

AGK

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

CRIMINAL APPLICATION NO.923 OF 2022

Faisal Nisar Ahmed ...Applicant

V/s.

The State of Maharashtra & Anr. ...Respondents

Mr. Prashant Pandey with Mr. Irfan Unwala, Ms. Harshita Shroff i/by W3Legal LLP for the applicant.

Ms. G. P. Mulekar, APP for respondent no.1/State.

Mr. Subodh Desai i/by Mr. Akshay G. Patkar for respondent no.2.

CORAM : AMIT BORKAR, J.

DATED : OCTOBER 7, 2022

PC.:

1. By this criminal application under section 482 of the Criminal Procedure Code, 1973, the applicant is challenging the order dated 24th January 2022 passed by the learned Metropolitan Magistrate, 15th Court, below Exhibit 1 in C.C. No. 1504823/SS/2021 against the applicant under section 138 of the Negotiable Instruments Act, 1881.

2. Respondent no.2 filed a complaint alleging that the accused needed funds as a loan to the tune of Rs.1,50,00,000/- (Rupees One Crore Fifty Lakh Only) and, therefore, under a loan agreement dated 4th October 2018, the complainant issued a cheque of Rs.1,50,00,000/- (Rupees One Crore Fifty Lakh Only) and for repayment of the said amount, the accused issued three (3)

cheques in the amount of Rs.1,50,00,000/- (Rupees One Crore Fifty Lakh Only), Rs.2,00,000/- (Rupees Two Lakh Only) and Rs.2,00,000/- (Rupees Two Lakh Only). However, on 5th December 2019, when the complainant presented said cheques, the cheques were returned with the remark "funds insufficient" and "payment stopped by drawer". The complainant, therefore, issued notice to the accused to repay the amount, which according to the complainant, was served on the office address of the accused. Since, despite receipt of notice within fifteen (15) days, the accused failed to repay the amount, the complainant filed a complaint under section 138 of the Negotiable Instruments Act, 1881, on 29th January 2020. As a result, the learned Magistrate issued a process against the accused on 24th January 2022. Aggrieved, thereby, the present application is filed by the applicant.

3. Learned advocate for the applicant submitted that the complainant's status is that of a money lender, which is clear from the averments of the complaint itself. Additionally, the loan was disbursed based on a promissory note; therefore, the case of the complainant would fall within the exception under section 25 of the Bombay Money Lenders Act, 1947 ("1947 Act", for short). According to him, therefore, the amount which is the subject matter of the cheque is not legally enforceable debt as the recovery of the loan is barred by section 13 of the Maharashtra Money Lending (Regulation) Act, 2014 ("2014 Act", for short) as the complainant is not holding a license as required under section 5 of the 2014 Act. He placed reliance on the judgment in the case of

Smt. Nanda Dharam Nandanwar v. Nandkishor Talakram Thaokar reported in 2010(2) AIR Bom R 337. He also placed reliance upon the judgment of the Apex Court in **G. Venkataswami Naidu & Co. v. The Commissioner of Income Tax** reported in AIR 1959 SC 359 and definitions under section 2(13) of the Income Tax Act, 1961, section 2(f) of the Interest Act, 1978 and section 2(c) of the Indian Contract Act, 1872 as also the judgment of the Calcutta High Court in **Commissioner of Income Tax (Central) v. Bikaner Trading Co. Ltd** reported in (1966) ILR 1 Cal 198 and judgment of the Delhi High Court in **Commissioner of Income Tax (Delhi Central) v. Bharat Insurance Co. Ltd.** Reported in AIR 1960 PH 598.

4. *Per contra*, the learned advocate for respondent no.2 submitted that the complainant had filed a complaint based on a cheque which is a negotiable instrument and not based on the promissory note. He submitted that advances exceeding rupees three lakh made based on the Negotiable Instruments Act, 1881 are not included within the expression "loan" under section 2 of the 1946 Act and, therefore, the provisions of the 2014 Act are not applicable. In support of his submission, he placed reliance on the Division Bench judgment of this Court in the case of **Mour Marbles Industries Pvt. Ltd. V. Motilal Laxmichand Salecha & Ors.** in Commercial Appeal (L) No. 248 of 2018, decided on 11th June 2018. He also placed reliance on the Division Bench judgment in the case of **Parekh Aluminex Ltd v. Ashok Commercial Enterprises & Anr.** reported in 2014 SCC OnLine

2304.

5. Having considered the submissions on behalf of the parties, at this stage, it would be relevant to note the definition of section 2(13)(j) of the 2014 Act, which reads as under:

“2. In this Act, unless the context otherwise requires, -

(1) to (12) ***

(13) "loan" means an advance at interest, whether of money or in kind but does not include -

(a) to (i) ***

(j) an advanced of any sum exceeding rupees three lakhs made on the basis of a negotiable instrument as defined in the Negotiable Instruments Act, 1881, other than a promissory note;”

6. Section 13(1) of the 2014 Act which reads as under:

“13. (1) No court shall pass a decree in favour of a money-lender in any suit unless the court is satisfied that at the time when the loan or any part thereof, to which the suit relates was lent, 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.”

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 based 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.

9. The Division Bench of this Court in the case of **Mour Marbles Industries** (supra), while interpreting section 2(13)(j) and section 13 in paragraph 13, held 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 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 under the Negotiable Instruments Act, other than a promissory note would not be ‘a loan’ within its definition as contained under Section 2(13).”

10. The said position has been made clear in paragraph by another Division Bench of this Court in the case of **Parekh Aluminex Ltd.** (supra) in an appeal arising out of the summary suit observed in paragraphs 21, 23, and 24 thus:

“21. The Bombay Money-Lenders Act was intended to do

away with a very serious evil in our society. It was intended to keep control over money-lending transactions and to see that excessive rate of interest was not charged by money-lenders and the only way that such control could be maintained was by providing penalties for doing money-lending business without a proper license from the State. Therefore, in construing an Act of this nature which takes away vested rights and curtails freedom of contract in order to give relief to a particular class, the Court should guard against giving it an interpretation which would extend its scope. The provisions of the Act should be interpreted literally and strictly. Section 2(9)(f) expressly excludes an advance made on the basis of the negotiable instrument as defined under the Negotiable Instruments Act, from the definition of the term 'loan'.

23. The question therefore, is whether the loan in the present case falls within the ambit of sections 2(17) and (10). The appellant's contention that the suit is barred by the provisions of the Bombay Money Lenders Act is not well founded. Section 2(9) defines a loan to mean an advance at interest whether of money or in kind, but does not include a loan or advance of the nature stipulated in clauses (a) to (f2) thereof. The above suit is not hit by the Bombay Money Lenders Act in view of clause (f) of section 2(9) of the Bombay Money Lenders Act. In view of clause (f), the loans do not fall within the purview of the Act as they were advances made on the basis of the negotiable instrument as defined in the Negotiable Instruments Act, 1881 viz. the cheques and the bills of exchange."

24. In our view, in the present case, the loans were advanced by the respondents to the appellants on the basis of negotiable instruments other than promissory notes. This is clear from the facts and circumstances of this case especially the manner in which the amounts were advanced and cheques were drawn. The fact that the cheques were forwarded by the appellants to the respondents after the loans were advanced by RTGS transfers makes no difference. The amounts were advanced by the respondents to the appellants and the cheques and the bills of exchange were issued by the appellant to the respondents as a part of one composite

agreement. In other words, this agreement was entered into at the same time. This is not a case where the amounts were first advanced and thereafter the parties agreed that the borrower would draw the cheques and bills of exchange and execute the said writings. The entire arrangement was agreed upon at the same time. The cheques and bills of exchange were forwarded subsequently in accordance with and pursuant to this agreement which had already been arrived at. There is nothing on record that militates against this view. The appellant has not even pleaded anything to the contrary. It is not the appellant's case that the cheques and the bills of exchange were drawn and the writings were executed independent of the loan pursuant to any understanding arrived at subsequently. It follows therefore that the said loan and were made on the basis of the said negotiable instrument viz. The cheques and the bills of exchange drawn by the appellants in favour of and payable to the respondents."

11. In view of the interpretation of the Division Bench of this Court that a summary suit to enforce a cheque having a term of repayment by interest would be recoverable, would make the loan in question legally recoverable debt and, therefore, in my opinion, the learned Magistrate was fully justified in issuing process against the application. Accordingly, there is neither error of jurisdiction nor a miscarriage of justice.

12. The application has no merit. The application, therefore, stands dismissed. No costs.

13. It is made clear that the learned Magistrate shall not be influenced by any of the observations made in this order, as the observations are made only for the purpose of the issue involved in the present criminal application.

(AMIT BORKAR, J.)