

Present: Fisher C.J. and Drieberg A.J.

1927.

MUTHU PATHAM *v.* ALIAR LEBBE.

90—D. C. Batticaloa, 6,043.

Money lending—Loan of money—Repayment in kind—Ordinance No. 2 of 1918, s. 2 (1) (a).

The plaintiff lent the defendant a sum of Rs. 16,000 and it was agreed that the defendant should discharge his obligation by the delivery of 1,600 amunams of paddy by instalments. In default of delivery of any instalment the plaintiff was to be entitled to sue for the value of the balance of paddy remaining undelivered at the ruling market price.

Held, that this was a money lending transaction within the meaning of section 2 of the Money Lending Ordinance and that it was open to the Court to grant relief under the section.

A PPEAL from a judgment of the District Judge of Batticaloa.

Balasingham (with *Spencer Rajaratnam*), for defendant, appellant.

No appearance for respondent.

September 9, 1927. FISHER C.J.—

In this case the respondent-plaintiff lent the appellant-defendant the sum of Rs. 16,000 on December 21, 1920, and the parties agreed that the defendant should discharge his obligation by delivery of 1,600 amunams of paddy by four annual instalments of 375 amunams each and a final instalment of 100 amunams. In default of delivery of any instalment the plaintiff was to be at liberty to sue the defendant for the value of the whole balance of paddy then undelivered calculated at the then selling price.

When the defendant had delivered 1,125 amunams he made default in delivery. 475 amunams then remained to be delivered under the contract, and the plaintiff sued the defendant for their value calculated at Rs. 21 per amunam, namely, Rs. 9,975. The defendant pleaded that he had delivered paddy to the value of Rs. 22,500 (calculated at the rate of Rs. 20 per amunam) and thereby overpaid what was due to the plaintiff by Rs. 2,635, which sum he claimed in reconvention.

The facts were not in dispute, and the value alleged in the plaint as the selling price at that time (September 14, 1926), Rs. 21 per amunam, having been agreed on, the case went to trial without any

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evidence being led and the learned Judge gave judgment for the amount claimed, being of opinion that the Money Lending Ordinance, No. 2 of 1918, was not applicable.

He says, in his judgment: "The Money Lending Ordinance refers purely to money lending and money recovering transactions," and later on he says, "it is only in the case of default on the part of the defendant that the plaintiff is said to be entitled to sue for the balance of paddy yet due at the price ruling at the time." I take that to mean that in the learned Judge's view if a borrower as in this case, binds himself to discharge his obligation by payment in kind and only becomes liable under the agreement to make a money payment in the event of failure to pay in kind the case is not within the Ordinance. He holds in effect that inasmuch as the obligation on the defendant to pay money is conditional and only comes into existence in the happening of a certain event it is not what he describes as a "money recovering" transaction. If such is the case presumably the operation of the Ordinance would be limited to cases in which on money being lent the borrower agreed to repay it and the interest on it by cash payments. I do not think that that is in accordance with the true construction of the enactment.

The case before us is clearly a money lending transaction, in that it is based on the fact that the plaintiff lent the defendant Rs. 16,000, and the action, in my opinion, falls within the words of section 2, of the Ordinance, inasmuch as it is a proceeding for the enforcement of an agreement "in respect of money lent." The amount of the loan is not primarily repayable in money it is true, but it is repayable in money's worth. It seems to me that the words of the section which I have referred to clearly indicate the intention to include transactions such as that which we are considering, and that view is emphasized by the words of sub-section (4) of section 2, which provides that "the foregoing provision of this section shall apply to any transaction which, whatever its form may be, is substantially one of money lending."

I think, therefore, that the judgment appealed from must be set aside, and the case must be remitted to the District Court to determine whether on the facts admitted with such further evidence as may be called the plaintiff is entitled to have the transaction reopened, and if so, to proceed accordingly. The respondent will pay the costs of the appeal and of the hearing which took place in the District Court.

DRIEBERG A.J.—

I agree with my Lord the Chief Justice that the transaction being found by the learned District Judge to be a loan of money the mere fact that it was to be repaid in property does not take the case out

of the Ordinance, and that it is open to the Court to give relief if the transaction is one of the character described in section 2 (1) (a) of the Money Lending Ordinance, No. 2 of 1918, and I agree with the order he has made.

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I wish to add that in determining whether the return to be received by the creditor was excessive, and whether the transaction was harsh and unconscionable or substantially unfair, the agreement should be considered as at the time it was made and not in the light of subsequent events.

In *Thomas v. Ashbrook*,¹ the report of which is not available to me, but which is quoted on page 83 of *Ajit Ghose's Law against Usury in British India*, Gibson J. said that the reasonableness of the interest is to be "ascertained with reference to the conditions which were or ought to have been present to the mind of the lender at the time of the transaction, not the actual or true risk, which the event might show to have been trifling or non-existent."

It is recorded that the market price of paddy is agreed to at Rs. 21; I take that this refers to the price of paddy for the purpose of determining the amount payable for failure to deliver the 475 amunams, and not to the price of paddy during the whole period of the agreement.

Set aside and sent back.

¹ (1913) Ir. R. 2, K. B. Div. 416, 427.