IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 435 OF 2013

Shri. Gulabrao Mahadeo Ghorpade
Age : 55 Years, Occu. : Army Retired,
Resident at : Flat No.61/1A/9, Gurukripa,
Niwas, Aundh Camp, Kate Vasti
Pimpale Soudagar,
Pune 411 027 ...Appellant

vs.

1. Shri Chandrakant Pandharinath Nehate
Age : Adult, Occu. : Business,
Resident at : Krushikesh Bungalow
In front of sainath colony,
Near Bhagirathi Nagar NDA Road,
Warje Malwadi Pune-58.

2. The State of Maharashtra and Anr. ...Respondents

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Mr. S. A. Sawant a/w Mr. Abhishek Matkar a/w Ms. Samiksha S. Mane, Advocate for the Appellant.
Ms. Nasreen Ayubi – Appointed Advocate for Respondent No.1.
Mr. S. R. Agarkar – APP for the Respondent No.2-State.

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CORAM : S. M. MODAK, J.

DATE : 9TH AUGUST, 2023

JUDGMENT :-

1. Heard learned Advocate Shri. Sawant for the

Appellant-Complainant and learned Advocate Ms. Ayubi appointed by the High Court Legal Services Committee for the Respondent-Accused. The Court of Additional Judicial Magistrate First Class Pune, *vide* judgment and order dated 30th July, 2012 was pleased to acquit the Respondent for the offence punishable under section 138 of Negotiable Instruments Act. All the points were answered in favour of the Appellant except the point about carrying a money lending business by the complainant without license.

2. It was held against the complainant and finally the Respondent was acquitted. This is the complainant's Appeal. Parties will be referred to by their original status.

3. <u>So the issue involved in this Appeal is whether on the basis of the documents produced by the accused, can it be said that the complainant was carrying a money lending business and without license</u>. The relevant findings are para no.10 to para no.17. According to learned Advocate Shri. Sawant for the complainant, the trial Court has not considered the entire provisions of Bombay Money Lenders Act and particularly the meaning of business of money

lending, loan, whereas, according to learned Advocate Ms. Ayubi when there are certified copies of documents that is complaint and judgment at Exhibit-25, 26, 27, 28 and 29 are filed what more is required.

4. If loan is advanced, on the basis of negotiable instrument, it falls within the meaning of a 'loan' and it does not fall within the meaning of 'business of money lending'. According to him, section 10 of the said Act prevents the Court from passing a money decree in a suit for recovery of a loan advanced by money lenders without a license. According to him, there is prohibition for suit only and it is not applicable for prosecution under section 138 of Negotiable Instrument Act. To buttress his submission he relied upon a judgment in place of ***Parekh Aluminex Limited Vs. Ashok Commercial Enterprises and another***[1]

5. The complainant advanced an amount on several occasion to the accused by way of hand loan. The total amount of Rs.1,50,000/-. The details are as follows:

(i) Rs.50,000/-(Rupees Fifty Thousand only) by cheque

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dated 7th December, 2009.

(ii) Rs.50,000/-(Rupees One Lakh Fifty Thousand Only) by cheque dated 7th September, 2009.

(iii) Rs.30,000/- (Rupees Thirty Thousand only) by cheque on 18th February, 2010 by way of cheque.

(iv) Rs.20,000/- (Rupees Twenty Thousand) by way of cash on 17th May, 2010.

6. There is receipt executed by accused on 17th May, 2010 at Exhibit-17 (page no.39). For repayment accused issued a cheque drawn on Bank of Maharashtra, Paud road branch for 1,50,000/- (Rupees One lakh Fifty Thousand only). It got dishonored due to insufficiency of funds. Complainant issued a notice dated 19th April, 2011. Respondent issued reply dated 2nd May, 2011 Exhibit-22 (page no. 48). Accused demanded certain documents and denied compliance with the notice unless those documents are supplied. Complainant has not complied with the said requisition. Complaint was filed. During trial complainant examined himself and relied upon documents. Accused cross-examined him and produced certain documents.

7. Learned Advocate Ms. Ayubi tried to contend that the liability is not proved. She also submitted that in fact her client has repaid the entire amount by installments. My attention is invited to answer given to question no.14 recorded under section 313 of Code of Criminal Procedure Code (page no.62). It is true that accused has admitted the payment by way of cheque amount of Rs.1,30,000/-(Rupees One Lakh Thirty Thousand Only) but denied receipt of Rs.20,000/- (Rupees Twenty Thousand Only). He has also pleaded about repayment of that amount.

8. It is true that the theory of repayment is neither substantiated by adducing evidence or not by cross-examination of the complainant. So theory of repayment has failed. In order to prove advancing Rs.1,50,000/- (Rupees Fifty Thousand Only), there is receipt on (page no.39). It has given the details as to how monies were advanced by cheque and last advance through cash of Rs.20,000/- (Rupees Twenty Thousand Only). The accused has simply denied the execution of this receipt but he could not substantiate his contention. The trial Court has rightly

accepted this receipt.

9. So far as issuance of cheque is concerned, it is also not disputed. The presumption under section 139 will come into force, trial Court has elaborately discussed about the evidence from para no.8 and para no.9 of the judgment.

10. I do not find any reason to disagree with those findings. It is supported by evidence on record. The provisions of Money Lending Act needs to be looked into. It is true that during cross-examination of the complainant receipts at Exhibit-27 to 29 are shown to him. He has admitted them. But denied repayment. Whereas, Exhibit-25, Exhibit-26, Exhibit-26-A pertains to judgment and two complaints filed under section 138 against other accused persons. It is on the basis of these documents, the trial Court opined that the complainant is a money lender and as such, prosecution under 138 of Negotiable Instruments Act is not maintainable.

11. I read the relevant observations in para nos.10, 11. It consists of submissions. Whereas, para no.12 refers to the documents and persons to whom the monies advanced.

Para no.14 deals with the provisions of Negotiable Instrument. In para no. 15, the provision of section 10 of Bombay Money Lenders Act, 1946 is reproduced. Whereas, para no.16 few of judgments are reproduced and one observation. What transpires is that there is no discussion about the provisions of the said Act. If your are non-suiting a litigant you have to discuss the provisions of law and what are the facts. No doubt the complainant has advanced amount to two different persons and also lodged prosecution under section 138 of Negotiable Instruments Act, this is not sufficient.

12. The provisions of section 2 (2) defines the meaning of the 'business of money lending'. It is nothing but the business of advancing loan. Whereas, meaning of word 'loan' is given in section 2(9), it means advance at interest whether in money or in kind at an interest but does not include certain categories. They are excluded from meaning of the word 'loan'. They are from Clause (a) to Clause (g). One of the category is if the monies deposited in Government post office bank, it cannot be considered as a

loan. So to say it will not fall within the business of money lending. As said above there is bar under section 10 of the said Act for passing of a decree. No doubt there is no prohibition for a prosecution under section 138 of Negotiable Instrument Act. It cannot be for the reason that this Act was enacted in the year 1946. Whereas, the provisions relating to section 138 are incorporated later on. So if there is a suit for recovery of money which is by way of business of money lending, there cannot be any decree mean to say it can not be enforced through Court of law. There is meaning of debt of liability given in section 138 of Negotiable Instruments Act. It must be legally recoverable debt or liability. So if a person had advanced money by way of business and it is not holding a license it cannot be legally recoverable debt.

13. The emphasis of Shri. Sawant is on the exclusion as per clause (f) to section 2 (g). If money is advanced on the basis of Negotiable Instrument it is excluded so to say if there is a bill of exchange or a cheque and monies are advanced it can be considered as a loan. The category of

promissory note is excluded. In this case cheque was issued towards repayment of those amounts.

14. The observations in case of ***Parekh Aluminex Limited*** (**Supra**) are relevant. That was a summary suit for recovery of loan. Question was raised about granting of leave to defend the suit. If loan was advanced on the basis of Negotiable Instrument then it can be considered as a loan. The receipt at Exhibit-17 (page no.39) mentions that cheque in question was issued. It was post dated cheque. The complainant was permitted to deposit on a due date. These facts were not considered by the trial Court. So it can be said that money was advanced on the basis of Negotiable Instrument and certainly falls within the meaning of the word loan. It does not fall within the meaning of business of advancing money. So the trial Court erred in non-suiting the complainant.

15. The accused tried to take defence about re-payment, however, he could not substantiate it. There is due compliance about issuance and service of notice. So finding of the trial Court requires to be set aside. The

complainant has proved the ingredients for offence under Section 138 of Negotiable Instruments Act. The accused needs to be dealt with as per law. Mr. Sawant submitted that instead of remanding the matter this Court can decide this matter. He submitted that there is a punishment in the form of imprisonment and fine being twice amount of the cheque. I heard both the learned Advocate on the point of sentence. Sentence is optional, either it may be imprisonment for two years or fine which may be twice amount of the cheque or both. I do not think it will be proper to impose sentence of imprisonment but the complaint is pending since 2011. I think, respondent can be imposed with the fine being twice the amount of the cheque. There is a request for leniency from imposing twice the amount of the cheque. It can't be accepted when this Court is not imposing the sentence of imprisonment. Hence, the following order :-

ORDER

(i) Appeal is allowed.

(ii) The judgment and order dated 30th July, 2012 passed by Additional Chief Judicial Magistrate, Pune in S.C.C. No.10066 of 2011 is set aside.

(iii) The Respondent Shri.Chandrakant Pandharinath Nehate is convicted for the offence punishable under Section 138 of NI Act. He is directed to pay fine of twice the amount of the cheque that comes to Rs.3 lakhs.

(iv) The amount be deposited before the Court of Additional Chief Judicial Magistrate, Pune within 12 weeks from today. From the deposited amount of Rs. 2 lakhs Fifty Thousand be paid to the complainant and Rs. 50 thousand be appropriated to the government treasury.

(v) If there is a failure to pay the amount of Rs.3 lakhs within 12 weeks, he is directed to undergo sentence of simple imprisonment for one month.

16. Appellant to communicate this order to the respondent and to produce proof of service before the trail Court in case of need.

17. Learned Advocate for Respondent No.1 be paid fees as per the Rules.

[S. M. MODAK, J.]