Present: Dalton and Lyall Grant JJ. 1927.

RAMEN CHETTY *v.* RENGANATHAN PILLAI.

330—D. C. Colombo, 12,931.

Money Lending Ordinance—Pro-note as security for future loans—False statement as to capital sum borrowed—Right to relief—Inadvertence —Ordinance No. 2 of 1918, ss. 2, 10, 13.

A promissory note, given as security for future loans, which contains a false statement in regard to the capital sum actually borrowed, is not enforceable.

Where such a false statement was the result of a deliberate act and was not due to inadvertence, the Court is not empowered to grant relief under section 10 (2) of the Money Lending Ordinance.

Wijesinghe v. Don Girigoris [2] over-ruled.

THE plaintiff sued the defendants jointly and severally to recover the sum of Rs. 11,080 alleged to be balance due to him on a promissory note for Rs. 100,000 made by them. The defendants pleaded that no money was paid to them on the note, which was given to the plaintiff as security for future advances. They also pleaded that under section 13 of the Money Lending Ordinance

[1] *25 L. J. Q. B. 310.* [2] *27 N. L. R. 342.*

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the note was "fictitious," and that the action could not be maintained. The learned District Judge held that the amount stated as due was fictitious and that the note had not been filled in accordance with the requirements of section 10. He further held that this was a case in which the Court should give relief under section 10 (2) and entered judgment in favour of the plaintiff for the balance claimed, condemning him to pay the defendants' costs.

H. H. Bartholomeusz (with *Garvin*), for defendants, appellant.

Hayley (with *Navaratnam*), for plaintiff, respondent.

February 1, 1927. DALTON J.—

The plaintiff in this action sued the defendants jointly and severally to recover the sum of Rs. 11,080 and interest alleged to be the balance still due to him on a promissory note for Rs. 100,000 dated January 19, 1922, and made by them.

The note sued on, marked A, is in the following form:—

Colombo, January 19, 1922.

Capital sum borrowed: Rs. 100,000.
Interest, premium, or charges deducted or paid in advance: Nil
Rate of interest per centum per annum: 15 per cent.

Rs. 100,000.

On demand we the undersigned jointly and severally promise to pay S. R. M. M. A. Raman Chetty or order the sum of Rupees One hundred thousand only, currency for value received, with interest thereon at the rate of fifteen per centum per annum from the date hereof.

Signed in Tamil.

Witnesses:
Signed in Tamil.

The defendants did not deny the making of the note, but they pleaded that no money was paid to them on the note, it being delivered to the plaintiff as security for further advances. They further denied that any sum was due by them on the note. They also pleaded that under section 13 of the Money Lending Ordinance the note was fictitious and the action could not be maintained, whilst the provisions of section 10 had not been complied with and the note was not enforceable.

The issues proposed to and accepted by the trial Judge were as follows:—

(1) Was the note (A) delivered by defendants to plaintiff as security for future transactions?

(2) Was the amount stated as due on the note (A) fictitious, and does the note contravene the provisions of section 13 of the Money Lending Ordinance?

(3) Has the note been filled up in accordance with the requirements of section 10 of the Money Lending Ordinance?

(4) If not, can plaintiff maintain this action?

No issue was raised as to the amount of the balance due on the note, assuming that plaintiff could maintain his action. Plaintiff did seek to give evidence on that point, but objection thereto was taken on behalf of the defendant, the objection being upheld by the trial Judge. He admitted the evidence in so far as it went to elucidate the first issue, as to whether the transaction was one to secure future advances, but for no other purpose.

With reference to the issues framed the trial Judge has found that the note was delivered by the defendants to the plaintiff as security for future transactions. He also held that the amount stated as due was fictitious contravening the provisions of section 13, and further that the note had not been filled up in accordance with the requirements of section 10. He adds, however, that he was prepared to hold under section 10 (2) that this was a case in which the Court should give relief on conditions. He accordingly held that plaintiff was entitled to the balance claimed, but the condition of obtaining relief was that he be condemned to pay the defendants' costs.

The defendants appeal from this decision on the following grounds which were argued before us:—

(1) The answer to the first issue being in favour of the defendants, they were entitled to judgment.

(2) The note was not enforceable, having regard to the findings on the issues, and there was no proof of any inadvertence upon which relief could be given.

(3) There is no evidence to show how the sum awarded is made up or that any sum is due at all.

It is quite clear from the plaint that plaintiff sought to recover the sum of Rs. 11,080 as balance of principal and interest on the note (A), although the plaint does not say that the sum of Rs. 100,000 was actually lent on the note. The defendants in their answer are in my opinion equally indefinite. They deny that any money was paid on the note, but that it was delivered to the plaintiff to secure future advances. They do not deny that Rs. 11,080 is due to plaintiff in respect of those advances, but state that nothing is due on the note. They plead also the provisions of the Money Lending Ordinance to which I have referred.

Mr. Bartholomeusz strenuously argued for the appellants that the plaintiff was unable to succeed in his claim if he failed upon the first issue. That issue contained the main contest between the parties, he urged, and it being shown that the note was made to secure future advances, plaintiff could not succeed in his claim.

The action was instituted, it is to be noted, under the provisions of Chapter LIII of the Code, as a summary action on a liquid claim plaintiff suing on the note as a promissory note. It does not appear

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that defendants obtained any leave to defend, but they have filed answer without any objection by the plaintiff. They also applied to the Court for particulars, and for an account showing the dates and amounts of the payments alleged to have been made by them to the plaintiff. This application was refused as it was held that any payment made by them would be particularly within their knowledge. The defendants appealed from that order, but this Court pointed out that all they had to do, so far as their application was concerned, was to plead that they had either paid or accounted to the plaintiff for more than he had given them credit in the plaint. The proceedings therefore, after the institution of the action, have continued as in an ordinary action, but still based upon the note. As the case came before the Court I am unable to agree with the argument that, because it was found that the note was one to secure future advances, therefore plaintiff's claim must be dismissed. As framed it is impossible to separate the first issue from the subsequent issues, as it seems to have been framed having in view the defence raised under the Money Lending Ordinance, and it was not contemplated that an answer to that issue alone unfavourable to the plaintiff would result in the dismissal of his claim.

The question raised in the second ground of appeal set out above is, however, in my opinion a much more difficult one. Having regard to the findings, is the note enforceable? The effect of sections 10 and 13 have recently been considered in *Wijeysinghe v. Don Girigoris.*[1] There the plaintiff sued the defendant as maker of a promissory note to recover the sum of Rs. 220. The note bore on the margin the particulars required by section 10, but those particulars were false, inasmuch as it was found that the sum actually borrowed was only Rs. 80. The Commissioner of Requests therefore held that the note was not enforceable, but this decision was reversed on appeal. In his judgment Jayewardene J. goes very fully into the matter in respect of both sections 13 and 10, and I am inclined to agree with his conclusion that under section 13 the promissory note is not void. As he points out, however, the question whether the note was not enforceable under section 10 is a more difficult one, and I entirely agree.

Section 10 provides that every promissory note given as security for the loan of money shall have a separate and distinct statement of—

(*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;

[1] *27 N. L. R. 342.*

and the section goes on to provide that any promissory note not complying with the provisions of this section shall not be enforceable provided that relief can be given in the case set out.

Note " A " complies in form with all these requirements, but in fact when it was made no capital sum was actually borrowed, nor was any value received as stated therein. It was intended to be security for loans which might in future be made to the makers up to the sum of Rs. 100,000.

Jayewardene A. J. holds that a false statement under head (*b*) or (*c*) does not make the note unenforceable, because section 14 makes a lender who fails to give the particulars under these heads guilty of the offence created by section 13, which latter section does not invalidate the note. He further points out that the making of a false statement under head (*a*) is nowhere penalized, and that the word " actually " in the section is omitted from the margin of the schedule. I regret I am unable to agree with the conclusion arrived at. It seems to me to give the material parts of section 10 no meaning, and in effect to be contrary to the, as it appears to me, clearly expressed intention of the legislature. It seems to be inconceivable that all the legislature required was an outward compliance with the form of note set out in the schedule without any reference to the actual and true facts of the transaction.

I quite appreciate the difficulty arising from section 2. This section is practically the same as section 1 of the Money Lender's Act (*63 & 64 Vict. c. 51*) with the addition of sub-heads (*b*) and (*c*). The section provides, under sub-head (*c*), that, in cases where the amount stated in the note as due was to the knowledge of the lender fictitious, the Court might re-open the transaction. It does not treat such notes as unenforceable. Is that inconsistent with the interpretation that I would put upon the words of section 10? I am unable to say that it is. Section 10 does provide for relief from its drastic provisions in case of a default due to inadvertence and not to any intention to evade the provisions of the section. May not then section 2 have in contemplation the re-opening of transactions in the case of loans in which relief was given by the Court under section 10, and in which, apart from the giving of the relief, the notes would otherwise not be enforceable?

In reply to the argument based upon the unenforceability of the note, owing to the provisions of section 10, Mr. Hayley answers that the note is in fact no note at all, and so does not fall under the section. There was no loan, and therefore it was impossible to comply with the provisions of heads (*a*), (*b*) or (*c*). If so, how does he propose to maintain his action? Plaintiff instituted his action upon the basis that the note was a promissory note for the sum of Rs. 100,000 received by the defendants. The terms of the note

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itself are clear, and it closely follows the forms set out in the schedule. If the argument now put forward on behalf of the plaintiff be accepted it can only result in the dismissal of his claims.

I have therefore come to the conclusion that the note is not enforceable. The question remains whether this is a case in which the Court should give relief. The trial Judge states that had it been necessary (it was not necessary as he followed *Wijeysinghe v. Girigoris* (*supra*)) he would have been prepared to give relief to the plaintiff, but condemning him to pay the defendants' costs. The section provides that relief may be given in any case in which the Court is satisfied the default is due to inadvertence and not to any intention to evade the provisions of section 10. Inadvertence is stated to be the effect of inattention, an oversight, mistake, or fault which proceeds from negligence of thought. In *In re Pieris* [1] Smith L.J. held that, as used in the Bankruptcy rules, the word meant the opposite of deliberate election, and that the word pointed to forgetfulness or accident. "There is no suggestion here of any neglect of thought, forgetfulness, or accident in connection with the making of this note. It was the result of a deliberate act, so far as one can judge, with full knowledge that, on the face of it, it did not correctly represent the actual transaction entered into by the parties. It has not in my opinion been shown that it is a case in which the Court was empowered to grant relief.

A further question has been raised that the sum awarded by the judgment includes compound interest and so cannot stand. That compound interest is included and would appear to be correct. In view, however, of my opinion that the appellant must succeed on the question of the enforceability of the note it is not necessary to deal with it.

The claim of the plaintiff should have been dismissed in the lower Court with costs. This appeal is allowed with costs.

LYALL GRANT J.—

This is an action on a promissory note. The plaint set out that on the note the defendants jointly and severally promised to pay to the plaintiff or order on demand the sum of Rs. 100,000 with interest thereon at the rate of 15 per cent. per annum from the date of the said note. The plaint continues—"Giving the defendants credit for various amounts paid from to time on account, there is now justly and truly due and owing to the plaintiff from the defendants jointly and severally on the said promissory note the sum of Rs. 11,080, being balance principal and interest."

The prayer of the plaint was for judgment against the defendants jointly and severally for the said sum of Rs. 11,080, together with interest on the sum of Rs. 7,500 at the rate of 15 per cent. per annum from the date of the plaint to the date of decree, &c.

[1] *(1898) 1 Q. B. at p. 631.*

The defendants pleaded in answer that no money was paid by the plaintiff to the defendants on the note, but that the said note was delivered to the plaintiff as a security for future transactions. They denied that any sum was due by them to the plaintiff on the note. In further answer they pleaded that the plaintiff could not maintain the action on the note, as the amount stated there as due was to the knowledge of the plaintiff fictitious, and that the document contravened the provisions of section 13 of the Money Lending Ordinance, No. 2 of 1918. They further pleaded that the note had not been filled up in accordance with the requirements of section 10 of the above-mentioned Ordinance and that therefore the note was not enforceable.

The proceedings were in the form of summary procedure on a liquid claim under Chapter LIII. of the Civil Procedure Code. Under this procedure the defendant is not allowed to appear or to defend the action unless he obtains leave from the Court.

There is no record in this case of any definite leave having been given, but there is a journal entry showing that the defendants moved for time to file their answers, that the plaintiff consented and that the application was allowed.

When the case came up for trial, the following issues were framed:—

(1) Was the note (A) delivered by the defendants to the plaintiff as security for future transactions ?

(2) Was the amount stated as due on the note (A) fictitious, and does the note contravene the provisions of section 13 of the Money Lending Ordinance?

(3) Has the note been filled up in accordance with the requirements of section 10 of the Money Lending Ordinance?

(4) If not, can the plaintiff maintain this action?

The first three issues were answered in favour of the defendants, but the fourth issue was answered in favour of the plaintiff. Judgment was entered for the plaintiff as prayed for except that plaintiff was condemned to pay defendant's costs.

The learned District Judge held that the note was obnoxious to section 10 of the Money Lending Ordinance as having been given as security for the loan of money and also held that in the margin of the note the wrong sum was entered as the amount borrowed. The amount entered was Rs. 100,000 and the District Judge held that the proper amount to have been entered was *nil*.

After so finding the District Judge said that he was prepared to hold under the provisions of section 10 (2) that this was a case in which the Court might give relief on such terms as it deemed fit, and that he was prepared to give judgment for the balance due claimed, but to give costs to the defendants.

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In so deciding he followed the case of *Wijeysinghe v. Don Girigoris* (*supra*). In that case it was held that a promissory note in which the sum borrowed was wrongly stated is not void, that an action can be brought on such note, and that 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.

That was a decision by a single judge, and if it was correctly decided, the appeal must be dismissed.

Section 10 of the Money Lending Ordinance requires that in every promissory note given as security for the loan of money, there shall be separately and distinctly set forth upon the document *inter alia* (*a*) the capital sum actually borrowed, and (*c*) the rate of interest per centum per annum payable in respect of such loan.

Sub-section (2) provides that any promissory note not complying with the provisions of this section shall not be enforceable, provided that in any case in which the court shall be satisfied that the default was due to inadvertence and not to any intention to evade the provisions of the section, it may give relief against the effect of this sub-section on such terms as it may deem fit.

Sub-section (3) preserves the negotiability of promissory notes in which particulars are set forth. Sub-section (4) provides that a promissory note setting forth the said particulars substantially in the form given in the schedule to the Ordinance shall be deemed to be in compliance with the section.

Section 11 preserves the rights of *bona fide* holders for value who have not had any notice of any matter affecting the enforceability of such note.

Section 13 makes it an offence for a person to take as security for a loan a promissory note in which the amount stated as due is to the knowledge of the lender fictitious.

The question arises whether the provisions of section 10 are sufficiently complied with where a false entry is made in the note as to the capital sum actually borrowed. Personally I am quite unable to see how an entry setting forth a sum of Rs. 100,000 as the amount actually borrowed, when in fact the sum borrowed was *nil*, can be said to set forth the capital sum actually borrowed.

It must always be kept in mind that a promissory note is a negotiable instrument, and careful provision to preserve its negotiability is made in the Ordinance.

A *bona fide* holder for value without notice of a note of this description would presumably be entitled to recover by summary procedure from the borrower the full amount mentioned on the note with interest thereon at the rate set out. The section only makes a note of this nature unenforceable as against the lender and holders with notice. It seems to me quite clear that the intention of the

Legislature in enacting section 10 was to prevent a lender suing upon a note where the required particulars were falsely set out. Where it otherwise it would be easy for an unscrupulous person to avoid the effect of the section.

Relief is provided in cases of *bona fide* error. The learned District Judge says he was prepared to hold that in the present case if there was a default, it was due to an inadvertence. There is, however, no evidence to support such a finding.

Jayewardene A.J. in *Wijeysinghe v. Don Girigoris* (*supra*) considered that the terms of sub-section (4) affected the requirements of sub-section (1) (*a*) and made it unnecessary for the lender to state correctly the amount actually borrowed.

I must, however, say that I cannot read sub-section (4) in that sense. The sub-section merely provides for a form contained in a schedule in which the particulars have to be set forth.

The word " substantially " in sub-section (4) to my mind merely means that the exact form prescribed in the schedule need not necessarily be followed.

I do not think it is necessary to consider the effect of sections 13 and 14 in connection with this case except perhaps in so far as the fact that section 13 makes it an offence to misstate the amount due on the note, may tend further to show that the intention of the Legislature in section 10 was that the true amount should be stated, and consequently that a note in which the amount stated as due is to the knowledge of the lender fictitious, should not be enforceable by him. The plaintiff may or may not have a good claim for the debt which he alleges to be due, but he is not entitled, in my opinion, to seek his remedy by the summary procedure reserved for the enforcement of liquid claims.

It is true that under section 2 of the Money Lending Ordinance it is open to the Court to re-open the transaction and take an account, &c. The section does not lay down any procedure which the Court is to follow in so acting nor does it impose any obligation on the Court to adopt this course.

The true issues between the plaintiff and defendant are:—

(1) What money has defendant received from plaintiff and how much of it remains owing?

(2) What interest is payable on money so received?

These issues seem to me to necessitate completely new pleadings as the present plaint and answers give no clue as to the true position of the parties.

I agree that the appeal should be allowed and that the present action should be dismissed with costs.

Appeal allowed.