 750 ; *Ex parte Pannell*, 6 Ch.D. 335 ; *Rajendrachandra* v. *Bipinchandra*, I.L.R. 60 Cal. 1298 ; *Sant Prasad Singh* v. *Sheodut Singh*, I.L.R. 2 Pat. 724 ; *Waddel* v. *Toleman*, 9 Ch.D. 212; *White* v. *Simmons*, 6 Ch. App. 555—*referred to.*

In re Nasse, I.L.R. 7 Ran. 201—*overruled.*

Tambe for the appellant. A secured creditor of an insolvent can proceed to realize his security without the leave of the Court. S. 2 of the Provincial Insolvency Act defines the terms "creditor"

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* Special Civil Second Appeal No. 184 of 1934 from the judgment of the Assistant District Court of Mandalay in Civil Appeal No. 3 of 1934.