

MAHAJIBHAI NAGHJIBHAI PATEL

v.

MAHENDRA KUMAR CHHOTALAL

[SUPREME COURT, 1962 (MacDuff C.J.), 10th, 11th, 25th October]

Civil Jurisdiction

Moneylending—moneylender's account—whether regular—question of fact in each case—Moneylenders Ordinance (Cap. 207) s.18(1)—Moneylenders Ordinance (Nigeria) (c. 136) s.19.

The plaintiff, a moneylender, owing to his absence from Fiji, did not enter in his account of a loan of £1,000 made by him to the defendant, payments made by the defendant on the 30th June 1961, and the 30th December 1961, until his return to Fiji in April 1962. All other receipts were promptly entered in the account.

The plaintiff's account book showed that individual loans were not entered in chronological order in the folios of the book.

Held: 1. The requirement of section 18(1) of the Moneylenders Ordinance that every moneylender shall keep or cause to be kept a regular account of each loan, involves a question of fact to be decided in the circumstances of each particular case.

2. Irregularity in the entering of loans as they are made, in relation to the folios of the account book, is some evidence (though of only persuasive effect) which may be taken into account in considering whether the account of one loan has been kept regularly.

3. On the evidence before the court it could not be found that the account was not regular.

Cases referred to: *Kasumu v. Baba-Egbe* [1956] A.C. 539; [1956] 3 All E.R. 266; *Bianath Singh v. Keshonand* (1962) 8 F.L.R. 83.

Action in the Supreme Court by a moneylender for the return of moneys lent.

D. Pathik for the plaintiff.

F. M. K. Sherani and R. I. Kapadia for the defendant.

The facts sufficiently appear from the judgment.

MACDUFF C.J.: [25th October, 1962]—

The Plaintiff is a registered moneylender carrying on business at Nadi. He claims from the Defendant the sum of £1,040 being principal and interest owing under a Promissory Note No. B 1904 dated the 11th January, 1960, and executed by the Defendant in his favour.

The Defendant claims that he owed the firm of Chimanbhai & Co. a sum of £1,000 and that this Promissory Note was given to secure repayment of that amount. He admits that on the 11th January, 1960, he went with the Plaintiff to the office of Mr. A. D. Patel where he executed this Promissory Note and where he received £1,000 in cash. He denies, however, that the Promissory Note was in favour of this Plaintiff, or that that part of the Promissory Note was translated to him. Incidentally in a subsequent case this Defendant found no difficulty in reading the Promissory Note in English. He then goes on to say that he returned the £1,000 in cash to the Plaintiff.

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The Defendant's story would be quite a believable one were it based on the fact that the Plaintiff, at this stage a registered moneylender, was taking over the advance to the Defendant previously made by Chimanbhai & Co., of which firm the Plaintiff was also a partner. This explanation the Defendant himself denies and when put to the Plaintiff he insisted that this loan was additional to that outstanding to Chimanbhai & Co., and that the Defendant did not return him the £1,000 as the Defendant alleges.

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Apart from a legal defence put forward by the Defendant the question resolves itself into whether the Defendant has discharged the onus of establishing that he repaid this £1,000. Counsel for the Defendant has pointed to certain facts which he submits supports the Defendant's story that he handed back this £1,000 immediately. The first and most important is the fact that on the day following the advance the sum of £1,000 was lodged to the credit of Chimanbhai & Co. with the Bank of New Zealand at Nadi. The Plaintiff says that this amount was lodged from moneys held in cash by Chimanbhai & Co. Again it is contended that it would be most unlikely for Chimanbhai & Co. to hold large amounts of cash in hand and at the same time carry an overdraft with the Bank of New Zealand of £4,000. While this may be unlikely with a European firm it is not so unlikely with an Asian firm whose predilection for cash in hand is well-known. This later factor would explain the necessity to make a lodgment of £1,000 out of cash to cover a cheque for that amount cashed the same day.

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It is also said to be unlikely that the Plaintiff would himself advance £1,000 to the Defendant when he could not repay the same amount owing to Chimanbhai & Co. That again may be so but during the next two years the Defendant did in fact pay some £550 to Chimanbhai & Co. and £200 to the Plaintiff. It is also said to be unlikely that the Plaintiff did not ask the Defendant what he wanted this £1,000 for. There are on the other side equally unlikely factors. If this Promissory Note were to secure the debt owing to Chimanbhai & Co. why was it drawn in the name of the Plaintiff as a registered moneylender. If the moneys were repaid to Chimanbhai & Co. why was this not done before Mr. A.D. Patel. If the moneys were repaid to the Plaintiff why was the Promissory Note not retired. Why was there no note of this transaction in the Defendant's books.

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To accept the Defendant's story I must of necessity hold that in January, 1960, the Plaintiff deliberately laid the ground work of a false claim against the Defendant and made entries in his books of

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account to support that false claim. I have seen both the Plaintiff and the Defendant in the witness box. I formed the impression that the Defendant was not telling the truth and was shifty and untrustworthy not only in his business transactions but also in his evidence. On the other hand I was rather impressed by the Plaintiff. In a long cross examination he appeared to be honestly trying to answer every question to the best of his knowledge.

Taking every suspicious circumstance into account and the evidence of the two parties I find that the Defendant has failed to establish repayment of the £1,000 admittedly borrowed by him.

During the course of hearing Counsel for the Defendant inspected the Plaintiff's books of account. He alleges that they are not a "regular account" within the terms of Section 18(1) of the Money-lenders Ordinance (Cap. 207 Laws of Fiji) and that the loan is unenforceable. In the first instance he points to two entries which were made by the Plaintiff on his return from India in April, 1962. These were a payment of £50 on June 30th, 1961, and a payment on December 30th, 1961. Counsel contends that although "regular account" is not defined it is intended to mean that entries in such account must be entered forthwith. For this contention he relies on *Kasumu v. Baba-Egbe* [1956] 3 All E.R. 266. I disagree with his contention. That case refers to Section 19(3) of the Nigerian Money-lenders Ordinance which explicitly states:

"(3) the entries in the said books shall be made forthwith on the making of the loan or the receipt of sums paid"

and is no authority for what constitutes a "regular account" in this Colony.

In default of definition it appears to me that the requirement of Section 18(1) that "every moneylender shall keep or cause to be kept a regular account of each loan . . . clearly stating in plain words and in English numerals . . . the terms and transactions incidental to the account entered in a book . . ." is a question of fact to be decided in each particular case. In *Bianath Singh s/o Rajmal v. Keshonand s/o Bissessar and Others*, (1962) 8 F.L.R. 83 Hammett J. held that the account kept by the Plaintiff was not a regular account within the meaning of Section 18(1). His reasons for so holding were that "the fact that this account was all written up at one time only a week before the hearing of this action, and that those entries covered all the transactions between the parties over the previous three years, deprive it, in my view, of any right to be called a 'regular account' of this loan and of the transactions incidental to the account". With that finding, on the facts of that case, I would respectfully agree.

What are the facts in this case? It is admitted that the Plaintiff wrote up the receipts of 30th June, 1961, and December 30th, 1961, in his account book in April, 1962. The remainder of the entries in the account were, according to the Plaintiff, made shortly after payments were made or received. These two payments were received on the Plaintiff's behalf by Chimanbhai & Co., during his absence

from the Colony, were entered to the credit of his personal account in the books of Chimantbhai & Co., and were entered by him in his moneylender's books immediately on his return. I can't see that this makes his account of this loan not a regular one.

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I am asked to find, on the evidence of the writing itself, that the Plaintiff's account of this loan at p. 7 of his Ledger was written up at the one time. The Plaintiff has said on oath that this was not so. I am afraid I cannot set myself up as handwriting expert. I must accept his sworn evidence.

Counsel also points to the fact that the Plaintiff's books show at page 2 a loan made on 18th January, 1960, at page 3 a loan made on 4th January, 1960, at page 4 a loan made on 16th September, 1959, at page 5 a loan made on 5th January, 1960, at page 6 a loan made on 6th January, 1960, and at page 7 a loan made on 11th January, 1960. I agree that irregularity in the entering of loans as they are made, by entering them in successive folios, is some evidence that may be taken into account in considering whether the account of one loan has been kept regularly. It can, of course, be of no more than persuasive effect since the section refers to the "regular account of each loan". On the books themselves and the evidence of the Plaintiff I am unable to find that he has kept any other than a regular account of this loan.

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In the result, therefore, judgment will be for the Plaintiff for the amount claimed and costs.

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Judgment for the plaintiff.