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IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5303 OF 2015

Mr.Kishor Jayantilal Janani .. Petitioner
Vs.
M/s.Arun Fintrade Limited .. Respondent

Mr.Surin Usgaonkar a/w Mr.Ritesh Jain, Advocates for the Petitioner.
Mr.R.K.Desai, Advocate for the Respondent.

CORAM : R. G. KETKAR, J.
DATE : 23rd JUNE, 2015

P.C. :

. Heard Mr.Surin Usgaonkar, learned Counsel for the petitioner and Mr.R.K.Desai, learned Counsel for respondent at length.

2. By this petition under Article 227 of the Constitution of India, original defendant No.2 has challenged the judgment and order dated 07/03/2015 passed by the learned Judge, City Civil Court, Bombay in Notice of Motion No, 552 of 2015 in Summary Suit No. 8011 of 1996. By that order, the learned trial Judge dismissed the Motion taken out by the petitioner, hereinafter referred to defendant No.2, for dismissing the suit in view of provisions of the Bombay Money- Lenders Act, 1946 (for short 'Act').

3. In support of this petition, Mr.Usgaonkar strenuously contended that the learned trial Judge has totally misconceived the provisions of Section 10 of the Act. He submitted that in paragraph

3 of the plaint, respondent, hereinafter referred to as plaintiff, specifically asserted that plaintiff had lent and advanced to the first defendant various amounts aggregating of Rs.24 lacks and in respect thereof, loan agreements were executed between the plaintiff and the first defendant recording the loan given by the plaintiff and other terms and conditions for repayment with interest as set out. It is further averred that defendants agreed to pay interest at 21% per annum compounded quarterly.

4. Mr.Usgaonkar further submitted that in paragraph 16 of cross examination, plaintiff's witness admitted that plaintiff did not have money lending licence. Mr.Usgaonkar submitted that Section 10(1) of the Act lays down that no Court shall pass a decree in favour of a money-lender in any suit to which the Act applies unless the Court is satisfied that at the time when the loan or any part thereof, to which the suit relates was advanced, the money-lender held a valid licence, and if the court is satisfied that the money-lender did not hold a valid licence, it shall dismiss the suit. In the first place, he submitted that the loan was advanced to the defendant some time in the year 1995. At the relevant time, plaintiff did not have valid licence under the Act. Secondly, in paragraph 6 of the impugned order, the learned trial Judge held that on behalf of the defendant, contention was advanced that the Civil Court has no jurisdiction to entertain and try the suit. He submitted that the said

finding is wholly unsustainable as basically defendant took out Notice of Motion for dismissing the suit in view of Section 10(1) of the Act. He further submitted that issue of jurisdiction as to subject matter is totally distinct and stands on a different footing. Where a Court has no jurisdiction over the subject matter of the suit by reason of any limitation imposed by statute, it cannot take up the cause of the matter. In support of this submission, he relied upon the decision of the Apex Court in the case of *Harshad Chiman Lal Modi Vs. DLF Universal*, **AIR 2005 Supreme Court Cases 4446** and in particular paragraph 28 thereof.

5. On the other hand, Mr.Desai supported the impugned order. He submitted that in the first place, defendant No.2 did not take up this plea in the written statement. Secondly, the plaintiff has closed his evidence and defendant has not led the evidence. Defendant No.2 has not produced any evidence on record to show that plaintiff is a money lender and that plaintiff has advanced loan to other persons. He relied upon the decision of this Court in the case of *M/s.Marine Container Services (India) Pvt.Ltd. Vs. Rishab Precision Bearings Ltd.*, **1999(3), Bombay Cases Reporter 760**. He submitted that having regard to the definition of expression "loan" in Section 2(9) of the Act as also having regard to the fact that it is not shown that plaintiff' is in the habit of advancing loan to the persons as a matter of regular business, the learned trial Judge rightly

dismissed the Motion.

6. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As held in the case of **Harshad Chiman Lal Modi** *(supra)*, the expression “jurisdiction” is of 3 types namely, i) territorial jurisdiction ii) pecuniary jurisdiction and iii) jurisdiction over the subject matter. So far as territorial jurisdiction and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. If such objection is not taken, the same is deemed to have been waived. However, jurisdiction over the subject matter stands on different footing and the same can be taken up at any stage of the proceedings. In view thereof, it cannot be said that merely because, defendant No.2 took out Notice of Motion at the stage when plaintiff has closed his evidence, Notice of Motion can be dismissed on that ground.

7. Section 2(9) of the Act defines the expression “loan” and clause (f2) thereof which reads as under:

> “Section 2 - In this Act, unless there is anything repugnant in the subject or context,
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> (9) “loan” means an advance at interest whether of money or in kind but does not include -
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> (f2) an advance made bona fide by any person carrying on any business, not having for its primary object the lending of money, if such advance is made in the regular course of his business.”

8. In view of the above provision, it is necessary for the defendant to establish that plaintiff is in the habit of advancing loan to persons as a matter of regular business. Whether the plaintiff was/is in the habit of advancing loan to persons as a matter of regular business is a matter of evidence.

9. In the case of *Sitaram Shrawan Koshti Vs. Bajya Parnya Bhoi*, **(28) A.I.R. 1941 Nagpur 177,** Hon'ble Mr.Justice Vivian Bose has observed thus :

> "The word "regular" shows that the plaintiff must have been in the habit of advancing loans to person as a matter of regular business. If only an isolated act of money lending is shown to the Court it is impossible to state that constitutes a regular course of business. It is an act of business but not necessarily an act done in the regular course of business."

10. Perusal of above extracted portion shows that if only an isolated act of money-lending is shown to the Court, it is impossible to state that that constitutes a regular course of business. It is an act of business, but not necessarily an act done in the regular course of business. The said decision was also considered by this Court in **M/s.Marine Container Services (India) Pvt.Ltd** *(supra)*. In my opinion, defendant No.2 will have to lead evidence to show that the plaintiff is in the habit of advancing loan to various persons as a matter of regular business.

11. In view thereof, I do not find that the impugned order requires any interference, albeit for different reasons. Hence,

petition fails and the same is dismissed. It is made clear that observations made herein are tentative and prima facie and the learned trial Judge will decide the suit on the basis of the evidence on record and in accordance with law and uninfluenced by the observations made herein.

(R. G. KETKAR, J.)