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Court : Mumbai

Decided On : Jan-16-1907

Reported in : (1907)9BOMLR143

Judge : Davar, J.

Appeal No. : Original Civil Suit No. 613 of 1906

Appellant : Poma Dongra

Respondent : William Gillespie

Judgement :

Davar, J.

1. The plaintiffs in this case are a firm of Marwarry money lender's. The defendant William Gillespie is described in the plaint as manager of the Money Order Department, General Post Office, Bombay.

2. The suit was heard ex parte, before me last Tuesday as a Short Cause. The plaintiff Poma Dongra, in the course of his evidence stated that on the previous Tuesday, when the suit was on board, the defendant was in Court and asked him for time to pay, that he refused to give time and the defendant left saying he would file his petition in insolvency, that the suit was subsequently O.C.J. called on but was adjourned because affidavit of service had not, 1907 then been filed.

3. In their plaint the plaintiffs state that on the 19th of July 1904 Poma they lent to the defendant Rs. 500 and the defendant executed Gillespie a promissory note promising to repay the sum with interest at- one anna per Rupee per mensem. This works out the rate of Davar J. interest at 75 per cent per annum.

4. The plaintiffs then go on to say that they, on the 20th of January 1905 advanced a further sum of Rs. 500 which the defendant by his promissory note of that date agreed to repay with interest at 5 per cent per mensem. The rate of interest on this loan is therefore 60 per cent per annum.

5. The defendant has repaid in different sums Rs. 320 and there is now due to the plaintiffs on these two promissory notes Rs. 680 for unpaid principal. At the date of the declaration of the plaint-the 25th of July 1906-a sum of Rs. 1008 is alleged to be due for interest and the plaintiffs pray for a decree for Rs. 1688 with further interest at the rates mentioned in the two promissory notes till judgment.

6. It appears from an affidavit of the plaintiff, Poma Dongra, affirm-ed on the 4th of October 1906, that the plaint was after declaration in July 1906 presented to the Prothonotary for acceptance in this Court as a Short Cause. The Prothonotary very properly directed the plaintiff's attention to the fact that the suit was within the pecuniary jurisdiction of the Small Causes Court and suggested that the plaintiffs should file their suit in that Court. In his affidavit after reciting these circumstances the first plaintiff says as follows:-

I know full well that my firm's claim was under the jurisdiction of the Small Causes Court but I say that if my firm were to file this suit in that Court it could not recover the sum at once but by instalments so I thought if the same was filed in this. Honourable Court my firm would be able to recover the sum at once.

7. He then offers to give up the costs of the suit and prays that the plaint may be accepted. Under the circumstances the Pro-thonotary admitted the plaint, on the 8th of October 1906, after having struck out from the plaint the prayer as to costs of the suit.

8. On the face of the promissory notes the rates of interest stipulated appeared to me to be so exorbitant that I refused to pass a decree in favour of the plaintiffs as prayed by them and took time to consider how far this Court, on its own motion, was entitled to interfere and alter the terms of the agreement evidenced by the two promissory notes before me.

9. It is unfortunate that the defendant has not chosen to appear and help the Court at arriving at an equitable decision. From the first plaintiff's evidence it appears, however, that the defendant is at present in much pecuniary difficulty. At the time when the first note was passed in favour of the plaintiffs he was already in the hands of Marwarrys. Poma Dongra admits that he knew that the defendant had then the firm of Goobba Vardha as his shroffs and creditors. It seems fairly clear that the defendant's credit with that firm was exhausted and he resorted to the plaintiffs for the moneys he required. The mere fact that a man in the position of the defendant borrows moneys on terms be ruinous as those in the two promissory notes is, I think, fairly conclusive evidence that he must have been at that time in sore distress. The transactions struck me as most unconscionable and I was of opinion, when I heard the case, that if I could relieve the defendant against these oppressive agreements I ought to do so. The only doubt in my mind was, 'Had I the right to alter the terms of the contracts between the parties ?'

10. I have carefully looked through the authorities and I find that the earlier cases are very conflicting as to the powers of the Court to interfere with agreements made by adults in the absence of fraud or proof that advantage was taken by a party of his fiduciary position towards the other. In the case however of *Mothoornohun Ray v. Soorendro Narain Deb* (1875) I.L.R. 1 Cal. 108, the defendant pleaded, in the first place, that he was a minor and, in the second place, that 'the transaction was unreasonable and unconscionable.' Mr. Justice Phear, who heard the case in the first instance, was of opinion 'that the transaction was a wholly unconscionable agreement and one which a Court of Equity would not enforce,' and that the claim 'should be reduced to such a sum as was actually received by the defendant from the plaintiff with interest at a reasonable rate.' The appeal in the case was heard by Chief Justice Sir Richard Garth and Mr. Justice Macpherson who referred the question of minority to a Full Bench and that

question was decided against the defendant. The Appeal Court however, concurred with Mr. Justice Phear in his finding that the transaction was unconscionable and gave to the plaintiff a decree for the amount actually advanced by him, which was less than that mentioned in the bond and gave interest at the rate of six per cent per annum instead of 30 per cent as stipulated in the bond. This case was decided in 1875.

11. Having regard, however, to the change in the law of contracts effected by Act VI of 1899, being an Act to amend the Indian Contract Act of 1872, I do not think it is necessary to discuss the earlier cases. By that Act Section 16 of the Contract Act, as it then stood, is repealed and the present Section is substituted. This Act also directs the omission of the words ' undue influence' in Section 19 and adds a fresh Section which is the present Section 19A.

12. Reading the two Sections 16 and 19 A together I have no doubt in my mind that this Court has the power to interfere and relieve a defendant against what may appear to the Court unconscionable transactions.

13. Section 16, Clause 3, of the Contract Act throws the onus of proving that a ' contract was not induced by undue influence' upon ' the person in the position to dominate the will of the other,' and the second paragraph of Section 19A of the Contract Act gives power to the Court to set aside absolutely or, if the party who is entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just. Illustration (6) to Section 19 A makes it quite clear that this Section is intended to 'give express sanction to the Courts to relieve a borrower against the oppressive terms of his contract.'

14. I have no doubt in my mind that, when the defendant executed the two promissory notes in this suit undertaking to repay the loans with interest at 75 and 60 per cent per annum, the plaintiffs were in a position to dominate his will. This appears from the face of the documents and to some extent from the evidence given by the first plaintiff. In the view I take of this case the plaintiffs are entitled to their unpaid balance of principal and interest at a reasonable rate. Sir Frederick Pollock and Mr. Mulla, in their commentary to Section 19 A of the Contract Act, say that reasonable rate has varied according to circumstances from 6 to 12 per

cent in Bengal and 20 per cent in the North-West Provinces. In Bombay unfortunately the rate at which moneys are advanced to needy or improvident borrowers has always ranged very high and our Courts have passed many decrees with interest at 24 per cent per annum and in some cases at even higher rates. It is always urged in favour of these high rates that the lender's security is merely the personal security of the borrower and in many instances the chances of recovering the full amount of principal and interest are slender and in other cases moneys are lost by the insolvency of borrowers. These reasons do not recommend themselves to my mind. The lender is under no obligation to advance moneys on doubtful security or to unsubstantial parties and it is not just that, because he may lose money by the insolvency of one of his customers, he should try to compensate himself by oppressing his other constituents. The circumstances in each case must be looked to in order to decide what would be a reasonable rate of interest to allow. In this case I will allow interest at 2 per cent per mensem, and, I think this rate of 24 per cent per annum is about as high a rate of interest as any Court ought to give.

15. Before concluding I should like to state that if the defendant had appeared before me and satisfied me that it was not possible for him to pay the whole amount of the decree at once but that he could satisfy the claim of the plaintiffs by instalment and applied to pay by instalments I would have considered the application. Under Section 210 of the Civil Procedure Code this Court has the power to make its money decrees payable by instalment and although this High Court does not usually make its money decrees payable by instalments, without the consent of the plaintiffs, I know of no reason why in proper cases this indulgence expressly authorised by the Code should not be extended to deserving or unfortunate defendants. The general impression prevailing in the minds of money lenders in Bombay, as echoed in the plaintiffs' affidavit, that in all cases they can defeat the provisions of the Code as to payment by instalments and get a decree for immediate payment by avoiding the Small Causes Court and coming to this Court is erroneous and needs to be corrected.

16. Taking the dates of the different payments endorsed on the promissory notes and the amounts thereof into consideration there will be a decree for the plaintiffs

for Rs. 680 with interest at 24 per cent per annum as follows:-

- (a) On Rs. 500 from the 19th of July 1904 to the 5th of July 1905; and
- (b) On Rs. 380 from the 6th of July 1905 up to date of judgment.
- (c) On Rs. 500 from the 20th of January 1905 to the 2nd of August 1905.
- (d) On Rs. 420 from the 3rd of August 1905 to the 1st of November 1905 ; and
- (e) On Rs. 300 from the 2nd of November 1905 up to date of judgment.

17. There will be no order as to costs as the plaintiffs before filing this suit have abandoned their prayer for costs. Interest on judgment at 6 per cent per annum till payment.

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