PERMAL NAIKER *v.* PACHAMUTTU

[FIJI COURT OF APPEAL AT SUVA (Lowe, C.J., President, Sir George Finlay and C. C. Marsack, JJ/A), June 9, 1959]

CIVIL APPEAL NO. 8 OF 1959

(Appeal from H.M. Supreme Court of Fiji—Hammett, J.)

Moneylenders Ordinance, section 3—" in consideration of a larger sum being repaid "—meaning of " moneylender "—lending at interest—whether constitutes lender a moneylender—case stated by Supreme Court—section 14, Court of Appeal Ordinance—whether Supreme Court empowered to state case—meaning of " trial of any cause or matter ".

Held.—(1) The Supreme Court is empowered by section 14 of the Court of Appeal Ordinance to state a case for consideration by the Court of Appeal ;

(2) The mere lending of money at interest does not constitute the lender a moneylender ;

(3) The words " in consideration of a larger sum being repaid " do not include the mere incidental lending of money at interest ;

(4) The denomination of a person as a moneylender is the culmination of a judicial process in which it is held that the person's business is that of a moneylender or that he has carried on or advertised or announced himself or held himself out to be a moneylender ;

(5) Section 3 of the Moneylenders Ordinance applies to only those transactions in which there is a promise to repay a larger capital sum in respect of the loan of a lesser capital sum.

Cases referred to:

Litchfield v. Dreyfus, (1906) 1 K.B. 584 ; *Edgelow-MacElwee* (1918) 1 K.B., 205 ; *Kirkwood v. Gadd* (1910) A.C. (H.L.), 422.

R. L. Munro for the appellant.

A. Lateef for the respondent.

Two questions have been reserved for consideration by this Court. They are presented in a case stated pursuant to the provisions of section 14 of the Court of Appeal Ordinance (Cap. 3).

The first question is whether a judge of the Supreme Court of Fiji can reserve for consideration by the Court of Appeal, by the way of case stated, a question of law arising on the hearing of an appeal to the Supreme Court from the judgment of a Magistrate's court. The only relevant and enabling legislation to which our attention has been attracted is section 14 of the Ordinance above mentioned. That being so its precise terms are material. It reads:

> " In addition and without prejudice to the right of appeal conferred by this part of the Ordinance, a judge of the Supreme Court of Fiji may reserve for consideration by the Court of Appeal, on a case to be stated by him, any question of law which may arise on the trial of any cause or matter, and may give any judgment or decision, subject to the opinion of the Court of Appeal and the Court of Appeal shall have power to hear and determine every such question."

The crucial phrase for present purposes is " which may arise on the trial of any cause or matter ". What the section clearly postulates is a trial and a question of law arising on that trial. It may be suggested that the hearing of an appeal is not in any true technical sense a trial. But we forebear from consideration of any possible narrow technical meaning because it seems to us that the word " trial ", as used in the section, was intended to be interpreted widely and distributively. We are induced to that view by a number of considerations. The proceedings to which the word " trial " relates could hardly be more extensively defined than they are by the words " any cause or matter " and it seems to us that the word " trial " in relation to proceedings so extensively and comprehensively defined is not likely to have been employed in any restrictive sense. It is, we think, more likely to have been used in a sense wide enough to conform to the widely defined subjects to which it relates. The wider construction would also appear to conform best to the interests of litigants in that by the simple process of a case stated, a final and in so far as Fiji is concerned a conclusive judgment can be expeditiously and inexpensively secured. Thus expense is saved and the conclusion of litigation expedited. Both are ends it is reasonable to infer the legislature would have it in mind to achieve. As we are anxious that the purport of this judgment should not be given too wide an application we emphasize that what we say, and all we say, is that where a preliminary point of law is fundamental to the respective rights and obligations of parties in litigation then a case stated which presents that point of law to the Court of Appeal for decision is authorized by and comes within the ambit of the phrase " trial of any cause or matter " in section 14 of the Court of Appeal Ordinance. Subject to what we have stated, the answer to the first question must necessarily be in the affirmative.

The second question is whether the words " in consideration of a larger sum being repaid ", in section 3 of the Moneylenders Ordinance (Cap. 207) include cases where the consideration for the loan is the repayment of the principal sum lent together with the payment of interest thereon. The section reads:

> " Save as excepted in paragraphs (*a*), (*b*), (*c*) and (*d*) of the definition of " moneylender " in section 2, any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary be proved to be a moneylender ".

There has been some differences of judicial opinion as to the interpretation of the phrase " in consideration of a larger sum being repaid " and this case has been stated to have any doubts put at rest.

The crucial feature must necessarily be what the Ordinance means by " moneylender ". The essence of the definition in the Ordinance is the carrying on of the business of moneylending or the holding out by a person that he is carrying on that business. It is the carrying on of that business or the self representation that he is carrying it on which and which alone invests a person with the character of a moneylender under the Ordinance. There is no indication in the Ordinance of what moneylending is but it can for present purposes be defined with sufficient accuracy by saying that it is the lending of money by a person to all and sundry whom he regards as eligible, at rates of interest which are normally regarded as excessive. Such rates are, of course, often justified by the risks involved. When loans at such rates of interest are made with sufficient repetition then it can be inferred as a fact that the lender is carrying on the business of moneylending.

In other words the investment of an individual with the character of a moneylender is the result of a judicial finding of fact based on conduct and circumstance. But there must be a business in the lending of money. So much has the confirmation of the judgment in *Litchfield v. Dreyfus* (1906) 1 K.B. 584, even subject to the gloss imposed by *Edgelow-MacElwee* (1918) 1 K.B. 205, and of *Kirkwood v. Gadd* (1910) A.C. (H.L.) 422.

The denomination of any one as a moneylender is therefore, as we have said, the culmination of a judicial process in which it is held as a fact in the light of conduct and circumstances that the person's business is that of moneylending or that he has carried on or advertised or announced himself or held himself out to be a moneylender. Until it is established to the satisfaction of the Court that these conditions are fulfilled no one is a moneylender within the ambit of the Ordinance. It follows that the mere incidental lending of money at interest does not *ipso facto* constitute the lender a moneylender.

Sub-paragraph (*b*) of the definition of " moneylender " recognizes this by prescribing that the lending of money at interest not exceeding 10 per cent per annum does not invest the lender with the character of a moneylender if the lending is done in the course of and for the purposes of a business, the primary object of which is not the lending of money, which indicates that the lending of money as a primary purpose is a crucial element in the business of moneylending. It is entirely erroneous to suggest that the mere lending of one sum of money at interest irrespective of the rate of interest constitutes moneylending and any judgment to that effect must be regarded as decided *per incuriam* despite its reliance upon section 3 of the Ordinance. The purpose of that section was no doubt to defeat the ingenuity of those who might endeavour to conceal the imposition of a heavy rate of interest by investing the interest with the character of a capital sum. If the rate of interest is expressed as interest then that rate is manifest on the face of the transaction. If the interest is invested with the character of principal by way of accretion it is not at once apparent and it might well be argued that it has not the character of interest at all. To defeat any such expedient the legislature provides that any person who lends a sum of money in consideration of a larger sum being repaid is to be presumed, until the contrary is proved, to be a moneylender. It is a rebuttable presumption which in terms of the section attaches to any person who resorts to the form of transaction against which the section is directed. There seems no reason, therefore, why the general rule should not apply and section 3 should not be as interpreted as extending only to those circumstances to which it is expressed to relate. It is our view, therefore, that the section only applies to those transactions in which there is a promise to repay a larger capital sum in respect of the loan of the lesser capital sum. Interest does not enter into that question. Indeed the word " repayment " is not properly applicable to the payment of interest. It is proper to speak of a repayment of principal but no question of repayment of interest ever arises, payment of interest being an independent collateral obligation.

We are aware, of course, that in certain forms of mortgage transactions it is customary to include a provision that unpaid interest may be added to the principal sum and recovered as principal. We hasten to add that such a provision would not, in our view, alter the character of the interest which might be added to the capital sum and would not come within the purview of this section because as an added sum it would always lack the character of a sum susceptible of being defined as " repayable " and would always remain clothed with the character of interest.

If any view contrary to that we express is accepted then it would mean that every person outside the statutory exceptions who lent money, however seldom, and at however low a rate of interest, would be deemed by law to be a moneylender unless and until he affirmatively proved contrary. That can never have been the intention of the legislature. It conflicts with the whole history and purpose of the law ; besides if the legislature meant to achieve any such radical purpose it would have said so in plain terms and would not have attempted to achieve its purpose by indirection. Holding the view we do we are necessarily constrained to answer the second question in the negative.