1971 *Present :* Weeramantry, J., and Thamotheram, J.

P. A. PERERA, Appellant, *and* H. A. D. AMARASENA, Respondent

S. C. 439/67(F)—D. C. Gampaha, 1301S/M

Money Lending Ordinance (Cap. 80)—Sections 8 and 9—Applicability to mortgage transactions—Mortgage Act (Cap. 89), s. 2—"Hypothecary action"—Inapplicability of maxim generalia specialibus non derogant.

Mortgages are not excluded from the scope of the Money Lending Ordinance. Accordingly, a professional money lender who lends money upon mortgage bonds is not entitled to enforce his claim on a mortgage bond if he has failed to keep regular books of account as required by section 8 of the Money Lending Ordinance. In such a case the money-lender cannot rely on the maxim *generalia specialibus non derogant* to contend that the general provisions of the Money Lending Ordinance should not be permitted to supersede the special statutory provisions in the Mortgage Act regarding mortgages.

APPEAL from a judgment of the District Court, Gampaha.

Frederick W. Obeyesekere, for the defendant-appellant.

J. W. Subasinghe, for the plaintiff-respondent.

Cur. adv. vult.

July 3, 1971. WEERAMANTRY, J.—

This appeal involves the simple but important question whether the provisions of sections 8 and 9 of the Money Lending Ordinance apply to a person who lends money upon mortgage bonds.

The plaintiff lent to the defendant upon the bond put in suit a sum of Rs. 1,000 with interest at 16 per cent per annum. He seeks in this action to recover a sum of Rs. 1,800 being the amount of the principal and the accrued interest. The defendant in his answer takes up the position that the plaintiff is a professional money lender and that he is not entitled to enforce his claim as he has failed to comply with the requirements of the Ordinance relating to the keeping of books of account.

The learned District Judge has held that the plaintiff has advanced money on several mortgage bonds but has taken the view that mortgage bonds are governed by the Mortgage Act and not by the Money Lending Ordinance. He has also held that even if the plaintiff carries on the business of money lending he would be entitled to relief under the proviso to section 8 (2) of the Money Lending Ordinance.

Counsel have not been able to cite to me any decision of this court directly discussing this subject. In *Sinnapillai v. Veeragathy* [1] it would

[1] *(1937) 39 N. L. R. 321.*

indeed appear that the court proceeded on the assumption that the Money Lending Ordinance was applicable to a person who lent money upon mortgage bonds, for the court has closely examined the provisions of section 8 of the Money Lending Ordinance in the context of a claim based upon a mortgage bond. However the court would not appear to have given its mind specifically to the question that has been raised in the present case.

There is on the other hand a decision of this court in *Gunatilake v. de Soysa*[1] assuming that ,inasmuch as a mortgage bond is not a proceeding under the Money Lending Ordinance, the plaintiff can recover interest at the agreed rate provided the interest recovered does not exceed the principal. The point now taken does not appear to have been urged before the court in that case, and a perusal of that judgment would appear to indicate that in that case likewise the court did not give its mind to the question now under consideration.

A decision cited in the course of the argument was that of Bertram C.J. in *Samithamby v. Nogan*[2]. This was a case concerning a promissory note given for the value of paddy supplied and it was held that the Money Lending Ordinance did not apply to such a transaction. The basis of this decision was that that was not a money lending transaction but a transaction arising out of advances of seed paddy. That case not being one of a loan and the Ordinance being therefore inapplicable in any event, this decision need detain us no longer.

In the result it would appear that this question must be viewed as one of first impression, and this indeed is what counsel have invited me to do.

The Money Lending Ordinance was enacted in the year 1918. By that date legislation on the question of mortgages was already upon our Statute book. Although this legislation was not of the comprehensive nature of the present Mortgage Act or even of the Mortgage Ordinance of 1927, the legislature had in fact given its attention to the subject of mortgage in provisions going as far back as Ordinance No. 21 of 1871 and Ordinance No. 8 of 1871. Moreover, quite apart from legislation, the mortgage was a well-known institution in our common law, being one of the important types of contract known to the Roman Dutch law.

It seems unlikely therefore that, had it been the intention of the legislature to exclude mortgages from the scope of the Money Lending Ordinance, it would not have done so in express terms. There is no indication whatsoever in the Ordinance to that effect. The Ordinance in fact specifically excludes certain classes of transaction from the operation of section 2, and among the classes so exempted are those of banks and pawn brokers. The question of exclusion from the operation of the Ordinance having been thus clearly before the legislature, it is unlikely

[1] *(1951) 45 C. L. W. 43.*

[2] *(1924) 26 N. L. R. 217.*

that a category as important as that of mortgage, so common in Ceylon, should have passed without mention had that been intended.

The provisions of the Money Lending Ordinance seem to suggest that all transactions involving the lending of money, other than those expressly exempted, are brought within its purview. To refer again to section 2, this section permits the court where, inter alia, the transaction is harsh and unconscionable or substantially unfair, to reopen the transaction and check the account between the lender and the person sued. In such account all previous transactions may be gone into and even settled accounts reopened. There is nothing excluding mortgage transactions from such an accounting, and indeed the same section expressly authorises the court upon such an accounting to set aside either wholly or in part, or revise or alter *any security* given or agreement made in respect of money lent.

Section 2 would not in fact appear to be workable as an instrument for achieving equity and fairplay upon an overall view of all transactions between the parties, unless mortgage transactions as well may be brought into the accounting. The equity sought to be achieved by the section is an equity which, it need scarcely be observed, protects not only the borrower but also the lender, for the courts would see that the section is not so used that the borrower becomes the oppressor[1]. In order to do so the court must necessarily have a conspectus of all transactions between the parties.

Again, section 8 speaks generally of persons carrying on money lending business. Money lending business is not restricted in any way to any one type of transaction, nor are any of the well-known species of money lending transactions left out of this section. Mortgages are indeed one of the best known methods of lending money. The mere fact that money is lent in the one case upon a promissory note and in the other case upon a mortgage bond affords no justification for holding that the one case comes within the scope of the Ordinance and the other does not. The man who habitually lends money on either type of transaction is equally a money lender, and if it were the policy of the Legislature to place certain checks upon his activities by section 8 it would not appear to be reasonable to remove those checks merely because the transaction is one of mortgage.

Furthermore, although the lending of money may be incidental to some other business carried on, it would appear from the decision in *Perera v. Jafferjee Brothers*[2] that the transaction is none the less one of money lending.

To view the matter from another angle, the fact that the Mortgage Act contains special provisions dealing with mortgage transactions no more makes the Money Lending Ordinance inapplicable to such transactions than the fact that cheques are dealt with by the Bills of Exchange

[1] *See Kusumu v. Baba Egbe, (1956) 3 All E. R. 266 at 270.*
[2] *S. C. 106/62 and 116/64 Inty. D. C. Colombo 6252 MB.*

Ordinance removes such instruments from the applicability of the Money Lending Ordinance. The fact that detailed provisions regarding the manner of execution, enforcement and effects of each type of instrument are specifically contained in Ordinances dealing especially with such instruments, does not mean that so far as they concern transactions of money lending, they fall outside the ambit of an Ordinance which deals without restriction with all types of money lending transactions.

The learned District Judge has been of the view that because mortgage bonds themselves contain the required particulars, no books of account would be necessary regarding such transactions. I do not consider this to be a correct view of the matter. If a person lends money upon promissory notes and sues upon them, the sum borrowed and the interest levied would equally appear upon the face of the document sued upon, but it seems clear that the Legislature requires other records over and above the information appearing upon the face of the document, where the lending is by a professional money lender. The need for such extra checks is self-evident where the court is required to form a conclusion regarding the regularity of these transactions and the fairness of such transactions in their totality.

In the absence therefore of express words of exemption in the Statute taking the lending of money upon mortgage bonds outside the operation of the Ordinance I consider that effect must be given to the terms of the Ordinance as they stand. It would not be permissible to take away from the operation of the Ordinance an entire category of money lending transactions of considerable importance unless there is express warrant in the Statute for doing so.

Counsel have referred me in this connection to the debates in the Legislative Council on March 1st 1918 when the Money Lending Ordinance was passed. There would appear to be no reference to mortgage transactions as being exempt from the scope of the Ordinance. Nor again is there any mention of mortgage transactions in the report of 23rd February 1918 of the Select Committee to which the Money Lending Bill had been referred prior to its being passed. That Select Committee included among others Sir Anton Bertram the Attorney General, Sir Ponnambalam Ramanathan and Mr. K. Balasingham and although these distinguised lawyers have made many comments in regard to the Bill there is not the slightest reference to mortgage transactions as being exempt from its scope.

There is nothing novel in the notion that a mortgage transaction, involving as it does a loan of money to the mortgagor, is a transaction of money lending. This view receives support from decisions not only in this but in other jurisdictions as well.

A recent decision of this court to be noted in this connection is that in *Perera v. Jafferjee Bros.*[1] where the contracts sued upon were mortgages

[1] *S. C. 106/62 and 116/64 Inty. D. C. Colombo 6252 MB.*

of land. The principal defence taken was that the plaintiff firm had made defaults in furnishing to the Registrar of Business Names a statement of particulars in accordance with the requirements of the Ordinance. The default alleged was that the plaintiff firm carried on the business of money lending but failed to specify the lending of money as one of the businesses which the firm carried on. The assumption throughout that case was that a mortgage transaction was one of money lending, this court observing that "The two mortgage bonds are in terms agreements for loans of money to be made from time to time upon the security of hypothecations of immovable property". This court held that the transactions between the parties (that is the mortgage transactions sued upon as well as other transactions) showed that the plaintiff carried on the business of money lending and that the business of money lending should have been declared under the Business Names Ordinance.

There is, from other jurisdictions, the decision of the Privy Council in appeal from the Supreme Court of Nigeria in *Kasumu v. Baba-Egbe*[1]. That was a case of the mortgage of immovable property in Lagos which was treated as a money lending transaction for the purpose of section 19 of the Nigerian Money Lenders Ordinance.

Likewise the Indian courts have held that dues of a mortgage on the basis of a mortgage transaction satisfying certain conditions stipulated by the Act, are loans within the definition given in the Money Lenders' Act.[2]

It has been argued on behalf of the plaintiff-respondent that a mortgage action is an action of a dual nature—an action upon the hypothecary claim and an action for the money due—and that therefore so much of the relief sought as relates to the hypothecary claim does not come within the ambit of the Money Lending Ordinance. In this connection we have been referred to the definition of a hypothecary action in section 2 of the Mortgage Ordinance wherein a hypothecary action is defined as an action to obtain an order declaring the mortgaged property to be bound and executable for the payment of the moneys due upon the mortgage and to enforce such payment by a judicial sale of the mortgaged property. This part of the relief sought in an action upon a mortgage bond is therefore said to be independent of and distinct from the money claim.

I do not think it is possible to compartmentalise the hypothecary claim in this way. The mortgage is always the subsidiary obligation, for hypothecation of property is accessory to some principal obligation[3] which may take one of many forms, such as dowry, sale, letting, suretyship or lending of money[4]. As Maasdorp observes[5] "the original obligation may be any obligation whatsoever, which in case of non-fulfilment,

[1] *(1956) 3 All E.R. 266.*

[2] *See Gurumtha Rao v. Dasarathy, (1953) A.I.R. Orissa 338 at 343, and Neelamoni Sabu v. Kethrabasu Sahu, (1954) A.I.R. Orissa 36.*

[3] *Wille, Mortgage and Pledge, p. 7. (1920 edn.)*

[4] *ibid p. 8.*

[5] *vol. 2, p. 234.*

is capable of being converted into a money value by means of a claim for compensation, but as a general rule it is a money debt".

There is then a principal obligation, arising in this case from the lending of money, which lies behind and supports the mortgage, and in examining the applicability to the entire transaction, of the Money Lending Ordinance, we cannot lose sight of this fact.

Moreover section 8 (2) of the Money Lending Ordinance states that a person failing to comply with the requirements of section 8 shall not be entitled to enforce *any* claim in respect of *any* transaction in relation to which the default shall have been made. Consequently both the hypothecary claim and the money claim, arising as they do, from a transaction in relation to which the default has been made, are thereby affected.

Similar phraseology appearing in section 13 (1) of the English Money Lenders' Act of 1927 was considered by the Court of Appeal in *Re Martin's Mortgage Trusts C & M Mattheus, Ltd. v. Marsden Building Society*[1]. That section prohibited the institution, unless before the expiration of twelve months from accrual of cause of action, of proceedings by a money lender for the enforcement of *any* claim made or security taken in respect of *any* loan made by him. The Court had little difficulty in finding that this wide language covered an assertion of the rights of a money lender under a mortgage taken by him to secure a loan of money. The court endorsed the trial judge's view that although the application was in form an application by the plaintiffs for execution of the statutory trust (which, in English law, results from the mortgage by virtue of section 105 of the Law of Property Act 1925) still they were nevertheless proceedings for the enforcement of security consisting of the mortgage, within the meaning of section 13 (1) of the Money Lenders' Act, 1927.

The more recent case of *Kasumu v. Baba-Egbe*, already referred to, is even more in point. The Nigerian Ordinance there under consideration by the Privy Council also contained the phraseology that the person in default shall not be entitled to enforce *any* claim in respect of *any* transaction. Their Lordships observed that these words of deprivation are very widely drawn and that they should not be confined even to the assertion of rights by means of or in the course of legal proceedings. It was held that even the performance of such acts in the law as the exercise of a right of sale over property mortgaged or charged, or the retention or taking possession of such property in assertion of the claim to repayment, is also precluded.

I do not think therefore that the circumstance that the relief sought upon a mortgage bond is twofold suffices to take the hypothecary claim outside the operation of the Money Lending Ordinance.

Learned Counsel for the plaintiff-respondent has laid much stress upon the maxim *generalia specialibus non derogant* and has submitted that where there is special statutory provision relating to mortgages, the

[1] *(1951) 1 All E. R., p. 1053.*

general provisions of the Money Lending Ordinance should not be permitted to supersede those special statutory provisions. However, for reasons which I have already indicated I do not think there is any limitation upon the wide words in the Money Lending Ordinance so as to exclude from its purview money lending transactions which are associated also with the taking of a mortgage bond. Furthermore there is not in any event any conflict between the provisions of the two Statutes.

For all these reasons I see no ground of principle justifying the exemption of mortgage transactions from the scope of the Ordinance. Indeed it would defeat the policy of the Ordinance if mortgage transactions which are one of the commonest forms of money lending transactions in this country, should be excluded from the scope of the Money Lending Ordinance.

The next question is whether the evidence proves a sufficient number of transactions to establish that the plaintiff is a professional money lender.

In the present case the learned trial judge has held that the plaintiff has advanced money on several mortgage bonds. The plaintiff, who is a mechanic in the Railway workshop, at first denied that he had lent money to any persons other than the defendant. Under cross-examination however he was constrained to admit, when details were put to him, that he had lent sums upon mortgages to other persons as well. He admitted having lent Rs. 1,000 upon a mortgage to one Don Daniel. Although he denied having lent money to one Agnes de Silva, a mortgage bond was produced marked D1 showing that Rs. 1,000 had been advanced to her. A loan of Rs. 2,500 to one Abraham Perera was proved by D2, a loan of Rs. 500 to one Obias by D4, a loan of Rs. 1,000 to one Laurie Nona by D5, a loan of Rs. 1,000 to Elaris Perera upon D7. The loan to Don Daniel was proved also by the bond D3. Although objection was taken to the production of these documents and an undertaking was given to prove them, learned counsel for the plaintiff later stated that he was prepared to admit all these documents without formal proof.

It has been submitted on behalf of the plaintiff-respondent that the transactions in evidence in the present case are in any event not sufficient to establish systematic money lending. In support of this contention I have been referred to the judgment in *Perera v. Sally*[1] where Poyser S. P. J. held that evidence of nine promissory notes was not sufficient to establish that the deceased was a professional money lender. However there would appear to have been certain circumstances in that case arising from the evidence of the alleged money lender's widow, which satisfied the court that despite the number of transactions the deceased was not in fact carrying on the business of money lending. As Poyser S. P. J. observed, although various decisions had been cited before

[1] *(1937) 16 Ceylon Law Rec. 164.*

him, this was not a matter which could be decided by authority. He observed further that the evidence in each case must decide whether the person suing is a professional money lender or not.

Having regard to the principle enunciated in this very decision I would have no hesitation in holding upon the facts of the present case that the plaintiff is a professional money lender. The transactions are sufficiently frequent and the attempt to conceal them sufficiently dishonest to rebut any suggestion that the plaintiff was not carrying on the business of money lending. The plaintiff's false denials at the commencement of his cross-examination have indeed deprived him of any vestige of a claim to the Court's sympathetic consideration.

In view of the conclusions I have reached, this is scarcely a matter for the applicability of the proviso to section 8 (2) of the Money Lending Ordinance.

In the result I conclude that section 8 of the Money Lending Ordinance applies to the plaintiff and that in view of his failure to keep regular books of account he is not entitled to enforce his claim. I therefore set aside the judgment and order of the learned District Judge and dismiss the plaintiff's action with costs both here and in the Court below.

THAMOTHERAM, J.—I agree.

Appeal allowed.