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Court : Kolkata

Decided On : Jul-27-1914

Reported in : AIR1915Cal383,29Ind.Cas.843

Judge : Holmwood and ;Chapman, JJ.

Appellant : Abdul Majid and ors.

Respondent : Ksherode Chandra Pal and anr.

Judgement :

1. 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 Jaistha 1312.
2. 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.
3. It appears that Abdul Majid, 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 6-anna shares of jotes and an 8-anna share of a howla belonging exclusively to him.
4. The three defendants had bid successfully at a sale of the land of one Nagarbashi 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 Nos. 1 to 4, on which he has according to the plaint recently got a decree or a heavy claim, and by him they were introduced to the plaintiff, another moneylender. 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 votes 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 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.

5. 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.

6. 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 harsh 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 one pice in the rupee per mensem or, as in the present case, Rs. 5 per mensem is

evidence of an intention to get it 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* (1906) 1 K.B. 79 : 75 L.J.K.B. 49 : 54 W.R. 424 : 93 L.T. 779 : 22 T.L.R. 109 and the discussion at page 87 of the meaning of the terms 'harsh' and 'unconscionable'. It is pointed out that in *In re a Debtor* (1903) 1 K.B. 795 : 72 L.J.K.B. 382 : 51 W.R. 370 : 88 L.T. 401 : 19 T.L.R. 283 : 10 Manson 130 the Master of the Rolls 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 moneylender 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.

7. 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 10 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.

8. 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 over

Rs. 3,000 with 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 no 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.

9. 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.

10. 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.

11. Our view upon both these points has recently been propounded by the Madras High Court. In the case of *Avathani Muthu Krishnier v. Sankaralingam pillai* 18 Ind. cas 417 : 13 M.L.T. 20 : 24 M.L.J.135 : 36 M. 229 the question of penalty was dealt with and the remarks of Sadasiva Aiyar, 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, 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.'

12. At the risk of repetition we cite the words of Lord Loreburn, L.C. in *Samuel v. Newbold* (1906) A.C. 431 : 75 L.J. Ch. 705 : 95 L.T.209 : 22 T.L.R. 703: 'In my opinion this contention can not 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 conditions required. There are many 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 itself be such evidence and particularly, if it is unexplained. If no justification be established the presumption hardens into a certainty'.

13. 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 Aiyar, 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 enunciation of variously worded tests and principles, tried to persuade themselves that they were acting on any other principles in giving relief against prima facie unconscionable bargains, except the one intelligible principle that the provision relieved against was unreasonable in the view of ordinary men of the world possessing the usual quantum of common

sense.'

14. 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.

15. But we would go further in reference to Section 16 which was dealt with in the case of *Kosavulu Naidu v. Arithulai Ammal* 22 Ind. Cas. 769 : 36 M. 533.

16. 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.

17. The parties were not at arm's length. The defendants needed the money on the spot, their own money-lender 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 and had 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 seven years 6 days, Rs. 168-6-5. There will, therefore, be a mortgage-decree for Rs. 248-6-5 with costs to the plaintiff in proportion to his success.

18. 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.

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