

(1960) 08 MP CK 0006
In the Madhya Pradesh High Court
Case No : C.F.A. No. 19 of 1956

Shivchand Mannalal

APPELLANT

Vs

Bhagwan (deceased) through Legal Representatives Kachru
and Others

RESPONDENT

Date of Decision : 12-08-1960

Acts Referred:

Citation : (1961) J LJ 269 : (1961) MPLJ 249

Hon'ble Judges : M.A. Razzaque, J; H.R. Krishnan, J

Bench : Division Bench

Advocate : R.G. Waghmare, for the Appellant; B.L. Johar and S.M. Jain, for the Respondent

Final Decision : Allowed

Judgement

H.R. Krishnan, J.

This is an appeal by the plaintiff whose suit has been allowed only in part and whose claim based on an agreement has been treated as, in substance a loan, in view of the history of the transactions between the parties; accordingly, under the Madhya Bharat Moneylenders Act, the accounts have been reopened, the claim has been scaled down from Rs. 6,447 to Rs. 3,252 payable in instalments of Rs. 1,000 annually. In appeal he prays that his claim should be allowed in toto. The facts which have all been found in favour of the plaintiff-appellant have not been challenged in any cross-appeal. Thus, the only questions arising here are, firstly, whether the claim is for a loan or for something which is in substance a loan; and secondly, whether in the event of its not being a loan, the accounts could at all have been reopened in the manner that has been done, and whether instalments could have been allowed.

The history of the transaction between the two parties shows that in our country, while it is easy to get a decree, the decree-holder rarely realises the decretal amount. On account of certain money transactions during a period before 1932,

the plaintiff-appellant ultimately obtained a decree on 30-8-1938. Instalments were no doubt provided. The last out of the several applications in execution was No. 105 of 1949. On the 29th January 1950, the parties filed an agreement, by which, the judgment-debtor undertook to pay the decree-holder, certain cash amounts and deliver to him some cattle and other goods the value of which was set out in the agreement, the total value coming to Rs. 4,746-12-3. In return, the decree-holder prayed that his decree might be treated as having been satisfied and the execution case disposed of on full satisfaction. This was accordingly done by an order dated 30-1-1950.

Though, there was this agreement, the defendant did not pay anything; nor did he deliver any of the goods he had expressly contracted to deliver. Therefore, the plaintiff filed his suit on the basis of the agreement for its performance by payment of the money and the delivery of the goods or payment of their value. The defendant raised various objections including the averment that he had already made certain payments. But the Court found on facts that no payment had been made. While the suit was proceeding, the defendant went to the Debt Conciliation Board which tabulated the principle of the debt and the interest paid in the remote past. It did not arrive at a decision as the parties did not agree. The defendant, however, produced copies of the statement in this suit, because he averred, it was for the realization of the loan advanced in the manner mentioned in the statement. The trial Court while rejecting the defence, still considered that this was a loan and it was competent to reopen the accounts and make the adjustments. Accordingly, it reduced the claim to Rs. 3,252-3-6, substantially, according to the statements prepared for the Debt Conciliation Board. It also awarded instalments.

The basic contention on the part of the plaintiff-appellant is that this is not a loan. Whether or not the statements prepared are factually correct, need not be examined in this suit; the principle applied by the learned Civil Judge is, according to the plaintiff, one indicated for loans and as such of no validity here. Both parties have argued on this, the defendant's stand being, this is still in substance a loan.

In this connection, it is worth noting that the suit is based upon a new transaction and is not a continuation of the older litigation in which a decree had been passed in 1938. As far as the parties are concerned, the decree passed in 1938 has been satisfied on 30-1-1950, the decree-holder accepting the offer of the judgment-debtor. A new cause of action has arisen, namely, the failure on the part of the defendant to implement the promise by which he persuaded the plaintiff to certify this satisfaction. This is not, obviously, a loan; but it has to be examined, whether, it partakes of the crucial elements of a loan, in substance-though not in form. Here, as in other cases, one has to follow the well accepted principle that the different elements constituting the transaction in question have to be examined separately to see whether they substantially reproduce those of a loan. "Loan" has been defined in the Madhya Bharat Moneylenders Act of

Samvat 2007 (62 of 1950) as-

"Loan" means an advance, whether of money or in kind, at interest and shall include any transaction which the Court finds to be in substance a loan.....

This is the definition in the corresponding Acts of certain other States as well, in particular, that of Bengal, which has been explained in *Radha Kisen Chamria and Others Vs. Keshardeo Chamria and Another*, and affirming it in *Radha Kissen Chamria and Others Vs. Keshardeo Chamria and Another*, . To be a loan, a transaction should involve, firstly, an advance either in money or in kind; secondly, a condition to repay; thirdly, a further provision that the repayment will include an additional element which by whatever name it be called, is really interest. In the present case, the plaintiff was not advancing anything whatsoever at the time of the agreement of the 29th January 1950. It is not even a case where the plaintiff having recovered certain goods or money is actually or notionally returning them to the defendant in accordance with the agreement. Thus, in no way can it be called an advance of anything. Quite on the contrary, it was for the defendant to give the plaintiff something on the failure of which he has brought a suit for performance or for compensation. Secondly, there is no condition for repayment; there is a condition for payment, which is of course different. There is no doubt a provision for interest; but that is really by way of damages in the event of loss, on the part of the plaintiff, of the use of money and the goods, which he would have got had the defendant performed his part of the agreement. Thus, the transaction does not in substance, answer to any of the tests of a loan. The *Calcutta* case is in essence similar to the present one. There also, there was a compromise which was actually incorporated in a decree according to which, among other things, one party had to pay money to the other, and this money was ultimately connected with a loan. Whatever may have been the history of these transactions, the money was payable not as a loan but in accordance with a contract. A similar question arose in the case reported in *Mangilal v. R.R. Contractor and Co.* 1959 MPLJ 859. In this, a distinction has been made between a loan as defined in the Moneylenders Act and a debt, which generally speaking, is a liability to pay money. A loan is certainly one of the ways in which a debt may be contracted but it not being the only way, while a loan may create a debt, the mere creation of a debt does not necessarily imply a loan; because, a debt may be created otherwise.

On behalf of the defendant-appellant, the ruling reported in *Fateh Chand Mahesri Vs. Akimuddin Chaudhuri*, has been cited. But the circumstances of that case were substantially different as in fact, that case has been distinguished in the judgment of the Supreme Court from *Radha Risen v. Keshardeo* AIR 1954 Cal. 108. Another ruling cited by the defendant is *Amarsingh v. Tulsiram* 1948 NLJ 277 : AIR 1949 Nag. 196 at p. 198. I do not see how that ruling comes in at all. Once it is a loan, then there will be occasion when the Court is called upon to ascertain the "principal of the loan". This has been defined in some Acts and left open in others. All that this part of the judgment lays down is a method of

arriving at the principal of the loan where small sums are borrowed and repaid from time to time. That rule has no application here. A third ruling cited on behalf of the defendant is *Parmal v. Rameshpuri* 1955 NLJ 359. This applies to a case where the transaction is already found to be a loan and an occasion has arisen for reopening and appropriating payments towards the principal. But it is of no assistance to us in answering the preliminary question whether the transaction is itself a loan.

In view of the nature of the transaction which is a separate contract and applying the principles laid down in *Radha Kissen Chamria and Others Vs. Keshardeo Chamria and Another*, I would hold that the claim in the present suit is not a loan for the purpose of the Madhya Bharat Moneylenders Act. It is a claim on a contract under which the defendant had to make certain payments and which he failed to do.

The contract itself provides for a penal interest, by way of damages at 11/2 per cent, per mensun in case the defendant fails to perform his part of the agreement. The Moneylenders Act certainly does not apply. But the fact remains that this is a condition in terrorem and normally, the party suing for the breach can only get a fair pre-estimate of the damages caused by the withholding of the money and goods by the defendant. It is difficult to make any precise estimate but the maximum rate of interest for unsecured loans provided in the Interest Act is a convenient yardstick. Though the agreement gave him 1 1/2 per cent, per mensum, the plaintiff had claimed only at 1 per cent, per mensum; but a fair pre-estimate of the damages on this account is 9 per cent, per annum. Therefore, the interest should be scaled down by Rs. 350. As for the principal, it is the figure mentioned by the defendant himself in the agreement totalling the values of the various items mentioned and of the cash instalments.

Since the Moneylenders Act did not apply, there was no case for granting instalments under it. Apart from the Moneylenders Act, there is nothing wrong in principle if the Court on grounds of equity and convenience grants instalments. But that is always granted to a defendant who is honestly willing to pay the money, but is unable to pay the entire amount in one lump sum. The defendant here, however, deserves no consideration on that account. He believes in not paying anything even after a decree is passed against him. His conduct throughout has been the most evasive, and is not of a person who is willing to satisfy the decrees and is only handicapped by not having the entire lump sum in hand.

In the result, the plaintiff's claim is allowed after the deduction of Rs. 350 interest, that is, scaling down the interest only from 1 per cent. per annum to As. 0-12-0 per cent, per annum. As he has won practically all over his case, the defendant should pay him the costs in both the Courts.