DIAS NAGAHAWATTE

v.

ALWIS APPUHAMY

COURT OF APPEAL.
G. P. S. DE SILVA, J. (President, C/A) AND GOONEWARDENA, J.
C.A. 337/76 (F).
D.C. GALLE 2503/MB.
NOVEMBER 24 AND 27, 1986.

Mortgage suit–Money Lending Ordinance s. 8–Professional money lender–Failure to keep books of accounts–Business–Inadvertence.

Where the defence to a suit on a mortgage bond was that the plaintiff was carrying on the business of money lending but failed to keep regular books of accounts and the action was therefore not maintainable–

Held–

(1) Being a money lender is distinguishable from being a person who is carrying on the business of money lending.

(2) Where the plaintiff had lent money to several persons on interest over a long period, the fact that the clientele was limited to persons well known to the plaintiff cannot detract from the fact that he was a professional money lender because no prudent money lender would give money to unknown persons.

(3) The variety of the security taken, namely mortgage bonds, promissory notes and cheques is typical of the transactions of a professional money lender.

(4) There must be more than occasional and disconnected loans. There must be a business of money lending and the word 'business' imports the notion of system, repetition and continuity. The line of demarcation cannot be defined with closeness or indicated by any specific formula. Each case must depend on its own peculiar features.

(5) The conduct of the plaintiff cannot amount to "inadvertence" under s. 8(2) of the Money Lending Ordinance. A mistaken view of the law cannot in the circumstances amount to inadvertence.

Cases referred to:

(1) *Litchfield v. Dreyfus – [1906] 1 KB 584, 589.*

(2) *Edgelow v. Mac Elwee – (1918) 118 Law Times 177.*

(3) *Perera v. Amarasena – (1971) 74 NLR 545.*

APPEAL from judgment of the District Judge of Galle.

N. R. M. Daluwatte, P.C. with *Miss K. Gabadage* and *Miss Nandadasa* for plaintiff-appellant.

Dr. H. W. Jayewardene, Q.C. with *L. C. Seneviratne, Miss T. Keenavinna* and *Miss Wattage* for defendant-respondents.

Cur. adv. vult.

January 30, 1987.

G. P. S. DE SILVA, J. (President, C/A)

The plaintiff sued the 1st defendant for the recovery of the principal sum and interest due on two mortgage bonds marked "A" and "C" and filed of record. On mortgage bond "A" dated 22nd April 1960, he sought to recover a sum of Rs. 17,000 as principal and interest from 22.12.65, and on mortgage bond "C" dated 29.03.69, a sum of Rs. 19,000 as principal and interest from the date of the mortgage bond. He further prayed for a hypothecary decree in respect of the property which was the subject matter of the mortgage.

The 1st defendant in his amended answer pleaded inter alia that the plaintiff was carrying on the business of money lending and as he had failed to keep regular books of accounts he was not entitled to maintain the action by reason of the provisions of section 8 of the Money Lending Ordinance. After trial, the District Judge held that the plaintiff was a professional money lender who had failed to keep regular books of accounts and dismissed the action. Hence this appeal preferred by the plaintiff.

The principal submission of Mr. Daluwatte, counsel for the plaintiff-appellant, was that the District Judge was in error when he held that the plaintiff was carrying on the business of money lending within the meaning of section 8 of the Money Lending Ordinance. Counsel contended that all that the evidence showed was that the plaintiff on occasions lent money to persons well known to him who were in financial distress and that the facts certainly did not warrant the inference that he was carrying on the business of money lending. He urged that there was a distinction between merely lending money to persons well known to the lender and a person who carries on the business of money lending, a distinction which, counsel complained, had been overlooked by the District Judge.

With this submission, I am afraid, I cannot agree. It is not in dispute that the plaintiff, in partnership with his wife, carried on a tailoring establishment and a textile business in Main Street, Galle. He admitted in cross-examination that since 1950 he lent money to his customers and persons known to him on mortgage bonds, promissory notes and cheques. This was done in his place of business in Main Street. He lent money not only in his own name but also in the name of his wife and children. The interest he derived was used for his tailoring and textile business. To the specific question "you in fact lend money on interest", his answer was in the affirmative. Having regard to the particular context in which this question was asked and the answer given, it seems to me that the District Judge was right in relying on it as an admission which tends to show that he was more than a mere money lender but rather was carrying on the business of money lending. The fact that he said that he lent money only to persons well known to him does not carry his case any further, for no prudent money lender would give money to unknown persons. On the other hand, as submitted by Dr. Jayewardene for the defendant-respondent, the variety of the security he obtained, namely mortgage bonds, promissory notes and cheques, is typical of the transactions of a professional money lender. It is worthy of note that it is not the plaintiff's case that he lent money only to his close friends and relatives.

In support of his case the 1st defendant produced several mortgage bonds marked D1 to D26 which clearly established that from 1950 to 1964 the plaintiff, his wife and his son had lent money on interest to various persons. These mortgage bonds were attested by one notary, a fact which was emphasised by Dr. Jayewardene. Besides lending money on mortgage bonds, there was documentary evidence to show that he lent money in 1968 and 1969 on promissory notes and cheques–vide P2, P3, P5 & P6.

What is more, the plaintiff produced his book of accounts marked P14 and a printed receipt book with his name and address marked P15. In P14 there is an index which gives the names of 19 persons to whom he has lent money. It shows money lent to different persons from 1964 and the interest received over the years up to 1974. P15 sets out the interest received on loans from 1963 to 1968. On a scrutiny of P14 and P15 it is difficult to resist the conclusion that the

plaintiff was one who had over a long period of time lent money to several persons on interest. The plaintiff's own documents tend to rebut the suggestion of occasional and isolated money lending transactions.

Undoubtedly, the question whether a person "carries on the business of money lending" within the meaning of section 8 of the Money Lending Ordinance is primarily a question of fact. Farwell, J. in *Litchfield v. Dreyfus* (1) observed:

> "But not every man who lends money at interest carries on the business of money lending. Speaking generally a man who carries on a money lending business is one who is ready and willing to lend to all and sundry, provided they are, from his point of view, eligible. I do not of course mean that a money lender can evade the Act by limiting his clientele to those whom he chooses to designate as 'friends' or otherwise: it is a question of fact in each case."

Dealing with the attributes of a money lender, Mc Cardie, J. in *Edgelow v. Mac Elwee* (2) expressed himself thus:

> "A man does not become a money lender by reason of occasional loans to relations, friends or acquaintances, whether interest be charged or not. Charity and kindliness are not the basis of usury. Nor does a man become a money lender merely because he may upon one or several isolated occasions lend money to a stranger. There must be more than occasional and disconnected loans. There must be a business of money lending and the word 'business' imports the notion of system, repetition and continuity. The line of demarcation cannot be defined with closeness or indicated by any specific formula. Each case must depend on its own peculiar features....."

On a consideration of the admissions of the plaintiff and the documents referred to above, it seems to me that the requisite "system, repetition and continuity" in the transactions has been established. I therefore find myself unable to say that the District Judge was wrong in holding that the plaintiff carried on the business of money lending.

It was not contended before us that P14 was a book of accounts regularly kept in the manner contemplated by section 8 of the Money Lending Ordinance. Indeed, Mr. Daluwatte very properly conceded that P14 is not a book of accounts which falls within the statutory provisions. He, however, sought relief against the "default" on the ground of "inadvertence"—vide section 8(2) of the Money Lending Ordinance. The "inadvertence" relied on by counsel was that until the decision of Weeramantry, J. in *Perera v. Amarasena* (3), the view that prevailed was that mortgages were excluded from the purview of the Money Lending Ordinance. A mistaken view of the law, as contended for by counsel, cannot, in the circumstances of this case, amount to "inadvertence" within the meaning of section 8(2) of the Ordinance. It was the duty of the plaintiff who carried on the business of money lending to observe the relevant provisions of the law.

Finally, it is right to add that in the course of the hearing before us, Mr. Daluwatte argued that at the stage the bond marked "C" was executed, the plaintiff had ceased to be a professional money lender for the reason that, that bond was executed in March 1969 whereas the last bond executed prior to March 1969 was 26 of August 1964. Counsel based his submission on the intervening period of five years during which no mortgage bonds were executed. In my view, this argument is not tenable having regard to the entire course of conduct of the plaintiff over the years, and in particular the money lent on the promissory notes P2 and P3 in 1968 and on the cheques P5 and P6 in 1969.

I would accordingly hold that the finding of the District Judge is reasonable and accords with the evidence. The appeal must therefore fail and is dismissed with costs fixed at Rs. 210.

GOONEWARDENA, J. – I agree.

Appeal dismissed.