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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPLICATION NO.781 OF 2022
WITH
CRIMINAL APPLICATION NO.785 OF 2022
WITH
CRIMINAL APPLICATION NO.783 OF 2022**

Anees Nisar Ahmed ... Applicant
V/s.
The State of Maharashtra & Anr. ... Respondents

**WITH
CRIMINAL APPLICATION NO.784 OF 2022
WITH
CRIMINAL APPLICATION NO.780 OF 2022
WITH
CRIMINAL APPLICATION NO.778 OF 2022
WITH
CRIMINAL APPLICATION NO.779 OF 2022**

Faisal Nisar Ahmed ... Applicant
V/s.
The State of Maharashtra & Anr. ... Respondents

Mr. Prashant Pandey with Mr. Ifran Unwala i/by
W3Legal LLP for the applicant.

Mr. A.R. Patil, APP for respondent no.1/State.

Mr. Manohar H. Ramsinghani with Mr. Kantilal Behwal,
Mr. Kaustubh Gaonkar, Mr. Uday Shah, Mr. Abhished
Jadhav and Mr. Keshav Thakur for respondent no.2.

CORAM : AMIT BORKAR, J.

DATED : NOVEMBER 30, 2022

P.C.:

1. These Applications arise in similar background. They have been heard together and would be disposed of by this common judgment challenging order of issuance of process in a complaint under section 138 of Negotiable Instruments Act, 1881.

2. Before I assess the submissions made at the bar in the light of individual facts, it would be convenient to note broad contours of controversy in the present Applications. Primary facts may be noted from Criminal Application Nos.781, 785, 783 of 2022 which are filed by the accused No.3. The amounts mentioned in the complaint were advanced by complainant to the accused firm as a loan on interest. Towards re-payment of the said amount, accused firm issued a promissory note and cheque. On cheque being dishonoured, the complainant issued a demand notice, which according to the applicant had not been received by her. According to the complainant in spite of receipt of notice the accused failed to pay the amount within fifteen (15) days and, therefore, a complaint under section 138 of the Negotiable Instruments Act, 1881 came to be filed against the applicants.

3. Learned Magistrate by order dated 2nd January, 2021 issued process against the applicants. The applicant challenged the order of issuance of process by filing revision before Sessions Court which was dismissed by judgment and order dated 18th February, 2022. Aggrieved thereby, the applicants have filed present criminal applications.

4. Learned advocate for the applicant made following submissions.

a) The averments made in the complaint are not sufficient to attract vicarious liability under section 141 of the Negotiable Instruments Act, 1881.

b) The applicant not being signatory on the cheque is not liable under section 141 of the Negotiable Instruments Act, 1881 based on vague averments made in the complaint.

c) There is no valid demand, as the averments in the complaint itself shows that applicant had moved out of the address mentioned in the notice.

d) There is no legally recoverable liability as the cheque was issued by the complainant for recovery of loan and interest therefore the transaction is barred under the provisions of Money Lending Act

e) In the complaint itself it is mentioned that a promissory note had been issued by the complainant and, therefore, the transaction in question is a money lending transaction under the provisions of Maharashtra Money Lending Act.

f) The expression 'business' has not been defined in the said Act and, therefore, the same needs to be interpreted relying on the definition of 'business' in the Income Tax Act, 1960, which would make transaction in question as money lending transaction. Therefore in the absence of licence, the debt in question is not legally recoverable liability.

g) Even a single transaction can be termed as money lending transaction therefore it is not necessary that there should be multiple transactions to attract the rigors of money lending act.

h) The learned advocate for the applicant relied on the unreported judgment of this Court in Criminal Revision Application No.394 of 2015 (**Monica Sunit Ujjain Vs. Sanchu M. Menon & Ors.**) decided on 2nd August 2022 and **Anil S/o Baburao Kataria Vs. Purshottam S/o Prabhakar Kawane** reported in 2010 Cri. LJ 1217, **Girdhari Parmanand Motaini Vs. Vinayak Bhagwan Khavnekar and Ors.** reported in 2016 ALL MR(Cri.) 1909, and **Smt. Nanda W/o Dharam Nandanwar represented through PAO Dharam S/o Kisandas Nandnwar Vs. Nandkishor S/o Talakram Thaokar** reported in MANU/MH/0069/2010.

5. *Per contra*, the learned advocate for the complainant invited my attention to the letter dated 21st June 2019 issued by accused No.2 wherein he admitted that accused Nos.2 and 3 both are looking after the business of accused No.1/partnership firm. He also invited my attention to the address mentioned in the letter which is the address of demand notice. In the cause title of present application and in the verification before the learned Magistrate, same address is mentioned. He submitted that in Criminal Application No.784 of 2022 the remark is to the effect that the notice is duly served. He submitted that the notice sent on correct address is a deemed service. whether the notice is received or not is a matter of evidence to be considered by the learned Magistrate at the time of trial. In support of his submission, he relied on the

judgment of this Court in the case of **Nandkishor Shamkant Sonar & Others Vs. Sau. Malati Divakar Kulkarni & Others** reported in 2019 SCC OnLine Bom 13189.

6. According to him, provisions of Money Lending Act are not attracted since the complaint has not been filed based on a promissory note, legally recoverable liability has to be construed in the context of negotiable instrument of cheque and. To bolster his submission, he placed reliance on the judgment of Division Bench of this court in Commercial Appeal (L) No.248 of 2018 decided on 11th June 2018 (**Mour Marbles Industries Pvt. Ltd. Vs. Motilal Laxmichand Salecha & Ors.**), **Mahesh P. Raheja & Others Vs. Base Industries Group & Another** reported in 2018 SCC OnLine Bom 21322 and **Faisal Nisar Ahmed Vs. The State of Maharashtra & Another** in Criminal Application No.923 of 2022 decided on 7th October, 2022.

7. He invited my attention to the relevant averments in paragraph 1 of the complaint to submit that the averments in the complaint are sufficient to attract vicarious liability under section 141 of the Negotiable Instruments Act, 1881. In support of his submission, he relied on the judgment of the Apex Court in the case of **Rallis India Limited Vs. Poduru Vidya Bhushan And Ors.** reported in (2011) 13 SCC 88 and **Ashutosh Ashok Parasrampuriya and Another Vs. Gharrkul Industries Pvt. Ltd. And Others** reported in 2021 SCC OnLine SC 915.

8. The first challenge is insufficient averments in the complaint to attract 'vicarious liability' under section 141 of the Negotiable

Instruments Act, 1881. The plea is sought to be founded averments in the complaint. The relevant averments in the complaint paragraph 1 are extracted below:

“1. I State that, I am the Complainant and I know the Accused. I say that the Accused No.1 is a partnership firm and Accused Nos. 2 and 3 are the partners of Accused No.1 and are responsible for the day-to-day affairs and management of Accused No.1.”

9. Indisputably accused No.1 is a partnership firm. Accused Nos. 2 and 3 are partners of accused No.1/firm. The recitals in the letter dated 21st June 2019 at page 30 issued accused no. signatory of cheque read thus:

“We confirm that the day to day affairs of our company are looked after by both our partners viz Mr. Faisal Ahmed residing at B-1501, Lokhandwala Residency, Manjrekar Lane, Near Tata Motors, Gandhi Nagar, Worli, Mumbai 400 018 and Mrs. Anees Ahmed residing at 307, Plot No.32, Pradeep Villa Co-op Hsg Society, B G Kher Road, Worli, Mumbai 400 018 and Mr. Faisal Ahmed has all the authority to sign and issue this cheque which he has done so in your presence.

10. The Apex Court in the case of **Rallis India Ltd.** (supra) in paragraph 2 quoted the averments in the facts of the said case at page 4 reads as under:

“2. ...

That Accused 1 is a partnership firm and Accused 2 to 7 are partners thereof and Accused 3 is signatory of the impugned cheques and all partners are looking after day-to-day affairs of the accused firm and thus the liability as raised by them is joint and several.”

11. In paragraph 10 of the said judgment, the Apex Court held as under:

“**10.** Thus, in the light of the aforesaid averments as found by us in the criminal complaint, we are of the considered opinion that sufficient averments have been made against the respondents that they were the partners of the firm at the relevant point of time and were looking after the day-to-day affairs of the partnership firm. This averment has been specifically mentioned by the appellant in the complaint even though denied by the respondents but the burden of proof that at the relevant point of time they were not the partners, lies specifically on them. This onus is required to be discharged by them by leading evidence and unless it is so proved, in accordance with law, in our opinion, they cannot be discharged of their liability.....

12. In a recent judgment in **S.P Mani and Mohan Dairy Vs. Snehalatha Elangovan** reported in 2022 SCC OnLine SC 1238, the Apex Court was considering a case of partnership firm and after taking stock of earlier authorities, the Apex Court observed in paragraph 33 thus:

“33. Thus, the legal principles discernible from the aforesaid decision of this Court may be summarised as under:

- (a)
- (b)
- (c)
- (d) In construing a complaint, a hyper-technical approach should not be adopted so as to quash the same.
- (e) The laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in the enactment of Sections 138 and 141 respectively should be kept in mind by the Court concerned.
- (f)
- (g)
- (h)”

13. The Apex Court thereafter considered earlier precedent of the Apex Court in the case of **Gunmala Sales Pvt. Ltd. Vs. Anu Mehta & Ors.** (2015) 1 SCC 103 and held in paragraph 47 thus:

“47. Our final conclusions may be summarised as under:

(a) The primary responsibility of the complainant is to make specific averments in the complaint so as to make the Accused vicariously liable. For fastening the criminal liability, there is no legal requirement for the complainant to show that the Accused partner of the firm was aware about each and every transaction. On the other hand, the first proviso to Sub-section (1) of Section 141 of the Act clearly lays down that if the Accused is able to prove to the satisfaction of the Court that the offence was committed without his/her knowledge or he/she had exercised due diligence to prevent the commission of such offence, he/she will not be liable of punishment.

(b) The complainant is supposed to know only generally as to who were in charge of the affairs of the company or firm, as the case may be. The other administrative matters would be within the special knowledge of the company or the firm and those who are in charge of it. In such circumstances, the complainant is expected to allege that the persons named in the complaint are in charge of the affairs of the company/firm. It is only the Directors of the company or the partners of the firm, as the case may be, who have the special knowledge about the role they had played in the company or the partners in a firm to show before the court that at the relevant point of time they were not in charge of the affairs of the company. Advertence to Sections 138 and Section 141 respectively of the NI Act shows that on the other elements of an offence under Section 138 being satisfied, the burden is on the Board of Directors or the officers in charge of the affairs of the company/partners of a firm to show that they were not liable to be convicted. The existence of any special circumstance that makes them not liable is something that is peculiarly within their knowledge

and it is for them to establish at the trial to show that at the relevant time they were not in charge of the affairs of the company or the firm.

(c) Needless to say, the final judgment and order would depend on the evidence adduced. Criminal liability is attracted only on those, who at the time of commission of the offence, were in charge of and were responsible for the conduct of the business of the firm. But vicarious criminal liability can be inferred against the partners of a firm when it is specifically averred in the complaint about the status of the partners 'qua, the firm. This would make them liable to face the prosecution, but it does not lead to automatic conviction. Hence, they are not adversely prejudiced if they are eventually found to be not guilty, as a necessary consequence thereof would be acquittal.

(d) If any Director wants the process to be quashed by filing a petition under Section 482 of the Code on the ground that only a bald averment is made in the complaint and that he/she is really not concerned with the issuance of the cheque, he/she must in order to persuade the High Court to quash the process either furnish some sterling incontrovertible material or acceptable circumstances to substantiate his/her contention. He/She must make out a case that making him/her stand the trial would be an abuse of process of Court.”

14. In the light of averments made in paragraph 1 of the complaint and the recital in the letter dated 21st June 2019, prima facie, it appears that complaint has discharged primary responsibility of making averments. The signatory of the cheque has accepted in letter dated 21st June 2019 that both applicants are looking after day today affairs of accused no. 1. I am, therefore, satisfied that the averments made in the complaint are sufficient, at this stage, to attract ‘vicarious liability’ under section 141 of the Negotiable Instruments Act, 1881.

15. The Next submission made on behalf of the respondent No.3 that she is not signatory of the cheque. Once it is held that the accused No.3 is vicariously liable, at this stage, it is not necessary that the accused No.3 should be signatory to attract liability under section 138 read with section 141 of the Negotiable Instruments Act, 1881.

16. The third submission is based on the averments made in the complaint that the envelop of accused No.3 has returned with remark 'addressee moved'. According to the applicant, the said remark is sufficient to hold that demand notice was not served on the accused. The learned advocate for the complainant is justified in placing reliance on the letter dated 21st June, 2019 wherein the address of the accused person is mentioned. The notice was issued on the same address. The address in the present application and verification statement is also the same. Therefore, issuance of notice on correct address is sufficient to draw presumption, at this stage, that the notice is deemed to be served. Whether the notice was actually served or not is the matter of trial which the learned Magistrate is required to consider at the time of trial.

17. Sustenance for the submission was sought to be drawn from the decision of the Apex Court in **Jagdish Singh Vs. Natthu Singh** (1992) 1 SCC 647 and other judgments, a learned Single Judge of this Court in **Nandkishor Shamkant Sonar (Supra)** held in paragraph 16:

“16. It must be borne in mind that as has been observed herein-above there are series of judgments on the point regarding the presumption under Section 27 of the General

Clauses Act, 1887 *vis-a-vis* requirement under Clause (b) of the Proviso to, Section 138 of the Negotiable Instrument Act. The decisions in the case of *Jagdish Singh V. Natthu Singh*, 1991 (SLT Soft) 137 : (1992) 1 SCC 647, *State of M.P. V. Hiralal*, 1996 (SLT Soft) 1344 : (1996) 7 SCC 523, *V. Raja Kumari v. P. Subbarama Naidu*, (2005) 1 BC 1 (SC) : IV (2004) CCR 211 (SC) : (2004) 6 SLT 443 : (2004) 8 SCC 74 lay down that when the notice is sent by registered post and is returned with a postal endorsement 'refused' or 'not available in the house' or 'house locked' or 'shop closed' or 'addressee not in station', it has to be presumed under Section 27 of the General Clauses Act that it was a due service. It is conspicuous that it is not that the situations include only positive act of 'refusal' endorsed by the postman but even where the endorsements read that the 'house is locked' or 'not available in the house' or 'shop is closed' or 'addressee not in station' which are passive in nature give rise to the presumption under Section 27 of the General Clauses Act."

18. In the case of ***C.C. Alavi Haji v. Palapetty Muhammed***, reported in (2007) 6 SCC 555 it held as under:

"14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station", due service has to be presumed. (Vide *Jagdish Singh v. Natthu Singh* [(1992) 1 SCC 647 : AIR 1992 SC 1604]; *State*

of M.P. v. Hiralal [(1996) 7 SCC 523] and *V. Raja Kumari v. P. Subbarama Naidu* [(2004) 8 SCC 774 : 2005 SCC (Cri) 393] .) It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved.”

19. In view of the settled position of law referred above, the notice sent on correct address creates presumption under section 27 of General Clauses Act, at the stage of issuance of process, that it was valid service and it is sufficient compliance with the service of demand notice.

20. The last submission made on behalf of the applicant is that the transaction in question is of money lending which does not constitute legally recoverable liability as the complainant does not hold valid money lending licence. Learned advocate for the applicant invited my attention to the averments in the complaint wherein the complainant has stated that the transaction between the applicant and the complainant was of loan on interest. He invited my attention to the definition in the Money Lending Act and the definition of adventure in nature of trade as defined under section 2(13) of the Income Tax Act, 1960.

21. According to him, a learned Single Judge of this Court in paragraphs 3, 8 and 10 in **Monica Sunit Ujjain** (supra) held that in cases of money lending business without licence, the provisions of section 138 of the Negotiable Instruments Act, 1881 are not attracted.

22. *Per contra*, learned advocate for the complainant invited my attention to the judgment of the Division Bench of this Court in the case of **Mour Marbles Industries Pvt. Ltd.** (supra) to urge that considering definition of “loan” in section 2(13)(j) of the Money Lending Act, any advance exceeding Rs.3,00,000/- (Rupees Three Lakh) made on the basis of the Negotiable Instruments Act, 1881 other than a promissory note would not be ‘a loan’ within the definition as contained under section 2(13). He also invited my attention to the judgment of the learned Single Judge of this Court in the case of **Base Industries Group and Others** (supra).

23. The learned Single Judge in the case of **Base Industries Group and Anr.** (supra) relied on the judgment of Apex Court in paragraph 36 and ultimately in paragraph 39 held as under:

“36. In *Gajanan V. Seth Brindaban*, The Supreme Court heard an appeal against a judgment of the Bombay High Court (Nagpur Bench), under the CP Money Lenders’ Act, 1934. The Supreme Court held:

“‘Moneylender’ as defined in Section 2(v) of the Act means a person who, in the regular course of business advances a loan as defined in this Act and it includes, subject to the provisions of Section 3, the legal representatives and successors-in-interest of the person who advanced the loan; and the expression “moneylending” is also to be construed accordingly. By virtue of Section 2(ix) “Sub-Registrars” appointed under the Indian Registration Act are to function under the present Act. ... According to Section 11-H no suit for the recovery of a loan advanced by a moneylender is to proceed in a civil court until the court is satisfied that he holds a valid registration certificate or that he is not required to have such certificate by reason of the fact that he does not carry on the business of

moneylending from the scheme of these provisions it is evident that for a person to be a moneylender he must, in the regular course of business, advance a loan. There is a long catena of authorities on the statutes regulating and controlling moneylenders in which the expression “moneylender” has been so construed as to exclude isolated transaction or transactions of moneylending.”

“39. From this discussion, the following propositions emerge:

- (a) Not every loan is axiomatically a money-lending transaction for the purposes of the 1946 or the 2014 Acts. There is no such presumption in law.
- (b) It is doing of the ‘business of money-lending’ that attracts the provisions of the statute. In interpreting the phrase, the correct emphasis is on the word ‘business’, not ‘money-lending’. It is the word ‘business’, and not the expression ‘money-lending’, that is determinative. Simply put, every instance of lending money is not money-lending. Not every lender is a Shylock.
- (c) To constitute ‘business’, a single isolated instance does not, and even several isolated stray instances do not, constitute ‘the business of money-lending,. To be engaged in the ‘business of money-lending’, the activity must be systematic, regular, repetitive, and continuous, and must generate an appreciable revenue. The fact that the borrower is a stranger to the lender does not on its own make the latter a ‘money-lender.
- (d) A loan recovery action is not barred merely because there is a loan. It has to be shown that the loan was part of ‘the business of money-lending’.
- (e) A plaintiff seeking a recovery of a loan is not required to show that his suit is not barred by the Money Lenders Act. It is always for the defendant who puts up money-lending as a defence to show that the transaction is forbidden by the Money Lenders Act.”

24. The learned advocate for the applicant distinguishing the judgment of **Mour Marbles Industries Pvt. Ltd.** (supra) submitted that in the facts of the said case the proceeding was not for recovery of loan but was for compensation to the plaintiff as holder of bill of exchange or cheque. He also placed reliance on paragraph 13 which reads as under:

“13. A plain reading of the above definition indicates that a loan means an advance at interest whether of money or in kind but does not include what is provided in clauses (a) to (m) as contained in the said provision. In the context of the present dispute the relevant clause of the definition is clause (j) which provides that an advance of any sum exceeding rupees three lakhs made on the basis of negotiable instrument as defined under the Negotiable Instruments Act, other than a promissory note would not be ‘a loan’ within its definition as contained under Section 2(13).”

25. Learned Single Judge of this Court in **Faisal Nisar Ahmed** (supra) after considering the judgment in the case of **Mour Marbles Industries Pvt. Ltd** in paragraph Nos. 7 and 8 observed as under:

“7. On careful reading of section 2(13)(j), it appears that the expression “loan” as defined under the provisions of the 2014 Act means an advance at interest, whether money or kind, but it does not include the advance of any sum exceeding three lakh made on a negotiable instrument other than a promissory note. Undisputedly, the complaint has been filed enforcing rights under a negotiable instrument/cheque. Therefore, the averment in the complaint regarding promissory note is not the foundational fact for filing the complaint.

8. The only relevant question would be whether or not the debt in question is a legally recoverable liability. If a person who has an advanced loan can recover the same by filing legal proceedings, such liability can be termed as a

legally recoverable liability. The only impediment under the provisions of the 2014 Act is in the form of section 13. If the complaint is filed enforcing the liability arising out of a negotiable instrument in the form of a cheque, only because contemporaneously another negotiable instrument in the form of the promissory note was executed, that by itself would not take away the rights accrued in favour of the applicant under the provisions of section 138 of the Negotiable Instruments Act, 1881 after the offence is complete.”

26. The position of law succinctly stated by the learned Single Judge of this Court in **Base Industries Group and Others** (supra), it is held that a loan recovery action is not barred merely because there is loan but it has to be shown that the loan on interest was part of business of money lending. It is held that to constitute business, a single isolated instance does not, and even several isolated stray instances do not, constitute ‘the business of money lending’, the activity must be systematic, regular, repetitive, and continuous, and must generate an appreciable revenue. On reading of complaint and other material produced before magistrate, at this stage, it cannot be conclusively held that the activity of complainant is systematic, regular, repetitive, and continuous.

27. In so far as the submissions made on behalf of the applicant that section 2(13) of the Income Tax Act, 1960 defines ‘business’ is concerned, it is well settled principle of interpretation of statute that to interpret a word in a statute, reliance cannot be placed on the definitions in other statutes. Ultimately, while interpreting definitions or expressions in the statute, entire scheme, purpose and object of the Act is relevant. It is well settled that the same

word may carry different meaning in different statutes. It is no doubt true that the meaning should be ascertained only from the words employed in the definitions, but the set-up and context are also relevant for ascertaining what exactly was meant to be conveyed by the terminology employed. Though the definition may be more or less the same in two different statutes, still the objects to be achieved may be widely different. The same words may mean one thing in one context and another in a different context. Therefore this submission cannot be accepted. In the facts of the present case whether the liability of applicants is legally recoverable or not being disputed question of fact needs to be decided by giving parties to lead evidence.

28. In my opinion, in view of the observations made by the Divisions Bench of this Court in the case of **More Marble Industries and Base Industries Group** (supra) at this stage it could not be held that the transaction which is the subject matter of the complaint is money lending transaction and, therefore, the debt is not legally recoverable debt.

29. In so far as the Revision Applications Nos.784, 779, 780 and 778 of 2022 are concerned, the applications are filed by the accused No.2, who is signatory to the cheque. While dealing with submissions made on behalf of the applicant in Application No.781 of 2022, I have dealt with same submissions made by the applicant in present applications and, therefore, for the same reasons, I repel submissions made by the applicant in the Criminal Application Nos.784, 779, 780, 778 of 2022 with the result the order of issuance of process cannot be termed as 'perverse' nor there is any

miscarriage of justice.

30. The advocate for the applicant submitted that the applicant is 77 years old and he is suffering from cancer. In my opinion, that is the defence which is applicant may raise when the learned Magistrate would be considering merits of the complaint.

31. The request for continuation of ad-interim relief is rejected.

32. In so far as Criminal Application No. 779 of 2022 is concerned the transaction averred in the complaint is that of sale of BMW and in Criminal Application Nos.784, 785 of 2022 the transaction alleged is of rendering provisional service, hence, the question of money lending transaction does not arise for consideration in the said applications.

33. In the result, all applications are dismissed. No costs.

(AMIT BORKAR, J.)