

1961 Present: Weerasooriya, J., and L. B. de Silva, J.

**MARIKAR, Appellant, and SAKREENA UMMA, Respondent**

*S. C. 53—D. C. Kandy, 2370/MB*

*Money Lending Ordinance (Cap. 67)—Section 2 (1) (a)—Re-opening of a money-lending transaction—Admissibility of evidence of a novation—Mortgage bond—Evidence to contradict terms as to amount of loan—Admissibility—Evidence Ordinance, s. 92, proviso (1).*

Under section 2 (1) (a) of the Money Lending Ordinance, a money-lending transaction may be re-opened to show that it was in reality the novation of a previous debt existing between the lender and a third party and that the transaction was harsh and unconscionable.

Under proviso (1) to section 92 of the Evidence Ordinance, evidence is admissible to contradict, on the basis of a mistake of fact, the terms of a mortgage bond in regard to the amount of the loan.

**A**PPPEAL from a judgment of the District Court, Kandy.

*H. W. Jayewardene, Q.C.*, with *S. Sharvananda* and *L. C. Seneviratne*, for plaintiff-appellant.

*Vernon Jonklaas*, for defendant-respondent.

*Cur. adv. vult.*

April 27, 1961. WEERASOORIYA, J.—

The plaintiff-appellant filed this action against the defendant-respondent for the recovery of a sum of Rs. 10,300/- being the balance due on a mortgage bond No. 7136 dated the 10th January, 1955, marked P7. The bond was executed on the basis of a loan of Rs. 6,500/- from the plaintiff to the defendant. Although there was no provision for the payment of interest, one of the conditions of the bond was that the defendant should deliver to the plaintiff, during a period commencing on the date of the bond and terminating on the 31st December, 1955, a minimum quantity of 144,000 lb. of green tea leaf payment for which was to be made by the plaintiff at the market price prevailing at the time of delivery less four cents per pound to be kept back by the plaintiff as his "commission". The tea leaf was the produce of an extent of some 76 acres of Weralugollehena Estate belonging to the defendant and hypothecated under the bond. On the plaintiff's own valuation the estate was worth about one and a half lakhs of rupees. The full "commission" payable to plaintiff came to Rs. 5,760, and the bond secured the payment of this amount as well as the loan of Rs. 6,500/, or a total of Rs. 12,260/-. Under another condition of the bond the plaintiff was at liberty to deduct from the amount due to the defendant for the tea leaf supplied a sum of Rs. 500 per month in liquidation of the loan.

According to the plaintiff, 12,000 lbs. of tea leaf were supplied by the defendant in January, and a like quantity in February, 1955, and no tea leaf was supplied thereafter. Out of the amount realised from the quantity of leaf supplied the plaintiff retained a sum of Rs. 960/- as "commission" and Rs. 1,000/- in liquidation of the principal; and the Rs. 10,300/- sued for represented the balance of the sum of Rs. 12,260/- secured by the bond.

That the Rs. 6,500/- referred to in the bond as a loan from the plaintiff to the defendant was not actually lent is common ground. The plaintiff's case is that this sum was due to him from the defendant's husband Abdul Cader on an earlier transaction between Cader and the plaintiff and to secure the payment of which the defendant executed the bond. The defendant admitted the execution of P7 but her main defence was that she accepted the plaintiff's representation that the Rs. 6,500/- was the balance due from her husband to the plaintiff on the earlier transaction, that no such amount was in fact due and she was therefore not liable in any sum on the bond, and in terms of the Money Lending Ordinance (Cap. 67) she asked for a re-opening of the transactions which the plaintiff had with her as well as her husband.

Despite the plaintiff's unctious assertion at the trial that being a Muslim he did not charge interest on his loans, the trial Judge rightly held that the "commission" of Rs. 5,760/- payable by the defendant on bond P7 was nothing but camouflaged interest. This return within one year on a loan of Rs. 6,500/- works out at approximately 88 per centum.

Abdul Cader was at one time the owner of the 76 acres of Weralugollehena Estate, which he mortgaged with one Muthalib. Muthalib put the bond in suit in D. C. Kandy Case No. 1166 MB., and obtained decree in a sum of Rs. 46,900. On his death his heirs assigned the decree to one Karupiah. In order to prevent a sale of the mortgaged properties at the instance of Karupiah the plaintiff advanced to Abdul Cader Rs. 30,000 on a conditional transfer of Weralugollehena Estate and this sum was paid to Karupiah in satisfaction of the decree. By a separate bond, P6 of the 18th December, 1953, Abdul Cader gave as further security for the re-payment of the Rs. 30,000 another land said to be worth three or four lakhs of rupees. The bond also provided for Abdul Cader, who continued to be in possession of Weralugollehena Estate, supplying a minimum quantity of 144,000 lbs. of green tea leaf per annum on terms which were the same as in P7; and for the deduction of a sum of Rs. 500 per mensem in liquidation of the principal sum. On the payment of this sum and a further sum of Rs. 11,500 within a period of two years from the date thereof the plaintiff undertook to re-transfer Weralugollehena Estate to Abdul Cader. During the period 1st February to 31st December, 1954, the plaintiff had paid himself a sum of Rs. 5,500 (at the rate of Rs. 500 per mensem) out of the proceeds of sale of the tea leaf supplied by Abdul Cader, and also taken as "commission" Rs. 5,280 (at the rate of Rs. 480 per mensem) and a further "commission" of Rs. 841/35 on 28,045 lbs. of tea leaf at 3 cents per pound. Abdul Cader then sold the land mortgaged on P6 and paid Rs. 18,000 to the plaintiff. After

giving credit to the defendant in Rs. 5,500 and Rs. 18,000, the plaintiff claimed the sum of Rs. 6,500 as the balance due from the loan of Rs. 30,000. Notwithstanding that the loan remained undischarged, it would appear that the plaintiff re-transferred *Weralugollehena Estate* to Abdul Cader, who later transferred it to the defendant. The terms on which this re-transfer came to be made are not in evidence.

The learned trial Judge held that even in the case of the transaction between the plaintiff and Abdul Cader, the "commission" received by the plaintiff was in reality interest. He also held that having regard to the substantial security which the plaintiff had under P6, a reasonable return on the Rs. 30,000 was 12 per centum, at which rate (taking into account the reduction of the principal at the rate of Rs. 500 per mensem) the amount due as interest to the 31st December, 1954, was Rs. 3,270, and that any "commission" recovered in excess of that figure should be set off against the principal sum. On this basis he held that only a sum of Rs. 2,688/65 was due from Abdul Cader to the plaintiff at the time when P7 was executed and that this sum together with interest amounting to Rs. 538 at 12 per centum up to the date of filing of action (or a total of Rs. 3,226/65) represented what was due from the defendant under P7. Giving credit to the defendant in the sum of Rs. 1,000 paid by her in reduction of the loan and the sum of Rs. 960 recovered from her as "commission" during January and February 1955, he entered judgment for the plaintiff without costs in a sum of only Rs. 1,266/65 as principal and interest due on P7 up to the date of action. From this judgment the plaintiff has filed the present appeal.

Mr. Jayewardene who appeared for the plaintiff at the hearing of the appeal did not seek to challenge the correctness of the learned trial Judge's finding that the "commission" provided for in P6 as well as P7 is in fact interest, but he contended that in this action, which is in regard to a transaction between the plaintiff and the defendant, the latter is not entitled to ask for a re-opening of the earlier transactions between her husband and the plaintiff. Mr. Jayewardene stressed the wording in section 2 (1) of the Money Lending Ordinance which enables a Court to "re-open the transaction and take an account between the lender and the person sued", and he submitted that the jurisdiction so conferred does not extend to the re-opening of a transaction between the lender and some other person. I find that I am unable to accept this submission.

Under section 2 (1) a Court may, in any of the circumstances specified in paragraphs (a), (b) or (c) therein, re-open the transaction and take an account between the lender and the person sued. Paragraph (a) refers, *inter alia*, to a case where there is evidence which satisfies the Court that the transaction embodied in the agreement or security sought to be enforced "was harsh and unconscionable, or, as between the parties thereto, substantially unfair". These provisions, in my opinion, imply that when such a question arises for consideration evidence may be led regarding a previous transaction, whether the parties thereto are the same or not, which is relevant to that question.

In view of the defence that P7 was executed on the basis of an incorrect representation by the plaintiff that Rs. 6,500 was the balance due from Abdul Cader on the earlier transaction, it became relevant to ascertain whether such balance was Rs. 6,500 or a lesser amount. This necessarily involved a scrutiny of the transaction between the plaintiff and Abdul Cader. We were referred by Mr. Jonklaas, who appeared for the defendant, to the case of *Ramalingam Pillai v. Wimalaratne et al.*<sup>1</sup> which was an action on a promissory note said to have been made by the second defendant in favour of the first defendant and endorsed by the latter to the plaintiff who claimed to be the holder in due course. It was apparent, however, that the transaction evidenced by the note was, in part at any rate, a loan by the plaintiff to the defendants. Prior to the making of the note the plaintiff had various money lending transactions with the second defendant's father, to some of which the first defendant was also a party. The second defendant's father having then fallen seriously ill, the two defendants approached the plaintiff for a further loan to defray medical expenses. The plaintiff refused to give any loan unless they agreed to take over the debt owing to the plaintiff from the second defendant's father and which, according to the plaintiff, was Rs. 2,350. A promissory note for Rs. 3,000 was thereupon made out as for a loan by the first defendant to the second defendant, signed by the latter and endorsed by the former, and retained by the plaintiff. The Rs. 3,000 included the Rs. 2,350 said to be due from the second defendant's father to the plaintiff, a further sum of Rs. 380 lent to the two defendants by the plaintiff and Rs. 270 kept back as interest. At the same time the plaintiff handed over to the second defendant two notes by the latter's father for Rs. 2,000 and Rs. 300 and a receipt for Rs. 50. Dalton, A.C.J. (in a judgment with which Koch, A.J., agreed) held that all the essentials to effect a valid novation of the contract were present in that case. He also held that as the defendants had no knowledge of all the transactions between the plaintiff and the second defendant's father, and had to accept plaintiff's account as correct if they were to obtain the loan they were seeking, they had made out a case for the re-opening of the transaction between them and the plaintiff, and he observed that *the legality of the previous transactions between the plaintiff and the second defendant's father may also have to be considered in that connection.*

In the present case the evidence shows that the transaction between the plaintiff and the defendant was intended by all the parties as a novation of the debt—whatever the actual amount of it—then due from Abdul Cader to the plaintiff. In considering the defence as to how the sum of Rs. 6,500 came to be mentioned in P7 as the amount of the loan, it clearly became relevant to look into the earlier transaction between the plaintiff and Abdul Cader. I think the evidence relating to that transaction is admissible under proviso (1) to section 92 of the Evidence Ordinance to contradict the terms of P7 in regard to the amount of the loan (on the basis of a mistake of fact). Such evidence is also admissible under paragraph (a) of section 2 (1) of the Money Lending

<sup>1</sup> (1933) 35 N. L. R. 379.

Ordinance to prove the harsh and unconscionable nature of the transaction embodied in P7 or that it was substantially unfair as between the parties thereto. There can be no doubt that if the extent of the indebtedness of Abdul Cader to the plaintiff under the earlier transaction be regarded as substantially less than Rs. 6,500/-, the transaction embodied in P7, which seeks to make the defendant liable in the greater sum incorrectly represented to her as the actual amount due from Abdul Cader, is a harsh and unconscionable one from which she should be given relief under section 2 (1) of the Money Lending Ordinance.

I am of opinion, therefore, that the learned District Judge was quite right in admitting evidence relating to the earlier transaction (to which no objection at all was taken at the trial by plaintiff's counsel) and in his findings as to the true nature of the "commission" payable thereunder and the reasonable rate of interest chargeable. On the basis of these findings there was, as stated earlier, due to the plaintiff a sum of Rs. 33,270 as principal and interest. Deducting from this the sum of Rs. 30,581/35 said to have been recovered by the plaintiff from Abdul Cader, the balance Rs. 2,688/65 was held by the Judge to be due from Abdul Cader to the plaintiff at the time when P7 was executed. It is not correct, however, to say that the plaintiff had recovered a sum of Rs. 30,581/35 from Abdul Cader. The actual amounts received are as follows: Rs. 18,000 paid by Abdul Cader in a lump sum, Rs. 5,500 deducted by the plaintiff in eleven monthly instalments of Rs. 500, Rs. 5,280 deducted as "commission" at the rate of Rs. 480 per mensem for the eleven months February to December, 1955, and a further sum of Rs. 841/35 deducted as commission on the sale of 28045 lbs. of tea leaf at the rate of -/03 cents per lb., making a total of Rs. 29,621/35. The figures relating to "commission" and monthly instalments I have taken from the entries in the plaintiff's pass book P8 the correctness of which was not in dispute. The last item in the account for 1954 in P8 refers to a sum of Rs. 1,821/35 as "commission". But this sum includes the December instalment of Rs. 500 against the loan and Rs. 480 recovered as "commission" on the sale of tea leaf while the balance sum of Rs. 841/35 is the "commission" on the sale of an additional quantity of 28045 lbs. of tea leaf. Deducting from the sum of Rs. 33,270 due to the plaintiff the sum of Rs. 29,621/35, being the total of the amounts recovered, Abdul Cader still owed the plaintiff the sum of Rs. 3,648/65 at the time when P7 was executed on the 10th January, 1955. This sum must therefore be deemed to represent the defendant's initial liability on the bond P7.

The interest at 12 per centum on Rs. 3,648/65 for the period 11th January to the 31st January, 1955, is Rs. 24/32, whereas the plaintiff received during the same period Rs. 500 in reduction of the principal and Rs. 480 as "commission", or a total of Rs. 980. Deducting from Rs. 980 the sum of Rs. 24/32 as interest, the balance Rs. 955/68 should be set off against the principal sum of Rs. 3,648/65 leaving Rs. 2,692/97 due as principal on the 1st February, 1955. The interest

on this sum for February is Rs. 26/93, after deduction of which from the sum of Rs. 980 received by the plaintiff during that month there is left Rs. 953/07 to be set off against the principal sum of Rs. 2,692/97. The principal outstanding as on the 1st March, 1955, is, therefore, Rs. 1,739/90. The interest on Rs. 1,739/90 at 12 per centum from 1st March, 1955, to the 22nd August, 1956, when action was filed, is Rs. 308/53. The total amount due as principal and interest from the defendant at the date of filing of action, is, therefore, Rs. 1,739/90 plus Rs. 308/53, or Rs. 2,048/43.

The decree appealed from will accordingly be varied by substituting the sum of Rs. 2,048/43 for the sum of Rs. 1,266/65 as the principal and interest due on bond No. 7136 up to the date of action.

As the plaintiff has succeeded only in part in this appeal I make no order as regards the costs of appeal.

L. B. DE SILVA, J.—I agree.

*Appeal partly allowed.*

