(1956) 11 CAL CK 0006

In the Calcutta High Court

Case No : Appeal from Original Decree No. 145 of 1949

Uday Chand Mahatab — APPELLANT

Vs

Kalyani Debi — RESPONDENT

Date of Decision : 26-11-1956

Acts Referred:

Citation : (1958) 1 ILR (Cal) 1

Hon'ble Judges : Sen, J;Lahiri, J

Bench : Division Bench

Advocate : Purushottam Chatterjee and Basanta Kumar Panda, for the Appellant;Apurbadhan Mukherjee and Chandra Nath Mukherjee, for the Respondent

Final Decision : Allowed

Judgement

Lahiri, J.—This is an appeal by the Plaintiff against a preliminary decree made in a suit for sale based upon a document that has been described as an instalment mortgage bond and the only question that arises for consideration in this appeal is whether the transaction evidenced by this instalment mortgage bond is a loan within the meaning of the Bengal Money-Lenders Act.

2. The facts of this case are not in dispute and they are as follows: Under the Plaintiff-Appellant, the Maharaja of Burdwan, Respondents other than Respondents Nos. 1 and 2 held a patni tenure which was put up to astam sales on more than one occasion and was purchased by Respondents Nos. 1 and 2, who are mere relations of the original Patnidars and who instituted a suit for setting aside the last patni sale. Ultimately all the parties interested in the patni came to terms and upon accounting it was found that a sum of Rs. 16,857 was due to the Plaintiff Maharaja as arrears of patni rent from Baisakh, 1340 B. S. to Chaitra, 1343 B.S. and Rs. 3,560 was due as interest. The Maharaja remitted the claim for interest at the instance of some of the original Patnidars and the Respondents amicably paid two sums of Rs. 4,500 and Rs. 2,358 and the balance of Rs. 9,999 remained due as arrears of patni rent. For this amount all the

Respondents joined in executing what has been described as instalment mortgage bond in respect of the patni interest on May 19, 1937. By this document all the Respondents agreed to pay Rs. 1,142 within Jaistha, 1344 B.S. and a sum of Rs. 1,000 within the month of Chaitra, 1344 B.S. and a further sum of Rs. 1,000 within the month of Chaitra, 1345 B.S. and the balance of Rs. 6,857 in equal kists every year in the course of 14 years from 1346 to 1359 B.S., that is to say, within the month of Chaitra of each year according to the instalments mentioned in the schedule to the bond and there was a further stipulation which is very important for the purposes of the present appeal and which runs as follows:

If we do not pay the amounts of two consecutive kists, then the recipient of this bond will be entitled to realise at a time the entire amount that will remain due out of the aforesaid amount up to that time together with interest at the rate of Rs. 12 per cent, per annum from the date of this bond till the date of realisation.

3. On December 22, 1947, the Plaintiff Maharaja instituted a suit for sale upon this bond and in this suit the Respondents inter alia pleaded that the transaction evidenced by the instalment mortgage bond was a loan within the meaning of Section 2(12) of the Bengal Money-Lenders Act. The learned Subordinate Judge, who tried the suit, accepted this plea and held that the Bengal Money-Lenders Act applied to the facts of this case with the result that the Plaintiff-Appellant was not entitled to recover interest at a rate higher than the statutory rate of 8 per cent, per annum and he made a decree in favour of the Plaintiff at the reduced rate for a sum of Rs. 15,375-4-6p. plus Rs. l,309-4-6p. as costs, the total being Rs. 16,684-9-0p. to be paid by the Respondents to the Plaintiff-Appellant in 8 equal annual instalments payable in Agrahayan from 1356 B.S. and he further directed that in default of payment of any kist the entire sum under the decree shall fall due at once.

4. Against that decree the Plaintiff has brought this appeal to this Court and the only question, as I have already stated, that has been argued before us is the question whether the transaction evidenced by the instalment mortgage bond amounts to a loan within the meaning of Section 2(12) of the Bengal Money-Lenders Act.

5. Mr. Chatterjee, appearing for the Appellant, has placed before us several decisions of this Court in which the true meaning of a loan has been considered. According to the definition given in Section 2(12) loan means an advance made on condition of repayment with interest and includes any transaction which is in substance a loan. According to this definition three things are necessary. There must be (a) an advance, (b) a condition of repayment and (c) a stipulation for payment of interest. The decisions which have been placed before us by Mr. Chatterjee lay down that the advance need not be actual and in order to come within the definition of the Act it is enough if the advance is notional. Mr. Chatterjee has argued that according to the definition of the word "principal" in Section 2(16) the principal must be the amount actually advanced to the

borrower and it cannot include an amount notionally advanced. It may be said that the effect of that definition has been whittled down by the expression occurring in the last part of the definition of "loan" which is to the effect that "loan includes any "transaction which is in substance a loan".

6. I shall now refer to the cases that have been relied upon by Mr. Chatterjee. The first case is that of Saradindu Sekhar Banerjee v. Lalit Mohan Majumdar (1941) 45 C. W.N. 734 where Nasim Ali and Pal, JJ. held that where purchase money is unpaid by the vendee who executes a bond for it in favour of the vendor there is no loan or transaction which is in substance a loan. The broad principles laid down by this decision was subsequently modified in the subsequent case of Kunja Behari Pal v. Rai Satyendra Nath Das Bahadur (1941) 45 C.W.N. 1122 where Mukherjea and Roxburgh, JJ. pointed out that circumstances might exist under which the transaction by which a bond or security taken in respect of unpaid purchase money might come within the definition as laid down in Section 2(12) of the Bengal Money-Lenders Act. This principle was followed by Mitter and Sen, JJ. in the case of Fatechand Mahesri v. Akimuddin Choudhury (1942) 47 C.W.N 52. Mitter J. in that case pointed out that in order to attract the definition of a loan as given in Section 2(12) of the Bengal Money-Lenders Act three things, which I have already recited above, must be present, namely, (1) an advance of money, (2) a condition of repayment and (3) stipulation about interest and in this decision it was pointed out that the case of Saradindu Banerjeei is distinguishable, because in that case there was no provision for payment of interest by the vendee. In the case of Satinath Bagchi Vs. Raja Bhupendra Narayan Sinha Bahadur, . 14 relied upon by the court below, Mukherjea, J. re-affirmed the principle laid down by him in Kunja Behari Pal''s case and pointed out that in the case before him the element of advance actual or notional was absent, because no bond or security was taken in respect of the rents due and the liability still remained a liability for rent. The net result of the aforesaid decisions is that a loan is a debt but all debts are not loans within the meaning of the statute and that in order to be a loan within the meaning of the Act there must be an advance, actual or notional, and that there must be a condition for repayment and there must be also a stipulation for payment of the interest. Bearing in mind the aforesaid principle I proceed to consider whether the present case can be said to fulfil the aforesaid conditions. Granting that the first two conditions have been fulfilled I am unable to hold that there is any provision for payment of the interest in the mortgage bond. In my opinion, the provision for payment of interest on the happening of the contingency mentioned in the bond is not enough to bring the transaction within the meaning of Section 2(12) of the Act. As I have already pointed out the agreement was that no interest would be charged if the executants went on paying the dues of the Maharaja according to the instalments fixed by the bond but that the Maharaja would be entitled to charge interest only if the executants did not pay the amounts of two consecutive instalments. Mr. Mukherjee, appearing for the Respondents, has strenuously contended before us that contingent interest is

interest within the meaning of Section 2(8) of the Act. That definition is that interest includes any sum by whatever name called, in excess of the principal paid or payable to a lender in consideration of or otherwise in respect of a loan. Now if the executants had paid up the dues of the Maharaja according to the instalments fixed by the bond they would not be liable for interest and the liability under the bond would not constitute a loan. Can it be said that by breaking the promise the Respondents have acquired a higher right? I have no doubt they have not; because that would be equivalent to encouraging a party to break the terms of a solemn undertaking and putting a premium upon default. The court must act on the principle that the undertaking given by a party to a bond would be fulfilled and I cannot, in the circumstances of this case, accept Mr. Mukherjee''s argument that the Respondents can claim higher rights by their defaults. Accordingly, in the facts of this case I have no doubt that the agreement for payment of interest upon the happening of the contingency of default does not amount to promise to repay the loan with interest and for this reason alone the present transaction does not, in my opinion, amount to a loan within the meaning of the statute.

7. Mr. Mukherjee relied upon a decision of the Full Bench of the Patna High Court in the case of Balchand Mahto and Others Vs. Munshi Lal Raut and Others, . In that case it was held that where under a Sudbharna, bond the rent was payable by the mortgagor but it was provided therein that in case the mortgagor failed to pay the rent it was payable by the mortgagees who were held entitled to tack to the principal amount the amount of rent paid by them with interest at a certain rate, the transaction was in substance a loan within the meaning of the Usurious Loans Act of 1918 as amended by the Usurious Loans (Amendment) Act of 1926 with which their Lordships had to deal. The definition of a loan as given in that Act which is quoted in Paragraph 7 of the judgment is as follows:

Loan means a loan whether of money or in kind and includes any transaction which is, in the opinion of the court, in substance a loan.

8. This definition, in my opinion, which the Patna Full Bench had to consider in the aforesaid case, is substantially different from the definition of a loan as given in Section 2(12) of the Bengal Money-Lenders Act. In the definition which the Patna Full Bench had to consider the condition for payment of interest was not required to be present to constitute a transaction a loan and the court has a discretion under that definition to come to its conclusion upon the circumstances of each case. In the Bengal Act however, condition for repayment with interest is essential to constitute a transaction a loan. For this reason, I am unable to hold that the Full Bench of the Patna High Court relied upon by Mr. Mukherjee is of any assistance to his clients.

9. For the reasons given above I have reached the conclusion that the decree made by the learned Subordinate Judge is wrong and this appeal must be allowed and it should be directed that the transaction evidenced by the installment mortgage bond, ext. 1, is not a loan within the meaning of the

Bengal Money-Lenders Act. The Appellant is entitled to his costs of this appeal.

10. The cross-objection has not been pressed and is accordingly dismissed without costs.

Sen, J.

11. I agree.

