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INDAR SINGH

v.

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SHEIKH MEERA

[COURT OF APPEAL, 1969 (Gould V.P., Marsack J.A., Spring J.A.), 25th February, 4th March]

Moneylending—memorandum of contract—retention by moneylender of part of stated principal sum—resulting inaccuracy of memorandum—Moneylenders Ordinance (Cap. 210) ss.16, 18—Bills of Sale Ordinance (Cap. 202).

C *Appeal—findings of fact—assessment of credibility of witnesses by trial judge—proper advantage taken of seeing and hearing witnesses—court on appeal will not interfere.*

In a Bill of Sale to a moneylender and in the corresponding memorandum of the contract required by section 16 of the Moneylenders Ordinance, the principal sum lent was stated to be £1,185. The trial D judge held as a fact that the full sum of £1,185 was never handed over to the borrower but that an amount of £118 was retained by the moneylender.

Held: 1. The memorandum of the contract failed to comply with the provisions of section 16 of the Moneylenders Ordinance in that the retention of £118 resulted in either the amount of the loan or the interest E rate being mis-stated; repayment of the loan and the securities therefor were accordingly unenforceable.

2. There being no reason to say that the trial judge had not subjected the evidence to adequate scrutiny or taken proper advantage of having seen and heard the witnesses, it was not for an appellate court to interfere with his assessment of their credibility.

F Cases referred to:

Yuill v. Yuill [1945] P.15; [1945] 1 All E.R. 183: *Benmax v. Austin Motor Co. Ltd.* [1955] A.C. 370; [1955] 1 All E.R. 326: *Powell v. Streatham Manor Nursing Home* [1935] A.C. 243; 152 L.T. 563: *Watt (or Thomas) v. Thomas* [1947] A.C. 484; [1947] 1 All E.R. 582.

G Appeal from a judgment of the Supreme Court granting a declaration that a moneylending transaction was unenforceable.

B. Sweetman for the appellant.

A. H. Sahu Khan for the respondent.

The facts sufficiently appear from the judgment of the court.

H Judgment of the Court (read by GOULD V.P.): [4th March 1969]—

The appellant, who was the defendant in the Supreme Court, is a registered moneylender, in whose favour the respondent (plaintiff in the Supreme Court), on the 14th July, 1965, executed a Bill of Sale and a

Collateral Assignment of his cane crop to secure a purported advance of £1,185. The respondent, on the 13th June, 1967, commenced an action in the Supreme Court against the appellant in which he prayed :— A

(a) a declaration that the said Bill of Sale Book 65 Folio 2010 and the collateral assignment are fraudulent and void;

(b) a declaration that the said Bill of Sale Book 65 Folio 2010 and the collateral assignment are void for uncertainty;

(c) a declaration that the said Bill of Sale and assignment are unenforceable for noncompliance with the Moneylenders Ordinance, Cap. 207, Fiji Laws; B

(d) an Order that the Bill of Sale Book 65 Folio 2010 and the collateral assignment be discharged by the defendant and handed over to the plaintiff;

(e) such other and further relief as to this Honourable Court seem just; C

(f) costs of this action.

Having heard the evidence, the learned Judge in the Supreme Court declared the entire transaction between the plaintiff and the defendant was unenforceable on the ground (a) that it was fraudulent and void, harsh and unconscionable and (b) that the defendant had failed to comply D with section 18 of the Moneylenders Ordinance (Cap. 210 — Laws of Fiji 1967) (which provides for the keeping of regular accounts by moneylenders). As consequential relief he ordered that the Bill of Sale and Assignment be discharged. The appellant appealed to this Court against that judgment; at the conclusion of the argument by counsel in support thereof we dismissed the appeal with costs and now give our reasons for so doing. E

In coming to his decision the learned Judge made certain findings of fact and counsel for the appellant acknowledged that unless he could induce this Court to upset those findings he could not succeed. The Bill of Sale recited the request for and agreement to grant a loan of £1,185 and that sum was expressed to be the consideration. Interest was at 10% per annum. In the Memorandum of the Terms of Contract, which F was required by section 16 of the Moneylenders Ordinance to be signed by the parties, the "Amount of Loan" was stated as £1,185 and the "Rate of Interest" as 10%.

The vital fact found by the learned Judge is that the respondent never received the sum of £1,185 from the appellant but that £118 was retained by the appellant as undisclosed interest. He then said :— G

> "The plaintiff was in financial difficulties and so he agreed to interest at the rate of 20% per annum and executed the documents as prepared. It is interesting to note that the sum of £118 does amount to interest at the rate of 10% per annum and the fact that it was taken in advance indeed pushes the total interest rate to beyond 20% because the defendant never had the advantage of using the sum of £118 although he was paying interest on that sum too. In H my view the fact that the sum of £118 was for interest does not affect the allegation that the true consideration was not shown because the plaintiff never in fact received £1,185 which is stated to be the principal sum and which is claimed to be the amount lent.

A In coming to my finding of fact, I have proceeded on the footing that as the document was willingly and knowingly signed by the plaintiff, it was for him to satisfy this Court that the true consideration was not shown. I have had the advantage of assessing the plaintiff's credibility on this point in the light of the whole of the evidence in this case and I have also had the advantage of assessing his credibility against that of the defendant and his witness. I experienced no difficulty in accepting the plaintiff's evidence on the B issue of the money he actually received against that of the defendant. The plaintiff is an illiterate rustic who did not appear to have the cunning and intelligence to concoct figures which would exactly support his case. Sucha Singh's evidence on this point in my view does not help either party one way or the other. In any case, he did not give me the impression of being an independent witness."

C Upon this finding the learned Judge held that the Bill of Sale was fraudulent and void as having failed to set out the true consideration. We do not need to consider that question for it is abundantly clear that on the finding of fact the Memorandum failed to comply with the requirements of section 16 of the Moneylenders Ordinance. It does not matter how the transaction is regarded. If it is looked at as a loan of £1,185 it follows that the interest rate is mis-stated, for the true interest rate D would be, not 10%, but 20% per annum payable as to the first half year in advance. If it is regarded as a loan of £1,185 less £118, then the "Amount of Loan" is clearly erroneously stated. Section 16 is in similar terms to equivalent provisions in money-lending legislation in many parts of the Commonwealth, and we do not need to quote authority for the proposition that where (as here) the Memorandum contains false and misleading information as to material matters, both the loan and all E securities therefor are unenforceable.

In his attack upon the finding of fact we have referred to, counsel for the appellant (basing his argument on *Yuill v. Yuill* [1945] 1 All E.R. 183) submitted that the favourable impression made by the demeanour of the respondent when giving evidence should have been tested against the whole of his evidence. We were referred to a number of passages F in the record of the witness's evidence in relation to collateral matters (such as receipt of accounts) which it was suggested showed him to be unreliable. In more than one case, however, counsel very properly conceded that answers given may have been due to misunderstanding of the question or other confusion. We did not find the examples given to be of real substance, nor in any case (with possibly one exception) did we find ourselves in as good a position to evaluate the evidence as G the learned Judge in the Supreme Court. The exception referred to was evidence of the respondent indicating that a solicitor, Mr. Jamnadas, was present when the money was dealt with in a manner inconsistent with the respondent having received the full consideration. Mr Jamnadas was not called as a witness and we are unable to draw from this evidence any inference of sufficient weight to entitle or induce us to say that the H learned Judge misdirected himself in his careful assessment of the credibility of the witnesses.

The principles governing the position of a court of appeal in relation to findings of fact are fully stated in *Benmax v. Austin Motor Co. Ltd.* [1955] A.C. 370 and in the earlier decisions in *Powell v. Streatham Manor*

Nursing Home [1935] A.C. 243 and *Watt (or Thomas) v. Thomas* [1947] A.C. 484; they need not be repeated. We consider this to be a case where assessment of credibility was paramount and we have no reason to say that the learned Judge did not test the evidence by adequate scrutiny or take proper advantage of having seen and heard the witnesses. Being therefore of opinion that the material findings of fact of the learned Judge in the Supreme Court must be accepted, we dismissed the appeal for the reasons we have given.

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Before dismissing the appeal we informed counsel for the appellant that we were unable to accept his submission that the findings of fact by the learned trial Judge were unjustified, and of our view that on those findings the appeal must be dismissed because the whole transaction (including the securities) was unenforceable as contravening section 16 of the Moneylending Ordinance. As the learned Judge in the Supreme Court had based his decision on section 18 of that Ordinance and on the provisions of the Bills of Sale Ordinance (Cap. 202) and to ensure that there should be no question of surprise, we invited counsel's submissions upon our proposed course but he was unable to find ground for objection. The facts had been fully pleaded and investigated and, as found, disclosed a deliberate attempt by the appellant to evade the moneylending laws.

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Appeal dismissed.

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