

(1949) 07 CAL CK 0036

In the Calcutta High Court

Case No : Appeal from Original Decree No. 174 of 1945

Manindra Nath Bhanja

APPELLANT

Vs

Hem Chandra Naskar

RESPONDENT

Date of Decision : 29-07-1949

Acts Referred:

Citation : (1949) 07 CAL CK 0036

Final Decision : Dismissed

Judgement

Chunder, J.—This is an appeal against an order of the Subordinate Judge, Second Court, 24-Pargands on an application by a borrower u/s 38(7) of the Bengal Money-lenders Act.

2. Briefly, the facts are that one Manindra Krishna Mitra owned certain zamindari properties, which he sold to the Naskar Babus, the Respondents in the present appeal, for a sum of one lakh of rupees, on March 13, 1925. It appears that the purchasers were unable to pay at that time the whole amount of the price and an arrangement was arrived at, by which Rs. 30,000 was paid in cash and for the balance of Rs. 70,000, the purchasers executed a mortgage-bond with simple interest at 7 per cent, per annum, the date of payment being April, 1928. It appears from the correspondence that the purchasers had been paying the interest regularly and they even paid a small part of the principal. The seller was unwilling, as he said in E"x. B--

to block further the said amount at the said rate of interest of 7 per cent, per annum,

3. There was an agreement, Ex. B, dated August 1, 1928, to enhance the rate of interest to 8 per cent, simple and the time for payment was extended to April, 1933. Then, it appears that interest was paid in part of the principal liquidated, but the purchasers were not able to pay back the entire amount and another agreement was then arrived at on June 27, 1934, which also provided for an increase of rate of interest from 8 per cent, simple to 8? per cent, simple; the

period of payment was extended to April, 1944, by Ex. B(2). The Bengal Moneylenders Act, having been put in the statute book in the meantime, trouble arose between the purchasers and the receiver to the estate of the seller, appointed by the High Court, in the probate proceedings in connection with the will of the seller, who had died in 1936. The purchasers claimed that it was a loan under the Bengal Money-lenders Act, while the receiver contended that it was merely unpaid purchase money, for which a security was taken in lieu of the statutory charge for the vendor's lien. The receiver of the seller's estate, a lawyer, even went so far as to draw attention to a decision of this Court in *Saradindu Sekhar Bannerjee v. Lalit Mohan Mazumdar* (1941) 45 W.N. 734. Then, on August 31, 1944, the purchasers filed the present application u/s 38(1) of the Bengal Money-lenders Act, alleging that they were borrowers; they wanted a declaration as to the amount of the debt on accounts being taken. The question was whether the debt came within the definition of a loan under the Bengal Money-lenders Act.

4. It is very unfortunate that several decisions of this Court on the present question have not as yet been able to see the light of the day either in official or non-official reports and no Divisional Bench decision has been reported after *Fateh Chand Mahesri v. Akimaddin Chaudhuri* ILR (1943) Cal. 297. It is necessary, therefore, to clear up how the law at present stands in this matter as far as decisions are concerned.

5. In the case of *Saradindu Sekhar Bannerjee v. Lalit Mohan Mazumdar* (supra), *Nasim Ali and Pal JJ.* held that when purchase-money was left unpaid by the vendee and he entered into a loan transaction in respect thereof in favour of the vendor, there was no loan or a transaction which in substance was a loan " which came within the purview of the Act. In that case, there was no stipulation as to payment of interest and there were some observations made in that connection. In the case of *Kunja Behari Pal v. Satyendra Nath Das* (1941) 45 C.W.N. 1122, *Mukherjea J.*, delivering the judgment of the Divisional Bench, pointed out that there might be cases of a bond or security taken in respect of unpaid purchase-money which would come within the definition of a loan under the Bengal Money-lenders Act. A perusal of the decision will show that it was in the nature of obiter. The obiter was affirmed in the next case, *Fateh Chand Mahesri v. Akimaddin Chaudhuri* (supra), where it was actually decided by the Divisional Bench that in every case where a vendor took a security in lieu of vendor's lien, it could not be said that it was a loan ostensibly securing unpaid purchase money and not falling under the Act. In every case, it will have to be determined whether a particular transaction amounted to a loan under the Act and this has to be done from the substance and not the particular form and attendant circumstances will have to be taken into consideration. We need not go into the particular facts of that case from which it was decided that, though it was a case of security taken in lieu of the statutory charge for vendor's lien for unpaid purchase money, it was also a loan hit by the Bengal Money-lenders Act. Then there was a "decision of *Henderson J.* sitting singly in *Nirode Barani Debya v. Sisir Kumar Mukherjee*

(1942) 47 C.W.N. 205, which accepted this view of the law. In several other unreported decisions, this view of the law appears to have been taken as correct by single Judges.

6. A Divisional Bench (of which one of us was a member) again in *Dibahar Mukherji v. Sunil Kumar De* (1946) Appeal from Original Decree No. 217 of 1945, decided by Mitter and Chunder JJ. on June, 26, laid down that in a case of this kind, where the question was whether it was merely a security taken in lieu of unpaid purchase money for which a vendor had a statutory charge, or it was really a loan falling under the Bengal Money-lenders Act and what was to be looked into was the essential nature of the transaction, what it was in substance and not merely the form of it. If it is found that it was a transaction merely to secure the vendor's lien by taking some security or bond, then the case will not be hit by the Bengal Money-lenders Act. But, if on the other hand, it was really in the nature of an investment, over and above being a security for the unpaid purchase money, then it was a loan under the Bengal Money-lenders Act. Many circumstances may have to be taken into consideration in different cases, viz., the status of the lender, i.e., whether he is a professional money-lender or not, whether the rate of interest is such as was charged in money-lending transactions, what is the nature of the security, etc.

7. It was pointed out again by Mitter J. sitting with Sharpe J. in *Kedar Nath Botra v. Goura Bai* (1947) A.O.C. No. 16 of 1946, from Suit No. 1801 of 1935, decided by Mitter and Sharpe JJ on September 4 that every case should be regarded on its own facts and it could not be considered as a mortgage transaction which was also a loan under the Bengal Money-lenders Act, because there was a stipulation for payment of interest. It was pointed out that, u/s 55(4)(b) of the Transfer of Property Act, a statutory charge is given, subject to any contract which may be made between the parties, to a vendor in respect of the unpaid purchase-money on the property sold. The Transfer of Property Act lays down that payment of interest is to be made on such unpaid purchase-money. It was pointed out that a charge might be defeated by a subsequent purchaser for value without notice and therefore, a mortgage for unpaid purchase-money would be taken as a better security than a mere charge provided for in Section 55(4)(b) of the Transfer of Property Act. It cannot, therefore, be said that simply by providing for a rate of interest, there was an intention to treat it as a loan, which in substance would be within the Bengal Money-lenders Act. It may rather be that the intention was to provide a better security than the statutory charge. In every case, the facts and circumstances, as also the intention of the parties must be gathered from the document as also the circumstances and it has to be seen whether it was merely a security in place of the statutory charge, or it was something more like a double transaction, i.e., an investment as well. The mere form of the document would not be the determining factor for judging whether the transaction is the one or the other, because if the court has to go by the form only or by the recitals and the contents of the instrument, the protection given by the Bengal Money-lenders Act to the borrowers may be defeated by a

carefully drafted recital or terms. It is now, therefore, clear that, in a case of this nature, what the court has to determine from the facts and circumstances what the intention of the parties was and from it find out, whether it was merely a security in lieu of the statutory charge, or it was a camouflaged loan, i.e., it was in substance a loan as contemplated by the Bengal Money-lenders Act.

8. In the present case, the facts are rather simple and the majority of them are not disputed, as we have already said. The Subordinate Judge acted upon two considerations in holding that it was in form and substance a loan and not merely a security in place of the statutory charge. These circumstances are, first, the evidence given by a pleader of the Sealdah Court, one Nagendra Nath Ghosh, that he negotiated the loan with the Shahas for Rs. 70,000 on behalf of the Naskars at interest of 7 per cent, per annum and on, hearing this, Manindra Babu himself offered to lend this money at that rate of interest; hence, the document of mortgage was executed. Nagendra Babu was supported to a large extent by the evidence of an officer of the Naskars. On the other hand, none of the Shahas were examined. The Subordinate Judge pointed out that none gave a denial on behalf of the vendor, but this may also be explained by pointing out that the vendor himself used to carry on his own transaction and he was head and there was perhaps no one who could throw any light on his side; his son, who was examined, told the court that he never did any of his father's work during the father's life time. The second circumstance which the Subordinate Judge has considered is the progressively increasing rate of interest, i.e., interest gradually raised from 7 to 8 per cent, per annum. It appears that because the vendor was kept out of the usufruct of his property which was being enjoyed by the vendee, provision is made in statute in case of a charge for paying some interest for the unpaid purchase-money. This does not explain the gradual increase in the rate of interest, from 7 to 8 per cent and then again to 8 per cent., when a further extension of time for payment was granted in each case.

9. In our opinion, the Subordinate Judge was right in holding that there was a double character in this transaction, viz., that it was a security taken in lieu of the statutory charge u/s 55(4)(b) of the Transfer of Property Act and it was in addition an investment made with a solvent party on the security of the property which the mortgagee himself had sold at a rate of interest varied from time to time (unlike statutory interest) and so it was in substance a loan contemplated under the Bengal Money-lenders Act. Therefore, Section 38(7) of the Act applied. As regards the declaration made by the Subordinate Judge after taking accounts that has not been questioned. The order of the Subordinate Judge being right is upheld and this appeal is dismissed with costs.

P.N. Mitra, J.

10. I agree.