1926.

Present : Jayewardene A.J.

WIJEYSINGHE *v.* DON GIRIGORIS.

210—C. R. Colombo, 13,344.

Money Lending Ordinance—Promissory note—Sum borrowed wrongly stated—Action on the note—Ordinance No. 2 of 1918, ss. 10 and 13.

A promissory note in which the sum borrowed is wrongly stated is not void, and an action can be brought on such note.

In such a case the court has power under section 2, sub-sections (1) and (2), of the Money Lending Ordinance to ascertain what sum was actually borrowed and is due from the debtor to the creditor.

APPEAL from a judgment of the Commissioner of Requests, Colombo. The plaintiff as payee sued the defendant, the maker of a promissory note to recover a sum of Rs. 220. The note bore on the margin the particulars required by section 10 of the

Money Lending Ordinance, No. 2 of 1918. The defence was that the sum actually borrowed on the note was only Rs. 80. The learned Commissioner held that the plaintiff had lent only a sum of Rs. 80, as stated by the defendant, and dismissed his action altogether.

S. J. V. Chelvanayagam, for plaintiff, appellant.—On a question of fact, the learned Commissioner has found that the first entry on the margin of this promissory note is false, and has, therefore, dismissed this action under section 10 of the Money Lending Ordinance (No. 2 of 1918). Section 10 only requires certain entries to be made on the margin, and once such entries have been made the provisions of that section are complied with. Whether those entries are true or false, does not matter. (*Vide* section 10, sub-section (4)).

If they are false, then the Court can act under section 2 (1) (*c*), but not dismiss the action under section 10.

H. V. Perera (with *Rajakariar*), for defendant, respondent.—Section 10 (1) (*a*) says the capital sum actually borrowed. So, if the entry on the margin gives any sum other than that actually borrowed, section 10 applies, and the dismissal of the plaintiff's action is right.

[JAYEWARDENE A.J.—But look at the schedule which says "Capital sum borrowed."] Even if the dismissal is not justified under section 10, it is under section 13. If the taking of a fictitious promissory note is penalized, then no action can be maintained on the contract.

S. J. V. Chelvanayagam, in reply.—The law may penalize the making of a particular contract and yet not avoid it. This Ordinance nowhere makes such a note void. In fact it prescribes the procedure on such transactions in section 2. Otherwise section 2 will be of no effect. Besides, this Ordinance is not meant to alter the law of promissory notes in any way. Its scope is to give only equitable remedies. (See *Kadiresan Chetty v. Arnolis.*[1])

January 19, 1926. JAYEWARDENE J.—

This case raises questions of some importance in the construction of the Money Lending Ordinance, No. 2 of 1918. The plaintiff, as payee, sued the defendant, the maker, to recover a sum of Rs. 220 due on a promissory note. The note bore on the margin the particulars required by section 10 of the Ordinance. The defence was that the amount actually borrowed on the note was only Rs. 80. The learned Commissioner, after trial, held, that the plaintiff had only lent a sum of Rs. 80, as alleged by the defendant. He did not,

[1] (*1921*) *23 N. L. R. 162* (*163*).

1926.

JAYEWARDENE A.J.

Wijeysinghe v. Don Girigoris

however, give judgment for the plaintiff for the sum of Rs. 80, but dismissed his action altogether. The plaintiff appeals, and it is contended for him that the learned Commissioner has erred in holding that only a sum of Rs. 80 was lent on the note, and that in any case the Commissioner should have entered judgment in his favour for the sum which he held, had been actually lent to the defendant. On the question of fact, I see no reason to interfere with the finding of the Commissioner.

The question of law is a difficult one. The learned Judge thinks that the note is unenforceable under section 10 inasmuch as it does not state correctly the actual sum borrowed. Learned Counsel for the respondent sought to justify the dismissal of the action both under section 10 and under section 13 of the Money Lending Ordinance.

I shall first consider the effect of section 13. It provides as follows :—

> " 13. Any person who shall take as security for any loan a promissory note or other obligation in which the amount stated as due is to the knowledge of the lender fictitious, or in which the amount due is left blank, shall be guilty of an offence, and shall be liable on conviction to a fine not exceeding five hundred rupees, or in the event of a second or subsequent offence, either to a fine not exceeding one thousand rupees, or to simple imprisonment for a period not exceeding six months."

Now, according to the finding of the learned Commissioner, the amount stated as due was to the knowledge of the lender fictitious, and further, the evidence shows that at the time of the making of the note the parties entered into a collateral transaction, that is, the plaintiff obtained from the defendant a receipt admitting that he had received a sum of Rs. 220. This receipt was, no doubt, intended to disguise the true nature of the transaction, and to show that Rs. 220 had been borrowed, when, in fact, the defendant had only received Rs. 80. Therefore, the note is also a " fictitious " one within the meaning of sections 13 and 14 of the Ordinance. The plaintiff's case clearly falls within the provisions of section 13, and he has committed the offence created by that section. It is contended for the defendant that inasmuch as section 13 makes it an offence for a lender to obtain a note in which the amount stated as due is fictitious and renders him liable to the penalties prescribed by the section, the note must be treated as void and unenforceable in law. I am unable to agree with this contention. In my opinion the section has refrained, and I think, purposely refrained from declaring a " fictitious " note void. If such a note

is held to be void, a *bona fide* holder for value would not be able to sue on it, and I do not think that it was the intention of the Legislature to invalidate a negotiable instrument as it may pass into the hands of persons who are absolutely ignorant of the circumstances affecting its validity. Otherwise, a radical alteration would be made in the law relating to negotiable instruments. Further, section 2 of the Ordinance, which enables the court to re-open transactions entered into between a lender and a borrower, authorizes the court, in adjusting accounts between the parties, to take into consideration notes in which the amount borrowed is not correctly stated (see section 2, sub-section (1) (c)). This could not be so if the note is void. The principles applicable to the construction of statutory provisions similar to those of section 13 have been laid down by the English Court of Appeal in the case of *Melliss v. The Shirley Local Board* [1] where Lord Justice Cotton enunciated them in the following terms :—

> " Although a statute contains no express words making void a contract which it prohibits, yet when it inflicts a penalty for the breach of the prohibition, you must consider the whole act as well as the particular enactment in question and come to a decision, either from the context or the subject matter, whether the penalty is imposed with intent merely to deter persons from entering into the contract, or for the purpose of revenue, or whether it is intended that the contract shall not be entered into so as to be valid in law."

In my opinion, section 13 has been enacted merely to deter lenders from inserting fictitious amounts as due on promissory notes and other obligations, and not with the object of invalidating such contracts altogether. A very similar question arose under section 547 of the Civil Procedure Code under which both the transferor and transferee of property belonging to the estate of a deceased person, before issue of probate or grant of administration, were declared to be guilty of an offence and liable to pay a fine of Rs. 1,000. And in the case of *Hassen Hadjiar v. Levane Marikar* [2] it was held by this court, notwithstanding that the parties were declared to be guilty of an offence and subject to punishment, that the transfer itself was not invalidated. The reasoning in that case applies to the present case. In my opinion, the penalties expressly prescribed by section 13 are exhaustive and, therefore, I hold that under section 13 the promissory note is not void.

[1] *(1885) 16 Q. B. D. 451.*

[2] *(1912) 15 N L. R. 275.*

1926.

JAYEWARDENE A.J.

Wijeysinghe v. Don Girigoris

The question whether such a note is not enforceable under section 10 is, however, a more difficult one. That section runs as follows (I give the material parts only) :—

" 10. (1) In every promissory note given as security for the loan of money after the commencement of this Ordinance, there shall be separately and distinctly set forth upon the document—

" (*a*) The capital sum actually borrowed ;

" (*b*) The amount of any sum deducted or paid at or about the time of the loan as interest, premium, or charges paid in advance ; and

" (*c*) The rate of interest per centum per annum payable in respect of such loan.

" (2) Any promissory note not complying with the provisions of this section shall not be enforceable

. . . . . .

" (3) The setting forth of the particulars required by sub-section (1) shall not affect the negotiability of any promissory note.

" (4) Any promissory note setting forth the said particulars substantially in the form given in the schedule to this Ordinance shall be deemed to be in compliance with this section."

(5) . . . . . .

and section 11 declares that nothing in section 2, 8, or 10 of this Ordinance shall impair the rights of any *bona fide* holder for value of any pro-note without notice of any matter affecting the enforceability of such note.

As I have stated above, the note in question purports to comply with the requirements of this section, but it gives the sum borrowed incorrectly. The question to be decided is whether where the amount borrowed is separately and distinctly set forth but is found to be incorrect the note ceases to be enforceable under the section. The Money Lending Ordinance was, no doubt, passed for the protection of the borrower from oppression, and its object was as Bertram C.J. said in *Kadiresan Chetty v. Arnolis* (*supra*) " to assist Courts of Law in discharging the equitable jurisdiction conferred on them by the Ordinance," but section 10 was intended to compel the lender, or it may be the borrower also, to comply with the requirements of that section, and in my opinion, a note would be unenforceable under the section, only when it did not give the particulars required by it separately and distinctly " as shown in the schedule. But the insertion of facts incorrectly in the particulars would not render a note unenforceable provided the form has been complied with. The note in question, on the face of it, complies with the requirements of section 10 and is *primâ*

facie enforceable. Then, does the fact that at the trial, and after a contest, it is proved that the particulars have been incorrectly entered up render it unenforceable ? The use of the word " enforceable " is significant. The meaning of this word was discussed in the case of *Jamal Mohideen & Co. v. Meera Saibo* [1] where this court was called upon to interpret section 9 of " The Registration of Business Names Ordinance, No. 6 of 1918 " which contained the words " the right of that defaulter . . . . shall not be enforceable . . . . by action or other legal proceedings . . . . " and it was held that the words " the rights shall not be enforceable by action " meant that " the defaulter shall not be entitled to bring any action to enforce his rights." The Court also pointed out that the words " enforceable " could not be construed as the word " maintainable " used in section 547 of the Civil Procedure Code was construed by Wood Renton C.J. in *Hassen Hádjiar v. Levane Marikar* (*supra*). If a pro-note, therefore contains the particulars required by section 10, it would be enforceable in law, that is, an action can be brought on it, and the subsequent discovery that the particulars contain false statements would not affect its enforceability. Therefore, when a note made after the commencement of the Ordinance is brought into Court to be sued upon, the Court has to be satisfied that it " sets forth separately and distinctly " the particulars required by section 10, if the particulars are duly set forth the note would be enforceable, and it is immaterial whether the particulars are *truly* set forth or not. No doubt the section requires " the capital sum actually borrowed " to be stated, but it is noticeable that in the schedule to which reference is made in sub-section (4) of section 10 and which gives the form of a note under the section the word " actually " is omitted. As pointed out above, the effect of section 13 is not to invalidate a pro-note, but to subject the lender to a penalty, and thus deter him from acting contrary to the requirements of the Ordinance. And section 14 makes a lender who fails to give the particulars under head (*b*) correctly and under head (*c*) truly and straight forwardly, guilty of the offence created by section 13. The making of a false statement with regard to the particulars required under head (*a*) are nowhere penalized. This may be due to the fact that the sum actually borrowed is generally the same as the sum stated to be due in the body of the note, and a false statement with regard to the latter is penalized by section 13. If my construction of that section is correct, then, a false statement under head (*b*) or (*c*) does not avoid the note, nor would it make a note unenforceable, which amounts to the same thing. Further, as I have pointed out above, section 2 does not treat pro-notes, in which the amount stated to be due is to the knowledge of the lender fictitious, as void or unenforceable, for, when such a note has

[1] *(1920) 22 N. L. R 268.*

1926.

JAYEWARDENE A.J.

Wijeysinghe v. Don Girigoris

been taken as security by a lender, the Court can *inter alia* relieve the borrower from payment of any sum in excess of the sum adjudged by the Court to be fairly and reasonably due in respect of principal, interest, and charges.

This shows that notes like the one in question in this case are not wholly and absolutely unenforceable. It is the duty of the Court, in such cases, to adopt the procedure laid down in section 2, sub-sections (1) and (2), and ascertain what sum was actually borrowed and is due from the debtor to the creditor. As Bertram C.J. remarked in the case already referred to, " by declaring that certain particulars should be entered on the margin of such notes, the Legislature did not intend in any way to affect the liabilities on such notes."

It is conceded that if the note is not unenforceable under section 10 or void under 13, the plaintiff would be entitled to recover the amount actually lent by him.

I would, therefore, set aside the judgment and direct that decree be entered in the plaintiff's favour for the sum of Rs. 80, with costs of appeal. The plaintiff will, however, pay the defendant his costs in the lower Court.

Set aside.