IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

Civil Appeal No. 15 of 1955

Between:

NARAIN SAMY NAIDU — Appellant

AND

MARIKA RATOTO — Respondent

Undefended action on promissory note—examination of plaintiff by Magistrate *suo moto*—section 15 Moneylenders Ordinance applied—judgment for defendant—whether Magistrate's action sustainable on appeal.

The appellant sued on a promissory note for money lent. The respondent filed no defence and was absent when the case was called before the Magistrate. The Magistrate, *suo moto*, called the appellant into the witness box. The appellant denied, when questioned by the court, that he was a moneylender. However the Magistrate gave judgment for the respondent holding that the appellant was an unlicensed moneylender, and that section 15 of the Moneylenders Ordinance applied. Section 15 provides that no contract for the repayment of money lent by an unlicensed moneylender shall be enforceable.

Held (*on appeal*).—There was no evidence before the trial Magistrate to justify him in holding that the appellant was an unlicensed moneylender.

Appeal allowed. Judgment entered for the appellant.

Case referred to: *Lipton v. Powell* (1921) 2 K.B. 251.

P. Rice for the appellant.

Respondent absent and unrepresented.

HAMMETT, J. [1st March, 1956]—

Judgment:

This is an appeal against the decision of the learned Magistrate sitting in the Magistrate's Court of the 1st Class at Ba dated 2nd December, 1955, whereby he entered judgment for the respondent-defendant on a claim by the appellant-plaintiff for money lent.

The particulars of claim read as follows:—

> " The plaintiff claims from the defendant the sum of £50 being the amount due and owing under a certain promissory note No. 10039 dated 7th July, 1950, and dishonoured by non payment on presentation."

The plaintiff swore an affidavit, in support of his claim that there was, in his belief, no defence, under the provisions of the Magistrates' Courts Rules Order 6, which was filed with the claim.

The defendant did not file a defence and did not appear at court on 2nd December, 1955, when the case was heard and judgment given. At the hearing the trial Magistrate intimated to counsel for the plaintiff that he was prepared to give judgment for the plaintiff if the plaintiff was not a moneylender.

The plaintiff was called to the box and gave formal evidence; the record reads that he said:—

> " I am plaintiff—I am a storekeeper and not a moneylender."

In reply to questions by the Court, he said, " This loan was in respect of my business. I lent him cash to buy something somewhere. I have given him credit for monies received from the defendant."

The trial Magistrate was not satisfied and gave a brief judgment:—

" Held section 15 of Cap. 185 applies. Judgment for defendant. No order as to costs."

The grounds of appeal are as follows:—

" 1. The Magistrate Mr. E. W. Morgan who delivered the above mentioned decision had no jurisdiction of his own motion to raise a defence based upon the provisions of ' The Moneylenders Ordinance ' (hereinafter called ' the Ordinance ').

2. By so doing the said Magistrate constituted himself counsel for the respondent in the above action and exhibited bias against the appellant.

3. There was no evidence tending to prove the appellant a ' moneylender ' within the meaning of the Ordinance.

4. The respondent did not allege the appellant was a ' moneylender ' as aforesaid.

5. Even if the appellant were such a ' moneylender ' as aforesaid (which the appellant denies) there was no evidence that he did not hold a moneylender's licence.

6. The course taken by the said Magistrate of his own motion and in the absence and without the knowledge or request of the respondent violated fundamental principles of the laws of procedure.

7. On the materials properly before the said Magistrate a judgment in favour of the appellant for the amount claimed was in law inevitable."

The Moneylenders Ordinance, Cap. 185, section 15 reads as follows:—

" No contract for the repayment of money lent (after the coming into force of this Ordinance) by an unlicensed moneylender shall be enforceable."

It is the contention of the appellant that, since the defendant did not plead the provisions of the Moneylenders Ordinance by way of defence, it was not open to the court to raise it of its own motion in the total absence of anything in the claim or in the evidence before the court which would justify the court to hold (*a*) that the plaintiff was a moneylender within the meaning of that term in section 2 of the Ordinance (Cap. 185), or (*b*) that he had lent money in consideration of a larger sum being repaid and that he should therefore, be presumed to be a moneylender, until the contrary was proved, under the provisions of section 3 of the Ordinance.

In support of this contention the case of *Lipton v. Powell* (1921) 2 K.B. at p. 251 has been cited, and with one exception it is on all fours with the circumstances of this case.

In *Lipton v. Powell* it was held that a defence under the Moneylenders Act must be specially pleaded in accordance with the County Court Rules. In Fiji, however, there is no such similar rule.

Order 16 Rule 1 of the Magistrates' Courts Rules begins as follows:—

" Suits shall ordinarily be heard and determined in a summary manner without pleadings."

Nevertheless, special provisions are made by Rule 1 of Order 16, whereby if the Magistrate considers it expedient in the interests of justice, he may order the filing of pleadings. Rule 2 of the same order specifically covers the case of illiterates.

Where the court considers it necessary in the interests of justice, it may direct the Court Clerk to take down an illiterate's statement in writing and after verifying the statement by oral examination may, if it thinks fit, direct that such a statement be filed as a pleading.

The procedure under Order 6 Rule 6, where the plaintiff has filed an affidavit of no defence, is usually different. Such cases normally should be dealt with as undefended cases requiring no evidence to be produced by the plaintiff (Rule 10). There is, however, a saving clause in Rule 11, which gives the court power at any stage to require oral evidence if it thinks fit.

In the present case, it is transparently obvious that the trial Magistrate suspected the plaintiff of being an unlicensed moneylender.

The defendant did not, however, defend the case, and there was no evidence before the trial Magistrate to justify him holding that the plaintiff was, in fact, an unlicensed moneylender.

For these reasons, this appeal must be allowed.

The judgment of the court below is set aside and judgment is entered for the plaintiff for the sum claimed namely, £50.