IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2138 OF 2023

Amar Juice and Restaurant LLP & Anr. ..Petitioners
Versus
State of Maharashtra & Anr. ..Respondents

Mr. Rajiv Patil, Sr. Advocate a/w. Kevin Pereira a/w. Aditya Rai a/w. Nitin Rai i/b. Ramchandra S. Rane for Petitioners.

Smt. M. R. Tidke, APP for State/Respondent No.1.

Mr. Dipen Furia a/w. Harsh Kesharia i/b. M/s. Shah and Furia Associates for Respondent No.2.

CORAM : SARANG V. KOTWAL, J.
DATE : 6 JULY 2023

PC :

1. The Petitioners have challenged the order dated 23/09/2022 passed by the Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai, issuing process against the Petitioners and other accused under section 138 r/w. 141 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'N.I.Act'.) The said order was challenged by the Petitioners by way of Criminal Revision Application No.55 of 2023 before the Additional Sessions

Judge, Greater Mumbai. That Revision Application was dismissed vide order dated 10/05/2023. Both these orders are challenged in this writ petition.

2. Heard Shri. Rajiv Patil, learned Senior counsel for the Petitioners, Shri. Dipen Furia, learned counsel for the Respondent No.2 and Smt. Tidke, learned APP for the State/Respondent No.1.

3. The Petitioners are the original Accused Nos.1 and 2 in C.C.No.3785/SS/2023 before the Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai. The case of the complainant i.e. Respondent No.2 herein is that the Accused No.1 is a limited liability partnership firm having juice and hotel business. The Petitioner No.2 is a partner and the authorized signatory of the accused No.1 firm. There are other averments in respect of the other accused. It is further mentioned in the complaint that the Petitioner No.2 and the other two accused i.e. Accused Nos.3 and 4 were responsible for the day to day affairs of the firm. In the year 2016, the accused approached the complainant through a common friend and sought financial help. Accordingly, the complainant

(Respondent No.2 herein) on 06/04/2016 extended a business loan of Rs.50 lakhs. The Accused No.1/firm issued a promissory note and confirmation & Undertaking in favour of the complainant; signed by the Petitioner No.2 on behalf of the accused No.1 and others. It is further mentioned in the complaint that the accused No.1 regularly paid the interest up to 30/09/2019 and thereafter defaulted in making the payment of the same; thereby huge amount of interest remained to be paid. It is further avered that, towards repayment of the principal amount of Rs.50 lakhs along with mutually agreed accrued interest and compensation amount, the accused No.1 issued a cheque of Rs.75 lakhs on 08/06/2022 drawn on the Federal Bank, Andheri Branch, Mumbai. It was dishonoured as the funds were insufficient. After that, the demand notice was sent and after following the due procedure this complaint was filed.

4. Learned Metropolitan Magistrate issued process against all the accused i.e. Accused Nos.1 to 4 for commission of the offence punishable U/s.138 r/w. 141 of the N.I.Act, vide order dated 23/09/2022. The said order was challenged in the Criminal

Revision. That Revision was dismissed, as mentioned earlier.

5. Learned Senior counsel appearing for the Petitioners made following submissions:

His principal submission was that the transaction was in the nature of money lending transaction. The complainant did not have a money lending license and, therefore, the transaction was in violation of the Maharashtra Money-Lending (Regulation) Act, 2014 (hereinafter referred to as the 'said Act'). He particularly relied on the provisions of Sections 2(3), 2(13), 2(14), 4 and 13 of the said Act. He submitted that, in the complaint it is not specifically mentioned as to how much amount was due and payable. The averments in that behalf are quite vague and, therefore, there was no legally enforceable liability. The loan allegedly was given in the year 2016 and the complaint was filed in the year 2022, thus the debt, if at all, could not have been recovered by a legal process, therefore, it cannot be termed as 'legally enforceable liability' and hence, the prosecution U/s.138 of the N.I. Act was not maintainable. He invited my attention to the promissory note executed on behalf of the Petitioners. In that promissory note, it was mentioned that the amount of Rs.50 lakhs was to be repaid at the interest of 1% per month. According to learned senior counsel, this clearly shows that, it was a purely money lending transaction, for which the complainant did not have the requisite money lending license and, hence, the transaction itself was illegal. Learned Senior counsel relied on the two orders of this Court. He relied on the order dated 02/08/2022 passed in ***Criminal Revision Application No.394 of 2015 in the case of Mrs. Monica Sunit Ujjain Versus Sanchu M. Menon and others*** to contend that, in such type of transactions it was a void contract and, therefore, the prosecution U/s.138 of the N.I. Act would not lie. He also relied on the order passed in ***Criminal Application No.630 of 2009 decided on 21/11/2009, in the case of Anil Baburao kataria V. Purshottam Prabhakar Kawane reported in 2010(1) AIR Bom R 434.***

6. Learned counsel for the Complainant, on the other hand, supported both the impugned orders. He relied on the Affidavit in reply filed by the complainant in this petition. He submitted and it is also mentioned in his affidavit in reply that, having a money

lending license is not a pre-requisite condition for lending money on interest. He submitted that the complainant was not in the business of money lending. The complainant does not come within the purview of the definition given under the said Act. He further denied that the contract in this case was a void contract. According to him, the money was advanced on 06/04/2016. It was mentioned in the complaint that the complainant had received periodical interest up to 30/09/2019 and, therefore, the cause of action arose only after that date. Therefore, when the complaint was filed in the present case, it was well within the limitation for recovery of that debt before the civil forum.

7. I have considered these submissions. To understand the submissions of learned Senior counsel, the provisions of the Maharashtra Money-Lending (Regulation) Act, 2014 referred to by him are required to be reproduced.

> **2(3).** “business of money-lending” means the business of advancing loans whether in cash or kind and whether or not in connection with, or in addition to any other business;
>
> **2(13)** "loan" means an advance at interest whether of money or in kind but does not include,--

(a) a deposit of money or other property in a Government Post Office bank or in any other bank or in a company or co-operative society;

(b) a loan to, or by, or a deposit with any society or association registered under the Societies Registration Act, 1860 or any other enactment relating to a public, religious or charitable object;

(c) a loan advanced by the Government or by any local authority authorized by the Government;

(d) a loan advanced to a Government servant from a fund, established for the welfare or assistance of Government servants, and which is sanctioned by the State Government;

(e) a deposit of money with, or a loan advanced by, a co-operative society;

(f) an advance made to a subscriber to, or a depositor, in a provident fund from the amount standing to his credit in the fund in accordance with the rules of the fund;

(g) a loan to, or by, an insurance company as defined in the Insurance Act, 1938;

(h) a loan to, or by, a bank;

(i) a loan to, or by, or deposit with, any corporation (being a body not falling under any of the other provisions of this clause), established by or under any law for the time being in force which grants any loan or advance in pursuance of that Act;

(j) an advance 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;

(k) an advance of any sum exceeding rupees three thousand made on the basis of a hundi (written in English or any Indian language);

(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;

(m) except for the purposes of sections 29 and 31,-

(i) a loan, by a landlord to his tenant for financing of crops or seasonal finance, of not more than Rs. 1,000 per acre of land held by the tenant;

(ii) a loan advanced to an agricultural labourer by his employer;

2(14) "money-lender" means,--

(i) an individual; or
(ii) an undivided Hindu family; or
(iii) a company other than a non-banking financial company regulated under Chapter IIIB of the Reserve Bank of India Act, 1934;

(iv) an unincorporated body of individuals, who or which,--

(a) carries on the business of money-lending in the State; or
(b) has his or its principal place of such business in the State; and

includes a pawn-broker, but does not include,--

(i) Government;
(ii) a local authority;
(iii) a Bank;
(iv) a Co-operative Bank;
(v) a multi-state Co-operative Bank;
(vi) a Non-Banking Financial Company;
(vii) a primary credit society;
(viii) a Regional Rural Bank;
(ix) the Reserve Bank of India;
(x) the Agricultural Refinance Corporation constituted under the Agricultural Refinance Corporation Act, 1963; or
(xi) any other banking or financial institution which the State Government may, by notification in the Official Gazette specify in this behalf;

Section 4. No money-lender shall carry on the business of money-lending except in the area for which he has been granted a licence and except in accordance with the terms and conditions of such licence.

Section 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.

(2) Nothing in this section shall affect the powers of a Court of Wards, or an Official Assignee, a receiver, an administrator or a Court under the provisions of the Presidency Towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920 or any other law in force corresponding to that Act, or of a liquidator under the Companies Act, 1956, or the Companies

> Act, 2013, as the case may be, to realise the property of a money-lender.

8. Learned Senior counsel laid emphasis on Section 4 of the said Act. It provides that, no money-lender can carry on the business of money-lending except in the area for which he has been granted a license and except in accordance with the terms and conditions of such license. This provision restricts the area of operation for such money-lender and also refers to the conditions of the license. Thus, according to learned senior counsel, the license under the said Act is the basic necessity before any loan is advanced.

9. Section 13 of the said Act suggests that, no order can be passed in favour of a money-lender unless he held a valid license. Therefore, the crucial question in this case would be whether the complainant can be termed as a money-lender and whether the transaction will be covered under the purview of the said Act. In this context, the observations in the order of another Single Judge Bench of this Court in the case of ***Base Industries Group & Anr.***

V/s. Mahesh P. Raheja & Ors. reported in ***2018 SCC OnLine Bom 21322,*** are relevant.

Paragraph-39 of the said order is important; which reads thus:

> "**39.** From this discussion, he 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.
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> **(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.
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> **(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'.
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> **(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'.
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> **(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."

Therefore, in the present case, from the averments of the complaint, at this stage, it cannot be held that it was a money-lending transaction or that the complainant was a money-lender. It has to be established that the complainant advanced loan in the regular course of business and that it was not an isolated transaction of advancing loan.

10. In this context, the presumption U/s.139 of the N.I. Act is also important. As per the explanation provided U/s.138 of the N.I. Act, for the purposes of Section 138 of the N.I. Act, "debt or other liability" means a legally enforceable debt or other liability.

Section 139 of the N.I. Act reads thus:

> **139. Presumption in favour of holder.** - It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in section 138, for the discharge, in whole or in part, of any debt or other liability."

Thus, at this stage, there is a presumption in favour of the complainant. It will have to be presumed unless the contrary is proved that the complainant in this case has received the cheque for the discharge, in whole or in part, of a legally enforceable debt or other liability. Thus, this presumption directly covers the submissions made by learned senior counsel. The stage to rebut this presumption is during the trial and not at the stage of consideration of correctness or otherwise of the order of issuance of process. The petitioners, will have to rebut this presumption during trial. They will have to prove that the complainant was a money-lender and was carrying on a business of money-lending without holding a valid license and that the transaction between the accused and the complainant was one such transaction. They have to prove that it was not a legally enforceable liability. That stage is yet to arise. Today, the only question is about the averments in the complaint and as to whether these averments are sufficient for issuance of process.

11. After reading the complaint, it is clear that in the complaint it is avered that the loan was advanced and the cheque was issued by the accused No.1 towards the repayment of the principal amount along with the mutually agreed accrued interest and compensation. Thus, there is a reference to the principal amount, the interest and the compensation. Therefore, there is no force in the submission that the complaint needed to be more

specific regarding exact dues payable to him. Similarly, as mentioned earlier, the Petitioners will get an opportunity to rebut the presumption about validity of the transaction during course of the trial.

12. As far as, learned senior counsel's reliance on the order of ***Mrs. Monica's case (supra)*** is concerned; in that case there was a reference to a Memorandum Of Understanding executed between the two parties. The order records that, as per the MOU it could be gathered that the transaction was without license. Learned Single Judge has observed that, he had perused the MOU and other documents on record and has specifically mentioned that, considering the factual matrix of that case, he was upholding the order of the Sessions Court passed in the revision setting aside the order of issuance of process. Thus, from order itself it is clear that those observations were restricted to the factual matrix of that particular case and the conclusion was arrived at on the basis of the MOU and other documents on record in that case. Therefore, that order will not be applicable in the present case.

13. The Judgment in the case of ***Anil Baburao Kataria (supra)***, arose out of the Judgment and order of acquittal. In that case, a full-fledged trial was conducted and only after that the High Court considered whether the transaction was in the nature of moneylending transaction. In the facts of that case, there were many transactions as is indicated in paragraph-5 of the said order. Thus, even that order is not helpful to the petitioners.

14. The next submission about the limitation for recovery of the amount of loan and the interest is answered by the complainant's counsel with reference to the averments in the complaint. In the complaint, it was mentioned that the mutually agreed accrued interest was paid up to 30/09/2019 and thereafter the default was committed. Therefore, according to learned counsel for the Complainant, the period of limitation for recovery of the dues was not over when the complaint was filed.

15. Learned Additional Sessions Judge has rightly relied on the Judgment in the case of ***Base Industries Group and another (supra)***. He has also recorded correct findings about the

submissions regarding the time barred debt. He has rightly observed that, at this stage, it may not be said that the cheque was issued for a time barred debt.

16. It is made clear that the petitioners can always rebut the presumption U/s.139 of the N.I. Act during trial and demonstrate that the complainant was a money-lender without license. But for that purpose, leading of evidence and cross-examination of the witnesses would be necessary. At this stage, the order of issuance of process cannot be interfered with which is based on the averments in the complaint.

17. I do not find any infirmity in either of the impugned orders passed by learned Magistrate or by the Additional Sessions Judge. Hence, there is no merit in the writ petition.

18. The Petition is dismissed.

(SARANG V. KOTWAL, J.)