ORIGINAL CIVIL.

Before Mr. Justice Macleod.

1907.
September 5.

CHATRING MOOLCHAND & Co., PLAINTIFFS, *v.* LIEUTENANT R. H. WHITCHURCH, DEFENDANT.*

Contract Act (IX of 1872), sections 16, 19A—Unconscionable bargain—Parties not on an equal footing—Defendant not aware of the nature of the transaction—Undue influence—Contract voidable.

To render a contract voidable on the ground of undue influence there must be evidence of undue influence as required by section 16 of the Indian Contract Act. A high rate of interest which would induce a Court of equity to give relief against a bargain as being on that account hard and unconscionable is not by itself sufficient evidence of undue influence. There must be additional circumstances and when there is evidence of such additional circumstances they should be considered in the light of justice and equity. When the parties to the trasanction are not on an equal footing, when it appears that the borrower was not aware of the real nature of the bargain, so that he put his signature to a document which in fact imposed very different terms to those appearing on the face of it, when the actual rate of interest is many times higher than what appears on the document, when the borrower when pressed for payment for what appears due on such a document has to renew on still more exorbitant terms, all these are additional circumstances sufficient to make out a *prima facie* case of undue influence so as to throw the onus on the lenders to disprove it.

THE plaintiffs, a firm of money-lenders, brought this suit against the defendant a Lieutenant in the Army to recover a sum due on a demand promissory note.

The defendant alleged (1) that he had not received the amount which the plaintiff alleged he had actually handed over to the defendant and (2) that the transaction was an unconscionable one falling under sections 16 and 19A of the Indian Contract Act.

On these points issues were raised and determined.

Jinnah (*Raikes* with him) for plaintiffs:—There is no evidence of an unconscionable bargain to satisfy section 16 of the Contract Act. See *Hari* v. *Ramji*[1] (judgement of Sir Lawrence Jenkins, C. J., at page 375). The Marwari could not dominate

* Original Suit No. 214 of 1907.

(1) (1904) 28 Bom., 371 at p. 375.

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Whitchurch a Military Officer. The defendant understood the terms of his bargain. Nor can section 19A apply. It cannot be said that defendant's consent was caused by undue influence.

Patel and *Lang* for defendant:—There is no need for direct evidence that plaintiff dominated the defendant. There has been an unfair advantage taken here by the plaintiff. We admit that general inadequacy of consideration is no defence but equity has exceptions. In all cases of reversioners and debtors in expectancy of money equity will relieve: see *Beynon* v. *Cook* (1). This doctrine is not confined to reversioners: see Denman, J., in *Nevill* v. *Snelling* (2). The case of *Hari* v. *Ramji* (3) was a case of two money-lenders who stood on an equal footing. The question of inadequacy of consideration depends on whether the parties stood on an equal footing or not. See Pollock's notes on section 16, clause 3 of the Contract Act. Undue influence is not required under the section. See illustration (c) to section 16.

We rely on section 19A. We do not ask to have the whole contract declared void but only to be relieved from the oppressive terms of the bargain. The defendant did not give his consent freely. He had no choice but to consent: Contract Act, section 25, Explanation II. See also Pollock and Mulla, page 133. All proceed on grounds laid down in *Kamini Sundari Chaudhrani* v. *Kali Prosunno Ghose* (4). *Lalli* v. *Ram Prasad* (5) was decided before the clause came into effect. See also *Madho Singh* v. *Kashi Ram* (6), *Balkishan Das* v. *Madan Lal* (7), *Poma Dongra* v. *William Gillespie* (8).

MACLEOD, J.:—The plaintiffs, a firm of money-lenders at Poona, have filed this suit as a summary suit against the defendant, a Lieutenant in the Indian Army, to recover the sum of Rs. 6,409-12 alleged to be due for principal and interest on a demand promissory note for Rs. 6,000 given to them by the defendant on the 14th September 1906. By an order of the 5th

(1) (1875) L R 10 Ch. 389.
(2) (1880) 15 Ch. D. 679.
(3) (1904) 28 Bom. 371 at p. 375.
(4) (1885) 12 Cal 225 at p. 238.
(5) (1886) 9 All. 74 at p. 81.
(6) (1887) 9 All. 228.
(7) (1907) 29 All. 303.
(8) (1907) 31 Bom. 348.

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May 1907 the defendant was given liberty to defend the suit and his affidavit of the 1st May was taken as his written statement. The execution of the note is admitted and the questions I have to decide are (1) what were the true facts relating to the transactions between the parties, and (2) whether the defendant is entitled to relief under sections 16 and 19 of the Contract Act or otherwise.

It appears that on the 30th July the defendant, who was then stationed at Aurangabad, wrote to the plaintiffs asking them to come to him to arrange a loan. On the 1st August the plaintiffs replied asking for Rs. 10 to pay their travelling expenses. The original correspondence is not forthcoming, but Ex. A is the draft of plaintiffs' letter of the 1st August, Ex. U is the entry crediting Rs. 10 to suspense account on the 14th August received for expenses from defendant, and Ex. W is the entry debiting the Rs. 10 to the suspense account on the 18th August when the money had been used for the journey to Aurangabad. Defendant said he did not remember asking the plaintiffs to come to Aurangabad, they had come to see Captain Oliphant who lived in the same bungalow with him and he took the opportunity to negotiate a loan. I think it more probable that the plaintiffs are right and that defendant at Captain Oliphant's suggestion wrote to the plaintiffs asking them to come to him. When the plaintiff Chatring Surajmal met the defendant the following arrangement was arrived at. The defendant was to sign a bond for Rs. 4,000 repayable by 32 monthly instalments of Rs. 125. The rate of interest was fixed at 1¾ per cent. per mensem and interest was to be deducted at this rate for 32 months. Defendant was to hand over a policy on his life for Rs. 5,000. The defendant says that the full interest was deducted amounting to Rs. 2,240 and that he only received Rs. 1,760 as follows: a cheque on Grindlay, Groom and Company for Rs. 1,230, Rs. 30 in cash and a *chithi* for Rs. 500. As the plaintiffs had no stamped paper and as defendant had not got the policy with him it was arranged that the stamped paper should be sent from Poona and that when the plaintiff received the bond duly executed and the policy they would send the Rs. 500 in exchange for the *chithi*. On the other hand Chatring Surajmal says that defendant objected to so much being deducted for

interest as he wanted Rs. 2,500 in cash, and after some bargaining only Rs. 1,655 were deducted for interest and Rs. 615 were paid in cash instead of Rs. 30 as alleged by the defendant. [His Lordship after discussing the evidence in detail continued:]

I find therefore that the defendant received in cash Rs. 1,760 on the bond for Rs. 4,000 of the 23rd August 1903 and Rs. 100 on the promissory note for Rs. 6,000.

The question then arises whether the defendant under the circumstances of the case is entitled to any relief from the liability he took upon himself by signing the note for Rs. 6,000.

In England Courts of Equity have always granted relief against unconscionable bargains; *Beynon* v. *Cook*[1]. This doctrine was discussed in *Kamini Sundari Chaudhurani* v. *Kali Prossunno Ghose*[2]; their Lordships of the Privy Council say at page 238: "But assuming the validity of the mortgage, a question arises whether, under the circumstances, the rate of interest exacted did not amount to a hard or unconscionable bargain such as a Court of Equity will give relief against" and after referring to *Beynon* v. *Cook*[1] the judgment proceeds: "This equitable doctrine appears to have a strong application to the facts of this case, where we have the borrower, a *purdanashin* lady; the lender her own *mukhtar*........, the security an ample one,......the interest.........exorbitant and unconscionable." The Allahabad Court in *Lalli* v. *Ram Prasad*[3] and *Madho Singh* v. *Kashi Ram*[4] applied this doctrine. The question arises however since the Contract Act was amended by Act VI of 1899 whether section 16 as it now stands is exhaustive and displaces the principle of justice, equity and good conscience. The Allahabad Court has answered this question in the negative: *Kirpa Ram* v. *Sami-ud-din Ahmad Khan*[5]; and in *Balkishan Das* v. *Madan Lal*[6] Knox, J., says: "From a careful consideration of these cases I am prepared to hold that even where no undue influence has been brought to bear on the man or any unfair advantage shown to

(1) (1875) L. R. 10 Ch 389.
(2) (1885) 12 Cal. 225.
(3) (1886) 9 All. 74.
(4) (1887) 9 All. 228.
(5) (1903) 25 All. 284.
(6) (1907) 29 All. 303 at p. 307.

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have been taken of him, the bargain may still be an unconscionable one." This seems to go considerably further than the decision of the Privy Council in *Kamini Sundari Chaudhurani* v. *Kali Prossunno Ghose*(1). On the other hand in *Hari* v. *Ramji*(2) Jenkins, C. J., says: "If it be argued that section 16 is not exhaustive, and that it does not displace the principles of justice, equity and good conscience, than accepting, but without admitting, this argument as correct, we still think the defendant's position is no stronger." The judgment of the Privy Council in *Sundar Koer* v. *Sham Krishen*(3), the latest authority on the point, appears to show that section 16 is exhaustive. Their Lordships say at page 16: "There is no evidence of any actual exercise of undue influence by the mortgagees or of any special circumstances from which an inference of undue influence could be legitimately drawn, except that the mortgagor was in urgent need of money." In *Dhanipal Das* v. *Raja Maneshar Bakhsh Singh*(4) their Lordships held the borrower was under a peculiar disability and the position of the parties was such that the lender was in a position to dominate his will. Urgent need of money will not place the parties in that position. I deduce from those two passages that there must be evidence of undue influence as required by section 16, and that a high rate of interest which would induce a Court of Equity to give relief against a bargain as being on that account hard and unconscionable, is not by itself sufficient evidence of undue influence, there must be additional circumstances. But I am prepared to hold that where there is evidence of such additional circumstances they should be considered in the light of justice and equity. Where the parties to the transaction are not on an equal footing, where it appears that the borrower was not aware of the real nature of the bargain, so that he put his signature to a document which in fact imposed very different terms to those appearing on the face of it, when the actual rate of interest is many times higher than what appears on the document, where the borrower when pressed for payment for what appears due on such a document has to renew on still more exorbitant terms, I consider that all these are additional

(1) (1885) 12 Cal. 225.
(2) (1904) 28 Bom. 371 at p. 376.
(3) (1906) L. R. 34 I. A. 9.
(4) (1906) L. R. 33 I. A. 118

circumstances sufficient to make out a *primâ facie* case of undue influence so as to throw the onus on the lender to disprove it. In this case the defendant, a Lieutenant in the Indian Army of the age of 24, and the plaintiffs were not on an equal footing. I am quite certain the defendant was not aware of the nature of the bargain he was agreeing to when he signed the bond for Rs. 4,000 and to demonstrate this it is advisable to show clearly the real nature of instalment bonds like the one in question. On the face of the bond the bargain appears to be that a loan for Rs. 4,000 is given at 21 per cent. per annum repayable by 32 instalments of Rs. 125 per mensem, interest deducted in advance. Assuming I am correct in finding that only Rs. 1,760 were actually advanced in cash the principal was repayable by Rs. 55 per mensem. As the defendant was to pay Rs. 125 at the end of the first month Rs. 55 represented principal and Rs. 70 interest, so that for the use of Rs. 55 for one month defendant paid interest at the rate of about 1524 per cent. per annum. As further instalments were paid of course the rate of interest would decrease down to about 47 per cent. for the last instalment, but I have roughly ascertained the average rate to be about 190 per cent. per annum. When the bond was renewed by execution of the promissory note for Rs. 6,000, if I am right in finding that only Rs. 100 were paid in cash, not only was future interest added to the Rs. 3,000 due on the old bond but the defendant bound himself to pay interest on the whole amount of the note at 24 per cent. per annum. The defendant having established a *primâ facie* case of undue influence, I find that the plaintiffs have not satisfied the onus imposed upon them by section 16 to prove that the contract was not induced by undue influence, that there is evidence on consideration of all the circumstances of the case of undue influence and that therefore the defendant is entitled to relief under section 19A on the terms that he repay the amount actually advanced with interest at the rates agreed upon. Considering the security I do not think those rates require adjustment. There will therefore be a decree for the plaintiff for the amount found due on an account being taken as follows. The defendant will be debited with Rs. 1,760 with interest at 21 per cent. per annum from the 17th August 1903 and Rs 100 with interest at 24 per

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cent. from 14th September till judgment and will be credited with the instalments paid by him with interest from the respective dates of payment at 21 per per cent. on Rs. 1,000 and 24 per cent. on Rs. 50 till judgment. Defendant to pay plaintiff's costs up to 25th July 1907 and the costs which would have been properly incurred in taking a consent decree on the footing of defendant's letter. As to all other costs each party must pay their own.

Attorneys for plaintiff:—*Messrs. Captain & Vaidya.*

Attorneys for defendant:—*Messrs. Craigie, Lynch and Owen.*

B. N. L.

ORIGINAL CIVIL.

Before Mr. Justice Davar.

1907. *September 16.*

IN THE MATTER OF THE TRUSTEE'S AND MORTGAGEES' POWERS ACT AND IN THE MATTER OF HORMASJI FRAMJI WARDEN (DECEASED), HIRJIBHAI BOMANJI WARDEN AND ANOTHER (PETITIONERS).

Will—Gift to charitable purpose—Unnecessary and useless object—Cy-pres doctrine Trust incapable of being carried out at testator's death—Diversion of funds to useful and beneficial purpose—Power of Court.

On the authority of *In re Campden Charities*(1) and of other cases it is clear that when under altered circumstances, through lapse of time or through other causes, it appears to the Court that the charity provided by the donor could not be carried out literally in terms of his directions with any benefit whatever to the objects of his benefaction, the Court ought not to hesitate to give its sanction to a scheme which will carry out the charitable intentions of the donor to be gathered from the instrument establishing the charity, as nearly as possible to the original intentions of such donor.

Each case in which an application is made to divert charity funds into other channels *cy-pres* must necessarily depend upon its own facts and circumstances and upon the evidences adduced before the Court.

THE facts of this case appear as set out in the judgment.

Padsha for the petitioners.

(1) (1881) 18 Ch. D. 310.