1947 *Present:* **Soertsz S.P.J and Nagalingam J.**

SABARATNAM *et al.*, Appellants, *and* INDO LANKA PROVIDENT INSURANCE CO., MADRAS, Respondent.

S. C. 202—D. C. Point Pedro, 2,103

Money lending—What constitutes it—Must be business—Books of account—Money Lending Ordinance, section 8.

Occasional and disconnected loans do not constitute money lending. It must be a business and requires system, repetition and continuity.

APPEAL from a judgment of the Additional District Judge, Jaffna.

H. V. Perera, K.C., with *S. J. V. Chelvanayakam, K.C.*, *P. Navaratnarajah* and *C. Shanmuganayagam*, for the defendants, appellants.

N. E. Weerasooria, K.C., with *H. W. Tambiah* and *W. D. Gunasekera*, for the plaintiff, respondent.

Cur. adv. vult.

December 10, 1947. NAGALINGAM J.—

This is an appeal from a judgment of the Additional District Judge of Jaffna entering a hypothecary decree against the defendants in favour of the plaintiff, a company in liquidation suing by its official receiver and liquidator duly appointed in that behalf.

Save for the production of the mortgage bond admittedly executed by the defendants, the plaintiff has not been able to place evidence before Court of any of the circumstances attending and relevant to its execution or the nature of the consideration that passed from the plaintiff to the defendants in respect of it. The managing director of the plaintiff company who negotiated this transaction is dead ; and all the documents

and books of the plaintiff company were kept and maintained at its Head Office in Madras and are now in the custody of the official receiver appointed by the Court in Madras. The Ceylon liquidator explained his inability to place any such evidence by stating that the official receiver at Madras was not co-operating with him inasmuch as he had declined to consent to pool the assets in Ceylon with those in India for the common benefit of both Indian and Ceylon creditors as in his view such a course would have been detrimental to the interests of the Ceylon creditors. But whatever differences there may be between the official receiver in Madras and the Ceylon liquidator, those differences have no bearing upon the adjudication of this action against the defendants.

The first defendant, however, testified and gave his version as to how he and his wife, the 2nd defendant, came to execute the bond sued upon in favour of the plaintiff company. The defendants also called witnesses to support the case presented by them. According to the 1st defendant, he had recommended one M. Ramanathan to the plaintiff company's managing director for a loan of Rs. 11,000 on the understanding that Ramanathan should repay the loan within three months and that he should mortgage his properties in Ceylon. The 1st defendant avers that in pursuance of his recommendation the plaintiff company lent to Ramanathan a sum of Rs. 11,000 and obtained from him a personal bond to repay the loan within three months, with a covenant attached that he would mortgage his properties in Ceylon. Ramanathan, after receiving the loan in Madras, is said to have left for Malaya. The loan was granted somewhere in May or June, 1937, and Ramanathan failed either to repay the loan within the time stipulated or even to hypothecate his properties. Thereupon the managing director of the plaintiff company called upon the 1st defendant to pay the amount of the debt due from Ramanathan, but the first defendant says that as he was not in a position to pay the amount he undertook to execute a mortgage bond on condition that the plaintiff company assigned Ramanathan's bond to him and that the managing director of the plaintiff company consenting thereto the mortgage bond sued upon was executed in consequence. Ramanathan's bond has not in fact been assigned to the 1st defendant, and the defendants contend that no obligation attaches on the bond as the condition upon which the bond was executed has not been satisfied.

The bond sued upon was executed on September 3, 1937. There is no reference in the bond either express or implied to this alleged condition. The defence, however, relied upon certain letters written by the managing director in support of their contention that there was this condition annexed to the bond.

The letters clearly indicate that the managing director and the 1st defendant were good friends. The letters D 8, D 9 and D 10 all written about a year subsequent to the execution of the bond unmistakably contain references to the fact that the Ramanathan bond should be assigned to the 1st defendant, but there is not the slightest indication in any one of them that the payment of the amount secured by the bond sued upon was to be in any way dependent upon the assignment of the Ramanathan bond. In fact, the contrary is amply established, for in letter D10 the managing director requests the " immediate payment " of

the loan and adds that Ramanathan's mortgage will be assigned to him on his next visit to Ceylon. It is difficult to believe that at a time when the relations between the 1st defendant and the managing director were cordial the managing director should have entirely ignored the basis of liability of the defendant on the bond and insisted upon " immediate payment " and relegated to a later date the fulfilment of the obligation on the part of the company to assign the bond to the first defendant.

There remains for examination the oral testimony of the 1st defendant and of his witnesses on this point. The evidence of the witnesses is of little value. The 1st defendant is a proctor and a man of standing, but the acceptability of his evidence, however, is very grievously assailed by the testimony of the liquidator who is himself a Proctor and had been for several years Crown Proctor and who is himself a man of very great standing in his community. According to the liquidator, he had written no less than three letters to the 1st defendant claiming payment of the amount due on this bond. The 1st defendant had not replied to any one of them. He says that thereafter he saw the 1st defendant in the Public Library at Jaffna and seized that opportunity to talk to him about the claim. He says that in reply to him the 1st defendant stated that a portion of the amount had already been paid and that the balance would be paid. The 1st defendant, however, admits the meeting but denies the conversation. The learned Judge has accepted the evidence of the liquidator in preference to that of the 1st defendant and I can see no reason to differ from him.

The evidence of the liquidator establishes one significant fact and that is that the 1st defendant had not at that date of the conversation entertained any idea in his mind that the liability upon the bond sued upon was to be dependent on the assignment of the Ramanathan bond to him. It has been vigorously argued that there was no reason for the 1st defendant to have withheld from the liquidator the defence he now puts forward because it is asserted that he had taken up this identical position earlier as that position is evidenced by letters D 8, D 9, and D 10 ; but as I have already indicated the letters D 8, D 9, and D 10 do not contain the remotest suggestion of any such defence, and the contention therefore fails. It has also been urged that even if the liquidator's evidence be true on the point, there might have been some confusion in the mind of the 1st defendant when he referred to a part payment and to repayment of the balance as there was another bond for Rs. 1,000 executed by the 1st defendant in favour of the plaintiff company. The evidence of the 1st defendant himself clearly proves that that bond for Rs. 1,000 had been paid off in 1938, so that at the date of the conversation with the liquidator the bond sued upon was the only bond that remained undischarged and was the only one that could have been in the contemplation of the parties. In this state of facts no other conclusion can be reached but that the attempt to make the liability on the bond sued upon depend upon the assignment of the Ramanathan bond is an afterthought and that at the date of the execution of the bond sued upon there was not any agreement or understanding that no obligation was to attach on the bond till the Ramanathan bond was assigned.

A point of law was also raised under the Money Lending Ordinance. It was argued that the plaintiff company was carrying on the business of a money-lender and that unless it would show in terms of section 8 of the Ordinance that it had kept proper books of account it could not recover. The burden of establishing that the plaintiff firm carried on a money-lending business is on the defendants. The 1st defendant, no doubt, gave evidence that to his knowledge a sum of over Rs. 150,000 had been lent by the company in Jaffna alone ; he went on, however, to say that the objects of the plaintiff company were set out correctly in paragraph 2 of its prospectus, namely, to provide insurance of various kinds, and added that the plaintiff company also lent money occasionally. As was said by Mc Cardie J. in *Edgelow v. Mac Elwee*[1] " there must be more than occasional and disconnected loans. There must be a business of money-lending, and the word " business " imports a notion of system, repetition and continuity ". It will thus be seen that the first defendant's evidence, far from establishing that the plaintiff company carried on a business of money-lending, disproves it. In this state of the matter it is unnecessary to decide the point of law argued.

I would, therefore, affirm the judgment of the learned Judge and dismiss the appeal with costs.

SOERTSZ S.P.J.—I agree.

Appeal dismissed.