Privy Council Appeal No. 9 of 1955

Patience Kasumu and others - - - - - - - *Appellants*

v.

Gbadamosi Baba-Egbe - - - - - - - - - *Respondent*

FROM

WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH JULY, 1956

Present at the Hearing:

LORD RADCLIFFE

LORD COHEN

LORD SOMERVELL OF HARROW

[*Delivered by* LORD RADCLIFFE]

This appeal from a judgment and order of the West African Court of Appeal dated the 22nd February, 1954, arises out of a suit relating to a money-lending transaction between one C. O. Kasumu, deceased, of whose estate the appellants are the administrators, and the respondent, who was the borrower in the transaction and the plaintiff in the resulting suit. The only question which is at issue in the appeal is whether the order of the Court of Appeal which granted the respondent relief against the transaction in the form of an order for repossession of mortgaged premises and delivery up of the mortgage deed and its accompanying title deeds ought to have been made subject to a condition of relief that he should undertake to pay back so much of the money lent as was still owing, with or without some interest.

There is no material point of fact which is now in dispute. The respondent held a building lease of some land known as No. 55, Great Bridge Street, Lagos, and on the 22nd August, 1945, he executed a deed of mortgage in favour of Kasumu, a licensed money-lender, by which deed he assigned the leasehold premises as security for the sum of £2,000 acknowledged to have been paid to the borrower at the time of the mortgage, with interest at the rate of 15 per cent. until repayment. Kasumu went into possession of the premises in September, 1946, and thereafter possession or receipt of rents and profits was retained by him and after his death by the appellants.

On the 14th February, 1950, the respondent instituted proceedings in the Supreme Court of Nigeria, claiming redemption of the premises or, alternatively, a declaration that the mortgage was void: an account of rents and profits received: and recovery of possession. He was met by a cross-action on the part of the appellants, the purpose of which was to set up a claim that there had been an agreement made between Kasumu and the respondent within a few months of the making of the mortgage, by virtue of which the respondent had undertaken to convey his equity of redemption to Kasumu, and to ask the Court for an order that this agreement should be specifically performed. The two actions were consolidated and now form one set of proceedings.

The alleged agreement to assign the equity to Kasumu has dropped out of the picture. The trial Judge held that it was unenforceable and that there was " no effective sale." The respondent's claim that the mortgage was void does not seem to have been supported by any facts deposed to by himself or any other witness called by him nor is it possible to say to what contention of law it was intended to be directed. The case would have remained simply a redemption action against mortgagees in possession had it not appeared on the face of the pleadings of both parties that Kasumu had committed a breach of section 19 of the Money Lenders Ordinance (Consolidated Ordinances of Nigeria, C.136) at the time of making his loan or instalments of loan to the respondent.

The introduction of this point came about somewhat accidentally. The respondent in his Statement of Claim made the statement that Kasumu had kept no book in which the principal amount advanced had been recorded (a duty which section 19 imposes upon a money-lender) and that because of this the appellants were assuming, wrongly as he claimed, that the full £2,000 had been advanced. He did not otherwise make any complaint of the absence of record. The appellants, on the other hand, explicitly admitted that no book recorded the amount of the principal advanced but denied that their assumption that £2,000 had actually been advanced was a mistaken one. It is sufficient, however, that the breach of section 19 was brought to the attention of the judge. It became his duty to give it such effect upon the rights of the parties as the law required. Indeed it is plain from the terms of his judgment that the respondent's counsel had raised the point in the course of the hearing and had argued " that Kasumu was a money-lender and kept no books as required by our local Ordinance, therefore he cannot enforce his mortgage ".

The learned judge did not give effect to this submission in any way, though it is not possible to find in his judgment the process of reasoning which led him to treat it as having no bearing on the form of his order. The order that he made was one for redemption and recovery of the property after an account had been taken of what was due on the mortgage. The account was taken and a subsequent order entered judgment for the appellants for £1,541 2s. 6d. and interest. These orders were reversed by the Court of Appeal, who substituted for them a declaration that the mortgage transaction was unenforceable: an order that the appellants should deliver possession of the premises to the respondent; cancellation of the mortgage and delivery up of the cancelled deeds and the title deeds of the premises.

Thus, on one view of the rights of the parties, the respondent gets the mortgaged property back on paying up the balance of monies outstanding on the loan together with interest: on the other view, he gets it back without being obliged to pay up any money at all, even on the basis that there is as much as the £1,541 outstanding.

At this stage it is convenient to set out the material portions of section 19 of the Money Lenders Ordinance. They are as follows:—

> " (2) Every money-lender shall keep a book (which shall be securely bound and paged so that leaves cannot be removed or inserted without apparent damage) in which he shall enter in connexion with every loan made by him
>
> (A) the date on which the loan was made:
>
> (B) the amount of the principal;
>
> (C) the rate of interest;
>
> (D) all sums received in respect of the loan or the interest thereon, with the date of payment thereof,
>
> and shall produce such books when required to do so by any court.
>
> (3) The entries in the said book shall be made forthwith on the making of the loan or the receipt of sums paid in respect thereof as the case may be.

(4) Any money-lender who fails to comply with any of the requirements of this section shall not be entitled to enforce any claim in respect of any transaction in relation to which the default shall have been made. He shall also be guilty of an offence under this Ordinance and shall be liable on conviction to a fine of ten pounds or in the case of a continuing offence to a fine of five pounds for each day or part of a day during which such offence continues."

One or two preliminary observations may be made with regard to this section. It was not in dispute that the effect of it was that a defaulting money-lender not only incurs a monetary penalty for his offence but also loses any right to take legal proceedings to recover the money he has lent. So far as legal rights of action go he loses his money. Secondly, their Lordships are satisfied that the words of deprivation " not be entitled to enforce any claim in respect of any transaction " are very widely drawn and that they should not be confined to the assertion of rights by means of or in the course of legal proceedings. Thus the performance of such acts in the law as the exercise of a right of sale over property mortgaged or charged or the retention or taking possession of such property in assertion of the claim to repayment is also precluded. Finally, section 19 is only one of a comprehensive set of provisions contained in the Ordinance which regulate the conditions under which money-lending can be carried on in Nigeria and the permitted effects of money-lending transactions. These provisions reproduce many of the sections of the current Money Lenders Act of the United Kingdom, the Money Lenders Act, 1927, though section 19 itself has no counterpart in that Act, and the scheme of the Ordinance is largely modelled on the legislation of the United Kingdom. It does not appear that the Nigerian courts have laid down any principles of their own in the interpretation of the Ordinance and the decision of the Court of Appeal which is now under appeal consists essentially of a weighing of the authority of *Lodge* v. *National Union Investment Co. Ld.* [1907] 1 Ch. 300, against that of *Cohen* v. *Lester (J.) Ld.* [1939] 1 K.B. 504.

The appellants' case is that, following the decision in *Lodge's* case (*supra*), the Court ought not to have made any order by way of giving relief to the respondent without putting him on terms as to repayment of such of the money borrowed as was still outstanding. And it is undoubtedly true that in that case Parker, J., did require such terms from a borrower as a condition of granting him relief in the form of delivery up of securities, the money-lending transaction in question being an illegal contract by virtue of the non-registration of the lender under the Money Lenders Act, 1900. But it is also true that in *Cohen* v. *Lester* (*supra*), Tucker, J., refused to impose any terms as to repayment when making an order for the return of a pledged chattel at the instance of a borrower, the contract and security being in that case rendered unenforceable by virtue of the Money Lenders Act 1927, section 6. The distinction exists between the respective circumstances of the two cases that one involved an illegal and the other an unenforceable contract: but, although this may to some extent account for the course of reasoning that led to the respective decisions, it is not inherently satisfactory that the law should accord to the money-lender who has committed an offence and made an illegal contract more favourable treatment than one who has done no more than enter into an unenforceable bargain. It is necessary for their Lordships therefore to ascertain clearly what principle is involved in the decision of *Lodge's* case and then to decide whether that principle is capable of being applied consistently with the policy of the legislature shown by such an enactment as section 19 of the Ordinance.

There are two main lines of reasoning to be found in Mr. Justice Parker's decision. Starting from the principle that the loan constituted an illegal transaction to which the plaintiff had made himself a party, he concluded that he ought to treat him as one who could only take advantage of the illegality by submitting to do whatever the court considered fair to the defendant. His approach to the matter was governed by his view that the former statutes against usury with their prohibition

of usurious contracts produced the same sort of situation as that produced by the Money Lenders Act, 1900, when an unregistered money-lender lends money, and he followed therefore the line of certain old decisions in the courts of equity and common law in which plaintiffs had not been permitted to take advantage of contracts being " utterly void " under the Usury Acts and recover their securities without repaying money due. Even so, it is apparent from Parker, J.'s, careful citation of the earlier cases that the practice in the courts of common law was by no means uniform in this matter and that there had been differences of view between the Court of Common Pleas on the one hand and the Court of King's Bench on the other. Indeed their Lordships find it very difficult to base any principle upon the conception that the borrower under a contract tainted with usury was himself tainted with the illegality that avoided the transaction and so stood to some extent " in mercy " when resorting to the courts to claim the relief which would seem to have been his right if the contract itself was rendered void. There is nothing in any of the main Acts, 37 Hen. VIII, c. 9, 12 Car. II, c. 13, and 12 Ann. c. 16, which suggests that the victim of usury was in any sense an offending party. Indeed, so little was this so that the courts did not even preclude him from recovering, as informer, his share of the triple penalty imposed. However that may be, it does become virtually impossible to transfer that principle to such cases as arise under the current legislation which regulates money-lending when the illegality that avoids the contract or the breach of duty that renders it unenforceable is produced by the act or negligence of the money-lender, himself and has nothing whatever to do with the inherent nature of the contract into which the borrower has entered. And section 19 deals with one of those cases. It was not the fault of the respondent that Kasumu did not keep his books properly.

But it is evident that there was another line of argument that weighed with Parker, J., and it is perhaps an easier one to support. The plaintiff before him was asking for equitable relief and it is a basic principle of equity that he who seeks it must do it. Was it proper then for a court of equity to place its power of making orders at the disposal of the plaintiff without requiring him to submit to the condition of doing the honest thing and repaying the money he owed? This principle at least had an established position in the practice of the courts of equity when relieving against usurious contracts: and it is noticeable that, when the subject is treated by Comyn in his book on Usury (see pp. 207–212) and by Story in his " Equity Jurisprudence " (see sections 300, 301), the court's imposition of terms is based squarely on this rule and not upon the more artificial conception that the borrower is an accessory to the lender's offence. " While, however, the courts protect the borrower they will be careful to observe that when he seeks relief he does not himself become the oppressor," says Comyn. This is a persuasive way of putting the matter: but it is exposed to the criticism that it was not so much the courts who were protecting the borrower as the Act of Parliament which made the contract " utterly void ". If the courts impose upon themselves the obligation of protecting the lender while the Act protects the borrower they may find themselves in the difficulty that they are in effect reversing the Act of Parliament in their endeavour to achieve a truly equitable solution.

Lodge's case was a decision of a great equity lawyer and it has stood as a decision since the year 1906. Nevertheless it cannot be treated as having established any wide general principle that governs the action of courts in granting relief in money-lending cases. In *Chapman* v. *Michaelson* [1908] 2 Ch. 612, Eve, J., refused to put the representative of a borrower upon any terms as to repayment when granting a declaration that a loan was illegal and void by virtue of section 2 of the Money Lenders Act, 1900. His decision was unanimously upheld by the Court of Appeal [1909] 1 Ch. 238). Thus in a court of equity a borrower relying on the contract being illegal obtained the relief against the lender that he chose to ask for without being required to make any offer to pay the outstanding monies. The plaintiff was in fact the borrower's trustee in bankruptcy, but this circumstance was not treated as having any special

bearing on the result. Both courts distinguished *Lodge's* case, Eve, J., on the ground that the declaration which he was making was not " in the nature of equitable relief ", the Court of Appeal on the ground that it was not " equitable relief " or " true equitable relief ". It must be admitted that, now that all courts endeavour to give effect to the rules of both systems with predominance for equity in the case of conflict, a distinction which is based entirely on the nature or history of the remedy sought does not seem a very satisfactory basis for a material difference in the resulting positions of lender and borrower. No doubt a court of equity, operating *in personam*, could produce remedies for the return or cancellation of instruments of value where the common law remedies of trover and detinue did not lie: but the purpose of all such proceedings is the same, to restore the borrower to the position he occupied before the void or unenforceable transaction.

The effect of *Cohen* v. *Lester* (*supra*) has already been stated. It is evident from what is said in the judgment in that case that it would be in accordance with prevailing practice for a court dealing with loans rendered unenforceable by the Money Lenders Act to make an order for the lender to surrender securities without imposing terms as to repayment.

It remains for their Lordships to consider whether the principle of *Lodge's* case ought to be applied in the case of a transaction declared to be unenforceable by section 19 of the Nigerian Ordinance. In their opinion it should not. If it were, the result would be that a lender who, while offending against the Ordinance, had fortified himself by taking any sort of security would be put by the courts in a position altogether more favourable than a similar lender who had taken no security for his loan. For any lender who by taking security had put himself in the position that his borrower would have to resort to the court in order completely to undo the effect of the transaction would be protected by the court from parting with his security except on terms that rendered the unenforceable loan enforceable, either to its full effect or in some modified terms. Yet the lender who had taken no security would lose any right to recover his money, as the Ordinance clearly intended. Not only would it seem anomalous for the Court to bring about a distinction of this sort between loans each of which equally offends the statute, but it would also be wrong that a lender in default should be allowed to defend himself in court by calling for the imposition of terms of repayment, for by so doing he would be enforcing, directly or indirectly, " a claim in respect of the transaction ".

In their Lordships' opinion it is not possible to transfer the principle which guided the courts in dealing with claims based on the Usury Acts to claims for relief arising out of transactions rendered void or unenforceable under the system of regulation which is contained in the Money Lenders Act. For in most respects the purpose of the two sets of Acts is essentially different. According to mediaeval ideas the taking of usury involved the sin of avarice. It was not the lending of money or the circumstances under which it was lent that were the material matter, but the obtaining of profit from the use of money. When mediaeval conceptions began gradually to give way before the impulse of commercial and industrial activity, the sin of avarice turned into the offence of usury: but the usury prohibited was no longer the lending of money at profit but the lending of money at a rate of profit greater than that permitted by the Statute. What the law penalised and made void was a particular kind of grasping contract: and it was evidently felt by equity judges at any rate that they were doing nothing that contravened the policy of the Acts if they insisted that the price of their remedies should be the return of the principal money and a reasonable rate of interest, so long as no effect was given to those elements of the loan in which the usury itself consisted.

But the Usury Acts disappeared in 1854, and much of the Money Lenders Act, 1900, and the Money Lenders Act, 1927, is directed to enforcing measures of control that have no concern with the intrinsic

nature of the contract made. Such requirements as that the moneylender must be registered or licensed, must use his authorised name, must procure a note or memorandum of the contract signed personally by the borrower, must keep a book in which is entered a contemporary record of the transaction strike indifferently at all moneylender's loans, however moderate the terms of any particular transaction. When the governing statute enacts that no loan which fails to satisfy any of these requirements is to be enforceable it must be taken to mean what it says, that no court of law is to recognise the lender as having a right at law to get his money back. That is part of the penalty which the statute imposes. There is no room to reform the terms of the loan, since the statute is not concerned with the vice of its content but with the vice of the conditions under which it was made. The provisions of section 19 are not purposeless: they seem to assume that no loan that is not contemporaneously recorded can be established with sufficient certainty to be recognised at law. If a court therefore were to impose terms of repayment as a condition of making any order for relief it would be expressing a policy of its own in regard to such transactions which is in direct conflict with the policy of the Acts themselves. In their Lordships' opinion the court should not place itself in such a position.

For these reasons their Lordships will humbly advise Her Majesty that the decision of the West African Court of Appeal in this case was correct and that the appeal should be dismissed. The appellants must pay the respondent's costs.

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In the Privy Council

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[DELIVERED BY LORD RADCLIFFE]

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