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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1086 OF 2004

Dinesh Prataprai Mehta
Devji Premji Building, R. No.17,
2nd Floor, 13 P Chakla Cross Lane
Behind Hanuman Temple
Mumbai 400 003 … Appellant

Vs.

1. Javedkhan Nabi Khan
Dinath Building, 2nd Floor,
Opposite Gulshan Talkies
Falkland Road,
Mumbai 400 004 …

2. The State of Maharashtra … Respondent

Mr. A. M. Vernekar for the Appellant.
Ms. Farhana Shah for Respondent No.1.
Mr. H. J. Dedhia APP for Respondent No.2-State.

CORAM : S. M. MODAK, J.

DATED : 22ND DECEMBER 2022.

JUDGMENT:

1. Heard learned Advocate for the Appellant-complainant Shri Vernekar and learned Advocate Ms. Farhana Shah for the Respondent-accused.

2. The Respondent is acquitted for the offence punishable under section 138 of the Negotiable Instruments Act by the Court of Metropolitan Magistrate, 16th Court, Ballard Pier, Mumbai, as per the judgment dated 22nd January 2004. The complainant has given hand loan of Rs.1,80,000/- on 1/03/1997. There is receipt executed by the Respondent to that effect. So also cheque dated 1/06/1997 for that amount was also issued. On presentation of cheque, the banker of accused has dishonoured it for the reason “insufficient funds” There was mandatory notice given. Inspite of receipt of notice, the Respondent has failed to pay amount of cheque and that is how the complaint was filed before the trial Court.

3. The complainant examined himself. He was thoroughly cross examined. Learned Magistrate acquitted the accused. It is predominantly for the reason that the complainant is carrying on business of money lending without license and hence it cannot be said that there was legally recoverable debt or liability.

4. During arguments, it is submitted on behalf of the Appellant that few isolated transactions do not lead to carrying on money lending transaction. It is submitted that all other findings are in favour of the Appellant. My attention is invited to the provisions of section 2(a) and more specifically clause no.(f) and clause (f-2) of the Bombay Money Lending Act, 1946. According to learned Advocate for the Appellant, if money is advanced on the basis on Negotiable Instrument (other than promissory note), it does not amount to advancing loan at interest. My attention is also invited to meaning of negotiable instrument as per the Negotiable Instrument Act, 1981, and

promissory note given under section 4 of the Act.

5. Learned Advocate for the Appellant relied upon the following judgments :

(i) Nandram Kaniram and Others vs. N. B. Rahatekar 1994 Mh. L. J. 380;

(ii) Sitaram Laxminarayan Rathi Vs. Sitaram Kashiram Koli and Others 1985 Mh. L. J. 430;

(iii) Fulchand Champalal Jain Vs. Punjaru Shankar Patil and Others 1987 Mh. L. J. 1032;

(iv) Ganesh Madhavrao Hawaldar Vs. Mithalal Keshaolal Dave 1999 (1) Mh. L. J. 110;

(v) Gajanan and Others Vs. Seth Brindaban AIR 1970 SC 207.

6. Whereas it is submitted on behalf of learned Advocate for the Respondent that during cross examination, the complainant has admitted about lending amount to various persons and in fact he has also advanced the amount to the Respondent, earlier to present transaction. Learned Advocate pointed out various admissions given by the Appellant during cross examination.

7. So in this Appeal this Court has to see whether the findings given by the trial Court from the point of carrying on business by the Appellant of money lending is proper or not. In addition, to that learned Advocate for the Respondent also pressed one more ground, it relates to certain part payment made by the Respondent prior to deposit of cheque. Hence, it is contended that when the cheque was deposited, there was no legally recoverable debt of Rs.1,80,000/-. In

support of that contention, the judgment in case of ***Dashrathbhai Trikambhai Patel Vs. Hitesh Mahendrabhai Patel and Others Manu/SC/1294/2022*** is relied upon.

8. When there is money lending transaction the provisions of section 138 of the Negotiable Instruments Act are not applicable and in support of said contention the order passed by this Court in ***Criminal Revision Application No.394 of 2015 dated 2nd August 2022 Mrs.Monica Sunit Ujjain Vs. Sanchu M. Menon and Others*** is relied upon. In that order, this Court has confirmed the order passed by the Additional Sessions Judge thereby reversing the order of issue of process and dismissing the complaint. It was dismissed for the reason that there was money lending transaction.

9. To rebut contention of the Respondent, it is submitted on behalf of the Appellant that whatever admissions are given during cross examination by the Appellant about receipt of certain amount from the Respondent cannot be co-related to present transaction. It is emphasized that the Respondent has not entered into witness box and has not given an opportunity to the Appellant to challenge that theory. On the point of entering into witness box, the judgment in case of ***Vidyadhar Vs. Manikrao and Anr. 1999 (2) Civil Court Cases 91 (SC)*** and more specifically para 15 is relied upon.

10. My attention is also invited to the answer given by the Respondent to question No.6, in statement recorded under section 313 of the Code of Criminal Procedure. When question is put to the Respondent why witnesses are deposing against him, he has answered

that the complainant did not got interest amount and in fact he has paid part payment after settlement. It is contended that this answer was not corroborated by way of giving evidence.

Money lending transaction

11. First of all, I will deal with the findings of the trial Court on the point of money lending transaction. Section 6 of the Bombay Money Lenders Act, 1946, mandates obtaining a license from the Assistant Registrar by every money lender. Section 2(10) of the said Act lays down the meaning of word "money lender", whereas section 2(2) of the said Act gives the meaning of the phrase "business of money lending". It is reproduced for ready reference :-

> "`business of money lending' means the business of advancing loans whether in cash or kind and whether or not in connection with or in addition to any other business"

12. The Appellant was working as clearing house agent in M/s.Sainath Clearing Agency that's why it is contended that the said business was different and the act of giving friendly loan to the accused is different from his other business. When we read meaning of the word "loan" given in Section 2(9) of the said Act we can decipher the following ingredients :-

(a) Loan amount advanced at interest, whether it is by way of money or in kind;

(b) But it does not include contingencies laid down in clause no.(a) to clause no.(g).

It means when the money is advanced under the contingencies laid down under the exception, it does not amount to giving up loan and it will not all within meaning of "business of money lending". However, it is important to note that there is one exception to clause no.(f). For ready reference clause no.(f) is reproduced as follows :-

> "(f) an advance (of any sum exceeding rupees three thousand) made on the basis of a negotiable instrument as defined in the Negotiable Instruments Act, 1881 (XXVI of 1881), other than a promissory note."

13. If the amount more than Rs.3,000/- is advanced on the basis of the Negotiable Instrument then it does not amount to giving of loan and will not fall within the phrase "business of money lending". However, there is one exception to this clause, that's to say if amount more than Rs.3,000/- is advanced on the basis of promissory note, it will amount to loan and it will fall within purview of carrying on business of money lending.

14. According to learned Advocate Shri Vernekar, in this case, the money is advanced on the basis of cheque and hence it will come out of purview of "business of money lending". He invited my attention to the receipt dated 1st March 1997, executed by the Respondent. For ready reference its wording are reproduced as follows :-

> "Received with thanks from M/s. Sainath Clearing Agency sum of Rs.1,80,000/- (Rupees One Lakh Eighty Thousand Only) by cash for friendly loan this amount return back to you on demand against Cheque No.701673/1-6-97."

15. It is true that there are three kinds of negotiable instruments, it includes
Bill of exchange;
Promissory note; and
Cheque.

16. So if the money is advanced on the basis of cheque or bill of exchange, such loan will not fall within business of money lending. I have perused the wording of that receipt. It is in two parts, one is acknowledging receipt of Rs.1,80,000/-, and the second is assuring to return it on demand. There is one more aspect. It further mentions about receipt of cheque No.701673/16-97. <u>If we consider all these aspects it can very well be said that the Appellant advanced the amount of Rs.1,80,000/- against the cheque</u>.

17. When I perused the observations of the trial Court, there is finding arrived at that it is money lending transaction. Predominantly, it is on the basis of answers given during cross examination by the Appellant. <u>But no where the provisions of the Bombay Money Lenders Act, 1946 are discussed</u>.

18. It is true that during cross examination, the Appellant was asked

about giving loan to various persons. The Appellant gave the following answers :-

(a) Giving loan to one Anil Bhatia.

(b) Giving loan to one Rajendra Goni.

(c) Giving loan to many persons.

(d) Giving loan to the Respondent of Rs.50,000/- in cash (other than present transaction)

19. On this background, if the observations of the trial Court in the judgment are perused, we may find that the provisions of the Bombay Money Lenders Act are not discussed. If the amount is advanced on the basis of the negotiable instrument other than promissory note, it is not considered as loan. If post-dated cheque is given, it is not loan as falling within purview of that Act. Even in the judgment of Phoolchand (supra) and as referred above, it is held that if there is no promise to pay the amount, it is not promissory note and hence will not fall within purview of the said Act. If there are two casual transactions, it will not make the accused, money lender as held in Ganesh Hawaldar's case (supra). Whereas in case of M/s.Monica Sunit Ujjain (supra), the revision was dismissed and the order of issue of process was set aside by the Sessions Court. My attention is invited to the observations in paragraph 8 by learned Advocate Ms. Farhana Shah for the Respondent. After going through said judgment, one may not find out what are transactions in that matter. Hence, this observations are of no use.

20. The findings given on the point of carrying on money lending business by the trial Court are not proper. It is for the reason that

<u>learned Magistrate has lost site of the fact that money was advanced against the negotiable instrument by way of cheque. Hence, these findings need to be set aside</u>.

<u>Part payment</u>

21. Apart from above there is emphasis on the admissions given by the Appellant on the point of receipt of certain amount. The complainant admitted that "accused made him payment on 1st August 1997, for Rs.46,000/- and on 13th August 1997, of Rs.44,000/-". He has expressed ignorance of receipt of Rs.27,000/- from the accused on 1st June 1997. <u>Now the issue remains whether these two receipts are in pursuance to the transaction of advancing money of Rs.1,80,000/- or other debt. The issue also remains whether burden lies on the Respondent to show that these two receipts pertains to transaction in question</u>.

22. It is true that in case of <u>Vidyadhar</u> (supra), it was a suit for redemption of mortgage by additional sale. Whereas sale deed was executed by Defendant No.1 in favour of the Plaintiff and it was fictitious. However, Defendant No.1 has not entered into witness box. On that background, it was held that not entering into witness box by defendant No.1 leads to presumption that case set up by him is not correct.

23. It is true that the Respondent has not replied to the mandatory notice. It is true that if the Respondent has entered into witness box that could have afforded an opportunity to the Appellant to cross

examine him. Not entering into witness box by the Respondent was his own decision.

24. It is true that evidence suggest that there were transactions in between the Appellant and the Respondent. These two payments were made in the month of August 1997 i.e. after receipt for Rs.1,80,000/- was executed on 1st March 1997. I think not entering into witness box by the Respondent has not weakened his defence. The party can prove its case by cross examining other side also. Respondent has done that. The Appellant had admitted two receipts. He was knowing that he has given evidence in case involving dishonour of cheque of Rs.1,80,000/-. The burden on Respondent-accused is not heavy as that of the Appellant-complainant, by probabilities he has to prove his case.

25. The observations made in the case of Vidhyadhar (supra) will not be applicable because in this case there was admission given by the Appellant. I think it was for the Appellant to clarify these two receipts are not towards repayment of loan of Rs.1,80,000/- but of different nature. He could have done that even by asking for re-examination or by giving other evidence but it has not happened. I am not inclined to accept the contention of learned Advocate Mr. Vernekar for the Appellant that the Respondent has failed to prove the connection of these two payments.

26. On this background the observations made by Hon'ble Supreme Court in case of Dashrathbhai (supra) will be perfectly applicable. If there is part payment of the cheque amount then it cannot be said that

the amount mentioned in the cheque is legally recoverable. In that matter certain part payments were made between the period when the cheque was drawn and when it was encashed upon maturity. It was not case of making part payment after issuance or receipt of notice. Hence in that matter it was held that the amount mentioned in the cheque is not legally recoverable debt. Hence, the Appeal was dismissed.

27. In this case there is cheque return memo issued by the Bombay Mercantile Cooperative Bank dated 18th November 1996 whereas these two payments were made earlier to that. Hence, it cannot be said that after considering these two payments, the Appellant owes Rs.1,80,000/- from the Respondent.

28. Though, I do not agree with the findings given by the trial Court on the point of money lending business, I have accepted the contention that there is no legally recoverable debt or liability. The trial Court has also referred to these two payments but there is no observation to that effect. Ultimately, the result is that I do not find any reason to interfere in the findings given by the trial Court. Hence, there is no merit in the Appeal and it is dismissed.

(S. M. MODAK, J.)