IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0006 OF 1996
(High Court Civil Action No. HBC0033 of 1992)

BETWEEN:

SOHAN SINGH

APPELLANT
(ORIGINAL DEFENDANT)

-and-

AMRIT PRASAD

RESPONDENT
(ORIGINAL PLAINTIFF)

Mr. H. K. Nagin and Ms. P. Narayan for the Appellant
Mr. A. Ram for the Respondent

Date and Place of Hearing : 19 August 1997, Suva
Date of Delivery of Judgment : 22 August 1997

JUDGMENT OF THE COURT

This is an appeal from a judgment Scott J delivered on 6 November 1996. The respondent was the plaintiff in those original proceedings. He claimed:-

(1) that a Crop Lien No. 90/2654 executed in favour of the present appellant was a nullity. As a consequence he sought a refund of all the moneys that had been paid pursuant to that Crop Lien;

(2) a declaration that three promissory notes were illegal and unenforceable.

Incidental to those two claims, he sought additional declarations and orders. However for the purposes of this appeal it is unnecessary to refer to them further.

The order following judgment conveniently sets out the determination of His Lordship:-

"(a) That the Promissory Note dated 12th December 1990 for $11650.00, the Promissory Note dated 21st January 1991 for $500.00 and the Promissory Note dated 7th May 1991 for $1200.00 are declared unenforceable and the moneys secured thereby are irrecoverable;

(b) That the Defendant is entitled to retain as moneys properly paid to him under a contract to repay such sums as he has actually received under the Crop Lien No. 96/2654 and any moneys not paid thereunder shall remain unpaid;

(c) That the Plaintiff is entitled to all proceeds now held by the Fiji Sugar Corporation Ltd and the same be paid to the Plaintiff."

This appeal is limited to part (a) only of that judgment and the declaration that the three promissory notes are unenforceable and the moneys secured thereby are irrecoverable.

The appellant is a registered money lender who between 1990 and 1991 advanced money to the respondent supported by three promissory notes details of which are as follows:-

(i) promissory note dated 12 December 1990 for $11650.00

(Exhibit H No.13)

(ii) promissory note dated 21 January 1991 for $500.00

(Exhibit H No.19)

(iii) promissory note dated 7 May 1991 for $1200.00

(Exhibit J No.07)

The respondent acknowledged that he had signed the promissory notes but maintained that as he could not read English he had signed them in the belief that they were invoices associated with trading arrangements he had with the appellant. He explained in evidence how over this period he purchased groceries from the appellant's store. His Lordship did not consider the respondent "...to be a witness of truth" and found as a fact that the respondent did borrow the three amounts on the separate dates stated on the three promissory notes.

Having made that finding it was necessary for His Lordship to then determine the legality and enforceability of those promissory notes. Once again he appears to have had great difficulty with the evidence tendered, this time by the appellant. His evidence was described in the judgment as "disingenuous to say the least"; "this assertion could not possibly be true"; "this was an absurd explanation which I reject". Critical to that assessment of legality was whether there had been compliance with the provisions of the Moneylenders Act (Cap.234) and in particular whether the interest rate had been stated on the promissory notes at the time of execution (s.16); and whether that interest was compound (s.17). Scott J described the appellant's evidence as follows:-

> *"The Defendant's attempt to explain how the different amounts came to be endorsed on the promissory notes was quite bizarre. He first claimed to have filled in the interest rates in advance on the blank promissory notes, book by book. Then he said he had filled them in <u>after</u> the promissory notes had been issued and signed, in one case five months after. His third explanation was that he had filled them in three or four pages at a time in advance. But how he knew what rate to fill in advance before he knew who he would be lending to if indeed the only two reasons for varying the interest rate were the repayment period and the good standing of the borrower he was quite unable to explain in any manner that made any sense at all."*

and his findings on these issues were as follows:-

> *"So far as the Defendant is concerned I am not satisfied that the three promissory notes in issue clearly bore on their face at the time of their making the rate of interest percent per annum payable on them and thereby complied with the requirements of Section 16(3)(c) of the Moneylenders Act. I am satisfied that all three rates of interest which the promissory notes now bear exceed the limit imposed by Section 22(1) and are accordingly excessive. I am also satisfied that in the case of the two promissory notes bearing a monthly rate of interest such interest was compound interest, violate Section 17 of the Act and were to that extent illegal. The amounts loaned to the Plaintiff under these three promissory notes are, in my judgment, irrecoverable (see generally <u>Ram Autar v Penaia Rokovuni</u> FCA Reps 65/99 and <u>Karnail Singh v Gaholi</u> FCA Reps 69/34)."*

From these findings the appellant appeals to this Court on the following grounds:-

1. THE Learned Judge erred in law and in fact in holding that the Promissory Notes were unenforceable under Section 17 of the Moneylenders Act Cap.234.

2. THE Learned Judge erred in law and in fact in holding that monies lent and advanced under the Promissory Notes were irrecoverable notwithstanding the Appellant had charged interest rate with (sic) was less than 12 percent per annum.

3. THE Learned Judge erred in law and in fact in holding that two Promissory Notes bearing a monthly rate of interest was in fact compound interest.

4. THE Learned Judge erred in law and in fact in not properly examining the exact rate of interest charged by the Appellant.

Counsel for the appellant now concedes that compound interest was charged contrary to s.17 of the Act, and that as a result, the appellant had acted illegally. However, it is submitted that any illegality is limited to the question of interest only and so does not render the promissory notes themselves illegal or unenforceable. This ground of appeal therefore is confined to a very narrow issue viz whether the illegal compound interest is severable so that the promissory notes by themselves are enforceable. S.17 in so far as it applies to that issue is as follows:-

> *"17. Any contract made ... shall be illegal in so far as it provides ... for the payment of compound interest ..."*

The appellant interprets that clause as meaning that the legality of a promissory note shall not be affected when compound interest is charged. Rather it is the compound interest only that s.17 declares to be illegal.

In support of that submission Mr. Nagin relies on **Malcolm Muir Ltd v Jamieson** [1947] S.C 314 and the statement of Lord Mackay:-

"When Parliament pronounces something that is within what is a single contract to be 'null' only 'in so far as' something or other is said or contained, Parliament did not mean to render the whole 'null' but only the part visited with disfavour."

That dictum he submits is authority for his claim to severability of those parts of the promissory notes which relate to the illegal interest. As a result the appellant is entitled, he says, to rely on s.21(2) which provides as follows:-

"(2) Where there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive and that the transaction is harsh and unconscionable or substantially unfair, the Court may reopen the transaction and take an account between the money lender and the person sued..."

In order to invoke those provisions the appellant not only concedes that he acted illegally by charging compound interest but that "as a consequence the contract was harsh and unconscionable". However, to reopen these transactions evidenced by the promissory notes, would require the Court to ignore the provisions of s.16 which provide:-

"16(1) No contract ..... shall be enforceable unless a note or memorandum .... (is) signed by the parties ...
(2) ......

(3) and the note or memorandum aforesaid shall contain ...
(a) ....
(b) ...
(c) the rate of interest per cent per annum payable ...."

It was that failure to comply with s.16(3)(c) that made the promissory notes unenforceable, while the breach of s.17 in charging compound interest made the promissory notes illegal.

We have already referred to the observations of Scott J relating to the very unsatisfactory evidence tendered to him by the appellant especially on the question of the interest charged, and which he acknowledges now, but did not in the High Court, was illegal.

What then is the justification for re-opening these transactions when the appellant provided such unsatisfactory evidence at the initial hearing? In any case s.21(2) is purely discretionary in its application.

It provides that the Court:-

"... may re-open the transaction ..."
"... may re-open any account ..."
"... may adjudge to the reasonable ..."
"... may order the creditor ..."
"... may set aside ..."
"... may order him to indemnity ..."

While this section provides that moneylending transactions may be re-opened, we are satisfied from the record of the proceedings in the High Court that there are no circumstances in the present case which would justify our ordering such a course of action.

The appellant's reliance on s.17 and s.21(2) as justification for re-opening these transactions fails to take account of the requirements of s.16 which we have already referred to. A clear breach of the provisions of that section has been established. In this context the respondent relies on <u>**Kasumu and Others v Baba Egbe**</u> [1956] 3 All E.R 266 a decision of the Privy Council which concludes:-

> ***"When the governing statute enacts that no loan which fails to satisfy any of these requirements is to be enforceable it must be taken to mean what it says, that no court of law is to recognise the lender as having a right at law to get his money back. That is part of the penalty which the statute imposes. There is no room to reform the terms of the loan, since the statute is not concerned with the vice of its content but with the vice of the conditions under which it was made. The provisions of s.19 [s.16 in the Fiji Act] are not purposeless. They seem to assume that no loan that is not contemporaneously recorded can be established with sufficient certainty to be recognised at law. If a court, therefore, were to impose terms of repayment as a condition of making an order for relief, it would be expressing a policy of its own in regard to such transactions which is in direct conflict with the policy of the Acts themselves. In their Lordships' opinion, the court should not place itself in such a position."***

In adopting the principles enunciated in that decision we can but say that we, too, do not intend to order the re-opening of these three transactions but adopt and approve the decision of Scott J. We would also like to add that we commend His Lordship for his clarity of reasoning and his perception of the principles fundamental to the judgment.

For the reasons stated the appeal is dismissed. The appellant is to pay the respondent's costs to be fixed by the Registrar if necessary.

I. R. Thompson

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Mr. Justice I. R. Thompson
Judge of Appeal

Gordon Ward

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Mr. Justice Gordon Ward
Judge of Appeal

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Mr. Justice J. D. Dillon
Judge of Appeal