

Santosh

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION**

**SUMMONS FOR JUDGMENT NO. 34 OF 2022
WITH
INTERIM APPLICATION (L) NO. 21983 OF 2022
IN
COMM SUMMARY SUIT (L) NO. 21977 OF 2022**

Dariyav K. Jogani ...Plaintiff

Versus

M/s. Champalal K. Vardhan & Co. & ors. ...Defendants

Dr. Birendra Saraf, Senior Counsel, a/w Mr. Muttahar Khan,
i/b Mr. Dharmesh Joshi, for the Plaintiff/Applicant.
Mr. Mayur Khandeparkar, a/w Mr. Vikramjit Garewal, Mr.
Paresh Shah and Ms. Meghna Mehta i/b M/s. Shah and
Sanghavi, for the Defendants.

CORAM: N. J. JAMADAR, J.

RESERVED ON: 5th SEPTEMBER, 2022

PRONOUNCED ON: 10th NOVEMBER, 2022

ORDER:-

1. This commercial division summary suit is instituted for recovery of a sum of Rs.4,13,58,189/- along with further interest at the rate of 15% p.a. from the date of the suit till payment and/or realization based on the confirmation of the liability.
2. The material averments in the plaint can be summarised as under:

(a) The plaintiff is primarily engaged in the business of real estate. M/s. Champalal K. Vardhan & Co. (M/s. Champalal), defendant no.1, is a registered firm. Defendant nos.2 to 5 are the partners of defendant no.1. Defendants are also primarily engaged in the business of real estate.

(b) The families of the plaintiff (Jogani) and that of the defendants (Vardhan) have had familial relations for several decades as the patriarch of the both the families Mr. Kaulchand Jogani and Mr. Champalal Vardhan have been friends. At the representation of Mr. Champalal, defendant no.2, the plaintiff and other members of Jogani family had advanced amounts to the defendants by way of friendly loans, as and when demanded on mutually agreeable terms to assist the defendants in tiding over financial difficulties.

(c) As a part of the aforesaid arrangement, in the month of January-2004 and June-2008, the plaintiff had advanced a sum of Rs.1,75,00,000/- in two tranches of Rs.25,00,000/- and Rs.1,50,00,000/-, respectively, to the defendants. The latter had agreed to pay interest and, as agreed, did pay interest at the rate of 12% p.a. at the end of every financial year upto 31st March, 2016. The defendants also executed confirmation of accounts at the end of each financial year commencing from FY-2005-2006

to FY-2016-2017. In the confirmation of accounts also the amount charged and paid towards interest at the rate of 12% p.a. has been duly reflected.

(d) In April-2016, the plaintiff recalled the loan. However, defendant no.1 expressed its inability to repay the loan on account of liquidity crunch and assured to pay interest at an enhanced rate at 15% p.a. Accordingly, charge of interest at 15% p.a. was reflected in the confirmation of the accounts for the year ending 31st March, 2017 and 31st March, 2018. Defendant no.1 also deposited TDS on the interest component at 15% p.a. for FY-2016-2017 and FY-2017-2018. However, defendants did not, in fact, pay interest to the plaintiff. Upon further representation and persuasion of the defendants, the plaintiff, in good-faith, and having regard to the longstanding familial relations between Jogani and Vardhan families deferred the claim for interest. Thus, for the FY-2017-2018 to FY-2020-2021, the defendants executed the confirmation of accounts for the amount of Rs.2,26,18,482/- only. This mechanism was resorted to as the defendants would then be not required to deposit TDS on the accrued interest.

(e) From the year 2020 onwards, however, the defendants started to avoid the plaintiff. Despite assurances

the defendants failed to repay the principal amount and the interest accrued thereon. Thus, the plaintiff addressed a letter on 8th September, 2021 calling upon the defendants to repay the principal amount of Rs.1,75,00,000/- along with interest accrued thereon at the rate of 15% p.a. with effect from 1st April, 2017. In the reply dated 28th September, 2021 though defendant no.1 admitted the debt, yet raised a false plea that in a meeting in the month of July-2021, it was mutually agreed between the parties that defendant no.1 would repay only the principal sum of Rs.1,75,00,000/- by 31st December, 2023.

(f) The plaintiff claimed to have categorically controverted the aforesaid claim on behalf of the defendants by addressing a letter dated 20th October, 2021. In response thereto, defendant no.1 again reiterated the alleged mutual understanding between the parties, without disputing the liability. Hence, this suit.

(g) Along with the suit, the plaintiff has filed an application purportedly under Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 ("the Code") seeking, *inter alia*, a direction to deposit the amount of Rs.4,13,58,189/-, provide security for suit claim, and also to restrain the defendants from alienating or otherwise disposing of their assets and properties.

3. Upon the service of writ of summons, the defendants entered appearance. Thereupon the plaintiff has taken out the summons for judgment. The defendants have filed an affidavit-in-reply seeking an unconditional leave to defend the suit.

4. First and foremost, the tenability of the suit under Order XXXVII of the Code is assailed on the ground that there is no agreement to pay interest on the amount advanced by the plaintiff. The institution of the suit without resorting to mandatory pre-institution mediation, the defendants contend, is barred by the provisions contained in Section 12A of the Commercial Courts Act, 2015 ("the Act, 2015"). The defendants contend that the loans, which were advanced in the year 2004 and 2008 and were allegedly been recalled in the year 2016. In this backdrop, the institution of the suit, without pre-institution mediation, in the absence of any averment in the plaint contemplating an urgent interim relief, is in teeth of Section 12A of the Act, 2015.

5. The suit is also stated to be barred by limitation. According to the defendants, the averments in the plaint on the aspect of limitation are mutually destructive. At one breath, the plaintiff avers that the loan was recalled in the month of April-2016. At another breath, the plaintiff has endeavoured to rely

upon the letters dated 28th September, 2021 and 30th October, 2021 to breath life into the suit. However, the reliance on the letters is misplaced as the instant claim is not in accordance with the alleged confirmation of accounts for the year 2018-2019, 2019-2020 and 2020-2021, which the plaintiff wants the Court to read along with the alleged acknowledgment of the liability in the letters dated 28th September, 2021 and 30th October, 2021. Therefore, the suit is wholly time-barred.

6. On merits, the defendants categorically contend that in the correspondence dated 28th September, 2021 and 30th October, 2021, the defendants have specifically referred to the mutual agreement between the parties that no further interest shall be charged and payable from 2017 onwards and that only principal amount would repaid by December-2023. The said agreement, according to the defendants, constitutes a novation of the contract and, thus, the suit is premature.

7. Lastly, the defendants contend that the suit is barred by the provisions contained in Section 13 of the Maharashtra Money-lending (Regulation) Act, 2014 ("the Money-Lending Act, 2014") as the plaintiff has been carrying on business of Money-lending sans a valid licence. On this sole count, the defendants are entitled to an unconditional leave to defend the suit. In the

passing, it is contended that defendant no.3 has retired from the defendant no.1 – firm with effect from 31st March, 2021 and, therefore, the suit qua defendant no.3 suffers from vice of mis-jonder of parties.

8. An affidavit-in-rejoinder is filed by the plaintiff controverting the contentions in the affidavit-in-reply.

9. I have heard Dr. Saraf, the learned Senior Counsel for the plaintiff and Mr. Khandeparkar, the learned Counsel for the defendants, at some length. With the assistance of the learned Counsel for the parties, I have perused the pleadings, affidavits-in-reply and rejoinder thereto and the documents placed on record.

10. It may be apposite to note uncontroverted facts before considering the rival submissions. The fact that the plaintiff had advanced a sum of Rs.1,75,00,000/- in two tranches of Rs.25,00,000/- and Rs.1,50,00,000/- is incontrovertible. No endeavour is made on behalf of the defendants to contest the fact that the said amount was advanced by way of loan. Though the defendants have endeavoured to controvert the claim for interest on the said loan yet, indisputably, interest was charged and paid on the said amount at the rate of 12% p.a. till the year 2016. The confirmation of accounts, admittedly executed on

behalf of defendant no.1 for the FY-2005-2006 to FY-2015-2016, wherein the principal loan amount along with interest component charged at the rate of 12% p.a. have been distinctly shown, seal the issue on both the quantum of the principal amount and application and payment of interest thereon. The parties are not at issue over the fact that interest was charged at the rate of 15% p.a. for the FY-2016-2017. Nor there is any controversy over the execution as such of the confirmation of accounts for the FY-2017-2018, FY-2018-2019, FY-2019-2020 and FY-2020-2021. For all four years, the outstanding amount stood freezed at Rs.2,26,18,482/-, the closing balance as of 31st March, 2018.

11. At the core of the controversy is the liability to pay interest on the said amount of Rs.2,26,18,482/- at the allegedly agreed rate of 15% p.a. with effect from 1st April, 2018. The defendants contend that it was agreed between the parties that no interest shall be charged and paid on the said amount and, secondly, it was also mutually agreed between the parties that the defendants would repay only the principal amount of Rs.1,75,00,000/-, by December, 2023.

12. In the light of the aforesaid uncontroverted facts and core controversy, the submissions canvassed on behalf of the parties

deserve consideration. Dr. Saraf, the learned Senior Counsel for the plaintiff, would urge that in the light of the indubitable advance of the loan amount and confirmations of the liability by executing successive balance confirmations, comprising the principal amount as well as interest thereon, at agreed rate, and also the acknowledgment of the liability in response to the demand notice addressed on behalf of the plaintiff, vide replies dated 28th September, 2021 and 30th October, 2021, there is no semblance of contest. Faced with such situation, according to Dr. Saraf, the defendants have resorted to technical and disingenuous defences.

13. Dr. Saraf urged that the challenge to the institution of the suit, for want of pre-institution mediation, does not deserve any countenance as alongwith the plaint the plaintiff filed an application for urgent interim relief. Resultantly, the interdict contained in Section 12A of the Act, 2015 does not come into play. The defence of illegal money-lending, according to Dr. Saraf, in the facts of the case, can only be said to be sham and illusory. Such defence is the last refuge of a debtor who claims illegal money lending in desperation to obviate otherwise admitted liability. Dr. Saraf laid emphasis on the fact that the defendants have not at all endeavoured to meet the principal

case of the plaintiff based on balance confirmation. In any event, even if maximum latitude is given to the defence, especially on the aspect of liability to pay interest, a decree must follow for the amount for which the balance confirmations have been executed for three successive years, 2018-2019, 2019-2020 and 2020-2021, urged Dr. Saraf.

14. Mr. Khandeparkar, the learned Counsel for the defendants, joined the issue by canvassing a submission that mere filing of an interim application mechanically incorporating the prayers for interim reliefs would not be sufficient to wriggle out of the mandatory requirements of Section 12A of the Act, 2015. Mr. Khandeparkar stoutly submitted that if the provisions of Section 12A are construed in such a manner, the very object of introducing the salutary mechanism of pre-institution mediation would be frustrated. Pre-institution mediation can be obviated by a device of merely filing of an application for interim relief, howsoever ill-justified it may be. Therefore, according to Mr. Khandeparkar, the Court must inquire into the necessity and justifiability of the prayer for interim relief and for that purpose the plaint needs to be read meaningfully to ascertain as to whether there exists an element of urgency which would justify interim relief. Lest, the mandate

of Section 12A would be rendered otiose, urged Mr. Khandeparkar.

15. A strong reliance was placed on the Division Bench judgment of this Court in the case of *Deepak Raheja vs. Ganga Taro Vazirani*¹ and the judgment of the Supreme Court in the case of *Patil Automation Private Limited and others vs. Rakheja Engineers Private Limited*², wherein the mandatory nature of pre-institution mediation envisaged under Section 12A of the Act, 2015 has been underscored. In the facts of the case, according to Mr. Khandeparkar, there is not a shred of material to show that any urgent interim relief can be said to have been contemplated whilst instituting the suit.

16. Mr. Khandeparkar further submitted that the defence that the transaction in question is hit by the bar contained in Section 13 of the Money-Lending Act, 2014 is borne out by the very documents relied upon by the plaintiff to substantiate her claim. There is material on record to indicate that the plaintiff (along with plaintiffs in the companion suits) has been dealing in the business of illegal money-lending. Since the transaction in question does not fall in any of the exclusionary clauses of Sub-section (13) of Section 2 of Money-Lending Act, 2014, and

¹2021 SCC Online Bom 3124.

²2022 SCC Online SC 1028.

there is no material to show that the advance can be said to be a *bona fide* business transaction, there is no other go but to draw an inference of illegal money-lending sans a valid licence.

17. It was further urged that the question as to whether the transaction falls within the mischief of “loan” proscribed by Money-Lending Act, 2014 is essentially a jurisdictional fact and thus raises a triable issue. To lend support to this submission, Mr. Khandeparkar placed reliance on a judgment of the Supreme Court in the case of *Budhu Sao and ors. vs. Baleswar Prosad Sao and anr.*³ and a judgment of this Court in the case of *Ramprasad Bhagirath Agrawal vs. Uttamchand Danmal Pande*⁴.

18. Lastly, Mr. Khandeparkar submitted that the very averments in the plaint workout the retribution of the plaintiff's claim. On the one hand, the plaintiff banks upon the replies dated 28th September, 2021 and 30th October, 2021 to bolster up the case that the defendants acknowledged the debt. On the other hand, the plaintiff avers that the contents of those letters are false and misleading. It was thus submitted that the plaintiff cannot be permitted to approbate and reprobate. To this end, reliance was sought to be placed on a judgment of the

³(1985) 1 Supreme Court Cases 565.

⁴2008 SCC Online Bom 1036.

Supreme Court in the case of *R. N. Gosain vs. Yashpal Dhir*⁵ wherein it was enunciated that law does not permit a person both to approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that, “a person cannot say at one time that a transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage.”

19. I have given anxious consideration to the aforesaid submissions.

20. To being with, the challenge to the institution of the suit for not resorting to mandatory pre-institution mediation. Sub-section (1) of Section 12A of the Act, 2015 reads as under:

“Section 12-A(1) A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government.”

21. On a plain reading the text of Section 12A(1) bars the very institution of the suit without exhausting the remedy of the pre-institution mediation, if the suit does not contemplate any urgent interim relief.

5(1992) 4 Supreme Court Cases 683.

22. This Court in the case of *Deepak Raheja* (supra) had an occasion to consider whether the aforesaid provision is mandatory or directory in nature. After an analysis, this Court ruled that Section 12A is mandatory and a commercial suit of specified value, which does not contemplate an urgent interim relief under the Act of 2015 cannot be instituted unless the plaintiff exhausts the remedy of pre-institution mediation.

23. In *Patil Automation Ltd.* (supra), the Supreme Court held that the provision is mandatory. The observations in paragraph 80 encapsulate the reasons.

“80. We may sum-up our reasoning as follows:

The Act did not originally contain Section 12A. It is by amendment in the year 2018 that Section 12A was inserted. The Statement of Objects and Reasons are explicit that Section 12A was contemplated as compulsory. The object of the Act and the Amending Act of 2018, unerringly point to at least partly foisting compulsory mediation on a plaintiff who does not contemplate urgent interim relief. The provision has been contemplated only with reference to plaintiffs who do not contemplate urgent interim relief. The Legislature has taken care to expressly exclude the period undergone during mediation for reckoning limitation under the Limitation Act, 1963. The object is clear. It is an undeniable reality that Courts in India are reeling under an extraordinary docket explosion. Mediation, as an Alternative Dispute Mechanism, has been identified as a workable solution in commercial matters. In other words, the cases under the Act lend themselves to be resolved through mediation. Nobody has an absolute right to file a civil suit. A civil suit can be barred absolutely or the bar may operate unless certain conditions are fulfilled. Cases in point, which amply illustrate this principle, are Section 80 of the CPC and Section 69 of the Indian Partnership Act. The language used in Section 12A, which includes the word ‘shall’, certainly, go a long way to assist the Court to

hold that the provision is mandatory. The entire procedure for carrying out the mediation, has been spelt out in the Rules. The parties are free to engage Counsel during mediation. The expenses, as far as the fee payable to the Mediator, is concerned, is limited to a one-time fee, which appears to be reasonable, particularly, having regard to the fact that it is to be shared equally. A trained Mediator can work wonders. Mediation must be perceived as a new mechanism of access to justice. We have already highlighted its benefits. Any reluctance on the part of the Court to give Section 12A, a mandatory interpretation, would result in defeating the object and intention of the Parliament. The fact that the mediation can become a non-starter, cannot be a reason to hold the provision not mandatory. Apparently, the value judgment of the Law-giver is to give the provision, a modicum of voluntariness for the defendant, whereas, the plaintiff, who approaches the Court, must, necessarily, resort to it. Section 12A elevates the settlement under the Act and the Rules to an award within the meaning of Section 30(4) of the Arbitration Act, giving it meaningful enforceability. The period spent in mediation is excluded for the purpose of limitation. The Act confers power to order costs based on conduct of the parties.

24. It is imperative to note that taking note of the cleavage of judicial opinion on the aspect of mandatory or directory nature of the said provision and the consequences the declaration that the provision is mandatory entails, the Supreme Court resorted to the device of prospective declaration, by ordering as under:

“92. Having regard to all these circumstances, we would dispose of the matters in the following manner. We declare that Section 12A of the Act is mandatory and hold that any suit instituted violating the mandate of Section 12A must be visited with rejection of the plaint under Order VII Rule 11. This power can be exercised even *suo moto* by the court as explained earlier in the judgment. We, however, make this declaration effective from 20.08.2022 so that concerned stakeholders become sufficiently informed. Still further, we however direct that in case complaints have been already rejected and no steps have been taken within the period of limitation, the matter cannot be reopened on the basis of this

declaration. Still further, if the order of rejection of the plaint has been acted upon by filing a fresh suit, the declaration of prospective effect will not avail the plaintiff. Finally, if the plaint is filed violating Section 12A after the jurisdictional High Court has declared Section 12A mandatory also, the plaintiff will not be entitled to the relief.”

25. Since this Court in the case of *Dipak Raheja* (supra) had ruled the mandatory nature of Section 12A on 1st October, 2021 and the instant suit came to be lodged on 11th July, 2022, the plaintiff can not claim the benefit of prospective declaration i.e. with effect from 20th August, 2022. The question that thus wrenches to the fore is whether the plaintiff succeeds in taking the suit out of purview of Section 12A on the count that the suit does contemplate an urgent interim relief?

26. As noted above, the plaintiff has filed an interim application seeking reliefs of direction for deposit, furnishing security and restraint against alienation of the property. Interim reliefs which are essentially in the nature of attachment before judgment are purportedly sought under Order XXXVIII Rule 5 of the Code.

27. Mr. Khandeparkar would urge that mere filing of an application without foundation in the plaint of the necessity and urgency of interim reliefs is of no avail. In contrast, Dr. Saraf submitted that the contemplation as to the necessity of an

urgent interim relief is that of the plaintiff. Therefore, once an application for interim relief is filed along with the plaint, the bar under Section 12A, by the very phraseology thereof, would not operate.

28. In the case of *Patil Automation* (supra) the Supreme Court has emphasized the legislative object behind introduction of pre-institution mediation as a mandatory measure. Evidently, the outlet for not resorting to pre-institution mediation is provided by the text of Section 12A itself, namely, a suit contemplating an urgent interim relief. In my view, if the said outlet is construed too loosely in the sense that mere filing of an application for interim relief, howsoever unjustified and unwarranted it may be, would take the suit out of the purview of Section 12A, it may run counter to the legislative object. The interdict contained in Section 12A can be easily circumvented by filing an application for interim relief without their being any reason or basis therefor. Such an interpretation may not advance the legislative object.

29. The Parliament, it seems, has designedly used the expression, “a suit, which does contemplate any urgent interim relief”. This phrase cannot be interchangeably used with the expression, “where the plaintiff seeks an urgent interim relief...”.

The test would be whether the suit does contemplate an urgent interim relief.

30. In a given case, the Court may be justified in embarking upon an inquiry as to whether there is an element of justifiability in the claim for urgent interim relief or such a prayer is a mere subterfuge to overcome the bar under Section 12A. At the same time, the scope of such an inquiry would be extremely narrow. Such an inquiry cannot partake the character of determination of the prayer for interim relief on its merits. It cannot be urged that if the Court is disinclined to grant interim relief then the justifiability of the institution of the suit, without pre-institution mediation, can itself be questioned. Therefore, the Court may be called upon to steer clear of two extremes.

31. In my considered view, the proper course would be to assess whether there are elements which *prima facie* indicate that the suit may contemplate an urgent interim relief irrespective of the fact as to whether the plaintiff eventually succeeds in getting the interim relief. In a worst case scenario, where an application for interim relief is presented without there being any justification whatsoever for the same, to simply overcome the bar under Section 12A, the Court may be justified in recording a finding that the suit in effect does not

contemplate any urgent interim relief and then the institution of the suit would be in teeth of Section 12A notwithstanding a formal application.

32. On the aforesaid premise reverting to the facts of the case, the thrust of the submission of Mr. Khandeparkar was that there was no element of urgency as the loan was advanced in the year 2004 and 2008 and, allegedly, recalled in 2016. In the circumstances, no interim relief could have been legitimately pressed for. Averments in the plaint and the interim application that the defendants were alienating the assets with a view to delay and defeat the decree which may eventually be passed, were, according to Mr. Khandeparkar, actuated by the design to sidestep the bar under Section 12A.

33. I am afraid to accede to aforesaid submission. There is contemporaneous material to indicate that before the institution of the suit the plaintiff had raised the concern that the defendants were in the process of alienating the assets. In the demand notice dated 8th September, 2021 the plaintiff asserted, *inter alia*, that it was learnt from reliable sources that the defendants were taking steps to alienate several of their assets and properties. In response to the said notice, the defendants, in fact, remonstrated by asserting that the said allegation was a

figment of imagination and also called upon the plaintiff to desist from fanning such rumors. The aforesaid pre-suit correspondence thus indicates that the plaintiff apprehended that the defendants may alienate the assets and properties and she would be left in the lurch. From this standpoint, in the facts of the case, it cannot be said that the prayer for interim relief was wholly unwarranted or unjustifiable. I am, therefore, not inclined to accede to the challenge to the institution of the suit for want of pre-institution mediation.

34. This takes me to the quality of defence rested in the bar for passing of a decree under Section 13 of the Money-Lending Act, 2014 on the premise that the transaction suffers from the vice of illegal money-lending. Mr. Khandeparkar, the learned Counsel for the defendants, would urge that the material on record indicates that the plaintiff recovered interest from the defendants at a stiff rate of 12% p.a. The plaintiff endeavoured to further enhance the rate of interest to 15% p.a. which can only be said to be exorbitant one. Advance of money on interest, in question, cannot be said to be a stray incident as the very documents banked upon by the plaintiff namely Form-26-AS indicating the tax deducted at source show that there is a pattern in advancing money on interest to many persons and

entities. Therefore, a clear case of illegal money-lending is made out.

35. Support was sought to be drawn from the pronouncement of the Supreme Court in the case of *Budhu Sao* (supra) wherein, in the context of the provisions contained in Bihar Debt Relief Act, 1976, the Supreme Court observed that the question whether the person who had lent money is money-lender or not is undoubtedly a question relating to jurisdictional fact. Attention of the Court was also invited to the judgment of this Court in the case of *Ramprasad Bhagirath Agrawal* (supra) wherein, in the facts of the said case, which revealed several instances of dealing in money-lending, this Court held that the bar under Section 10 of the Bombay Money-Lending Act, 1946 (Precursor to Money-Lending Act, 2014) would come into play.

36. Per contra, Dr. Saraf strenuously submitted that the affidavit-in-reply as well as the replies to the demand notice dated 28th September, 2021 and 30th October, 2021 do not divulge the alleged incidents of money-lending. A bald contention in the affidavit-in-reply that the plaintiff deals in money-lending as a business, which has assumed a standard form defence, cannot sustain a triable issue, urged Dr. Saraf.

37. In the case at hand, the plaintiff asserts that friendly loans were advanced on account of familial relations. In effect, the plaintiff seeks to assert that the loans were not advanced, on interest, by way of business. Exclusion under Clause (l) of Sub-Section (13) of Section 2, which defines 'loan', is claimed by the plaintiff. The relevant part of Sub-section (13) of Section 2 of Money-Lending Act, 2014 reads as under:

"Section 2(13) "loan" means an advance at interest whether of money or in kind but does not include,-

.....

(l) an advance made *bonafide* by any person carrying on any business, not having for its primary object the lending of money, if such advance is made in the regular course of his business;

....."

38. While construing Clause (l) extracted above, this Court has consistently held that mere advance of money, on interest, by itself, is not sufficient to bring the case within the tentacles of the provisions of Money-Lending Act, 2014. An advance made *bona fide* by any person, who carries on any business if such advance is made in the regular course of business is excluded by Clause (l) provided the primary object should not be lending of money, on interest. To qualify as a business, a course of lending money would require the elements of system, continuity and repetition. One or few instances of lending money, on

interest, may not satisfy the description of lending money as a business.

39. A useful reference, in this context, can also be made to a judgment of this Court in the case of *Base Industries Groups & Anr. vs. Mahesh P. Raheja & Ors.* wherein the learned single Judge had traced the pronouncements on the transactions which fall within the mischief of money lending and culled out the legal propositions in the following words:

"**36.** 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 moneylending'. 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."

40. The aforesaid pronouncement underscores that emphasis is on the word “business” and not “money-lending”. It has to be seen whether the instances of money-lending were by way of “business”. Number of instances, by themselves, are not determinative. Several isolated stray instances do not constitute a business of money-lending. Onus is on the defendant who raises money-lending as a defence to show that the transaction is forbidden by the Act of 2014.

41. In the instant case, indisputably, the plaintiff had charged and collected interest upto March, 2016. The TDS certificates do indicate that interest was received from other entities as well. However, those entities include banks and financial institutions also. That by itself, in my considered view, can not bring the transaction in question within the tentacles of the ‘loan’ envisaged by Money-Lending Act, 2014. It is imperative to note that the defence of illegal money-lending did not see the light of the day till the affidavit-in-reply came to be filed. On the contrary, the defendants asserted that it was agreed between the parties that the principal amount would be repaid by December-2023. Moreover, the transactions of charging and receiving of interest have been duly documented and accounted for. In the circumstances, I am not persuaded to agree with the

submission of Mr. Khandeparkar that, on this count, the defendants are entitled to an unconditional leave to defend the suit.

42. The edifice of the defence of suit being barred by limitation was sought to be built on the alleged inconsistency in the case of the plaintiff. I find it superfluous to delve deep into this issue for the simple reason that the execution of the balance confirmations has been specifically admitted in the affidavit-in-reply. It is trite that a balance confirmation furnishes a sustainable foundation for institution of a summary suit.

43. A profitable reference in this context can be made to a Full Bench judgment of this Court in the case of *Jyotsna K. Valia vs. T. S. Parekh & Co.*,⁶ wherein it was enunciated that a suit based on duly confirmed accounts by the defendant is tenable as a summary suit. Paragraph 29 of the said judgment reads as under:

“29. In so far as the 'settled account is concerned,' it is no doubt true as noticed by the learned single Judge, that the various judgments adverted to, for holding that the summary suit would lie on a settled account, either of the Privy Council or of the Supreme Court did not arise from suits filed as summary suits. However, after the judgment of the Privy Council (Elvira L. Rodrigues) Sequeira (supra) which has been considered by the Supreme Court in Hiralal & Ors. (supra), a summary suit on a settled account, duly confirmed by the Defendant is maintainable as it is an acknowledgement by the Defendant in the ledger in which

62007(4) Mh.L.J. 517.

mutual accounts have been entered and the accounts settled between them. Such settling of accounts gives rise to a written contract on a fresh cause of action, with an implied promise to pay the amount settled. A summary suit would therefore lie on 'Settled accounts duly confirmed by the defendants. Issue (1) is answered accordingly."

44. Dr. Saraf was justified in placing reliance on a judgment of a learned Single Judge of this Court in the case of *Sun and Sand Hotel Limited vs. M/s. V. V. Kamat, HUF*⁷ wherein in paragraph 27, it was enunciated as under:

"27. In *Khan Chand v. Dayaram*, AIR 1929 Lahore, 263, affirmed by the Supreme Court in the above case) the Division Bench held that even a balance struck and accepted implies a promise to pay.

In *Gordon Woodroffe & Co. v. Sk. M.A. Majid & Co.*, , the Supreme Court held :

"The legal position is that the accounts are settled or stated if they are submitted and accepted as correct by the other side to whom the accounts have been rendered. Such a statement of accounts need not be in writing, nor is it necessary, that before the accounts are settled, they should be gone into by the parties and scrutinized and supported by vouchers. It is sufficient if the accounts are accepted and such acceptance may be inferred by conduct of parties."

Thus, the balance confirmation letters furnish the plaintiff a cause of action on which the suit is maintainable."

45. As noted above, in the balance confirmations, for four years preceding the institution of the suit, the outstanding amount stood freezed at Rs.2,26,18,482/-. The plaintiff endeavoured to impress upon the Court that it was so freezed so

⁷2003(3) Mh.L.J. 932.

as to relive the defendants of the burden to deduct the tax at source. The defendants, in contrast, contend that the parties had agreed that no interest would be chargeable and, in fact, there was a mutual agreement between the parties in the month of July-2021 that the defendant would repay the principal amount of Rs.1,75,00,000/- only by 31st December, 2023. This stand of the defendants is manifested in the communications dated 28th September, 2021 and 30th October, 2021.

46. The situation which thus obtains is that, firstly, the advance of Rs.1,75,00,000/- is indisputable. Secondly, confirmation of the liability as of 1st April, 2021 to the tune of Rs.2,26,18,482/- is also rather admitted. The question as to whether the defendants are liable to pay interest on the said amount from 1st April, 2018, as claimed by the plaintiff, or the liability stood freezed at the very amount thence, is essentially a matter for adjudication.

47. I am not persuaded to accede to the submission of Dr. Saraf that since interest was paid for years together, it can be assumed that there was a tacit understanding to pay interest though the amount stood freezed, in the face of the balance confirmation for three successive years preceding the institution of the suit. It can be legitimately urged that the successive

balance confirmations reflect the agreement between the parties and disrupt the earlier course of payment of interest.

48. Likewise, the submission on behalf of the defendants that the plaintiff is guilty of approbating and reprobating whilst relying upon the replies dated 28th September, 2021 and 30th October, 2021 does not warrant a definitive determination at this stage. It would be a matter for trial as to whether there was an agreement between the parties that the defendants were to repay the principal amount only by 31st December, 2023.

49. For the forgoing reasons, in my view, as the liability to the extent of Rs.2,26,18,482/-, acknowledged under balance confirmations, is in the nature of an admitted liability, the defendants cannot be granted leave to defend the suit without depositing the said amount. Hence, I am inclined to grant conditional leave to defend the suit.

50. Thus, the following order:

: O R D E R :

- (i) The defendants are granted leave to defend the suit on the condition of deposit of a sum of Rs.2,26,18,482/- within a period of six weeks from the date of this order.

- (ii) If the aforesaid deposit is made within the stipulated period, this suit shall be transferred to the list of Commercial Causes and the defendants shall file their written statement within a period of four weeks from the date of deposit;
- (iii) If this conditional order of deposit is not complied with, within the above stipulated period, the plaintiff shall be entitled to apply for an *ex-parte* decree against the defendants after obtaining a non-deposit certificate from the Prothonotary and Senior Master of this Court.
- (iv) The Summons for Judgment accordingly stands disposed.

In view of disposal of the Summons for Judgment, Interim Application (L) No.21983 of 2022, also stands disposed.

[N. J. JAMADAR, J.]