1958 *Present:* **Weerasooriya, J., and T. S. Fernando, J.**

A. SINNATHANGAM and another, Petitioners, *and*
E. MEERAMOHAIDEEN, Respondent

S. C. 319—Application in Revision in
D. C. Batticaloa, 2887/M

Revision—Abatement of appeal—Power of Supreme Court to consider, in revision, the merits of the appeal—Civil Procedure Code, ss. 753, 756.

Custom—Can it prevail over a statute?—Promissory note—Capital sum overstated according to a local custom—Unenforceability—"Inadvertence"—Can transaction be re-opened?—Money Lending Ordinance (Cap. 67), ss. 2, 10 (2).

(i) The Supreme Court possesses the power to set aside, in revision, an erroneous decision of the District Court in an appropriate case even though an appeal against such decision has been correctly held to have abated on the ground of non-compliance with some of the technical requirements in respect of the notice of security.

(ii) The usage of a particular place cannot control the operation of a general statute. Accordingly, the provisions of section 10 of the Money Lending Ordinance cannot be overridden by evidence of the existence of a village custom which will have the effect of defeating the object of the statute.

The sum actually borrowed upon a promissory note was Rs. 600, but a sum of Rs. 900 was inserted in the note because a custom existed in the village (Kalmunaikudy) in which both the lender and the borrower lived, whereby the sum set forth in the note as borrowed was expressed as one and a half times the actual sum borrowed. Interest was claimed on a capital sum of Rs. 900 from the date of the making of the note.

Held, that the local custom could not prevail over the provisions of section 10 (2) of the Money Lending Ordinance, according to which the promissory note was not enforceable. Nor could relief be granted to the lender under the proviso to section 10 (2).

Held further, that the transaction could not be re-opened under section 2 of the Money Lending Ordinance.

APPLICATION in Revision in respect of a judgment of the District Court, Batticaloa.

S. Sharvananda, for the defendants-petitioners.

E. R. S. R. Coomaraswamy, with *Hanan Ismail*, for the plaintiff respondent.

Cur. adv. vult.

December 30, 1958. T. S. FERNANDO, J.—

This is an application seeking a revision of a judgment of the District Court of Battticaloa delivered on 19th June 1958 in an action instituted under Chapter LIII of the Civil Procedure Code. An appeal lay against the judgment sought to be revised but, although a petition of appeal was presented to the District Court within time, the petitioner appears to have failed to comply with some of the technical requirements in respect of the notice of security. His appeal was therefore declared by the District Judge to have abated. Counsel for the respondent has referred us to several decisions of this Court in support of an argument advanced by him that this is not a case in which this Court should grant relief to the petitioner against the consequences of a failure to comply with the requirements of the Code. It does not become necessary to consider these decisions or this argument as counsel for the petitioner does not canvass the correctness of the declaration that the appeal has abated.

The sole argument upon which the petitioner's counsel relies is that the judgment is manifestly erroneous in law, and that this error in law has resulted in a denial of the petitioner's right to have the action instituted against him dismissed. He refers us to two fairly recent decisions where this Court has exercised its powers to revise decisions reached in District Courts in somewhat similar circumstances. The first of these is the case of *Abdul Cader v. Sittinisa* [1], where this Court, notwithstanding that an appeal had abated, heard the appellant by way of revision observing that it did so as a matter of indulgence and interfered with the judgment appealed from on a point of law. The other is a more recent and hitherto unreported decision— S. C. 309/D. C. Colombo 36064/M— S. C. Minutes of 17th March 1958—in which this Court while rejecting an appeal for non-compliance with the provisions of sections 755 and 756 of the Civil Procedure Code stated that it would be prepared to deal with the questions raised by way of revision as important questions of law arose on the appeal. We do not entertain any doubt that this Court possesses the power to set right an erroneous decision of the District Court in an appropriate case even though an appeal against such decision has been correctly held to have abated. It only remains therefore for us to examine whether there is a substantial question of law involved here and whether this is an appropriate case for us to exercise the powers of revision vested in this Court by section 753 of the Civil Procedure Code.

The respondent by this action filed on 1st November 1957 claimed that the petitioner had on a promissory note dated 28th December 1955 borrowed from him that day a sum of Rs. 900 payable on demand with interest at the rate of 12% per annum. He alleged that accordingly a sum of Rs. 1,098 was due to him from the petitioner and he claimed to recover that sum with legal interest from the date of action. The petitioner gave security in a sum of Rs. 1,000 and was permitted to

[1] *(1951) 52 N. L. R. 536.*

file answer. In his answer the petitioner stated that only a sum of Rs. 300 was received by him and that this sum had already been repaid by him, that the promissory note sued upon was fictitious within the meaning of the Money Lending Ordinance (Cap. 67) and that the note was therefore unenforceable in view of section 10 (2) of the Ordinance. After trial, the learned District Judge held that the actual sum borrowed by the petitioner was Rs. 600, but that a sum of Rs. 900 was inserted in the note because of a custom prevailing in the village of Kalmunaikudy in which both the petitioner and the respondent lived whereby when a sum of money is borrowed on a promissory note the sum set forth in the note as having been borrowed is expressed as one and a half times the actual sum borrowed. He held that the note sued upon is a fictitious note within the meaning of the Ordinance, but that the note is not unenforceable as—to use his own words—" this custom must be given effect to despite the existence of the Money Lending Ordinance ". In the result he gave judgment for the respondent in the full sum of Rs. 900 with legal interest thereon from date of action. The judgment did not allow interest from the date of the making of the note, but the result has had the effect of awarding interest on Rs. 600 at a rate in excess of twice the rate appearing on the note.

No authority appears to have been cited before the trial judge, and certainly none has been submitted to us, to show that custom can prevail over the plain words of the statute. It is good law that the usage of a particular place cannot control the operation of a general statute. In the old English case of *R v. Hogg* [1] it was argued that a certain class of property in the town of Rochester was not liable to be rated under section 1 of the Poor Relief Act, 1601, because it was not the custom of the town to rate that class of property. " We are ", said Grose J.. " interpreting a universal law, which cannot receive different constructions in different towns. It is the general law that this kind of property should be rated, and we cannot explain the law differently by the usage of this or that particular place ". Another case in which it was held that a local custom cannot be set up against a statute is that of *Noble v. Durell* [2]. It was established in evidence in that case that a custom existed in Southampton that every pound of butter sold in the markets shall weigh 18 ounces. Counsel contended that this custom attempted to set up a particular weight for Southampton and could not be supported as it was contrary to several statutes which directed that there shall be only one weight throughout the Kingdom. Upholding this contention, Lord Kenyon C.J. observed that to say that the custom can be supported would be to violate all the rules of language as long as the Acts of Parliament are to regulate the subject. Ashhurst J. in the same case, agreeing with the Chief Justice, stated that " the only ground on which this custom can be supported is a supposition that the legislature did not intend to interfere with the customs of any particular place. But that is totally unfounded ; for the

[1] *(1787) 1 T. R. 721 ; 99 E. R. 1341.* [2] *(1789) 3 T. R. 271 ; 100 E. R. 569.*

legislature supposed that at the times when the several Acts passed, different weights and measures prevailed in different towns; to remedy which inconvenience they passed those Acts. And in none of them is there any reservation of any ancient customs; but they are applicable to every place, directing that in future there shall be but one weight and measure throughout the kingdom ".

The object of the Money-lending Ordinance was generally the protection of the borrower and the provisions of section 10 of the Ordinance cannot, in my opinion, be overridden by evidence of the existence of a village custom which will have the effect of defeating the object of the statute. Sub-section (2) of section 10 renders a promissory note in which the capital sum stated to have been borrowed is not the capital sum actually borrowed unenforceable in a court of law and relief against unenforceability can be granted only where a lender can show that the case is covered by the proviso to that sub-section. Counsel for the respondent attempted to show that there was no intention to evade the provisions of this section. It seems to me that the facts accepted as proved by the trial judge show the opposite of inadvertence which as stated in *Ramen Chetty v. Renganathan Pillai* [1] is the effect of inattention, oversight, mistake or fault which proceeds from negligence of thought. Here the respondent's action in obtaining a note for Rs. 900 when the sum lent was only Rs. 600, being referable to the custom in the village, must be considered to have been deliberate and not due to inadvertence. Further it is impossible, in my opinion, to uphold the suggestion that there was no intention to evade the provisions of this section when one appreciates that interest was claimed from the date of the making of the note on a capital sum of Rs. 900. I am therefore of opinion that no relief could have been granted to the respondent under the proviso to section 10 (2).

Counsel for the respondent finally submitted to us that, as there is a finding that Rs. 600 have been actually lent to the petitioner, the Court should re-open the transaction under section 2 of the Ordinance and grant judgment in a sum adjudged by us to be reasonable. The wording of section 2 suggests that it is a provision designed for the protection of the borrower and not of the lender; moreover, as was suggested by Dalton J. in *Ramen Chetty v. Renganathan Pillai* (*supra*), section 2 may 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. As in my opinion the non-compliance with the provisions of section 10 has not been due to inadvertence and is therefore not protected by the proviso, the circumstances in which action under section 2 may be considered are here absent.

The decision of the trial judge has followed solely from the erroneous decision reached by him on a question of law, and this case is in my opinion an appropriate one in which to restore to the petitioner his legal

[1] *(1927) 28 N. L. R. at 343.*

right to immunity from being sued upon a note declared by statute to be unenforceable. I would therefore set aside the judgment and decree of the District Court dated 19th June 1958 and direct that the respondent's (plaintiff's) action be dismissed with costs. The petitioner will be entitled to the costs of this application.

WEERASOORIYA, J.—I agree.

Application allowed.