

IV

CONTROLS OF MONEYLENDING BUSINESS

In the credit system comprising of moneylenders licensed under the Moneylenders' Ordinance 1951, the machinery of control is a vital necessity, without which abuse and oppression of borrowers would be rampant. What is essentially required is a sound and effective system of checks and controls capable of controlling and regulating the business of moneylending efficiently, without being oppressive, restrictive or onerous. However, the basis of any such control must invariably be the prevention of any violation of the borrowers' interests.

While the Moneylenders' Ordinance 1951 is intended to operate as a check on the rapacity on the part of moneylenders, it is uncertain to what extent the borrowing public has benefitted from it. On one hand, moneylenders, vaguely conscious of the penal consequences with which they might be visited if they omit to conform with the law, more often than not, hesitate or refuse to lend money except to those from whom they least expect trouble. As a result their dealings become absurdly selective and restricted.¹ On the other hand, the adequateness of the restraints embodied in the law is highly questionable.

¹ On discovering their reluctance to disclose any information on their operations the writer persuaded friends to visit the Chettiars on the pretext of borrowing but the latter made it clear to them that they lend only to Indians.

Although such stipulations may seem stringent to the money-lender (who feels that his dealings are justified by virtue of the risk and uncertainty he faces), yet more often than not he finds that the severity envisaged by the law is seldom enforced. The checks and controls imposed on him are in practice ineffectual as a result of deficient enforcement. They remain a detached piece of legal machinery, having little force or compulsion on his operations. This may encourage or induce him to act contrary to provisions having the effect of curtailing or curbing practices of self-interest. In such a case, the otherwise cautious and law-abiding moneylender could possibly revert to what the law would term as 'harsh and unconscionable' dealings detrimental to the interests and well-being of the borrowers in general, but beneficial and profitable to the moneylender.

Forms of Control

(i) The Licensing Provisions

Section 5(1) which requires licences to be taken out annually in respect of moneylending business can be regarded as a form of control in that it eliminates or reduces incidence of unlicensed lenders. It also facilitates the elimination of bad hats from the institution of moneylending. Section 7(1) which requires the yearly publication in the Gazette of a correct list of all persons licensed under the Ordinance serves as a record of all existing licensed money-lenders. It also serves as evidence in all Courts that the persons specified therein are licensed according to the provisions of the Ordinance; and the absence of the names of

any person from such printed list is evidence that such person is not a licensed moneylender.² Hence one would know who and who are not licensed moneylenders.

Section 9(1) on the other hand restricts the issuance of licenses in that a licence is refused where:

- (a) satisfactory evidence has not been produced of the good character of the applicant and, in the case of a company or a firm, of the persons responsible for the management thereof;
- (b) the applicant or any person responsible or proposed to be responsible for the management of his business as a moneylender is not a fit and proper person to hold a licence.
- (c) the applicant or any person responsible or proposed to be responsible for the management of his business as a moneylender is by order of a Court disqualified from holding a licence.
- (d) the applicant has not complied with the provisions of any regulations made under Section 5 of this Ordinance with respect to application for licences.

²Section 7(2) Moneylenders Ordinance, 1951

- (e) the applicant or his firm has after the commencement of Ordinance knowingly lent money to a person under the age of eighteen years.

An application made by an agent³ is similarly refused if:

- (a) satisfactory evidence has not been produced of the good character of the principals and, where the principal is a firm, of the persons responsible for the management thereof;
- (b) satisfactory evidence has been produced that the principal is not a fit and proper person to carry on the business of moneylending;
- (c) the principal or any present or former agent of the principal is by an order of a Court disqualified from holding a licence;
- (d) the principal or any present or former agent of the principal has after the commencement of this Ordinance knowingly lent money to a person under the age of eighteen years.

This section therefore seeks to safeguard the moneylending system from undesirable elements. In practice an application for a moneylending licence must be furnished with two character certificates, which are sent to the police for verification. The Registrar then

³ Proviso to Section 9(1) Moneylenders' Ordinance 1951

sets the date for the hearing of the application whereupon he decided whether or not a licence should be issued.

(II) Suspension and Forfeiture of Moneylenders Licence

Section 10(1) provides that:

"Where any person being the holder of a licence
is convicted of any offence under this Ordinance
the Court -

- (a) may order that the licence held by that person and, in the case of a partner in a firm, by any other partner in respect of that firm, shall either be suspended for such time as the Court thinks fit or be forfeited, and may also if the Court thinks fit declare any such persons or any persons responsible for the management of the moneylending business carried on by the person to be convicted to be disqualified from obtaining a licence for such time as the court thinks fit; and
- (b) shall cause particulars of the conviction and of any order made by the Court under this sub-section to be endorsed on the licence held by the person convicted or by any other person affected by the order and shall cause copies of those particulars to be sent to the authority by whom any licence so endorsed was granted

Provided that where by the order of a Court a licence held by any person is suspended or forfeited or any person is disqualified from obtaining a licence he may, whether or not he is the person convicted, appeal against the order in the same manner as any person may appeal against his conviction and pending such appeal the operation of the order shall be suspended:

Provided further that on order for forfeiture or suspension made under this sub-section shall not affect any moneylending transaction entered into before such order is made other than that in respect of which such order is made."

The consequence of any conviction being the suspension or forfeiture of licence would deter moneylenders from acting in contravention of the Ordinance and hence keep them under control.

(III) Unenforceable Contracts

Section 15 states that no contract for the repayment of money lent after the coming into force of this Ordinance by an unlicensed moneylender shall be enforceable.⁴ This is however subject to the proviso that money lent on behalf of a principal through an agent who is licensed under the

⁴ Chellapan v. Official Assignee (1970) 1 MLJ 220
see also Batu Ria v. Lian Kim Lian (1965) 31 MLJ 128

provisions of this Ordinance to carry on the business of moneylending on behalf of such principal shall be deemed to have been lent by a licensed moneylender

Section 16(1) further provides that:

"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 memorandum⁵ in writing of the contract in English language or Romanised Malay 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

Note or memorandum of money-lenders' contract to be given to the borrower

⁵ Memorandum attached in Appendix F

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:

In this connection the note or memorandum must contain all the terms of the contract and in particular must show separately and distinctly:

- (a) the date of the loan;
- (b) the principal; and
- (c) the rate of interest per centum per annum payable in respect of such loan or, where the interest is not expressed in terms of a rate per centum per annum, the amount of such interest.⁶

Section 16(1) therefore requires the delivery to the borrower of a copy of the memorandum authenticated by the lender or his agent according to the case. Kartar Singh v. Mahinder Singh,⁷ authentication

⁶ In the case of Thangalu v. Saudagar Singh (1965) 31 MLJ 38, failure to specify the rate of interest was held to be in breach of the provisions of Section 16 and therefore the contract was unenforceable.

⁷ (1959) 25 MLJ 248

requires not merely that a signed copy of the memorandum should be delivered to the borrower but that the lender should endorse upon it something in the nature of a certificate confirming that what the borrower receives is a copy of the original memorandum. There is as such no prescribed form of authentication and it is for the court to say whether or not the form of authentication adopted in a particular case is sufficient. A written acknowledgement by the borrower is sufficient to establish that the copy of promissory note handed to the borrower was duly authenticated. In the case of Mahinder Singh v.⁸ Beh Yoke Nam the borrower was estopped from denying that a true copy of the note was given to him as he had signed a receipt for a true copy of the promissory note.⁹ A promissory note containing all the terms of the contract and countersigned by the lender is also sufficient for the purpose of this Section.¹⁰

The onus of proving that the requirements of the Ordinance have been complied with is on the plaintiff. It is not necessary that a copy of the form of authentication or the copy of the memorandum should be placed on the memorandum itself, but there must be evidence that the separate and additional act of authentication was done by the lender in

⁸ Subramaniam vs. Konar (1973) 1 MLJ p.

⁹ (1967) 1 MLJ 294

¹⁰ Gulwant Singh v. Abdul Khalik (1964) 30 MLJ 286

relation to the copy of the memorandum.¹¹

Mere physical delivery of a memorandum of a charge for the purpose of execution by the borrower does not constitute till delivery for the purpose of Section 16(1), since there is no intention that the document shall be retained by the borrower.¹² Similarly where a promissory note has been given as a security for loan, both the promissory note and the contract for the repayment of the loan in respect of which it was given were unenforceable by the lender against the borrower unless the lender has delivered an authenticated copy of the promissory note to the borrower before the money was lent.¹³

Section 16(1) also clearly differentiates between a contract for the repayment of a loan and any security given in respect of that contract, and it is of the contract that the note or memorandum is required to contain all the terms of the contract and where it was a term that a particular security be given in respect of it, the particulars of that security would require to be stated in terms or by reference.¹⁴ Hence where there is a contract without security the note

¹¹ Katar Singh v. Mahinder Singh, op. cit., n. 7

¹² Subchent Kaur v. Chai Sau Kian (1958) 24 MLJ 32

¹³ F. Xavier v. K. Kathamuthu Konar (1958) 24 MLJ 286

¹⁴ Abirami Ammal v. M.S.M.M. Meyappa Chettiar (1959) 25 MLJ 149

or memorandum must embody the terms of the contract and where there is a contract without security the note or memorandum it must embody the terms of the security.

It should be noted that Section 16 is also to be read together with Section 28 which states that any moneylender who makes any note or memorandum (under Section 16) or who takes as security for any loan a promissory note or other contract for the repayment of money lent in which the principal or rate of interest, is to the knowledge of the lender, not truly stated, or is left blank shall be guilty of an offence and shall be liable to a fine not exceeding five hundred dollars or, in the event of a second or subsequent offence, to imprisonment for a term not exceeding six months or to a fine not exceeding six months or to a fine not exceeding one thousand dollars or to both such imprisonment and fine.

The intention of Section 16 is to protect borrowers from abuse by moneylenders and to avoid disputes as to the actual terms of loan transactions. The section checks fraudulent practices by requiring the authentication and delivery of the memorandum of contract by the lender to the borrower before money is lent. In this way the documents are safeguarded from being tampered with. Moneylenders as such, must learn the importance of strict compliance with the technical requirements of this Ordinance if they wish to recover their money.¹⁵

¹⁵ Katar Singh v. Mahinder Singh op. cit., n. 7 p. 248

(IV) Keeping Permanent Accounts

Section 18(1) states that every moneylender shall keep or cause to be kept a regular account of each loan made after the commencement of this Ordinance clearly stating in plain words and in English numeral with or without the numerals of the script otherwise used the terms and transactions incidental to the account entered in a book paged and bound in such a manner as not to facilitate the elimination of pages or the interpolation or substitution of pages.

"The onus of discrediting the statement of account rests on the borrower. To succeed, so as to render the moneylenders claim unenforceable by virtue of Section 18(2) of the Moneylenders Ordinance 1951, it had to be shown that entries of relevant transaction in the particular account is false. It is not sufficient merely to cast suspicion on it by reason of defaults or defeciciencies in other accounts non-compliance with the requirements of Section 18(1) is a question of degree which may or may not be fatal to a claim by the moneylender. Each case must be considered in the light of the particular facts and circumstances.¹⁶ The Federal Court in Nasib Singh v. Jamilah held that the decision of the High Court judge erred in holding that the

¹⁶ Nasib Singh v. Jamilah (1972) 1 MLJ 255

irregularity shown in the accounts of other debtors were sufficient for the purpose of impeaching the truth of the respondents account in the same book. However the appellants account books provided intrinsic evidence that the respondents account contained false entries relating to the payment of interest. The accounts of other debtors provided corroborative evidence that for all payments of interest, the true date of payment was disregarded when the entries were made. Such being the case, the appellant clearly failed to comply with the provisions of Section 18. Hence Section 18 preserves the right of debtors to pry into his creditors affairs but it is essential that all courts should be vigilant in exercising their discretion to see that this right is not abused in an oppressive manner.¹⁷ It should be noted that failure to comply with the provisions of Section 18(1) disentitles the moneylender from enforcing any claim in respect of any transaction. He is also liable to a fine not exceeding fifty dollars or in the case of a continuing offence, to a fine not exceeding ten dollars for each day or part of a day during which such offence continues.

(V) Reopening Provisions

Section 21(2) empowers the Court to reopen past transactions of moneylending where there is satisfactory evidence that the interest charged in respect of the sum actually

¹⁷ Nasib Singh v. Jamilah (1972) 1 MLJ 255

lent is excessive and that the transaction is harsh and unconscionable or substantially unfair. Although this section is capable of rendering wide protection borrowers it has yet to be utilised by them. The reliefs available depends mainly upon the Courts interpretation of expressions like "excessive", "harsh and unconscionable" and "substantially unfair."

It should be noted that this section is to be read together with sections 22 and 23 which prohibits the charging of excessive interests and expenses respectively. These reopening provisions will be dealt with fully in Chapter 5.

(VI) Attestation of Promissory Notes

Section 27 (1) states that :

"Whenever a promissory note is taken as security for any loan and the borrower is a person not understanding the written language on such note the note shall be attested by an Advocate and Solicitor of the Supreme Court, a President of Sessions Court, a Magistrate, District Officer, Justice of the Peace, Registrar of a Sessions Court or such other person as may be appointed by the High Commissioner generally for such purpose. The attester shall explain the terms of the promissory note to the borrower, and shall certify thereon that the borrower appeared to understand the meaning of the same. The money borrowed shall be paid over by the lender to the borrower in the presence of the attester who shall certify the fact upon the promissory note."

Attestation
of certain
promissory
notes,

Sub-Section (2) of the same section provides that :

" Any promissory note required to be attested under this section and not so attested shall be void and the lender shall not be entitled to recover any loan for which such note is taken as security."

In this connection Mac Intyre J¹⁸ said that :

" The first requisite of that section is that every promissory note written in a language not understood by the borrower must be attested. The word "not understanding the written language on such note" means, in my humble opinion, an inability to read and comprehend the language in which the note was written".

Asmi C.J. went further and said that :

" I have in mind a case of a Malay borrower who, unable to read the written language on the note, would be able to understand it however if the note is read to him by another person. In my view, in such circumstances, such other person who reads out the note must be one of those enumerated under sub-section (1) of Section 27, for example a Magistrate or District Officer." ¹⁹

¹⁸ Sundralingam V. Ramanathan Chettiar (1967)
2 MLJ 211 at P. , High Court

¹⁹ Sundralingam V. Ramanathan Chettiar, op.cit, n. 17, P. Federal Court.

(VII) Protection Against Inducement

Section 29 provides that:

False
statements
or repre-
sentations
to induce
borrowing
an offence

"If any moneylender or any manager, agent or clerk of a moneylender or if any person being a director, manager or other officer of any company, by any false, misleading or deceptive statement, representation or promise or by any dishonest concealment of material facts fraudulently induces or attempts to induce any person to borrow money or to agree to the terms on which money is or is to be borrowed, he shall be guilty of an offence and shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding five thousand dollars or to both such imprisonment and fine.

This section prohibits moneylenders from fraudulently inducing or attempted to induce any person to borrow money or to agree to terms set by them. It therefore safeguards against exploitation of borrowers.

(VIII) Protection Against Harassment

Section 30 provides that:

Besetting
residence,
etc., of
debtor

"Any moneylender, who, with a view to harassing or intimidating his debtor or any member of the debtor's family, either personally or by any person acting on his behalf, watches or besets the residence or place at which the debtor receives his wages or any other sum periodically due to him, shall be guilty of an

offence, and shall be liable to a fine not exceeding two hundred and fifty dollars, or to imprisonment for a term not exceeding three months: Provided that an offender being a company shall be liable to a fine of one thousand dollars."

By virtue of this section it is illegal for moneylenders to harass or intimidate their clients for repayment of loans.

In the light of the controls set above it is quite correct to say that the interests of borrowers are sufficiently protected and money-lending operations adequately controlled. Such controls would only be ineffective if borrowers neglect to acquaint themselves of their rights under the Ordinance or if they condone abusive practices of moneylenders. The penalties involved in relation to the provisions discussed are sufficiently harsh as to constitute a deterrence in respect of mal-practices committed by moneylenders. However a more effective enforcement of regulatory measures would contribute considerably towards making the institution of moneylending abuse-free. The Registrar with the assistance of a police officer normally carry out inspections of the business premises of moneylenders. The checks he makes relates to various sections in the Ordinance, for example Section 14(1), which requires boards bearing the words "Licensed Moneylenders" to be affixed at the authorized premises of moneylenders. The Registrar also inspects accounts of moneylenders but these are normally in conformity with Section 18(1). Though inspections are carried out, the question arises as to their frequency. Being a one-man enforcement authority, the Registrar normally 'visits' moneylenders at the instance of complaints. At other times he

carries out surprise inspections. Accordingly the effectiveness of this form of control is highly questionable.

However, taking the Ordinance as a whole it is fairly correct to conclude that though abuses exist within the moneylending system, they are not as yet uncontrollable as the Ordinance is essentially designed for the protection of borrowers, to the point of being almost too restrictive in respect of moneylending activities.²⁰ In this connection, the Ordinance has in fact been said to disregard the interests of moneylenders who expend private funds at risk of loss and non-payment.

²⁰ Interview with a licensed moneylender on 24th July, 1976