A

BIANATH SINGH

v.

KESHONAND AND ANOTHER

[SUPREME COURT, 1962 (Hammett P. J.), 21st, 26th March,
B 25th April]

Civil Jurisdiction

Moneylending—moneylender's account—entries not in proper sequence—entries made at one time shortly before court proceedings—not a regular account—loan irrecoverable—Moneylenders Ordinance (Cap. 207) ss.16,17,18.

C *Moneylending—pleading—failure to keep regular account—illegal act—court will take cognisance though not pleaded—Moneylenders Ordinance (Cap. 207) s.18—Rules of the Supreme Court 1883 (Imperial) 0.3 r.10, 0.70 r.1.*

Practice and procedure—pleading—moneylenders—failure to keep regular account —illegal act—not pleaded by defendant—court will take cognisance—Moneylenders Ordinance (Cap. 207) s.18—Rules of the Supreme Court 1883 (Imperial) 0.3 r.10, 0.70 r.1.

D The failure to keep a regular account as required by section 18 of the Moneylenders Ordinance is an illegal act, and when such an act is brought to the notice of a court cognisance will be taken of the illegality whether pleaded or not.

A moneylender's account book showing entries not made in chronological order, and in which the entries relating to the transaction in
E issue in the action, extending over three years, had all been written at one time only a week before the action, is not, either as a whole or in relation to the particular transaction, a regular account within section 18 of the Moneylenders Ordinance.

Cases referred to: *In re Robinson's Settlement, Gant v. Hobbs* [1912] 1 Ch. 717; 106 L.T. 443 : *Scott v. Brown Doering McNab & Co.*
F [1892] 2 Q.B. 724; 67 L.T. 782 : *Kasumu v. Baba-Egbe* [1956] A.C. 539; [1956] 3 All E.R. 266.

A. I. N. Deoki for the plaintiff.

F. M. K. Sherani for the defendants.

G The facts sufficiently appear from the judgment.

HAMMETT P.J. : [25th April, 1962]—

The Plaintiff is a licensed moneylender and he claims from the three Defendants the sum of £460.10.4 being £400 principal and
H £60.10.4 the balance of interest due under a Promissory Note dated 9th September, 1957, executed by the Defendants and payable on demand.

The Defendants by their pleadings admit that they executed this Promissory Note, but contend that it was given subject to an agreed condition precedent, which has not been fulfilled, as a result of which they maintain they are not liable to the Plaintiff upon it. The only issue raised on the pleadings by the defence was that concerning the alleged unfulfilled condition precedent subject to which Defendants contended the Promissory Note was given.

When the case came on for hearing, Counsel for the defence immediately applied for certain amendments to be made to the defence in paragraphs 5, 6, 7(b) and 7(c). Whilst these amendments were not of a major character, the necessity for them must have been apparent months ago. Counsel for the Plaintiff did not, however, object to the application which was granted. At no time had the Defendants taken objection to the contents of the Statement of Claim on the specially endorsed writ, but, instead, pleaded to it. The Court, therefore, drew attention to the fact that the Statement of Claim did not comply in all respects with the requirements of Order 3 Rule 10 of the Rules of the Supreme Court. These omissions did not appear to be of a major character but nevertheless they were omissions. The Defendants have not suggested that they have been misled or prejudiced in any way by them and I am quite satisfied that they have not been prejudiced or misled. Nevertheless the Defendants could undoubtedly, had they noticed these defects, have applied to have the writ set aside for irregularity instead of pleading to this defective statement of Claim.

Immediately the attention of Counsel for the Plaintiff was drawn to these defects, he very properly intimated that he was willing for the case to be adjourned for the full particulars to be given. Such an adjournment would of course have only been given on the terms that the Plaintiff pay the Defendants' costs. Counsel for the Defendants, however, not only refused to agree to an adjournment but said that he insisted that the case should proceed. When later the Plaintiff sought leave to amend the Statement of Claim so as better to comply with the provisions of Order 3 Rule 10, Counsel for the defence opposed this application and submitted that in any event the defects were fatal and could not be cured by any amendment. I later allowed the amendment to the Statement of Claim sought by the Plaintiff partly on the ground that the defence had waived any right of objecting to it by entering an unconditional appearance. Further, in my opinion, these defects were curable and not incurable defects. In my view the Plaintiff's non-compliance with Order 3 Rule 10 did not render the porceedings void in view of the provisions of Order 70 Rule 1.

The trial then proceeded at the specific request of the Defendants and was at first limited to the issue of liability—it being agreed that the question of quantum should be dealt with as a separate issue after the determination of the issue of liability. Later in the trial, since it became clear that there was no conflict of evidence on the issue of quantum, it was agreed that that issue should also be determined at the same time.

Since the Defendants admitted the due execution by them of the Promissory Note, I ruled that it was for the defence to begin and to show that by reason of the non-fulfilment of the alleged condition precedent the Defendants were not liable on this Promissory Note to the Plaintiff.

The case for the defence is this. On or about the 9th September, 1957, they agreed with one Gurdar Singh s/o Dilbag Singh, to purchase from him a building for the sum of £3,400. At that time Gurdar Singh's father, Dilbag Singh, was indebted to the Plaintiff, Bianath Singh, in the sum of £400 which sum was secured by a Promissory Note. The payment by the Defendants to Gurdar Singh of the consideration of £3,400 was to be made in part by the Defendants taking over the liability of Dilbag Singh to the Plaintiff for this £400. In furtherance of this agreement the Defendants executed this Promissory Note for £400 in favour of the Plaintiff in satisfaction of, and in place of, the Promissory Note Dilbag Singh had given the Plaintiff, and conditional upon the conveyance to the Defendants by Gurdar Singh of Gurdar Singh's building.

The Defendants admit that when they signed the Promissory Note £400 cash was actually handed them but they assert that this was for formality only to comply with the letter of the law, and that the money was handed back to a Mr. B. B. S. Mal, who had provided the notes for this purpose, immediately afterwards.

It is the Defendants' contention that Gurdar Singh left Fiji a few weeks after 9th September, 1957, without conveying to them his property, as had been agreed, and Gurdar Singh has never returned to Fiji. They maintain that by reason of the failure to fulfil this condition precedent the Promissory Note for £400 they executed in favour of the Plaintiff is of no effect and was given either for no consideration or presumably for a consideration that has wholly failed.

The Plaintiff denies that this Promissory Note for £400 was given him subject to any condition precedent. He says that on the 9th September, 1957, shortly before the Defendants executed the Promissory Note for £400, Dilbag Singh had paid him back the £400 due to him on Dilbag Singh's Promissory Note and that the Defendants' Promissory Note was in security for a loan to them of £400. He says that nobody said anything to him about any "condition precedent" and no one told him that if Gurdar Singh failed to convey his building to the Defendants, the Defendants would not repay to him the £400 he says he lent them.

There was a direct conflict of evidence on this matter and also on the procedure adopted when the Defendants signed this Promissory Note and the memorandum of this moneylending contract and the money was actually handed to the Defendants.

The Defendants contend, as was related by the 2nd Defendant in evidence, that on 9th September, 1957, when they went to the office of Deoki & Co., the Plaintiff's solicitors, where the Promissory Note was signed, that the procedure followed was in chronologically close sequence as follows :

1. The three Defendants signed the Promissory Note for £400.
2. The 2nd Defendant picked up, off the table where it had been put by Mr. Madhoji (the partner in the law firm of Deoki & Co. acting for the Plaintiff), the sum of £400 in cash which had been previously handed to Mr. Madhoji by a Mr. B. B. S. Mal.
3. The Defendants signed the memorandum of contract under the Moneylenders Ordinance.
4. The 2nd Defendant handed back the £400 to Mr. B. B. S. Mal.

A

This order is, of course, different from that required by Section 16 of the Moneylenders Ordinance whereby it is absolutely essential that the memorandum of contract should be signed before the security is signed, or the money is actually lent.

B

The memorandum of contract in this case, which was signed by the Defendants and attested by Mr. Madhoji bears a certificate signed by Mr. Madhoji to the effect that the correct order of procedure prescribed by Section 16 of the Moneylenders Ordinance was followed and evidence to this effect was given by Mr. Madhoji himself. There is undoubtedly a serious conflict of evidence on this point of what was the exact procedure followed on this day some 4½ years ago when this transaction was carried out. I need hardly say, however, that it would require very convincing evidence indeed to satisfy me that the procedure followed then was different from both what the document executed at the time said was followed and also from that which the legal practitioner who had the documents prepared and supervised their execution and who witnessed their execution, has on oath said was followed. On this issue, having considered all the conflicting testimonies, I have no hesitation in accepting that of Mr. Madhoji.

C

D

Having accepted the evidence of Mr. Madhoji on this issue, it is clear that I have disbelieved that of the Defendants to the contrary effect on this issue. Whilst the Defendants may well have made collateral arrangements with both Dilbag Singh and Gurdar Singh, I am quite satisfied that in carrying out this transaction not only was no reference made to any condition precedent in the memorandum of contract between the Plaintiff and the Defendants but also that it was not mentioned therein because no such condition precedent had been agreed to between them. As far as the Plaintiff was concerned I am satisfied that it was an out and out moneylending transaction for £400 at which the necessary documents were signed and the actual money passed as is prescribed by law. Again, what happened to this £400 after it was received by the Defendants was no concern of the Plaintiff. I accept the evidence of Mr. Madhoji on this issue and I do not believe that of the Defendants. I hold as fact that this Promissory Note was not given subject to any condition precedent but as an out and out security for a loan of £400. Whilst I have no doubt that the Defendants required this money and may well have used it in connection with their property transaction with Gurdar Singh, I hold as fact that the Plaintiff was not a party to that transaction and that he did not agree to the Defendants being liable to repay him the £400 and interest secured by this Promissory Note only if the Defendants' proposed purchase of Gurdar Singh's property was completed.

E

F

G

H

I will add this further, that on the evidence before me, I am quite satisfied that when Gurdar Singh left Fiji he left a Power of Attorney behind in favour of the 1st Defendant, whereby the 1st Defendant could have executed a conveyance of Gurdar Singh's property to the three Defendants jointly, as they had hoped would be the case, and that the only reason why this was not done was because the Defendants were unable to raise enough capital to carry through the proposed transaction, in view of the arrears of principal and interest due to the mortgagees of the property before they exercised their rights as mortgagees.

On the merits of this action, and on the pleadings and on the evidence adduced by the parties, I have no hesitation in holding that the Defendants have completely failed to establish what they set out to prove, namely, that the Promissory Note they executed in favour of the Plaintiff was agreed to be subject to a condition precedent that has not been fulfilled. It is admitted by the Plaintiff that the Defendants made the following payments to him before the issue of the writ, namely :

1. On 14th April, 1959 .... £50
2. On 17th Sept., 1959 .... £40.

Credit for these payments has been made in the Claim, as is made aparent when the Statement of Claim is read with the reply to the defence. After the issue of the writ, i.e. 13th December, 1960, a further £50 was paid on 20th December, 1960, leaving a nett figure due to the Plaintiff of £400 principal and £10.10.4 balance of arrears of interest. Subject to what I now have to say, the Plaintiff is, in my opinion, entitled to judgment for that sum.

During the hearing of this case an entirely new and interesting point has, however, arisen which was not referred to on the pleadings. It arises in this way.

Section 18 of the Moneylenders Ordinance reads as follows :

> "18. (1) Every moneylender shall keep or cause to be kept a regular account of each loan made after the commencement of this Ordinance clearly stating in plain words and in English numerals with or without the numerals of the script otherwise used the terms and transactions incidental to the account entered in a book paged and bound in such manner as not to facilitate the elimination of pages or the interpolation or substitution of pages.
>
> (2) If any person subject to the obligations of this section fails to comply with any of the requirements thereof, he shall not be entitled to enforce any claim in respect of any transaction in relation to which default shall have been made. He shall also be guilty of an Offence under this Ordinance and shall be liable to a fine not exceeding five pounds, or in the case of a continuing offence, to a fine not exceeding twenty shillings for each day or part of a day during which such offence continues."

It is the contention of the Defendants that the Plaintiff has failed to keep a regular acocunt of the loan transaction in this case as is

required by this section. The Plaintiff's ledger, or account book in which the entries relating to this loan have been made, was produced in evidence in this case and admitted as Exhibit C. Mr. Shiu Prasad, a clerk, said he made most of the entries in this book but on page 16 of it, in which the details of the transaction in this case are set out, he said he only entered the names of the three Defendants, the number of the Promissory Note, the amount of the loan, namely £400 and, presumably, the entry "Interest 12%", and the date 9th September, 1957. He swore that he made these entries at the time, i.e. on or about 9th September, 1957. One Hari Ram Anganu, a public accountant, has given evidence, which was not challenged or contradicted and which I accept, that he made all the other entries in this account book at page 16 on 15th March, 1962, that is some 15 months after the action was begun and less than a week before he gave his evidence. The entries made by Mr. Anganu are as follows :

"1957			1959		
Dec. 31 To Interest	10. 10. 1		Apr. 14 By Cash	50. 0. 0	
1958			Sept. 17 By Cash	40. 0. 0	
Dec. 31 To Interest	48. 0. 0		Bal c/d	422. 18. 9	
1959					
Dec. 31 To Interest	54. 8. 8				
	512. 18. 9			512. 18. 9	
1960			1960		
Jan. 1 To Bal c/d	422. 18. 9		Dec. 20 By Cash	50. 0. 0	
Dec. 31 Interest	50. 16. 6		31 Bal c/d	423. 15. 3	
	473. 15. 3			473. 15. 3	
1961			1961		
Jan. 1 To Bal c/d	423. 15. 3		Dec. 31 By Bal c/d	474. 10. 5	
Dec. 31 Interest	50. 15. 2				
	474. 10. 5			474. 10. 5	
1962					
Jan. 1 To Bal c/d	474. 10. 5."				

It is clear that the majority of these entries merely show the calculation and addition of interest accrued due and the balance of the account at the end of each calendar year. Apart from that the only entries of actual transactions are :

1959		
April 14	By Cash	£50
Sept. 17	By Cash	40
1960		
Dec. 20	By Cash	50.

It is of interest to note that although under the Moneylenders Ordinance, Section 17 contains a prohibition against the payment of compound interest, the account drawn by Mr. Anganu does in fact

appear to charge to the debit of the Defendants interest calculated with yearly stops at a compound rate.

A It is the contention of Counsel for the Defendants that this account of the loan has not been kept "regularly" in the sense that it has not been entered up at the time the transactions took place but has merely been written up and prepared for the purposes of this action. It is submitted that as a result the Plaintiff is, by reason of the provisions of Section 18(2) of the Ordinance, not entitled to enforce his claim in respect of this transaction.

B The first point that must be determined is whether, since the Defendants did not plead this by way of defence, they are entitled to rely on this statutory defence at the last minute.

Section 18 of the Moneylenders Ordinance does not make illegal a loan by a moneylender a regular account of which has not been kept. It makes any claim to return of the money lent unenforceable but it C is the failure to keep the regular account itself which is an illegal act. Where this illegal act has been brought to the notice of the Court it appears to me, in view of the decisions of *In re Robinson's Settlement, Gant v. Hobbs* [1912] 1 Ch. 717; *Scott v. Brown Doering McNab & Co.* [1892] 2 Q.B. 724; and *Kasumu and Others v. Baba-Egbe* [1956] 3 All. E.R. 266, that the Court must take cognisance of the illegality whether it has been pleaded or not.

D The next point to be determined is whether the Plaintiff has kept or caused to be kept "a regular account" sufficient to comply with the provisions of Section 18 of the Moneylenders Ordinance. There is no definition in the Ordinance of the meaning of the expression "regular account".

E An examination of the account book (Exhibit C) reveals the following position. It is a bound account book—not a loose leafbook—of which each account page bears a page number running from 1 to 162 consecutively. It has not, however, contrary to the sworn testimony of the clerk who said he kept it, been entered up in chronological order. The initial entry on each of the pages up to page 22 is dated as follows :

F

Page	1	18 April, 1955
"	2	4 Aug. 1959
"	3	13 July 1959
"	4	13 Oct. 1959
"	5	17 April 1958
"	6	3 Sept. 1958
"	7	No entries
"	8	16 Jan. 1956
"	9	7 March 1955
"	10	25 Jan. 1955
"	11	27 May 1958
"	12	12 Dec. 1957
"	13	23 Nov. 1959
"	14	4 April 1958
"	15	11 Feb. 1955
"	16	9 Sept. 1957

G

H

"	17	24 March 1959
"	18	26 Oct. 1959
"	19	1 Dec. 1958
"	20	10 May 1956
"	21	No entries
"	22	21 Aug. 1957.

The sequence of the transactions recorded first on each of these consecutive pages clearly have not been made in chronological order. No reason explaining this rather extraordinary method of keeping this account book has been suggested by the clerk who says he made most of the entries in it. In fact not only was no explanation offered by this clerk but he went so far as to say that he made the entries in the book as the Plaintiff made the business transactions recorded. If he is telling the truth, it means that he did not enter the book up on the pages in their proper order. In either event, I do not consider that this account book as a whole can properly be called "a regular account".

As far as the actual account dealing with the transactions between the Plaintiff and the Defendants, and recorded on page 16 of the book, is concerned the fact that this account was all written up at one time only a week before the hearing of this action and that those entries covered all the transactions between the parties over the previous three years, deprives it, in my view, of any right to be called a "regular account" of this loan and of the transactions incidental to the account. On the evidence before me I do not feel I have any alternative but to hold, albeit with considerable reluctance, that the Plaintiff has failed to comply with the provisions of Section 18 of the Moneylenders Ordinance as to the keeping of a regular account of the loan and of the transactions incidental to the account.

For these reasons the Plaintiff is not, in my opinion, in view of the express provisions of Section 18 (2) of the Moneylenders Ordinance (Cap. 207), entitled to enforce any claim in respect of this transaction. There will, therefore, be judgment for the Defendants on the claim. I will give Counsel the opportunity of being heard before making any order as to costs.

Judgment for the defendants.