1933 *Present :* **Dalton A.C.J. and Koch A.J.**

RAMALINGAM PILLAI *v.* WIMALARATNE *et al.*

154—D. C. Kalutara, 341.

Money Lending Ordinance—Promissory note—Novation of debt—Meaning of capital sum borrowed—Reopening of transaction—Ordinance No. 2 of 1918, s. 2 (1) (b) and s. 10 (1) (a).

In a money lending transaction a promissory note for Rs. 3,000 was drawn up in favour of the payee. The actual sum paid to the maker was Rs. 380, while Rs. 2,350 represented the novation of a debt due from the maker's father. A sum of Rs. 270 was deducted as interest due in advance. The capital sum borrowed was set out in the margin as Rs. 3,000.

Held, that the note had correctly stated the capital sum borrowed as required by section 10 (1) (*a*) of the Money Lending Ordinance.

Held, further, that, in the circumstances, a case had been made out for reopening the transaction between the parties under section 2 (1) of the Ordinance.

APPEAL from a judgment of the District Judge of Kalutara.

H. V. Perera, for defendants, appellants.

M. T. de S. Ameresekere (with him *N. E. Weerasooria* and *D. E. Wijewardena*), for plaintiff, respondent.

Cur. adv. vult.

August 30, 1933. DALTON A.C.J.—

This was an action on a promissory note (exhibit P 1) for the sum of Rs. 3,000 to recover from the defendants Rs. 2,500 capital due thereon, and Rs. 356.25 interest, and further interest until payment. The note was made by the second defendant in favour of the first defendant, and endorsed by the latter, and plaintiff brought the action as a holder in due course, but it is clear from the evidence that plaintiff lent money to the two defendants and that the transaction evidenced by the note was in part at any rate a loan by him to them. It is conceded now in this appeal that he cannot sustain his earlier plea that the note was assigned to him by the first defendant for valuable consideration or that he was a holder in due course.

Subject to a variation in the rate of interest, the trial Judge has entered judgment for the amount as prayed for, from which decision the defendants have appealed.

The first point raised on the appeal is that the note P 1 is not enforceable since it does not comply with the provisions of section 10 of the Money Lending Ordinance, 1918. Plaintiff is a professional moneylender and licensed pawnbroker who has been in Ceylon fifteen years. He had had various money lending transactions between July 7, 1929, and May, 1930, with the second defendant's father, a Veda Mohandiram, to some of which the first defendant was also a party. On May 27, 1930, the two defendants went to plaintiff stating that the Veda Mohandiram had been taken to Colombo seriously ill and that they wanted money for his illness. Plaintiff states they wanted the money badly, but that he

refused to lend them any unless they took over the Veda Mohandiram's debt. They were obviously in a difficult position, but they consented to do as plaintiff asked, although there is nothing to show they knew the amount of that debt or how it was made up. Plaintiff states he looked into his books and found the Veda Mohandiram owed him Rs. 2,350. He then made out the promissory note for Rs. 3,000, which amount was made up of Rs. 2,350 the Veda Mohandiram's alleged indebtedness to him, Rs. 380 which he paid to the two defendants in cash, and Rs. 270 which he retained as interest paid in advance. The note was then made out as for a loan by the first defendant to the second defendant, signed by the latter and endorsed by the former, and retained by plaintiff. At the same time plaintiff handed over to the second defendant notes by his father for Rs. 2,000, and Rs. 300 and a receipt for Rs. 50 (exhibits D 9, D 10, and D 11). The Veda Mohandiram died on June 2, 1930. The notes does not represent of course a true version of the actual transaction between the parties. The ground raised in the case that it was not enforceable was that the capital sum actually borrowed was not separately and distinctly set forth upon the documents.

The note sets out in the margin that the capital sum borrowed was Rs. 3,000, and that Rs. 270 interest had been deducted or paid in advance. It is urged for appellants that the capital sum actually borrowed was Rs. 380 only, and that the sum of Rs. 2,350, the Veda Mohandiram's liability taken over by them, was no part of the loan made to them. It was urged that the note was not given for a loan of money, so far as the sum of Rs. 2,350 was concerned, and that as the note did not set out Rs. 380 as the capital sum actually borrowed as required by section 10, it was not enforceable.

In support of his argument against this contention that the sum of Rs. 2,350 was part of the loan secured by the note Mr. Weerasooria referred us to the case of *Wade v. Wilson*[1]. That was an action for debt for penalties under an old statute (*12 Ann. st. 2. c. 16*) for taking more than the legal interest for a loan of money. The facts there were as follows:—One G owed F £600 on a bond, and F and his son owed defendant £1,200. F could not pay defendant more than half the £1,200 because of G's indebtedness to him. The parties then agreed that defendant accept G with a surety as his debtor for £600 instead of F. G and his surety executed a promissory note in favour of the defendant for £600 and next day the old securities, G's bond to F and F's note for the original debt of £1,200, were respectively delivered up and cancelled. Amongst the points raised in the case it was argued that there was here no loan of money by the defendant to G since none had been paid to or received by the latter, and that making himself the debtor of defendant instead of F and giving his own note for the money did not constitute a loan. This objection was held to have no weight. Lord Kenyon stated the transaction was in substance a loan of money from the defendant to G for which the new note was security. Although the ceremony of handing over the money from the one to the other did not take place, and the other learned Judges agreed with him. Although the point for decision in that case was a question arising under a statute against

[1] *1 East 195.*

usury, I think the authority is, on the facts, an answer to the argument before us that the promissory note (P 1) before us was not given as security for the loan of money in respect of the sum of Rs. 2,350. Further, all the essentials to effect a valid novation of the contract are in my opinion present here.

There was a further argument raised before us that even if the sum of Rs. 2,350 was part of the loan secured by the note, it was no part of the capital sum actually borrowed as those words are used in section 10 (1) (*a*). It was urged that those words can only refer to the sum of money that actually passed from lender to borrower. I am unable to agree with that argument. For one thing, it is inconsistent with any deduction being permissible as provided in section 10 (1) (*b*), for, if any deduction is made, on this argument, it cannot be included as part of the capital sum actually borrowed. What are required to be set out separately and distinctly are the capital sum borrowed, the rate of interest per cent. per annum payable, and the amount of any sum deducted or paid at the time of the loan for interest or other charges. The note must set out the real or actual amount of the capital sum which is borrowed and the other items separately and distinctly, so that the borrower may not be in any doubt as to the amount of the loan, the amount of the interest and the amount of any deduction made. I do not see that section 10 (1) (*a*) means any more than that. If that is so, and if the sum of Rs. 2,350 is part of the loan secured by the note, then the capital sum actually borrowed is Rs. 3,000, of which sum Rs. 270, as the note sets out, has been deducted or paid in advance. In that event the note P 1 does not fail to comply with any of the provisions of section 10 (*a*), (*b*) or (*c*) of the Ordinance.

A further question raised on the appeal was as to whether the District Judge was right in refusing the defendants' prayer for the reopening of the transaction between the parties. On this question issues were raised as to whether the second defendant was entitled to an accounting as regards the transactions between the plaintiff and his late father, and whether the notes in the transactions between plaintiff and his late father did not comply with the provisions of the law.

The learned Judge has held that it does not matter that the previous notes did not comply with the requirements of the Money Lending Ordinance, for the reason, I understand, that the omission to do so was not due to any fraud. He adds that nobody would believe that the full amount stated in the instalment notes was paid, and that the interest must have been deducted in advance, for it is not likely that any Chettiar would lend money without charging interest. I fear he has lost sight of the explicit requirements of the Ordinance. Further he has lost sight, I think, of the provisions of section 21 (*b*) of the Ordinance. I agree with him to this extent, that the defendants, when they signed the note P 1, knew to some extent what they were doing. He has overlooked, however, I think, the fact that they had no knowledge themselves of all the transactions between plaintiff and the Veda Mohandiram, or how the accounts stood, and had to accept plaintiff's account as correct if they were to obtain the loan they were seeking. In this connection the legality of the transaction represented by the note D 9 and of the previous transactions

might also have to be considered. In view of the further proceedings I do not wish to say more on that point than that. He has overlooked too, I think, the difficult position in which the defendants were at the time, the emergency for which the money was required being admitted. Plaintiff was of course under no obligation to lend them money, but he undoubtedly took advantage of their difficulties to induce them to sign the note and take over the father's liabilities, although he admits he had no reason to think the father was going to die. In my opinion the defendants have made out a case for the reopening of the transaction between them and the plaintiff under the provisions of section 2 of the Ordinance. The appeal must therefore be allowed, and the decree in favour of the plaintiff must be set aside, and the case will be sent back for the purpose I have denoted. The costs already had in the lower Court will be in the discretion of the trial Judge after the further proceedings. The appellants, however, are entitled to the costs of this appeal.

KOCH A.J.—I agree.

Appeal allowed.