

(1870) 08 CAL CK 0007
In the Calcutta High Court

Mia Khan and Manu Khan

APPELLANT

Vs

Bibi Bibijan and Bibi Amnujan

RESPONDENT

Date of Decision : 13-08-1870

Acts Referred:

Citation : (1870) 08 CAL CK 0007

Judgement

Phear, J.—If, for the purpose of disposing of the matter now referred to us, it were necessary to answer specifically the question which is put to us by the learned First Judge of the Calcutta Court of Small Causes, I think I should be prepared to say that it ought to be answered in the affirmative. It seems to me almost impossible, with sound reason, to put restriction on the generality of the words which are employed in section 1, Act XXVIII of 1855. Those words declare that a certain specified English enactment, and certain specified Regulations, and parts of Regulations and all laws in force in any part of the territories, which are in the possession and under the government of the East India Company relating to usury, are by that Act repealed.

2. I have given my best consideration to the opinion which the late Chief Justice is reported to have expressed in Ramlall Mookerjee v. Haranchunder Dhur 3 B.L.R., O.C., 130. That opinion does not seem to have been essential to the decision of the particular case in which it was given, but it is nevertheless entitled to very great weight. According to the report of the case, Sir Barnes Peacock said:—"I do not think that Act XXVIII of 1855 was ever intended to repeal the Hindu or Mahomedan law as to interest." He then quoted the title of the Act, the preamble, and the first section, and he added:—"That Act did no more than repeal the various Regulations and Acts which the English Government of India had passed on the subject of usury." With the greatest deference for the opinion of Sir Barnes Peacock, I feel it most difficult to take this limited view of the operation of the Act. I see nothing to indicate that the words "the laws now in force relating to usury" of the preamble, and "all laws in force in any part of "the said territories relating to usury" of the first section, are to be limited in their meaning to Regulations and Acts passed by the English Government of

India. If the Legislature had so intended, surely it would have used "Regulations and Acts" in the place of "laws." Instead of "the several parts of Regulations mentioned in the schedule hereto annexed, and all laws in force in any part of such territories relating to usury are hereby repealed," we should have had "the several parts of Regulations, &c., and all other Regulations and Acts in force in any part, &c."

3. Neither was the mischief at which Act XXVIII of 1855 was directed, so far as I comprehend it, such as should induce us to suppose that it would be sufficient for the purposes of the Legislature that the Regulations and Acts of the English Government alone should be repealed. If this were so, probably we should be bound, if possible, to put a construction upon the words of the Legislature which would limit their operation to the bringing about this result; but upon considering the Regulations which are specifically repealed by this Act, I find that their general effect was to place a restriction of universal operation upon the rate of interest, which should be recoverable by law under the terms of any contract of loan; and having regard to Act XXVIII of 1855 as a whole, I can only conclude that the Legislature, at the time of passing it, was of opinion that restraint of this sort was mischievous. It appears to me indeed that the sole object of the Act was to leave the parties in any transaction entirely free to make their own terms with regard to the rate of interest, and if so, this object could only be attained by the removal of all prohibitions upon their freedom in this respect, whether imposed by English authority, or by that of the recognized ancient lawgivers. This view is, I think, not a little strengthened by the fact that Act XXVIII of 1855 followed immediately upon the repeal of the usury laws in England, and was, in appearance at any rate, an extension of that measure to India. Throughout the Act there is no trace to be found of reference or allusion to any still existing laws of prohibition, or any indication that the Legislature entertained the notion that such laws might remain in existence, notwithstanding the Act. On the contrary, every clause of the Act seems to me to negative anything of the kind. By the second section it is enacted that "in any suit" (without a shadow of qualification) "in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties," and the application of all the other sections is equally general; the contingencies upon which they severally take effect are designated by "whenever," "in any case," and so on.

4. It seems to me, then, something more than difficult to escape the conclusion that the repeal of "all" laws relating to usury, which is effected by Act XXVIII of 1855, must extend to Mahomedan laws. I will add that in my judgment the Legislature, by the use of the words "laws relating to usury" in this Act, intended to speak only of laws affecting the rate of interest, which might legally be stipulated for. The rate of interest is the sole subject of the Act from the beginning to the end. There may be, however, laws which in strictness relate to usury, yet do not meddle directly with the rate of interest, such as a law limiting the period within which an action for arrears of interest must be brought by reference to the amount to be recovered. For instance, Menu, section 151,

chapter 8, says:--"Interest on money received at once, not month by month, or day by day, as it ought, must never be more than enough to double the debt, that is, more than the amount of the principal paid at the same time." This in substance is a law for the limitation of suits, and as such does not, I think, fall within the scope of Act XXVIII of 1855. The Bombay High Court pointed out the true character of Menu's rule in the case of Dhondu Jagannath v. Narayan Ramchandra 1 Bom. H.C. Rep., 47; and by two decisions in Khushalchand Lalchand v. Ibrahim Fakir 3 Bom. H.C. Rep., 2 and Ramkrishnabhat v. Vithoba 3 Bom. H.C. Rep., 25, that Court also held that the rule does not fall within the repealing operation of the Act of 1855. I do not in any degree dissent from these decisions.

5. Unfortunately we have not been aided by the argument of counsel in this case; and therefore, having regard to the opposite opinion of Sir Barnes Peacock, I cannot do otherwise than greatly distrust my own judgment upon the question which has been proposed to us. It is consequently, with considerable satisfaction, that I find myself able to determine the matter of the reference which is before us, without making that question the turning point of my decision. The case is submitted to us by the learned First Judge, u/s 55 of Act IX of 1850. By the terms of that section, the case constitutes a judgment of the Judge of the Court of Small Causes, contingent upon the opinion of this Court; and by section 8 of Act XXVI of 1864, which extended the jurisdiction of the Court of Small Causes, when judgment is given, contingent upon the opinion of the High Court, the High Court may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party as the case may be, and may make such order, with respect to the costs of reserving the question, and stating the same for their opinion, and otherwise arising there out and connected therewith, as such High Court may think proper. And all orders made by the High Court under this "section shall be final." Act XXVI of 1864, together with Act IX of 1850, forma one procedure; and it appears to me that the words of the section which I have just quoted from the later of the two Acts were intended to apply as well to judgments, contingent on the opinion of the High Court, which are passed under the provisions of the former Act, as to those of the like kind which are passed under the powers given by the last Act. If this be so, I think that the large discretion which the 8th section of Act XXVI reposes in us enables us to give consideration to all the facts stated to us, and is not necessarily fettered by the form of the question upon which the judgment is made contingent. Now it seems to me apparent, on the face of the stated case, that the question proposed to us does not properly arise between the parties, for I think the rule nisi for a new trial ought to issue, whatever may be the extent to which Act XXVIII of 1855 operates.

6. The learned First Judge appears to be of opinion that, if the Act of 1855 be put upon one side, the law which the Civil Courts of this country are bound to administer between Mahomedan suitors "does not allow a Mahomedan to charge another Mahomedan any interest whatever." It seems to me that this view is

erroneous. No doubt, the passage in the Hedaya to which the learned First Judge refers, and other passages in the Koran, do, as they are commonly understood, forbid the taking of interest; and certainly as far as I have the means of judging, I should suppose that a very considerable number of religiously inclined persons of the Mahomedan faith consider themselves bound to observe these precepts, and conscientiously keep themselves out of all transactions which appear to infringe them. But on the other hand, it is notorious that there are in India Mahomedan dealers in money, and traders of unquestionable respectability, and that it has been the practice among this class for a very long period to take interest even from their co-religionists in the way of their business. Mr. Harrington in his Analysis, 1st vol., page 182, after remarking that the Mahomedan law forbids the taking of interest for the use of money upon loans from one Mussulman to another, and that the Hindu law permits interest to be taken at prescribed rates only, goes on to say:--"The Hindu legislators have expressly sanctioned, and the Mussulman Government of India appear to have tolerated directly or indirectly, the "customary interest of the country which, in the plan for the administration of justice proposed by the Committee of Circuit in 1772, is stated to have amounted to the most exorbitant usury." I cannot learn that our Courts have, in any case which is of authority, refused to decree interest to a Mahomedan, on the ground that he was disentitled by Mahomedan law to recover it. On the whole it seems to me that, for a considerable period of time past, the prohibition of the Koran and the Hedaya against the taking of interest has not been treated by the executive and by the persons charged with the administration of justice in this part of India, as forming part of the active municipal law of the country. As a moral precept, it will, no doubt, always be influential with those who acknowledge its authority, but I think that, as a part of the municipal law, if it ever had existence as such, it has long been obsolete.

7. I am therefore of opinion that we ought to pass an order that the rule nisi do issue.

Markby, J.

I also think the rule nisi ought to issue. Looking to the very strict construction which has been put on the prohibitions contained in the Mahomedan law, with respect to profit on transactions in the nature of a loan or an exchange of commodities, I doubt whether any passage in the Hedaya (certainly I think not that to which the learned Judge of the Small Cause Court refers) would render invalid an agreement for a loan at interest, unless the loan was made and repaid in coin of the same description. Possibly, there may have at one time been a general feeling amongst Mahomedans against the propriety of taking interest, and that feeling may still exist to some extent. Possibly also, the Court administering Mahomedan law may at some distant period have refused to enforce the payment of interest. But it seems to me unnecessary to consider this. Ever since our Courts have been established, and apparently long before, the custom of taking interest as between Mahomedans has been recognised and

enforced, and, until this case was tried in the Court of Small Causes, I cannot discover the slightest trace of the validity of the custom having been questioned. I have not the least doubt that, by the law which we are bound to administer, a Mahomedan may claim the same right to take interest as any other person.

(2) Act XXVIII of 1855, preamble,--"Whereas it is expedient to repeal the laws now in force relating to usury: It is enacted as follows: "Section I. Section 30 of the Act of parliament passed in the thirteenth year of his late Majesty king George III, intituled "an Act for establishing certain regulations for the better management of the affairs of the east India company, as well in India as in Europe," shall not apply in any part of the territories in the possession and under the Government of the said Company to any bond, contract, or assurance whatsoever which shall be made or entered into within the said territories after the passing of this Act and the several parts of regulations mentioned in the schedule hereto annexed, and all laws in force in any part of the said territories relating to usury are hereby repealed."