IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. No.200 of 2004

In the matter of appeal under Section 100 of the Code of Civil Procedure assailing the judgment and decree dated 03.04.2004 passed by the learned Adhoc Additional District Judge, Jeypore in Title Appeal No.2 of 2002 (T.A. No.18 of 1998 of District Judge) confirming the judgment and decree dated 29.08.1998 and 14.09.1998 respectively passed by the learned Civil Judge, Senior Division, Jeypore in Title Mortgage Suit No.32 of 1997.

Gambili Someswer Rao @ Swamy .... ***Appellant***

-versus-

Penta Ramesh .... ***Respondent***

Appeared in this case by Hybrid Arrangement (Virtual/Physical Mode):

For Appellant - M/s.P.K. Rath, M. Mohanty, M.M.Rout, B. Rout, P.K. Satpathy & P.K.Samantaray (Advocates)

For Respondent - None

CORAM:
MR. JUSTICE D.DASH

Date of Hearing : 29.08.2022 : Date of Judgment:06.09.2022

D.Dash,J. The Appellant, by filing this Appeal under Section 100 of the Code of Civil Procedure, 1908 (for short, 'the Code'), has assailed the judgment and decree passed by the learned Adhoc Additional District Judge, Jeypore in Title Appeal No.2/18 of 2002/1998.

By the same, the Appeal filed by the present Appellant, being aggrieved Defendant under section 96 of the Code, challenging the judgment and decree dated 29.08.1998 and 14.09.1998 respectively passed by the learned Civil Judge, Senior Division, Jeypore in Title Mortgage Suit No.32 of 1997, has been dismissed. Thereby, the judgment and decree passed in the Suit have been confirmed.

2. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the Trial Court.

3. The Plaintiff's case is that he and the Defendant were known to each other as they are of the same locality and in the field of business. It is stated that the Defendant , being in need of money for investment in his business and delay expenses on other counts as also to repay old loans, approached the Plaintiff for advancement of a loan of Rs.30,000/-. The Plaintiff, having agreed in total, paid a sum of Rs.30,000/- in two installments; while executing the deed of mortgage; he paid a sum of Rs.17,000/- and then a sum of Rs.13,000/- at the time of registration. It is stated that on the same day, the Defendant executed a simple mortgage deed acknowledging the receipt of Rs.30,000/- from the Plaintiff and mortgaged his lands in total measuring Ac.14.98 Cents (Fourteen Acres and Ninety Eighty Cents) in favour of the Plaintiff with an undertaking to repay the said loan with interest twenty four percent (24%) per annum within two years from the date of execution of the deed with a stipulation that on failure, the Plaintiff would have the right to sale the mortgage the property in order to satisfy his claim from out of the sale proceeds. The Plaintiff's repeated demand for payment when failed to repay the principal and the interest, notice being issued on

19.03.1997, Plaintiff also demanded a sum of Rs.30,000/- with interest from the Defendant. The notice, however, could not be served as the Defendant was found absent. It is stated that the Plaintiff is not a money lender in regular course of his business and he had financially accommodated the Defendant at the time of his need. He states that as on 05.05.1997, a sum of Rs.60,000/- stands as outstanding to be paid by the Defendant to the Plaintiff. The Plaintiff, therefore, filed the suit for realization of a sum of Rs.60,000/- with pendentelite and future interest @ 24% per annum.

4. The Defendant, while traversing the averments made in the plaint, has admitted to have received sum of Rs.30,000/- from the Plaintiff by mortgaging his land. He, however, denies the transaction to be a simple mortgage. It is stated that the Plaintiff, at the time of advancing, had agreed that the mortgage would be a possessory mortgage. But, for some ulterior motive, he compelled the Defendant to execute the deed of simple mortgage. The Defendant delivered the possession of his mortgaged land on the very date of execution of the deed. Out of the mortgaged land, which covered 14 acres, over six acres, there was Cashew Plantation whereas three acres was the land where paddy is grown and the rest is dongar land. It is stated that the Plaintiff enjoyed the usufructs of the mortgaged land for ten years. The Plaintiff derived an income of Rs.19,500/- per year from out of said user. Therefore, it is said that the Plaintiff is only entitled to interest at the rate of 9% per annum as the loan advanced was a secured loan. The Defendant also claims that the Plaintiff was a regular Money Lender and doing money lending business without having the license.

5. On the above rival pleadings, the Trial Court, having framed six issues, has answered that the transaction was a simple mortgage and there was not a possessory mortgage. It has then held that the Plaintiff is not doing money lending business without any license. Having said above, the Trial Court has held the Plaintiff to be entitled to recover a sum of Rs.60,000/- with pendentelite and future interest @ 24% per annum. It has been directed that on the failure of the Defendant to pay the decreetal dues within two months, it would be open for the Plaintiff to take such steps for putting the mortgage lands into sale for recovery of the dues.

The Defendant thus having suffered from the judgment and decree passed by the Trial Court, although had carried an Appeal, the same has been dismissed.

6. The present Appeal has been admitted to answer the following substantial question of law:-

> (a) "Whether the courts below have fallen in grave error by not holding the Plaintiff to be a Money Lender falling within the definition as given in Orissa (Scheduled Areas) Money Lenders' Regulation, 1967 in finally saying that the suit as laid for the reliefs claimed at his instance is not maintainable in the eye of law?
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> (b) Whether the courts below, keeping the important aspect as to the charge of interest @ 24% per annum over the advanced loan in view should have drawn the presumption that the transaction in question was nothing but an activity in the direction of money lending by the Plaintiff as a Money Lender without having the license as mandated under law and thus the suit at his instance ought to have been dismissed?"

7. Ms.Das, learned counsel for the Appellant submitted that the Courts below have proceeded in a wrong direction without keeping in mind that the Odisha Money-Lenders' Act, 1939 (for short, 'the Act') has no applicability in the area where the parties reside and that the Orissa (Scheduled Areas) Money Lenders' Regulation, 1967 has its play on the subject in the locality. She submitted that on a reading of the definition of 'Money-Lender' as given in section 2(ix) as well as section-2(x) read with section of the said Regulation, the evidence on record, being properly appreciated; the Courts below ought to have dismissed the suit. She further submitted that the Courts below have failed to appreciate the totality of the facts and circumstances emerging out of the evidence let in by the parties and the conclusions arrived at are all faulty.

8. None appeared on behalf of the Respondent despite repeated notice and being provided with sufficient opportunities.

9. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below. I have also read the plaint and written statements. The evidence both oral and documentary let in by the parties have been perused.

10. The area where the parties reside being the Scheduled Areas within the State of Odisha, the Orissa (Scheduled Areas) Money Lenders' Regulation, 1967 (in short, 'the Regulation') promulgated by His Excellency, the Governor of Odisha, in exercise of powers conferred by sub-paragraph (2) of paragraph (5) of the Fifth Schedule to the Constitution of India has its play on the subject.

The definition "Money-Lender" as has been provided in 2(x) of the said Regulation, reads as under:-

> **"money-lender"** means a person whose business is that of advancing and realizing loans and shall include a mandi merchant and a trader but does not include a Bank of Co-operative Society and the expression "money-lending" shall be construed accordingly.
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> ***Explanation:-***Where a money-lender who is not a resident of the Scheduled areas carried on the business of money-lending through his agent who resides in such areas, such agent shall be deemed to be money-lender in respect of that business."

The explanation is to the effect that being an agent of the Money-Lender when that agent is residing in the Scheduled Areas and carries on business of Money lending even though the Money-Lender does not reside in the Scheduled Areas, that agent by virtue of this place of residence in carrying on business of Money lending would come within the net of the Regulation. The Money-Lender under the Regulation also include Mandi Merchant and a Trader, which is in contrast to the definition of Money-Lender as provided in Odisha Money Lenders Act, which is applicable in Non-Scheduled Areas. The 'Trader' is defined in section-2(xiv) of the Regulation which simply means a person who carries on the business of taking goods and chattels in security for a loan given by him.

Section-7 of said Regulation provides that no money lender shall charge interest on any loan advanced by him at a rate exceeding 9% per annum simple interest, where the loan is secured and 12% per annum simple interest where the loan is not secured. The proviso contains that no Money-Lender shall recovery towards interest in respect of any loan advanced by him, an amount in excess of the amount of the principal. Section-2 of the said Regulation reads that no Money-Lender shall demand and take from the debtor on account of charges any amount in excess of such amount as may be prescribed. Section 10-B of the said

Regulation says about the discharge of possessory mortgage, which in the present case, although has been stated by the Defendant, is refuted by the Plaintiff, who says it to be simple mortgage.

The 'loan' is defined in section 2(ix) of the Regulation and it reads as under:-

> "**loan"** means an advance of money, articles, goods or materials for interest and includes any transaction which the Court finds in substance to amount to such an advance, but does not include-
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> (a) a deposit of money or other property in a Bank, Post Office, Savings Bank or Co-operative Society;
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> (b) an advance made by the Government or by any person authorised by the Government to make advances in their behalf or by any local authority; and
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> (c) an advance made by any person *bona fide*, carrying on any business, not having for its primary object the lending of money if such money is advanced in the regular course of such business."

11. The Plaintiff is stating that the Defendant has executed a simple mortgage deed of Rs.30,000/- and agreed to pay interest @ 24% per annum. He says that the loan was advanced to the Defendant for his business as also to meet household expenses and repay the old debts. He further states to have given the loan to the Plaintiff as a friendly accommodation. The rate of interest as her charged being kept in mind and viewed, the element of making substantial gain on the part of the lender is quite clear and the case of friendly financial accommodation under the circumstances as emanate from evidence appears to be doubtful.

On a close examination, the evidence that the Plaintiff was not in business and having no such involvement falls flat. The deed in question has been admitted in evidence and marked Ext.1. The land covered under the said deed exceeds 14 acres appertaining to different khatas. The Plaintiff has stated to be having no regular money lending business and the present one to be the solitary transaction. The Plaintiff being cross-examined has stated that when the transaction was made, he was prosecuting his studies in Vikramdev College, Jeypore and his elder brother was doing business when the transaction had been entered into. He then admits to be one of the partners of the Cashew Industry, which they had established. The land covered under the said deed (Ext.1) embraces within itself the cashew plantation area to a major extent. His positive evidence is that his father is the Managing Director of the said Cashew Industry. The witness has denied to have taken lease of plantation areas form private persons although he states to be an income tax assessee when the transaction took place. The acreage involved in the mortgage being quite significant; it is not stated as to what stood as the compelling circumstance for getting such a deed of mortgage in a friendly loan covering such huge area. Interestingly, the witness has stated at the end that the Defendant was a cultivator and he had incurred the loan for investment in his agricultural land and when he states that the Defendant had mortgaged 14 acres of such lands he does not say as to if besides the said area; the Defendant was having any more area of cultivating land with him. The principal loan amount being Rs.30,000/- mortgage of such vast acreage of land without leading of evidence as to valuation raises eyebrow on the nature of transaction. The Defendant, on the other hand, has asserted that the Plaintiff was a Money-Lender and was regularly doing such business. It is also stated by the Defendant that he had delivered the possession of the mortgaged property to the Plaintiff which the Plaintiff of course has denied. The interest charged in the present case being twenty four percent (24%), the Plaintiff here has strictly confined his total claim just up to the double of the principle mortgaged money, so as to bring it in consonance with the provision contained in the Regulation. The Defendant has stated that he had approached the father of the Plaintiff to lend him money and then he made all such arrangements for the purpose. This part of his evidence has remained unshaken. Moreover, the witnesses examined from the side of the Plaintiff have said that the very second installment of Rs.13,000/- had been paid by the father of the Plaintiff and not the Plaintiff himself. From this an inference that the father of the Plaintiff is the person behind the screen in monitoring the affairs can legitimately be drawn. The evidence on record, thus being cumulatively viewed, this Court finds that the conclusions arrived at by the Courts below suffers from the vice of perversity and the Plaintiff squarely falls within the definition of 'Money-Lender' as contained in the Regulation. Therefore, the suit, at his instance as laid seeking the reliefs, as already stated, is liable to be dismissed.

The substantial questions of law are accordingly answered against the case/claim of the Plaintiff.

12. In the result, the Appeal stands allowed and the judgments and decrees passed by the Courts below are hereby set aside. There shall, however, be no order as to cost.

(D. Dash),
Judge.

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