

A

BHAGAT SINGH

v.

B

MAHENDRA SINGH AND ANOTHER

[SUPREME COURT, 1970 (Moti Tikaram P.J.), 10th November]

Appellate Jurisdiction

C *Moneylending—action by moneylender for recovery of money lent on promissory note—copy of promissory note delivered to borrower—failure to adduce affirmative evidence that copy delivered prior to lending of money as required by section 16 of Moneylenders Ordinance—in peculiar circumstances inference of due compliance with section drawn by court—Moneylenders Ordinance (Cap. 210) ss. 11, 16, 18, 19, 21.*

D In an action by a moneylender to recover moneys secured by a promissory note the borrower pleaded (*inter alia*) “the Moneylenders Ordinance and especially sections 16, 11 and 21 thereof and the laws relating thereto”. In the Magistrate’s Court the Magistrate, basing himself on the decision of the Supreme Court in *Sarwan Singh v. Salote Vibote* (post) held that in order to comply with section 16 of the Ordinance, (a) the lender must have countersigned the promissory note executed by the borrower; (b) an authenticated copy of the promissory note must have been delivered to the borrower by the lender; and (c) that such delivery must have been made *before* the money was lent: the *onus* of proving compliance with the section was on the lender.

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The Magistrate held that the *onus* had been discharged in respect of requirements (a) and (b) above but not in respect of (c), concerning which the plaintiff had tendered no evidence; the claim therefore failed. On appeal—

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Held: 1. The lender had given evidence and it was not suggested to him that he had failed to give a copy of the contract document to the borrower before the money was lent.

2. The receipt of the loan was acknowledged in the defence.

3. On the evidence there was no doubt that the borrower received a true copy of the promissory note on the day the money was lent.

G

4. It was not a case where there was evidence of actual contravention of the mandatory provisions of the Moneylenders Ordinance; *Sarwan Singh v. Salote Vibote* (post) distinguished on this point.

5. There was evidence of substantial compliance with section 16 and the mere failure to adduce specific evidence as to the time of delivery of the copy of the promissory note could be partly attributed to the defence itself.

H

6. To allow the borrower to take advantage of the situation would be to defeat the fundamental object of law and justice, and in any event the court would, in the peculiar circumstances, draw the inference from the evidence adduced by the lender that there had been due compliance with the provisions of section 16.

Case referred to:

Sarwan Singh v. Salote Vibote (1968) 14 F.L.R. 87 A

Appeal against a judgment of the Magistrate's Court dismissing an action by a moneylender for repayment of money lent.

K. P. Mishra for the appellant.

M. S. Sahu Khan for the respondents.

The facts are sufficiently ascertainable from the judgment.

MOTI TIKARAM P.J.: [10th November, 1970]— B

This is an appeal against the decision of the First Class Magistrate sitting at Ba whereby he dismissed appellant/plaintiff's action claiming recovery of cash advanced with interest thereon, on the ground that the appellant/plaintiff had failed to prove compliance with the provisions of section 16 of the Moneylenders Ordinance, Cap. 210, inasmuch as there was no evidence to show that the authenticated copy of the contract was given by the plaintiff to the borrower before the money was lent. C

The trial Magistrate's judgment was based on a decision given by me in this court in a Civil Appeal—*Sarwan Singh v. Salote Vibote* (1968) 14 F.L.R. 87. The appeal by Sarwan Singh (the moneylender) was dismissed primarily because evidence clearly showed that he had failed to maintain a regular account of each loan thereby contravening Section 18 of the Moneylenders Ordinance. Furthermore I also held that there was no evidence that a copy of the promissory note delivered by Sarwan Singh to the borrower on each occasion was an authenticated copy. D

The facts of the appeal case now before me and the reasons for the learned trial Magistrate's decision appear in his judgment—the full text of which reads as follows:—

“ JUDGMENT ” E

This is a claim by the Plaintiff a Moneylender to recover certain moneys lent to one Prem Singh deceased and interest thereon under a Promissory Note Ex “ A ”, given by the said Prem Singh to the Plaintiff. The defendants are sued as executors of the estate of the said Prem Singh deceased.

The Plaintiff gave evidence and called one witness. The defendants did not call evidence, their counsel submitting that at law the said Promissory Note was unenforceable by virtue of s. 16 and 18 and 21 of the Moneylenders Ordinance Cap. 210. F

On the evidence before me I am satisfied that the Plaintiff has complied with s. 18 of the Ordinance relating to books of accounts. I have heard his evidence and that of his witness and have examined his books of accounts. From all this it is apparent that the plaintiff kept regular accounts of loans made by him and in particular of the loan made to Prem Singh. G

In the statement of defence the defendants pleaded Section 11 of the Moneylenders Ordinance. However no submissions were made in this respect by defence counsel who however submitted that s. 21 not pleaded in the defence had not been complied with in that the arrears of interest shown in the statement of account attached to the writ of summons is incorrectly shown. There certainly appears to be an error in this respect. The amount shown as arrears of interest in the statement of account attached to the writ is \$28.90 whereas \$204.90 is claimed in the writ. However the statement of account shows the date of loan, the principal sum and the rate of interest and that there has been H

A no repayment of any moneys. The correct interest would easily be arrived at from the information. In my view the error is not material and that there has been substantial compliance with s. 21 of the Ordinance. In any event s. 21 requires such statement of account as prescribed in s. 19 to be produced when proceedings are taken in any Court by a Moneylender for recovery of money lent. It does not specify what the consequences are if this is not done. The defence also did not raise any preliminary objection on this point or cross examine on it or plead it in his defence. Further statements of account B Exhibits "C" and "E2" have been produced and tendered in evidence by the Plaintiff. I therefore hold that there has been substantial compliance with s. 21 of the Ordinance.

C As to s. 16 of the Ordinance the defence submits that there is no evidence that a copy of the memorandum of contract authenticated by the lender was given by the Plaintiff to Prem Singh before the money was lent, and that it is for the Plaintiff to prove that s. 16 has been complied with before he can enforce the contract. The case of *Sarwan Singh s/o Battan Singh v. Salote Vibote* decided by the Supreme Court of Fiji in Civil Appeal No. 30 of 1967 has been cited by the defence in support of their contention.

D In that case it was held that where a moneylender lends money solely on the security of a Promissory Note then by virtue of s. 16 of the Moneylenders Ordinance the following procedure must be complied with namely—

- (1) That the lender or his agent shall counter-sign the Promissory Note executed by the borrower;
- (2) That an authenticated copy of such Promissory Note shall be delivered to the borrower by the lender or his agent;
- (3) That such delivery shall be made *before* the money is lent.

E The evidence in this case shows that the Plaintiff counter-signed Promissory Note Ex "A" after it was signed by the borrower. This then became sufficient memorandum or note of the contract by virtue of s. 16 (4).

F Secondly there is the plaintiff's evidence that an authenticated copy of the contract (Ex "B") was delivered to the borrower. The borrower himself has acknowledged receiving a true copy of the Promissory Note and there can be no doubt that this acknowledgement refers to receiving an authenticated copy similar to Ex "B".

G However, there is no evidence of compliance with the third requirement mentioned in the judgment in the above case, namely, that such authenticated copy was delivered before the money was lent. The Plaintiff in his evidence mentioned that he had the Promissory Note drawn and that a certified copy of it was given to Prem Singh. He does not say at what stage this was done. Neither does Prem Singh's acknowledgment on the back of the Promissory Note of having received a copy of the Promissory Note state at what stage he received it.

H In the judgment in the above case it was held that "Once non-compliance with the provisions of s. 16 of the Moneylenders Ordinance is pleaded as a defence, the burden of proving compliance, (except perhaps as regards proof that the note or memorandum was not signed before the money was lent) is on the party seeking to enforce the contract that is to say the lender. The lender having failed to discharge this *onus* it follows therefore that he was not entitled to enforce repayment either of the principal or interest by suing on the Promissory Note." Section 16 has been pleaded in this case. Counsel for the defence did not cross examine the Plaintiff as to whether the authenticated

copy of the contract was delivered before or after the money was lent. But such was also the case in *Sarwan Singh v. Salote Vibote* (supra). The Plaintiff has not adduced any evidence to show that in fact the authenticated copy of the contract was delivered before the money was lent and the above case decides that the *onus* is on him to show that this was done. The Plaintiff's evidence is silent on the point. A

The Plaintiff therefore, having failed to discharge this *onus*, I must hold on the authority of the above case, that he is not entitled to enforce repayment of the principal or interest lent by him in this case, and on this ground the Plaintiff's claim fails. Accordingly the Plaintiff's claim is dismissed with costs to the defendants to be taxed if not agreed." B

The grounds on which this appeal is brought are as follows:—

1. The Learned Magistrate erred in basing his judgment on the decision of Civil Appeal No. 30 of 1967 (*Sarwan Singh v. Salote Vibote*) in regard to the time of payment of money in relation to the time of delivery of a copy of the memorandum of contract as it was merely "obiter dicta". C
2. The Learned Magistrate's construction of the word "before" as contained in Section 16 (1) of the Money Lenders' Ordinance Cap. 210 was erroneous as he over-emphasized the formality of whether the right hand containing the document reaches the borrower first before the left hand containing the money. It is submitted that the term "before" in the said section means "on a prior occasion" as opposed to a simultaneous transaction. D
3. The Learned Trial Magistrate omitted to advert to the evidence of the Plaintiff when he said that he gave the money after the execution of the document wherein the borrower admits to have received a copy.
4. The Appellant seeks to reserve the right of adding to the above grounds or making further application upon receipt of the printed copy of the records of evidence." E

There was some dispute between the parties to this appeal as to whether the plaintiff's evidence was fully recorded. Consequently each party filed certain affidavits. However since there was no agreement as to the disputed material it was agreed by both sides that the typed record as certified by the Magistrate should stand.

In the course of hearing this appeal it became abundantly clear to me that it is not the contention of the defence that the authenticated copy of the promissory note on which the action was founded was in fact not given before the money was lent. What is contended is that the Plaintiff omitted to adduce evidence that it was given before the money was lent. Furthermore the appellant/plaintiff who himself was the lender gave evidence and it was never put to him or even suggested that he had failed to give a copy of the contract document before the money was lent. Indeed it could be said that the plaintiff was, even if unwittingly, led into believing that this procedural aspect of the lending transaction was not being questioned, although in the written defence it was contended in a general way in paragraph 4—"That as a further and alternative defence the said Defendant pleads the Moneylenders Ordinance and especially Sections 16, 11 and 18 thereof and the laws relating thereto." F G

Reading grounds 1 and 2 of the defence together it becomes abundantly clear that the receipt of loan of \$500 with 12% interest was being acknowledged but it was contended that out of this sum \$200 was repaid. So on the defence case itself a sum of \$300 plus interest was owing. H

A By paragraph 3 of the defence the defendant pleads non-compliance with section 18 of the Moneylenders Ordinance which relates to the keeping of proper books of account.

The learned trial Magistrate having found in favour of the plaintiff in every respect except with regard to one aspect of the requirements of section 16 of the Moneylenders Ordinance, it is quite obvious to me that the defence is endeavouring to take advantage of a technical matter, namely failure to adduce evidence that the money was lent after the delivery of the authenticated copy of the promissory note.

B There can be no doubt that the borrower Prem Singh received on the same day as the loan was made, namely 15th December, 1966, a true copy of the promissory note as is evidenced by the endorsement signed by him on the reverse side of Exhibit "A". The solicitor who witnessed the signature of the lender and the borrower on the promissory note itself is the same solicitor who witnessed Prem Singh's acknowledgment.

C This is not a case where there is evidence of the actual contravention of the mandatory provisions of the Moneylenders Ordinance as was the position in *Sarwan Singh v. Salote Vibote*, but this is a case where the defendants are endeavouring to defeat a legitimate claim on a technical ground. There was in my view actual evidence of substantial compliance with the provisions of section 16 of the Moneylenders Ordinance and the mere failure to adduce specific evidence in relation to the matter in dispute can be partly attributed to the defence itself. Indeed

D I would go as far as to say that although there was no direct evidence to show at what stage of the transaction the authenticated copy of the contract was delivered yet there was on the peculiar facts and in the peculiar circumstances of this case sufficient material from which inference of compliance could have been drawn.

The object of all legal proceedings is to do justice between parties within the meaning of the law. In my view to allow the defendants to take advantage of the situation in this case would be to defeat the fundamental object of law and justice especially as in this case where there is no evidence that in fact the provisions of law were contravened. In any case, in the absence of any evidence to the contrary I draw the inference from the evidence adduced by the plaintiff that there was due compliance with the provisions of section 16 of the Moneylenders Ordinance.

E Consequently I allow this appeal, set aside the decision of the Magistrate's court and enter judgment for the appellant/plaintiff in the sum of \$500 plus interest as claimed. The Appellant/Plaintiff is also awarded costs in the court below.

F In view of the fact that the learned trial Magistrate's judgment was based on the decision of the Supreme Court there will be no order as to costs of this appeal.

Appeal allowed.