

A

SARWAN SINGH

v.

SALOTE VIBOTE

B [SUPREME COURT, 1968 (Moti Tikaram Ag. P.J.), 1st April, 20th May]

Appellate Jurisdiction

Moneylending—promissory notes sole security—procedure required—authentication of copy by lender—positive act of authentication necessary—Moneylenders Ordinance (Cap. 207—1955) ss.16 (1) (4), 18.

C *Moneylending—burden of proof—proof of compliance with section 16 of Moneylenders Ordinance (Cap. 207—1955)—section pleaded in defence—Moneylenders Act 1927 (17 & 18 Geo. 5, c.21) (Imperial) s.6.*

In an action by a moneylender to recover moneys lent, once non-compliance with section 16 of the Moneylenders Ordinance is pleaded as a defence, the burden of proving compliance with the section (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.

D

Where a moneylender lends solely on the security of a promissory note, which constitutes the contract, the following procedure is required to comply with section 16 of the Ordinance —

E

(1) That the lender or his agent shall countersign 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.

F

Semle: This construction of section 16 may produce the result that the borrower is made to acknowledge receipt of the money before the money is in fact lent to him.

Authentication of a promissory note implies some positive act upon the part of the person charged with the duty of authenticating it, whereby he attests or certifies to the document's authenticity. It is not sufficient merely to prove that a copy of the note was delivered to the borrower.

G

Appeal from a judgment of the Magistrate's Court in an action by a moneylender. The judgment is reported only insofar as it relates to questions arising under section 16 of the Moneylenders Ordinance.

R. D. Mishra for the appellant.

H

M. T. Khan for the respondent.

The facts sufficiently appear from the judgment.

MOTI TIKARAM J. (in part): [20th May, 1968]—

This is an appeal from the decision of the First Class Magistrate delivered at the Magistrate's Court, Nadi on the 8th November, 1967. The Appellant, who was the original Plaintiff, has lodged the following two grounds of appeal :

"1. That the learned trial Magistrate erred in law and in fact in holding that there was not one shred of evidence that a copy of the contract (that is the promissory note) was ever given by the moneylender to the borrower.

2. That the learned trial Magistrate misdirected himself in holding that there was no evidence that copies of the promissory notes were ever given by the moneylender to the borrower when there was sufficient endorsement at the back of the promissory notes evidencing delivery of the copies of the said promissory notes to the borrower.

The Plaintiff therefore prays as follows :

(a) that the judgment entered against the Appellant-Plaintiff be set aside and judgment be entered in favour of the Appellant-Plaintiff.

(b) alternatively that this case be heard de novo.

(c) that the Appellant-Plaintiff may have such other or further relief as to this Honourable Court shall seem meet."

As I see it, the second ground of appeal is a mere elaboration of ground one of the Petition.

The Respondent (original Defendant) has cross appealed on the ground "that the learned trial Magistrate erred in law in not holding that having regard to the evidence adduced by the Appellant-Plaintiff the Appellant-Plaintiff's claim was unenforceable by reason of his failure to comply with the mandatory provisions of Sections 16 and 18 of the Moneylenders Ordinance."

The Respondent also gave notice that he will argue at the hearing of the appeal that the decision of the trial Magistrate be affirmed in all respects and that the Plaintiff-Appellant do pay the costs of appeal and cross-appeal.

At the hearing of the appeal the Appellant withdrew his prayer that the action be heard de novo.

The Appellant in this case is a moneylender. On three separate occasions he made advances to the Respondent totalling £158.8.2 on the security of three separate promissory notes. When he sued the Respondent for the recovery of the loan monies the Defendant contested the claim and filed an Affidavit of Defence material parts of which read as follows :-

1. That I am the abovenamed Defendant in this action.

2. That I admit drawing a Promissory Note on or about the 25th August, 1962 for the sum of £24.0.0. The said sum of £24.0.0. is made up as follows :-

(i) Cash lent to me

£20.0.0

(ii) Agreed interest

4.0.0

£24.0.0

3. That I have repaid the said sum of £24.0.0 in cash to the Plaintiff on or about the month of December, 1962.

A 4. That I admit drawing a Promissory Note on or about the 23rd June, 1964 for the sum of £70.0.0. The said sum of £70.0.0 is made up as follows :

(i)	Cash lent to me	£50.0.0
(ii)	Agreed interest	£20.0.0
		<u>£70.0.0</u>

B 5. That I have repaid the said sum of £70.0.0 in cash to the Plaintiff on or about the month of December, 1964.

6. That I admit drawing a Promissory Note on or about the 24th March, 1965 for the sum of £20.0.0. The said sum of £20.0.0 is made up as follows :-

(i)	Cash lent to me	£17.0.0
(ii)	Agreed interest	3.0.0
		<u>£20.0.0</u>

D 7. That I have repaid the said sum of £20.0.0 in cash to the Plaintiff on or about the month of June, 1965.

8. That I deny that I am indebted to the Plaintiff in the sum of £158.8.2 or in any other sum at all.

9. That the particulars of claim do not show the true particulars of the transactions between the Plaintiff and myself.

E 10. That in the alternative I say that the present claim is unenforceable on the grounds that the Plaintiff has not kept regular books of account and he has not complied with the provisions of Section (16) and (18) of the Moneylenders Ordinance (Cap. 207). Consequently the Plaintiff is not entitled to enforce any claim against me.

F At the trial the Appellant-Plaintiff gave evidence and he was cross-examined at length. The Respondent-Defendant's Counsel called no evidence and was content to rest on his submission that the Promissory Notes were unenforceable. He argued that the three promissory notes produced as exhibits did not comply with Section 16 of the Moneylenders Ordinance. In particular he argued that there was no evidence that the lender gave authenticated copies of the promissory notes to the borrower and even if there was evidence that he on each occasion did give a copy of the promissory note there was no evidence that the copies were delivered before monies were lent. He also cited cases in support of his contention that the accounts kept by the lender are not "regular account of each loan" as required by Section 18 of the Moneylenders Ordinance.

H The Appellant-Plaintiff was not cross-examined as to whether he gave an authenticated copy of the promissory note on each occasion before the money was lent. On the other hand the Appellant-Plaintiff although aware that noncompliance with the provisions of Sections 16 and 18 was being pleaded by way of defence chose not to ask, at any stage, for any

particulars as to non-compliance. Sections 16 and 18 of the Moneylenders Ordinance were specifically mentioned in the Defence.

As the learned trial Magistrate's judgment was not a very long one it can be usefully repeated here. It reads as follows :-

" This is a claim by a Money Lender, Sarwan Singh to recover certain moneys due as principal and interest under three promissory notes given by the Defendant to the Plaintiff.

It is for the Plaintiff to prove that he is entitled to recover this money, and being a licensed Money Lender under the Moneylenders Ordinance he must prove that he has complied with the requirements of the Ordinance and, in particular with the provisions of Section 16. The Court has been referred to "The Law relating to Moneylenders" 4th Edition by Rt. Hon. Lord Meston. At page 104 that author states, referring to the similar provision (Section 6) of the Moneylenders Act 1927 :-

"As s.6 renders it necessary that both the borrower and the moneylender should do certain things, it is material to inquire into the question of the burden of proof in regard to such things. It is submitted that there is no presumption that the requirements of s.6 have been fulfilled; in every case it must be proved by the person seeking to enforce the contract (who is usually the moneylender in the first instance) that the requirements of the above section have been fulfilled."

Clearly this is so. Under the provisions of Section 16 of the Moneylenders Ordinance (so far as it applies to the facts in this case) no contract for the repayment by a borrower of money lent to him by a moneylender or for the payment by him of money so lent and no security given by the borrower shall be enforceable unless a note or memorandum in writing of the contract in the English language be signed by the parties to the contract, and unless a copy thereof authenticated by the lender be delivered to the borrower before the money is lent. The section continues further that no contract or security shall be enforceable if it is proved that the note or memorandum was not signed before the money was lent or the security given, and in this regard the burden of proof would rest on the defendant. Subsection (4) of that section provides that where a promissory note in the English language given by a borrower to a money lender in respect of a loan contains in the body of the note or by writing thereon all the terms of the contract and is countersigned by the lender the promissory note shall be a sufficient note or memorandum for the purpose of the section.

In this case three promissory notes were given and all have been produced in evidence. All purport to comply with the requirements of the subsection but there is not one shred of evidence that a copy of the contract (that is the promissory note) be it authenticated or not was ever given by the moneylender to the borrower, be it before or after the giving of the security or the lending of the money. On this ground alone the Plaintiff's claim must fail. Accordingly judgment for the Defendant with costs to be taxed or assessed "

I shall first deal with the defence based on the non-compliance with the provisions of Section 16 of the Moneylenders Ordinance. The material parts of Section 16 of the Moneylenders Ordinance read as follows :-

16. (1) No contract for the repayment by a borrower or his agent of money lent to him or to any agent on his behalf by a moneylender or his agent after the commencement of this Ordinance or for the payment by him of interest on money so lent, and no security given by the borrower or by any such agent as aforesaid in respect of any such contract, shall be enforceable unless a note or memorandum in writing of the contract in the English language be signed by the parties to the contract or their respective agents or, in the case of a loan to a partnership firm, by a partner in or agent of the firm, and unless a copy thereof authenticated by the lender or his agent be delivered to the borrower or his agent or, in the case of a loan to a partnership firm, to a partner in or agent of the firm, before the money is lent, and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not so signed before the money was lent or before the security was given as the case may be :

Provided that —

- (a) where a security is given to secure an immediate loan and subsequent loans the security shall be enforceable in respect of any subsequent loan thereby secured if the note or memorandum in respect of such subsequent loan be signed and delivered to the borrower before the money shall be lent;
- (b) where a security is given to secure an immediate loan and subsequent loans, and the terms both of the immediate loan and of the subsequent loans are set out in the document constituting the security, it shall not be necessary for the note or memorandum in respect of any such subsequent loan to set out the terms thereof, but a reference in such note or memorandum to the above-mentioned security shall be sufficient for the purposes of this section if the note or memorandum contains the particulars referred to in paragraphs (a), (b) and (c) of subsection (3) of this section.
- (4) Where a promissory note in the English language given by a borrower to a moneylender in respect of a loan contains in the body of the note or by writing thereon all the terms of the contract and is countersigned by the lender or his agent, such promissory note shall in itself be a sufficient note or memorandum of the contract for the purpose of this section.

An examination of the promissory notes in question clearly shows that a copy of the promissory note was on each occasion received by the Respondent-Defendant who acknowledged in writing at the back of each promissory note the fact of not only receiving a copy of the "within promissory note" but also the amount advanced. To this extent, therefore, the Appellant is correct in saying that the learned trial Magistrate erred in law and in fact by holding 'that there was not one shred of

evidence that a copy of the contract (i.e. promissory note) be it authenticated or not was ever given by the Moneylender to the borrower, be it before or after the giving of the security or the lending of the money'. In my view the promissory notes which were tendered by consent and which showed endorsement acknowledging receipt by the borrower of the copy of the promissory note, constituted evidence against the Respondent-Defendant to the effect that she was supplied with a copy of the promissory note on each occasion. It is possible that the trial Magistrate's erroneous approach was due to an oversight on his part. However, this does not dispose of the questions (1) Were the copy promissory notes authenticated or not? and (2) Were they given to the borrower before the money was lent?

In my view if a moneylender lends money solely on the security of a promissory note which constitutes the contract then by virtue of the provisions of Section 16 of the Moneylenders Ordinance the following procedure must be compiled with:

1. That the lender or his agent shall countersign 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.

Bearing in mind the usual wording contained in the body of a promissory note, this construction on Section 16 may produce the curious result that the borrower is made to acknowledge receipt of money before the money is in fact lent to him. It may be that Section 16 of the Moneylenders Ordinance, particularly insofar as it affects promissory notes, is in need of clarification and streamlining but this is a matter for the Legislature.

There is no evidence in this case that a copy of the promissory note delivered to the borrower on each occasion was an *authenticated copy*. Authentication implies some positive act on the part of the party charged with the duty of authenticating the document in question whereby he attests or certifies as to the document's authenticity. It is not sufficient merely to show or prove that a copy of the "within promissory note" was delivered. In this particular case it was open to the lender to require the production of the copy delivered to the borrower by way of Notice to Produce to show that the copy delivered to the borrower was in fact an authenticated copy. This he failed to do. Nor is there any evidence that the copies of the promissory notes were delivered *before* the monies were lent. Once non-compliance with the provisions of Section 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 of either the principal or interest by suing on the promissory notes.

Appeal dismissed.