1932 *Present :* **Dalton and Drieberg JJ.**

KADIRESEN CHETTY *v.* RAYEN *et al.*

87—D. C. Colombo, 39,448.

Promissory note—Failure to insert particulars—District Judge takes objection ex mero motu—Court of appeal will grant relief—Inadvertence—Money Lending Ordinance, No. 2 of 1918, s. 10.

Where in an action on a promissory note, without any objection being taken by the defendant, the Court *ex mero motu* held that the note was bad as the particulars required by section 10 (1) (*b*) of the Money Lending Ordinance had not been entered, and dismissed the action,—

Held, that the Court of appeal will consider whether relief should be granted to the plaintiff under the proviso to section 10 of the Money Lending Ordinance.

APPEAL from a judgment of the District Judge of Colombo.

N. E. Weerasooria, for plaintiff, appellant.

L. A. Rajapakse, for second defendant, respondent.

May 2, 1932. DALTON J.—

The plaintiff sued the defendants for the recovery of the sum of Rs. 1,250, amount of principal and interest due, on a note, for Rs. 2,500 and further interest as set out, made by the defendants in plaintiff's favour. Judgment was entered against the first defendant in default in September, 1930, but the second defendant filed answer denying his

[1] *(1909) 12 N. L. R. 212.*

liability. Whilst holding that that defence was entirely false, the trial Judge held that the action could not be maintained, as the note does not comply with the provisions of section 10 of the Money Lending Ordinance.

In so discussing the action the learned Judge acted *ex mero motu,* since no objection was taken by defendants that the action could not be maintained. He has, further, unfortunately not stated in what respects the note does not comply with the provisions of section 10, but after hearing counsel we have acted upon the presumption that the defect is that the note does not state what sum was deducted or paid in advance as interest, premium, or charges at the time the loan was made.

When the plaintiff's attorney was giving evidence, he produced his books which showed that on the day the loan for Rs. 2,500 was made, the sum of Rs. 168.75 was deducted for interest. The marginal note of the promissory note is silent as to this deduction. At no stage, however, was there any issue as to the enforceability of the note on this ground, and it is urged that the plaintiff was taken by surprise when his claim was dismissed on the ground that it was unenforceable. It is not urged that the learned Judge was not entitled to act as he did, but it is urged that the plaintiff should have had some intimation that he might so act, in order that he might, if necessary, apply for relief under the Ordinance. If this Court holds that the note was not enforceable on the ground that it fails to comply with the requirements of section 10 (1) (b), he asks that he be given relief under that section on the ground that his default was due to inadvertence and not to any intention to evade the provisions of the section.

An application of this kind should as a general rule be made and dealt with in the trial Court (see *Vadivelu v. Velupillai* [1]), but plaintiff seems to have had no opportunity of applying for relief for the reasons stated. It is conceded that there is on the record all that is necessary for this application to be dealt with. For these two reasons we have dealt with his application on appeal.

There seems to be no doubt at all that plaintiff acted *bona fide.* His failure to make the entry on the margin of the note was only seen when the entry was discovered in books on their production by his attorney. If he had wished to conceal that entry from the Court, he had ample opportunity of doing so. The production of the books with the entry is against his own interest. There is further the finding of the trial Judge that the defence is a false one.

In discussing the claim the learned Judge lays stress upon the necessity of strict action on the ground that the provisions of the Ordinance are being flagrantly flouted. On an application for relief, however, as made now to this Court under the circumstances set out, the Court has to consider whether the default was due to inadvertence and not to any intention to evade the provisions of the law.

That there was no intention to evade the provisions of the law is quite clear. How he came to omit the entry on the margin of the note whilst making it in his books plaintiff has stated. Inadvertence has been

[1] *4 C. L. R. 43.*

described as the effect of inattention, an oversight, mistake, or fault which proceeds from neglect of thought (*Ramen Chetty v. Renganathan Pillai*[1]). No doubt plaintiff knew, as the trial Judge states, the requirements of the law, but I think the evidence does show in the circumstances here forgetfulness or inattention on his part, due to a failure to address his mind fully to the necessity of making an entry in the note that he had been careful enough to enter in his books. I have heard nothing from respondent's counsel to lead me to think that that conclusion is wrong.

The plaintiff is in my opinion entitled to the relief he seeks. He is, therefore, on the other findings of the learned trial Judge entitled to judgment. The order dismissing the action as against the second defendant must therefore be set aside, and a decree must be entered against him for the sum and interest claimed. In the decree of September 5, 1930, against the first defendant, the latter was allowed to pay by instalments, but I presume that has not been done, otherwise the debt would by now have been liquidated. Plaintiff is entitled to his costs in both Courts.

Appeal allowed.

DRIEBERG J.—I agree.