A **TOTARAM**

v.

NASIBAN

[COURT OF APPEAL, 1962 (Hammett P., Marsack J.A., Trainor J. A.),
B 7th, 12th, 26th February.]

Civil Jurisdiction

Moneylending—memorandum of contract—existing loan repaid from new loan between same parties—whether term of moneylending contract—Moneylenders Ordinance (Cap. 207) s.16(3)—Bills of Sale Act (1878) Amendment Act 1882 (45
C *& 46 Vict., c.43) (Imperial)—Moneylenders Act 1927 (17 & 18 Geo.5, c.21) (Imperial)*

A loan of £799 by a licensed moneylender was made subject to a condition that a sum of £681 already owing by the borrower to the moneylender should be repaid from the new loan.

D *Held*: The condition for repayment was a term of the moneylending contract and as it had not been included in the memorandum of the contract required by section 16 of the Moneylenders Ordinance the contract and the securities therefor were unenforceable.

Case referred to: *Egan v. Langham Investments Ltd.* [1938] 1 K.B. 667; [1938] 1 All E.R. 193.

E Appeal from a judgment of the Supreme Court.

R. D. Patel for the appellant.

K. C. Ramrakha for the respondent.

The facts appear from the judgment of Trainor J. A.

F [26th February 1962]—

TRAINOR J.A. :

The Respondent in this appeal, the Plaintiff in proceedings in the Supreme Court, is the widow of one Abdul Hay and the administratrix of his estate. During his life, Abdul Hay had from time to time
G borrowed money from the Appellant, and when he died in 1956 was indebted to him. In 1957 the Respondent wanted some money which she borrowed from the Appellant. Up to this time the Appellant was not a licensed moneylender but was licensed in 1958 when the Respondent had a further dealing with him.

In 1958 a transaction took place between the Respondent and the Appellant and it is as a result of that transaction the proceedings
H in the Supreme Court were brought. In those proceedings the Respondent claimed as administratrix of the estate of Abdul Hay and alleged that Abdul Hay had borrowed money from the Appellant

from time to time, and that on the strength of the security given for such loans the Appellant had received from the Colonial Sugar Refinery certain sums of money but had refused properly to account for the money so received. She further alleged that about the 27th of February, 1958, the Appellant, being then a registered money-lender, requested her to execute a bill of sale and a crop lien for the sum of £799, which she did, explaining that this sum of £799 would cover all debts owed by the said Abdul Hay to the Appellant and all other debts that might be due by the deceased and for which the Appellant would asusme reponsibility.

The Respondent alleged that the sum of £799 was not advanced to her; that no full and proper particulars of the said sum had ever been furnished despite repeated requests; and that the Appellant had requested the Respondent to enter into this transaction solely for the purpose of making the matter legal within the provisions of the Moneylenders Ordinance.

The Respondent in the proceedings prayed:

"(a) that a full and proper account be taken in respect of all transactions between the Plaintiff in her own capacity and as that of administratrix of the estate of Abdul Hay deceased and the Defendant as licensed moneylender or otherwise and/or his agents trustees or nominees as from the 4th day of April, 1955;

(b) alternatively for a declaration that the true consideration was not set forth in the said bill of sale and crop lien dated the 27th of February, 1958, made between the Plaintiff and the Defendant, and the said securities are fraudulent and void on account thereof;

(c) costs;

(d) such further or other relief in the premises as to this honourable Court shall seem meet."

Having heard the evidence of the parties and their witnesses, the learned trial Judge found in favour of the Respondent, and in his judgment said:

> "The evidence has clearly established that the transaction of the 27th of February, 1958, involved the liquidation of the old debt of £672 plus interest. Yet there is no mention whatsoever of the liquidation of this old debt in the memorandum of contract, Ex. 2(c). It follows that the memorandum of contract Ex. 2(c), does not contain all the terms of the contract, and therefore offends section 16(3) of the Moneylenders Ordinance . . . Accordingly the Plaintiff is entitled to the declaration sought. The contract, the bill of sale, Ex. 2(a), the crop lien, Ex. 2(b), are declared unenforceable, and it is ordered that they be delivered up for cancellation. The Plaintiff is awarded costs against the Defendant."

Against this decision of the learned trial Judge, the Appellant has appealed.

At the hearnig of the appeal, Counsel for the Appellant paraphrased the first four grounds. The substance of this paraphrase was that the learned trial Judge did not find the facts and say which person

he believed; and not having found the facts he disabled himself from applying the law. In support of these grounds of appeal, Counsel stated that in this case the Appellant had lent money to the deceased and the Respondent on certain occasions, but at that time was not a moneylender—it was only in January, 1958, that the Appellant became a licensed moneylender. The transaction that was attacked was that entered into on the 27th of February, 1958. He said that at the time the Respondent entered into this transaction the Respondent owed Appellant a balance of £681 in respect of the previous transactions. Counsel then quoted an extract from the judgment of the learned trial Judge:

> "It is common ground that this transaction fell under the provisions of the Moneylenders Ordinance, Cap. 207,"

and agreed that the transaction did in fact fall under the provisions of that Ordinance. He further quoted from the judgment:

> "Yet there is no mention whatsoever of the liquidation of this old debt in the memorandum of contract, Ex. 2(c)",

and stated that the learned trial Judge would seem to hold that as there was no reference to the old debt the contract was unenforceable. But, Counsel contended, the learned trial Judge did not find as a fact that the liquidation of the old debt was in fact a term of the contract. He stressed that nowhere in the judgment did the Judge say, "I find as a fact . . .", and that this should have been done having regard to the conflict that there was between the evidence of the Respondent and her witnesses and the Appellant and his. Counsel argued that not everything that is agreed to between the parties prior to the making of the moneylender's contract must be included in the memorandum, but in a case such as this the Court must find whether or not a term exists which should have been included. He referred to the evidence of Mr. Patel who was the Appellant's lawyer at the time of the transaction and was called by him as a witness at the hearing of the case. He quoted from Mr. Patel's evidence as follows:

> "Before (the Appellant) gave the £799, both parties understood that she would return the £681 to the Defendant",

but maintained that this was not a condition which must be entered in the contract. Counsel gave examples of what might be agreed between the parties before a moneylending contract was entered into but which need not necessarily be included in the memorandum. For example, if a person approached a moneylender for money to purchase a motor car or decorate a house, it is not necessary that such purpose should be included in the memorandum.

Counsel mentioned the case of *Egan v. Langham Investments Limited* [1938] 1 A11 E.R. 193, which he conceded was a decision against him but suggested that the judgment in that case went too far.

That was an action for a declaration that a bill of sale granted by way of security was unenforceable under the Bills of Sale Act (1878), Amendment Act (1882), and the Moneylenders Act (1927).

The substantial contention was that the memorandum of loan (secured by Bill of Sale) was insufficient under the Moneylenders Act.

The facts, briefly, were that Egan had several transactions with certain moneylenders to whom he owed some money. He approached them for a further loan and was refused, but a representative of theirs undertook to introduce him to another moneylender. As a result, Egan went to the Defendants. Before going to the Defendants, he was informed by the other moneylenders that the amount of his indebtedness to them was £79. He received a cheque for £85 from the Defendants and was sent off with a clerk of the original moneylenders, who had been waiting in an adjoining room while the transaction was being completed, to cash the cheque. The two returned to the Defendants' office and the £85, in £1 notes, was handed over. Six pounds was then given to Egan and the rest handed over to the clerk of the original moneylenders.

There was another version of the facts presented by the defendants, but those above recited were those which the Court accepted.

In his judgment in that case, Du Parcq J. said:

> "I have no doubt at all, looking at the case as a whole, that it was agreed between the defendants and Mr. Egan as a condition of the lending him money at all, and that it was a term of the contract under which the money was lent, that (the other moneylender) should be paid the £79, and that they saw that (the other moneylender) was paid the £79. It was a part of the bargain and it was a part of the contract; I have no doubt about that."

Counsel reiterated that it is not the duty of a moneylender or his solicitors to see that the purpose for which a loan is granted is included in the memorandum. He maintained that in the instant case it may have been a purpose of the loan to repay money due to the Appellant but that it was not a condition precedent to the granting of it. If, he contended, the Respondent had received the £799 and had not paid back the £681, the Appellant could not have proceeded against her for breach of contract. He did, however, concede that for this Court to agree with his arguments, it would have to find that the decision in Egan's case went too far.

There was a conflict between the parties as to what were the circumstances surrounding this transaction of the 27th of February. It is clear, however, that no reference was made in the memorandum of the Respondent's indebtedness to the Appellant or of any conditions such as she alleged had been a condition of her singing it. The isuse before the Court was whether or not there were terms agreed between the parties which, according to the Moneylnders Ordinance, should have been included in the memorandum.

Section 16 of the Moneylenders Ordinance stipulates that no contract for a repayment of a loan by a borrower from a moneylender or for the payment of interest and no security given for such contract shall be enforceable unless a note or memorandum thereof be signed by the parties or their agents. Sub-section 3 of section 16 reads:

"The note or memorandum aforesaid shall contain all the terms of the contract . . ."

At the hearing of this case the following cross-examination of the Appellant took place:

"Q: Why make the loan £799?

A: Because I had £799 cash with me. We calculated it at home. They owed me £681. They asked for a loan of £118. That is true it comes to £799. They asked specifically for £118 loan. They said if we require any further money will ask for it. They totalled up the money they were owing to other people. That is how they arrived at £118."

Later the Appellant was asked:

"Q. Was it a condition of you leading her £799 that she would repay £681 out of it?

A: Yes. We agreed to that. As I passed £799, she returned £681 to me. Pursuant to our previous agreement with her. I kept that £681 in my pocket . . ."

As I said earlier, there are differences between the parties as to the circumstances surrounding this transaction, but for the purposes of this appeal it is my opinion that the matter can be decided on the version given by the Appellant.

In the quotation from the evidence of Mr. Patel made by Counsel for the Appellant and referred to above, it is clear that there was an understanding between the parties, arrived at before any money passed, that the Respondent would return £681 to the Appellant. When one considers that; the extract from the Appellant's cross-examination that the Respondent only wanted £118; and that it was a condition that out of the £799 she should repay £681, it is difficult to see any substance in the contention of Counsel for the Appellant that the transaction was an out-and-out loan without any conditions precedent to it other than the return of the principal and the payment of interest. I am satisfied that it was one of the terms of the agreement, and a condition precedent to the Appellant advancing £799 to the Respondent that she should repay £681 of it to the Appellant. I am also satisfied that the decision of the learned trial Judge is to this effect even if he does not expressly say so. This unquestionably is one of the terms contemplated by the Moneylenders Ordinance which should have been incorporated in the memorandum of the transaction, and was not so incorporated.

It is my opinion that the judgment of the Court below which declared the contract of the 27th of February, 1958, the Bill of Sale and the crop lien to be unenforceable, and that they be delivered up for cancellation, was a correct and proper judgment, and accordingly I would dismiss this appeal with costs to the Respondent.

HAMMETT P.: I concur.

MARSACK J.A. : I concur.

Appeal dismissed.