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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO.223 OF 2001

Sagaskumar Mohanlal Pande

..APPELLANT
(Orig.pltff)

VERSUS

1. Madhukar Trimbak Patil
(appeal abated as against R.No.
1, vide Registrar's order dtd.
20/03/2013)
2. Ramdas Krishna Patil,
since deceased, by his heirs
and legal representatives
- 2(1) Bayajabai Ramdas Patil
- 2(2) Deelip Ramdas Patil
- 2(3) Pradeep Ramdas Patil,
(dismissed against R.No.2(3) vide
order dated 22-4-88, passed on
office report)
- 2(4) Vijay Ramdas Patil
- 2(5) Sanjay Ramdas Patil
- 2(6) Sau. Mangala L. Kakuste
- 2(7) Kum. Meena Ramdas Patil
- 2(8) Kum. Maya Ramdas Patil

..RESPONDENTS

Mr R. R. Raghuwanshi, Advocate holding for Mr R. B. Raghuwanshi,
Advocate for appellant;
Mr Mangesh Jadhav, Advocate for respondents

CORAM : NITIN W. SAMBRE, J.

**(Date of reserving judgment : 03.08.2017
Date of pronouncing judgment : 08.11.2017)**

JUDGMENT

This appeal is by original plaintiff, who filed Regular Civil Suit No.39 of 1981 for recovery of outstanding hand loan of Rs.8,000/- against defendant. The aforesaid suit of the appellant came to be decreed by judgment and decree dated 16th June, 1983 passed by 2nd Joint Civil Judge Junior Division, Dhule, directing the defendant-respondent to pay Rs.7,900/- together with future interest at 6% per annum, from the date of filing of the suit till realization.

2. In first appeal being Regular Civil Appeal No.341 of 1983, at the behest of defendant no.1, learned District Judge, Dhule, reversed the finding and dismissed the suit vide judgment and decree dated 16th April, 1987. As such, this second appeal by the original plaintiff.

3. It is the case of the present appellant-plaintiff that defendant no.1 Ramdas and defendant no.2 Dr. Madhukar were in close terms with the plaintiff and his father and as such had obtained hand loan of Rs.8,000/- for purchase of house by defendant no.1. Defendant no.2 put his signature on the document of hand loan on 25th April, 1978 as against acknowledgment executed by defendant no.1 on 20th January, 1978.

4. Since the amount demanded was not repaid, suit came to be filed, which was resisted by defendant no.1 vide written statement Exh.13 by denying the claim. Amongst others, the plea raised were denial of

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transaction and absence of any money lending license in favour of the father of the plaintiff. According to defendant no.1, amount of Rs.4,000/- was taken as hand loan with interest at the rate of 4% per annum, to be returned within three months, however, the receipt of damduppat was got executed. It is claimed that entire amount was repaid.

5. Defendant no.2 and his legal heirs resisted the claim vide written statement at Exh.39. It is alleged that the signature on the document was obtained without knowledge. It is claimed that father of the plaintiff carries on money lending business. In short, defendant no.2 supported the case of defendant no.1.

6. The Trial Court, pursuant to the rival pleadings framed issues, and amongst others, the issues framed were; whether the promissory note of Rs.4,000/- was executed by defendant no.1, whether the amount of loan with interest was repaid by defendants and whether it was a money lending transaction. The burden was cast on defendant no.1 to prove all these issues. Upon appreciation of evidence on record, the Trial Court answered these issues against the defendants and as such, decreed the suit.

7. In Civil Appeal No.341 of 1983, the learned appellate court reconsidered the issues and answered the same in favour of the original defendants, resulting in dismissal of the suit.

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8. The substantial question of law on which the appeal is admitted by this Court is, whether the finding of District Court that the appellant-plaintiff was carrying on business of money lending at the time of the suit transaction was supported by any relevant evidence.

9. In order to appreciate the submissions made, it is required to be noted that the learned Trial Court, after considering the rival pleadings, framed the issues shifting burden on defendant no.1 to prove that amount of Rs.4,000/- was given as hand loan, keeping in mind the provisions of the Negotiable Instruments Act and presumption thereunder. The alleged loan note Exh.48 is sought to be proved through the evidence of the plaintiff. The status of original defendant no.1, a medical practitioner – literate man, was appreciated by the learned Trial Court and based on evidence, recorded a finding that loan of Rs.8,000/- was advanced by the plaintiff to the defendants, resulting into execution of the document Exh.48. On the basis of the evidence, by a cryptic finding, the Trial Court held that defendants have failed to prove repayment of Rs.8,000/-. The Trial Court also observed that in absence of any material, it is difficult to record a finding that the father of the plaintiff was in the business of money lending transaction, and rather observed that the plaintiff was engaged in coaching business.

10. The lower appellate court considered provisions of Section 10, which were brought by amendment in the Bombay Money Lenders Act, 1946 (for short “Act”) and proceeded to observe that the transaction in

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question was purely a money lending transaction.

11. In addition to the aforesaid substantial question of law, Mr Raghuvanshi, learned Counsel appearing on behalf of the appellant would invite attention of this Court to the provisions of Section 10 of the Act. Sub-section (9) of Section 2 of the Act defines "loan", which means an advance at interest whether of money or in kind. According to him, the transaction in question, particularly in the backdrop of Exh.48, cannot be termed as a money lending transaction. By inviting attention of this Court, he submits that Section 4 of the Negotiable Instruments Act defines "promissory note". The language employed in Exh. 48 could term the same as promissory note and as such, the burden is on the present respondent-defendant to demonstrate that he is not liable to pay the loan of Rs.8,000/- as agreed in the promissory note, in view of presumption under Section 118 of the Negotiable Instruments Act. According to him, the Trial Court rightly appreciated the evidence and recorded a finding that it is not a money lending transaction and father of the plaintiff is not engaged in money lending business. According to him, though in paragraph 15 of the judgment of the lower appellate court a finding is recorded, that the father of the plaintiff is engaged in money lending business, still there is no material or indication that the appellant-plaintiff was also engaged in money lending business.

11. According to him, the judgment and decree rendered by the lower appellate court needs to be set aside.

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12. Per contra, learned Counsel for the respondents-defendants would submit that the documents viz. Exhs.49 to 55 and 57 to 61 go to establish that the father of the plaintiff had advanced loan to various persons on many occasions. According to him, in view of the fact that the transaction is a money lending transaction, the suit is rightly held to be hit by Section 10 of the Act and as such is not maintainable. He, therefore, sought dismissal of the appeal.

13. Considered rival submissions.

14. Considering the presumption under Section 118 of the Negotiable Instruments Act and the defence set out by the defendant in the written statement, the Trial Court shifted burden on the defendant to prove the fact of advancement of Rs.4,000/- and it being a money lending transaction.

15. The Trial Court then appreciated the contents of the document Exh.48 in the backdrop of provisions of Section 118 of the Negotiable Instruments Act and recorded a finding that amount of Rs.8,000/- was advanced. The Trial Court then considered that even assuming that father of the plaintiff is a money lender, still the plaintiff was in coaching business and as such, the transaction cannot be termed as a money lending transaction, as there was independent source of earning to the plaintiff.

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16. The lower appellate court reconsidered the entire evidence by framing specific points for determination. The lower appellate court considered evidence of respective parties. The lower appellate court noted that on Exh.48 there is an endorsement of receipt of Rs.8,000/-. The appellate court then considered that amount of Rs.4,000/- was received by defendants, which was agreed to be repaid with interest at the rate of 4% per annum.

17. The document Exh.48 was then assessed in the backdrop of the provisions of the Act. Section 10 of the Act, as amended in 1975 Act puts an embargo on the rights of a money lender to initiate recovery proceedings in absence of any money lending license, provided such transaction was under a valid license.

18. So as to ascertain, whether the transaction in question was a money lending transaction or not, it is brought on record by the parties to the suit that the plaintiff in his early 20s claimed to have independent source of earning of Rs.8,000/-, which was advanced to the defendant in an isolated or singular transaction. It is also claimed that he is not a regular money lender and rather, in the business of giving tutorials to the students. The income from the tutorial/coaching is considered to be the source for advancing the amount.

19. If the aforesaid conduct on the part of the plaintiff i.e. present appellant is appreciated, in my opinion, the lower appellate court was right

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in inferring that at the age of 20, that too way back in the year 1978, the appellant could be held to have capacity of independent earning of Rs.8,000/- out of his coaching business, which was a source for principal amount advanced to the defendant.

20. It is then required to be noted that the father of the plaintiff had dealing with various persons by advancing loans and for that purpose Exhs.49, 50, 51, 52, 53, 54 and 55 are produced. The certified copies Exhs.57 to 61 were also pressed into service so as to demonstrate that father of the plaintiff was engaged in money lending business. It is then to be noted that in favour of the father of the appellant-plaintiff there are decrees of money recovery issued by the Court, which were considered to claim that it was father, who was engaged in money lending business with active participation in the various transactions. The documentary evidence placed on record against plaintiff and his father was rightly assessed by the lower appellate court to infer that the money lending transaction was at the behest of the father and not the plaintiff and as such, the suit was hit by the provisions of Section 10 of the Act. Once this Court having gone into the findings of the Courts below and in the wake of above observations having reached and recorded a finding that the transaction is a money lending transaction and is hit by Section 10 of the Act, in my opinion, the lower appellate court rightly held that the suit was not maintainable.

21. Though the learned Counsel appearing on behalf of the appellant has relied upon the judgment of this Court, in the matter of

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Sureshchandra Nandlal vs. Lala Gopikrishna Gokuldas Agencies, reported in **1996 (4) ALL MR 325**, particularly on the issue of provisions of sub-section (9) of Section 2 of the Act and Section 118 of the Negotiable Instruments Act so as to canvass that since the interest was not charged on the loan amount alleged to have been advanced, the provisions of the Act are not attracted, as the factum of charge of interest was not proved. He has also relied upon the judgment delivered by Kerala High Court in the matter of **C.N. Sankaran Nambudripad vs. Vijayan**, reported in **AIR (KER) 1988 0 120**, so as to demonstrate that a promissory note, as defined under Section 4 of the Negotiable Instruments Act, could be inferred from the contents of such document.

22. Per contra, learned Counsel appearing on behalf of respondents has relied upon the judgment of this Court, in the matter of **Ramprasad Bhagirath Agrawal vs. Uttamchand Danmal Pande**, reported in **2009 (3) Bom. C.R. 865**, so as to demonstrate that advancement of payment on the basis of promissory note cannot be excluded from being a money lending transaction. He would draw support from paragraphs 7 and 15 of the said judgment to canvass that the suit is hit by the provisions of Section 10 of the Act, and if such intention is gathered from the relevant document, may be a promissory note, the suit is not maintainable.

23. So far as issue as to application of the Act to the case in hand is concerned, whether the interest is payable or not, under a transaction is

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not relevant for recording a finding as to whether the transaction could be termed as a money lending transaction. The law on the issue is well settled by the judgments of this Court in the matter of Ramprasad (supra) and in **Dharamdas Motibhai Wani vs. Shidya Jatrya Bhil**, reported in **1971 Mh.L.J. 608**.

24. In the aforesaid background, the claim of the appellant that even in a promissory note the execution does not speak of levying any interest, the provisions of the Act, particularly of Section 10 are not attracted, is liable to be rejected.

25. In that view of the matter, the appeal fails and stands dismissed.

(NITIN W. SAMBRE, J.)

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