

(1941) 04 AHC CK 0001
In the Allahabad High Court

Chaube Ram Lal and Another	Vs	APPELLANT
Ram Din Kiledar and Others		RESPONDENT

Date of Decision : 21-04-1941

Acts Referred:

Citation : AIR 1941 All 318 : (1941) 11 AWR 224

Hon'ble Judges : Mohammad Ismail, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Mohammad Ismail, J.—This is a plaintiffs' appeal arising out of a suit brought for foreclosure of a mortgage by conditional sale dated 2nd July 1928 executed by Earn Din defendant 1 in favour of the plaintiffs, who are station-masters on the G.I.P. Railway. The Courts below dismissed the suit on the ground that the plaintiffs being railway servants were forbidden by law to enter into money lending business and accordingly u/s 23, Contract Act, the mortgage in suit was not enforceable. The main question that falls to be decided is, whether the Courts below have correctly interpreted the relevant sections of the Railways Act and Section 23, Contract Act. Section 137(3)(b), Railways Act, provides:

A railway servant shall not in contravention of any direction of the Railway Administration in this behalf engage in trade.

2. The plaintiffs, who are own brothers, had to sign an agreement which embodies the terms of their service. Clause (5) of the agreement says:

A railway servant will not, without permission in writing to be first obtained of the agent of the Great Peninsular Railway, carry on or be interested in any lending business or any other business or trade of any kind whatsoever, either directly or indirectly.

3. It is obvious that under the statutory provision applicable to the plaintiffs and under the terms of the agreement executed by them the plaintiffs could not

engage in a trade or business. Learned Counsel for the appellants has contended that the Court below has not recorded a finding to the effect that the plaintiffs are engaged in a trade or business. It is urged that an isolated investment made on the security of property does not amount to business or trade. Before considering the law on the subject I would like to refer to the relevant portion of the pleading raised by the defendant in his written statement on this point. Para. 10 of the written statement says:

The plaintiffs are public servants and as such they are legally not authorized to advance money. That being so, the plaintiffs are not legally entitled to maintain the present suit and in any event the contract sought to be enforced is opposed to public policy and therefore the suit is not maintainable.

4. The trial Court framed several issues, Issue 3 runs thus:

Whether the execution of the mortgage in favour of the plaintiffs was against public policy and opposed to law?

5. It would be observed that it was nowhere pleaded that the plaintiffs were engaged in money-lending business. The learned District Judge has not directed his attention to this point and has not recorded a definite finding whether the advancing of money on mortgage in one or two cases amounts to money-lending business. The trial Court, however, makes a passing reference to this matter in its judgment. In issue 3 the learned Munsif observed:

There is also no denying the fact, as appears too well from the statement of their Mukhtar-am Hazari Lal , that the plaintiffs who are brothers, carry on money-lending business in this sub division of Latitpur and I think that because this issue was directly raised in this case the plaintiffs have avoided to come into the witness-box.

6. Learned Counsel for the plaintiffs-appellants challenged this remark of the Court and referred me to the statement of Hazari Lal who is the Mukhtaram of the plaintiffs and was examined as a witness on their behalf. I do not find any admission by Hazari Lal to the effect that the plaintiff's carry on money-lending business. In cross-examination, certain questions were asked by the defendants and from the replies to those questions it is inferred that the witness admitted the existence of money-lending business. I am unable to accept this interpretation of the statement of Hazari Lal Hazari Lal says:

I do not know whether the plaintiffs are forbidden to carry on money-lending business. I cannot say what is the extent of Ram Lal 's money dealings. I am not aware whether the plaintiffs maintain any account of money-lending.

7. The plaintiffs' Mukhtaram nowhere admitted that the plaintiffs carried on money-lending as a business. This was a matter very vital to the decision of the suit. It was never pleaded by the defendant. No issue was struck by the trial Court on this point. No evidence was led by the defendants and no definite finding was arrived at by either of the two Courts. In the circumstances I am

unable to accept the contention of the opposite party that the plaintiffs carried on money-lending business in contravention of the statutory provision contained in the Railways Act.

8. Now I proceed to consider the legal aspect of the question. In *In Re: Bhairu Dutt Bhandari*, An Advocate, a Full Bench of this Court had to consider the meaning of the expression "engage in trade or business" in connexion with Section 15, Bar Councils Act. Section 15 of the Act provides: "No advocate while practising shall engage in trade or business..." In that case the advocate concerned had advanced money on several occasions. The question for consideration was whether the money-lending constituted "a trade or business." The learned Judges constituting the Full Bench held:

Investments of his savings by an advocate do not necessarily amount to engagement in money-lending business, the more so when such investments are few and far between and are mostly made to relations and friends. Nevertheless if investments by way of loan are made as a matter of regular business and for gain there can be no escape from the conclusion that such investments constitute engagement in money-lending business. What does or does not constitute money-lending business must depend on the facts and circumstances of each case and is not capable of an exact definition. The question is a mixed question of fact and law and the answer to the question must depend on the facts found in each particular case.

9. In *Edgewood v. Macleod* (1918) 1 K.B. 205, MacOrdie J. observed:

A man does not become a money-lender by reason of occasional loans to relations, friends, or acquaintances, whether interest be charged or not. Charity and kindness are not the bases of usury. Nor does a man become a money-lender merely because he [may upon one or several isolated occasions lend money to a stranger. There must be more than occasional and disconnected loans. There must be a business of money-lending, and the word "business" imports the notion of system, repetition and continuity The line of demarcation cannot be defined with closeness or indicated by any specific formula. Each case must depend on its own peculiar features. It is ever a question of degree....

10. In *Litchfield v. Dreyfus* (1906) 1KB 584 the learned Judges observed:

Speaking generally, a man who carries on a money-lending business is one who is ready and willing to lend to all and sundry, provided that they are from his point of view eligible.

11. In *Grainger and Sons v. Gough* 1896 A.C. 325 at p. 343, Lord Morris remarked:

There can be no definition of the words "exercising a trade." It is only another mode of expressing "carrying on business;" but it certainly carries with it the meaning that the business or trade must be habitually or systematically

exercised, and that it cannot apply to isolated transactions. There is no special legal meaning to the words "exercising a trade," and it must be considered with regard to what would be its ordinary or popular meaning and that must in each case depend on the facts of that particular case; and we are not to canvass what might be a logical outcome from any decision when it is the fact of a particular case that are solely decided on. I have heard no suggestion of any plainer or more intelligible meaning for the words "exercise his trade" than the words themselves convey.

12. In the light of the observations quoted above I have no hesitation in holding that there is no proof in the present case that the appellants are engaged in trade or money-lending business. The Courts below have not referred to any other transaction in which the money was advanced by the plaintiffs to third parties. It appears that the learned District Judge did not appreciate the importance of the expression "engaged in trade." In his opinion it appears that an isolated transaction would be sufficient contravention of the statutory provision and the condition of the agreement executed by the plaintiffs. This, however, does not appear to be the law. In the absence of a clear finding, I am unable to uphold the decrees of the Courts below. For the reasons given above I allow the appeal, set aside the decrees of the Courts below and decree the plaintiff's suit. The case will be remanded to the trial Court for the preparation of a preliminary decree under Order 34, Rule 2 in accordance with law. The appellants will be entitled "to their costs. The minor defendant is not represented before me. Mr. Badri Prasad an advocate practising in the District Court was appointed guardian ad litem under the orders of the Court about a year ago. No steps were taken by him to engage counsel or to apply to this Court for funds. Today when the case was taken up for hearing Mr. Girdhari Lal Agarwala conveyed an oral message to me from Mr. Badri Prasad to the effect that he required funds to enable him to engage a counsel. I am unable to take any notice of such informal communication. It was the duty of Mr. Badri Prasad to have approached the Court with a formal request for funds when he was appointed guardian. He has waited for a considerable time without taking any action and at the last moment he has sent a message of which this Court is unable to take any cognizance. As it happens the case has been fully argued by Mr. Girdhari Lal Agarwala who appeared for one of the respondents. Leave to appeal under Letters Patent is refused.