

1935

*Present: Poyser and Koch JJ.*WICKREMESURIYA *v.* SILVA.

277—D. C. Kandy, 43,984.

Promissory note—Non-compliance with requirements of section 10 of the Money Lending Ordinance—Note not fictitious within the meaning of sections 13 and 14—Action on money count—Ordinance No. 2 of 1918, ss. 10 (1), 13, and 14.

Where a promissory note is not fictitious within the meaning of sections 13 and 14 of the Money Lending Ordinance, an action on the money count lies even though the note fails to comply with the requirements of section 10 of the Ordinance.

A PPEAL from a judgment of the District Judge of Kandy.

N. E. Weerasooria, for defendant, appellant.

L. A. Rajapakse (with him *J. R. Jayawardene*), for plaintiff, respondent.

Cur. adv. vult.

September 12, 1935. POYSER J.—

In this action the plaintiff sued the defendant for Rs. 1,600.65 being principal and interest due on four promissory notes. At the trial it was admitted that the defendant had signed the promissory notes and that the sum claimed was due.

It was at the same time, however, contended that as the notes did not comply with the requirements of section 10 of Ordinance No. 2 of 1918, they were unenforceable.

The plaintiff then moved to amend his plaint and this motion was of consent allowed. In his amended plaint the plaintiff claimed in the alternative for money lent. The plaintiff gave evidence in support of his claim but the defendant did not give evidence or call any witnesses but relied on his previous objection that the notes were unenforceable and that the alternative claim was prescribed.

The Judge finds that the promissory notes complied with the provisions of the Ordinance and, in regard to the issues framed in respect of the alternative claim, held that the monies were lent on the dates set out and that the claim was not prescribed.

The petition of appeal was admittedly unsatisfactory; it did not set out concisely, as required by section 758 of the Civil Procedure Code, the grounds of objection to the judgment appealed from but set out some of the issues that were framed at the trial and stated the ground of appeal was that the Judge's decision was contrary to law.

We decided however to hear the appeal, but only on the questions of law that could be said to be indicated by the petition of appeal, viz., whether the notes conformed with the requirements of the Money Lending Ordinance or not, and if not, whether the plaintiff could recover on the alternative claim.

The notes sued on do not, in my opinion, conform to the requirements of the Money Lending Ordinance. They were not substantially in the form given in the schedule to the Ordinance (section 10 (4)), nor do they set out separately or distinctly the capital sum actually borrowed (10 (1) (a)), or the amount of any sum deducted or paid at or about the time of the loan, as interest, premium, or charges paid in advance (10 (1) (b)). They only set out a promise to pay a certain sum and interest at a certain rate.

I do not consider therefore the Judge was correct in holding that such notes complied with the requirements of the Ordinance.

In view of this finding the Judge did not consider whether it was a case in which relief should be given under the proviso to section 10 (2), but if the point had been considered and the principles laid down by Garvin J. in *Fernando v. Fernando*¹ had been applied, I do not think there is any doubt that such relief should have been granted for the plaintiff does not appear to have intended to evade the provisions of section 10, and the Judge finds the plaintiff's books were carefully kept and the debits and credits therein are not questioned.

As the notes are not, in my opinion, enforceable, the next point to consider is whether the plaintiff can recover on the money count. In my view he can for the principles laid down in *Sockalingam Chettiar v. Ramanayake*² do not apply to this case.

The decision in that case proceeded largely on the ground that the note in question was fictitious within the meaning of sections 13 and 14 of the Ordinance.

¹ (1934) 36 N. L. R. 77.

² 85 N. L. R. 33.

The notes in this case are not 'fictitious' within the meaning of these sections and the plaintiff has not incurred a penalty; he can therefore recover on the money count. See *Fernando v. Fernando* (*supra*).

It only remains to deal with the argument whether the plaintiff's action on the money count was prescribed. The Judge has held that it was not.

Counsel for the appellant sought to show, by reference to the evidence, that such claim was prescribed. As previously stated, however in view of the notice of appeal, I do not think we should go into the question of the sufficiency of the evidence or otherwise in connection with this finding.

The appeal is dismissed with costs.

KOCH J.—I agree.

Appeal dismissed.
