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IN THE SUPREME COURT OF FIJI

Civil Jurisdiction

Action No. 633 of 1984

Between:

HASID ALI (f/n Wazid Ali)

Plaintiff

and

ASHNI KUMAR (f/n Behari Maharaj)

Defendant

Mr S.P. Shankar for the Plaintiff  
Messrs P.I. Knight and H.K.Nagin for the Defendant

JUDGMENT

The Statement of Claim in this action is a somewhat confused one. After hearing both the plaintiff and the defendant that confusion has not been dispelled.

The allegations in the statement of claim are in the main criticism of the securities, in support of an allegation that the securities are illegal and null and void. There are also allegations made of fraud.

There are contradictory claims for relief. For instance the first claim for relief is for a declaration that the security documents executed by the plaintiff in favour of the defendant are illegal null and void. That is followed by an order for accounts. There is also a

claim for repayment of all moneys that the plaintiff had paid to the defendant being payments made by him on account of moneys some of which he does not deny were advanced to him by the plaintiff. He also seeks damages.

None of these claims to relief are expressed to be in the alternative.

Groping my way through the lengthy and confused pleading and considering the evidence before me what the plaintiff really complains about is that the defendant was at all relevant times an unregistered moneylender within the meaning of that term in the Moneylenders Act. The plaintiff alleges that the contract or contracts for repayment of the moneys purportedly lent to the plaintiff by the defendant is or are therefore unenforceable.

That is the issue I propose to consider. Consideration of this issue does not require me to consider the accounts in any detail.

If the contract/s for repayment of the loans is/are unenforceable it follows that the securities can not be enforced and there would be no need for any order for accounts.

The issues as I see them are:

1. Was the defendant at all relevant times a moneylender as defined in the Moneylenders' Act, and
2. Are the securities or any of them unenforceable.

Dealing with the first issue. There is no dispute that the defendant at no relevant time held a license under the Moneylenders' Act.

Nor is it in dispute that the defendant lent money to the plaintiff in consideration of his paying interest thereon to the defendant.

Section 3 of the Moneylenders' Act provides as follows:-

"3. 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."

The definition of 'moneylender' in Section 2 is as follows:

"moneylender" includes every person whose business is that of moneylending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business whether or not that person also possesses or earns property or money derived from sources other than the lending of money and whether or not that person carries on the business as a principal or as an agent but does not include -

- (a) any body corporate incorporated or empowered by any written law or Imperial enactment to lend money in accordance with such law or enactment; or  
(Substituted by 13 of 1977, s.13.)
- (b) any person bona fide carrying on the business of banking or insurance or bona fide carrying on any business not having for its primary object the lending of money in the course of of which and for the purposes whereof he lends money at a rate of interest not exceeding ten per cent per annum; or
- (c) any pawnbroker licensed under the provisions of the Second-Hand Dealers Act; or
- (d) any body corporate for the time being exempted by the Minister from the provisions of this Act.

The defendant is a retired bus proprietor. He first met the plaintiff in 1977 when one Shiriram, a bailiff came with him to see the defendant. He, at that time wanted a loan which was not given to him.

The defendant said that on many occasions thereafter the plaintiff came to him for loans and the defendant lent him money.

In 1981 the defendant lent the plaintiff money from time to time and the plaintiff used to give him cheques in return. The cheques were not honoured and the defendant sued and obtained judgment for \$13,200. After that he lent the plaintiff \$1000. The plaintiff later asked him for a loan to pay off one Ram Lakhan to whom the plaintiff had given a mortgage. The defendant agreed and the plaintiff executed a mortgage for \$52,000 in favour of the defendant.

The mortgage registered under No. 195484, and dated the 2nd October 1982 was a second mortgage which purported to record therein that the defendant had on that date advanced to the plaintiff the sum of \$52,000. That was not factual. The mortgage according to the defendant included the judgment debt and other expenses which the plaintiff alleged he had previously paid but he produced no receipts for any payments in support of that contention.

The mortgage provided for 13% interest, a rate which commercial banks were then charging but which was in excess of the rate an unregistered moneylender could charge. The rate that a private individual could then charge was 10% (subsection (5) of section 22 of the Moneylenders' Act.)

After the documents purporting to secure a loan of \$52,000 were executed, the defendant continued to lend him sums of money. Those advances should have been recorded by memoranda of further advances since they were intended to be further advances under the mortgage. The sums, the defendant said were not large sums. Exhibit 10 seems to indicate there were 5 loans all within 5 days of the day the defendant alleged he made \$35,000 available. The five loans he made totalled the

sum of \$8,595 which the defendant said he made the plaintiff acknowledge in writing.

He later lent the plaintiff more money on several occasions.

On 24th January 1983, the parties gave their solicitors instructions to upstamp the mortgage by a further \$38,000. The variation of mortgage, executed by the parties (Exhibit 23) records receipt of the sum of \$38,000 and that the principal sum secured by the mortgage was increased to \$90,000. The variation confirmed that the rate of interest remained at 13%.

A further variation was signed by the parties on the 13th December, 1983 recording that a further sum of \$10,000 had been received as a further advance under the mortgage increasing the principal sum secured to \$100,000.

The defendant said that prior to lending money to the plaintiff he had made a number of loans - the number he could not remember. He said in answer to a question from Mr Knight that the number could be 4 or 5. He took security for loans by way of mortgage.

He said that he had not advertised that he was in the business of moneylending but he admitted that Shiriram the bailiff would from time to time inform him that people were in trouble and he would help them financially. Shiriram was a bailiff and in a position to know when people were, in financial trouble. As bailiff he would execute writs of fieri facias.

The defendant admitted that when he lent money to other people he charged interest. He stated he did not charge more than 10% interest but he and plaintiff had agreed to 13% interest.



In cross-examination he admitted that Shiriam as a middle man knew who wanted money and he knew the defendant had money which the defendant would lend on interest. The defendant said this was the situation up to the time Shiriam brought the plaintiff to see him.

The defendant admitted making many loans to the plaintiff but he alleged that initially he charged no interest. On this issue I prefer the plaintiff's story that interest was charged on his loans but he did not establish that the rate was 40%.

There can be no doubt whatsoever that the defendant was at all relevant times a moneylender within the meaning of that term in the Moneylender's Act and I so hold. He paid interest on overdrafts to his bank while lending at interest. He used his solicitors' offices in which to transact business, at least the documentation was done there, and they collected payments. In respect of the plaintiff he lent sums according to the documents up to a total of \$100,000. He had no need to advertise because Shiriam was aware the defendant had money and would make loans.

As the defendant did not at any time take out a moneylender's licence any contract entered into by the defendant for repayment of money lent by him, an unlicensed moneylender, to the defendant, a borrower, must be held to be unenforceable unless the loans are exempted by section 29 of the Act.

Section 29 provides as follows:

"29 - (1) This Act shall not apply to any loan which fulfils all the following conditions, and no such loan shall be taken into consideration in determining whether or not a person is a moneylender:-

- (a) the loan is secured by a registered mortgage of freehold or leasehold land with or without collateral security;

- (b) the rate of interest charged does not exceed ten per cent per annum or such other rate as may from time to time be fixed by the Minister in pursuance of the power conferred upon him so to do;
- (c) the rate of interest (if any) is expressed in such mortgage in terms of a rate per cent per annum;
- (d) the conditions as to interest on the loan do not conflict with the provisions as to interest prescribed by section 17 in the case of loans by moneylenders:

Provided that for the purposes of this paragraph a provision for the reduction of interest on prompt payment shall not be deemed to conflict with that section;

- (e) the loan is not subject to any agreement for the payment by the borrower of any costs, charges or expenses other than the following:-
  - (i) costs, charges or expenses which are properly incurred in connexion with the negotiations for or the granting of the loan or any necessary documents incidental thereto;
  - (ii) costs, charges or expenses properly incurred in connexion with protecting, maintaining, preserving, varying, discharging, renewing, realizing or attempting to realize any security for the loan, or making good any default by or discharging any outgoing payable by the borrower;
  - (iii) any other costs, charges or expenses necessarily and properly incurred by the lender as a result of any request by the borrower;
  - (iv) interest at a rate not exceeding the rate permitted under this section on any such costs, charges and expenses as aforesaid if incurred by the lender.
- (2) The Minister may from time to time, by notice in the Gazette, vary, in relation to loans made at any date subsequent to such notice, the rate of interest specified in subsection (1). (Inserted by 22 of 1957, ss. 2 and 4)".

Interest has now been increased from 10% to 12% (vide Legal Notice No. 22 of 1982 made by the Minister of Finance pursuant to subsection (2)).

Unless the defendant can rely on section 29 the law is clear that the contract or contracts for repayment of money lent by him to the plaintiff will be not enforceable.

Section 15 of the Act provides:

"15. No contract for the repayment of money lent after the commencement of this Act by an unlicensed moneylender shall be enforceable."

The mortgage executed by the plaintiff on the 21st October 1982, and subsequently registered as No. 195484, purported to secure the sum of \$52,000 allegedly lent and advanced on the 21st October, 1982. This was not factual.

Mr Patel did not seem to appreciate that he was dealing with trust moneys belonging to the plaintiff. No moneys were advanced by the defendant to the plaintiff on the day the mortgage was executed. Mr Patel as solicitor acting for both the parties at the time should have had the defendant pay the moneys which were being advanced to the plaintiff into his trust account with Sherani & Co., before requiring the plaintiff to execute the securities.

One of the accounts prepared for the plaintiff by Messrs. Sherani & Co. during the hearing indicates the sum of \$52,000 was advanced in cash on 23.10.82.

The plaintiff's account prepared by the same firm indicates the defendant paid the firm \$35,000 on 25th October 1982 and \$3,395 the following day. The sums totalling \$38,395 were paid to Mr Ram Lakhan.



Mortgage No. 195484 does not indicate therein that it is collateral to and secures the same moneys as are secured by Bills of Sale 82/3875 and 82/3876. Nor do either of those Bills of Sale record that each bill of sale is collateral to the other and to the mortgagee. On the face of the bills of sale each of the registrations of them would appear to be void.

Section 11 of the Bills of Sale Act provides as follows:-

"11. If a bill of sale is made or given subject to any defeasance, or condition, or declaration, of trust, not contained in the body thereof, such defeasance; condition or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before registration; otherwise the registration shall be void:

Provided that in the case of a document securing the payment of the moneys or any part thereof payable by virtue of a bill of sale it shall not be necessary for the purposes of this section to write such document on the same paper or parchment so long as the date, names of the parties thereto and the nature of the security are set forth in the bill of sale or in some schedule thereto."

Since Counsel did not raise this issue and I am of the view in any event that the Bills of Sale are not enforceable for another reason, which I shall refer to later, I make no finding that the bills of sale are caught by section 11.

The defendant had difficulty in establishing that \$52,000 was in fact owing. His solicitors prepared the account (Exhibit 41) which discloses that no moneys were advanced to the plaintiff on the day he executed the mortgage. The account is as follows:

21.10.1982

Balance Amount owing under Supreme Court Judgment in Action No. 735 of 1981	\$12,225.00
Interest on \$12,225.00 from 6th December, 1981 to 21st October, 1982 at 10%	\$ 1,071.78¢
Fees paid to R.I.Kapadia & Co., for the above action	\$ 200.00
Fees paid to Sherani & Co., for issuing of two Bankruptcy Notices	\$ 120.00

25.10.82

Paid Sherani & Co., to discharge Mortgage over C.L.4306 to Mr Ram Lakhan	\$35,000.00
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26.10.1982

Paid Sherani & Co., to discharge Mortgage over C.L.4306 to Mr Ram Lakhan	\$ 3,395.00
	<u>\$52,011.78¢</u>

In respect of this account I have the following  
comments to make:

1. The sum of \$12,225 was the amount alleged  
to be owing under judgment in Action 735  
of 1981.
2. \$1071.78 is interest on that sum at the  
rate of 10%. Interest on judgment debts  
in 1982 under the rules of the Supreme Court  
was at the rate of 5%. Interest on this sum  
was compounded when it was capitalised and  
included in the \$52,000 alleged loan.

3. The plaintiff was not legally liable to pay the defendant's solicitor's costs of \$200. The judgment debt included court costs payable by him.
4. Nor was the plaintiff legally liable to pay Messrs Sherani & Co, the costs of the two bankruptcy notices which at a cost of \$120 appears an exorbitant charge.
5. The additional sum of \$11.78 was apparently written off as a generous gesture if true. The defendant did not strike me as being a person who would write off any money which he did not have to write off. I suspect that the defendant was unable to come up with an account confirming \$52,000 was owing. Mr Patel admitted he did not have on his file anything to confirm the accuracy of the figures in the account.
6. There is nothing left out of the \$52,000 with which the plaintiff could meet the solicitor's costs which I have no doubt the plaintiff was called on to pay.

On the 29th January 1983 the parties executed a variation of the mortgage which both parties signed. It purported to record a receipt of \$38,000 by the defendant. That is not the usual way of recording a further advance. It is normally done by way of a Memorandum of Further Advance. The sum of \$38,000 was not in fact one advance but the total of several alleged advances. The document is of interest because it confirms the interest rate of 13%.

A little over three months later on 2nd May, 1983 another variation of the mortgage was prepared by Mr Patel which was executed only by the defendant.

The variation in the circumstances prevailing is a most unusual one. After reciting the particulars of the mortgage the parties and the land the actual variation is stated in very brief terms. It states:

"Is hereby varied: That the interest rate is hereby decreased to ten per cent per annum with effect from the 21st day of October 1982."

The October date is the date of the execution of the mortgage.

The variation was registered on the 24th May, 1983.

About the end of April 1983 the plaintiff in Supreme Court Action 417 of 1982 had commenced action against the defendant claiming (inter alia) that the defendant was an unregistered moneylender.

The defendant would not admit that the variation of interest from 13% to 10% was a direct result of the plaintiff commencing action in Civil Action 417 of 1982.

I do not think there can be any doubt that the variation was a direct result of the action. Mr Patel when cross-examined said he had in mind section 29 of the Moneylender's Act which excluded from the Act registered mortgages on land in which (inter alia) interest charged was not in excess of 10%.

Mr Patel said that he knew before Action 417 of 1983 commenced that the mortgage might be caught by the provisions of the Moneylenders Act. Mr. Patel drew no documents varying the two collateral Bills of Sale. He expressed the view that variation of the mortgage would automatically effect variation of the Bills of Sale.

If it was necessary to also vary the bills of sale there was one significant difference. Any variation of the terms of the Bill of Sale, if it could be effected by a deed of variation without preparing new Bills of Sale, would require execution of the deed by both parties.

A variation of the mortgage prepared by Mr Patel could and was in this instance registered with only the signature of the defendant as mortgagee. The proviso to section 66 of the Land Transfer Act specifically states that it shall not be necessary for a mortgagor to execute a memorandum of reduction of the interest payable under the mortgage.

Mr Patel did not have the plaintiff execute the variation and I am satisfied that was deliberate and that the plaintiff knew nothing about it at the time.

The defendant's evidence on this issue satisfies me that the variation was not the result of any agreement between the parties to reduce the interest.

The defendant said:

"Mr Patel advised me to sign the variation reducing interest to 10%. I did not decide this he did. I was advised 13% only applicable to banks and my interest was 10%."

There was a further variation of the mortgage dated the 13th December 1983 which both parties did sign.

The body of the document commences:

"Is hereby varied as follows:

- (1) - (not relevant)
- (2) - " "
- (3) - The interest rate remains at 10% (per cent) per annum."

Although Mr Patel witnessed the execution of this document which contains the usual certificate that he had read over and explained the contents of the document to the plaintiff I can not with regret accept that certificate. Mr Patel was not very convincing when giving evidence on



this sensitive issue. His handling of the various transactions left much to be desired. Had he taken the precaution of sending the plaintiff to another solicitor for advice and that solicitor had witnessed the signature of the plaintiff I would accept that the parties had agreed to or confirmed the reduction. As it is I am satisfied the purported variation did not record any agreement by the parties to reduce the rate of interest.

On 26th September 1983 and 13th February 1984 Mr Patel prepared papers calling up the moneys allegedly owing under the two Bills of Sale and the mortgage.

In respect of each of the two demands under the Bills of Sale he demanded on behalf of the defendant the sum of \$150 for bailiff's seizure costs and possession although there had been no seizure before the demand and \$100 solicitors costs. Those claims were in my view exorbitant and so far as the claim to solicitor's costs was concerned (which only involved a notice) quite improper. It is an extension of the practice in Fiji of some solicitors claiming excessive legal fees for writing a letter threatening to sue if debt and legal costs were not paid. The debtor is not obliged to pay the costs of the demand.

It is interesting to note in regard to the costs claimed that Mr Patel when preparing an account for the plaintiff in respect of the alleged advance of \$52,000 does not disclose that there was any surplus available to pay his firm's fees. His firm's account discloses that only \$38,395 was received and the whole of it was paid out to Ram Lakhan.

Mr Patel had an account prepared which was produced to the Court. He must have known that the account was not correct from the very first entry which purports to show that cash amounting to \$52,000 was advanced on 23.10.82.

The Court queried the absence of costs payable by the plaintiff to Mr Patel's firm and a corrected account was then produced showing that the defendant had paid the firm \$2,000 on behalf of the plaintiff's costs on 28.2.83.

Mr Patel says there were on that day two payments of \$2,000 each one by the plaintiff to the credit of the defendant and the payment by the defendant to Messrs. Sherani & Co which is stated to be an advance to the plaintiff in payment of their legal fees.

It was not explained by Mr Patel if the second account was correct that despite the addition of \$741.75 interest which should have resulted in the balance alleged to be owing being the sum of \$88,173.45 the account shows that balance was \$86,077.45.

The account is suspect and if I were concerned with the issue of accounts I would reject it.

Mr Patel obviously had access to other figures which he did not disclose to the Court. He signed the demand notices calling up the loans.

The first demand indicates balance due as at 26th September 1983 was \$86,535. The account he prepared discloses that on 28.2.83 the loan balance was \$86,077.45 and at no time from that date to 15.10.83 did the account rise to \$86,535. On that date the balance was \$83,415.49. The demand appears to be for about \$3000 more than the account indicates was then owing.

I have spent some time on this aspect of the accounts which I felt was necessary to indicate why I believe Mr Patel could have told the Court a great more about the transactions between the parties. I am left in the position where, with regret, I can not accept his testimony except where it is supported by documents or admitted by the plaintiff.

I turn now to consider section 29 of the Moneylenders' Act on which the defendant is forced to rely if his securities are not to be held to be unenforceable because the contract or contracts to repay the money lent is/are unenforceable.

I hold as a fact that the variation of mortgage Registered No. 201502 is false and/or fraudulent and must be held to be void and of no effort. There was no agreement by the parties to vary the mortgage. The plaintiff at no time was consulted or agreed to the variation. The sole purpose of the variation was to seek to validate securities which were then, to the knowledge at least of Mr Patel, unenforceable.

In my view the defendant can not rely on section 29 of the Act.

I would also hold that the \$52,000 purported advance did not meet all the conditions in section 29 and in particular conditions (1) (b) and (c).

I believe the plaintiff when he alleges he was charged more than 10% but I do not accept that it was 40%. If the accounts which Mr Patel prepared are taken to indicate that the defendant only charged 10% interest then the seizure notices prepared by Mr Patel clearly indicate the defendant previously claimed an unexplained larger sum than was owing. On the balance of probabilities the unexplained surplus can only be interest calculated at a rate higher than 10%. That was an infringement of condition (1)(b).

If I accept that the plaintiff agreed to pay Mr. R.I. Kapadia & Co., costs of \$200 being legal costs in respect of action No 735, which were the responsibility of the defendant this alone would be a breach of condition (e)(i).

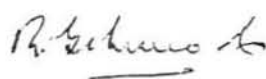
There was a third Bill of Sale No. 83/487 dated 7th February 1983 given by the plaintiff and his son Hasrat Ali which purports to secure a loan to them jointly but securing the same sum as the other securities the plaintiff executed. Delay in executing this Bill of Sale was due to the plaintiff's son not being available when his father executed the other securities.

This Bill of Sale purports to secure a loan of \$52,000 to the two mortgagees named therein on the 31st January 1983 more than 3 months after the \$52,000 which was alleged to have been advanced on 21st October 1982 to the plaintiff.

If it were not for the documents which were produced the plaintiff may not have succeeded. He made contradictory statements and statements which I can not accept. He appears to have relied on his then solicitors over a period when he was very heavily in debt and creditors were applying pressure on him. Most of his contradictory evidence resulted from his being shown documents which refuted his recollections of events. He admitted his mistakes when shown the documents.

I hold as a fact that the contract or contracts for repayment of the moneys lent by the defendant to the plaintiff and secured by mortgage No 195484 and Bills of Sale Nos. 82/3875, 82/3876 and 83/487 are not enforceable against the plaintiff. It follows that those securities are not enforceable and I so hold.

The plaintiff is to have the costs of this action.

  
(R.G. Kermode)  
J U D G E

SUVA,

23 August, 1985