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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.1158 OF 2004**

M/s. Raj Exports
101, Devi Darshan Complex,
Tembhi Pada, Thane (W) 400 601 ... Appellant

Vs.

1. The State of Maharashtra

2. Dharamchand Pukhraj Jeewawat
Shop Nos.3 and 4, Jambhali Naka
Thane (W) 400 601 ... Respondent

Mr. Subhash Jha i/b Law Global for the Appellant.

Mr. N. B. Patil APP for Respondent No.1-State.

Ms. Ilsa Shaikh for Respondent No.2, Appointed Advocate

CORAM : S. M. MODAK, J.

RESERVED ON : 27TH JANUARY 2023

PRONOUNCED ON : 13TH APRIL 2023

JUDGMENT :

1. The only issue arisen in this Appeal is whether solitary transaction of lending money can be said to be money lending

transaction within purview of the Bombay Money Lenders Act, 1946 because carrying on business of money lending without obtaining license amounts to offence under the provisions of section 32B of the Act. So also the provisions of section 10 of the said Act put fetters on the power of Court to pass decree in favour of money lender in any suit unless a money lender holds valid license. In other words, if money is lent without license as part of money lending business and if the cheque is issued towards discharge of that debt, it cannot be said as legally recoverable debt and the prosecution under section 138 of NI Act will not be maintainable.

2. This issue has arisen in Summary Case No.811 of 2002 filed before the Court of 5th Judicial Magistrate, First Class, Thane. The Appellant was complainant and present Respondent was accused therein. The trial Court has not treated money advanced by the complainant as part of money lending business and on proof of other ingredients, convicted Respondent No.2-accused for offence punishable under section 138 of NI Act to

rigorous imprisonment for one month and fine for Rs.5,000/-.

3. There was an Appeal filed by the accused against this order of conviction whereas the complainant preferred revision for enhancement. The Court of Additional Sessions Judge as per judgment dated 28th June 2004, was pleased to set aside the conviction and dismiss the complaint consequently, revision was also dismissed. The correctness of this judgment is challenged by original complainant before this Court.

4. I have heard learned Advocate Mr. Jha for the Appellant and learned Advocate Ms. Ilsa Sheikh for Respondent No.2-accused. Most of the factual aspects are admitted. Both of them have taken me through evidence part and findings of the Appellate Court. I must say that the findings recorded by the Appellate Court were wrong. It is for two reasons. The ingredients required for invoking the provisions of said Act were not satisfied and the Appellate Court has not considered relevant provisions of the said Act in totality. Few of the provisions are considered and factual aspects were not considered. This order

certainly deserves to be set aside. I will give reason for said decision.

Facts

5. The complainant M/s. Raj Exports, is a proprietary firm and proprietor Arun Joshi is its proprietor and he is in the export business. The Appellate Court referred his business as exporter of tobacco. Learned Advocate Mr. Jha expressed his surprise for reference to his business as exporter of tobacco. The complaint was filed by the proprietor through Power of Attorney Shri Babu Singh Purohit and he too gave evidence. Whereas the accused is proprietor of Dhanesha Jewellers. The complainant lent an amount of Rs.4,00,000/- to accused. There are two documents. They are as follows :

- (i) Agreement dated 24th July 2001, thereby evidencing lending of amount of Rs.4,00,000/-.
- (ii) Promissory note dated 24th July 2001, executed by accused in favour of Proprietor Arun Joshi.

6. In fact when cheque is issued and signature is admitted, presumption comes into picture that there is consideration for which the cheque is issued. Accused has not denied signature and issuance of cheque. In this case the complainant has not only relied upon the said presumption but supports it by way of above two documents.

7. Learned Advocate Ms. Ilsa Shaikh for Respondent No.2 with all her humility tried to support the order of the Appellate Court. She invited my attention to the agreement dated 24th July 2001, wherein there is reference of issuance of cheque in question as security. According to her, after the cheque is issued for guarantee, it is to be presumed that it is by way of security.

8. Appellate Court observed that cheque was issued not towards liability but by way of security. While doing that the Appellate Court relied upon the judgment in case of *Pawan Enterprises Vs. Satish H. Varma*¹. I have perused the judgment.

In the said case, the cheque was issued towards repayment of

¹ 2003 All MR 756

balance amount of purchase price of TV. There was understanding to deposit cheque only when remaining purchase price is not paid by way of installments. Prior to deposit of cheque, the complainant has received some of the amount from balance purchase price. On the basis of these facts, the judgment of acquittal was confirmed. It was observed in para 6 that ---

“The liability and security are two distinct entities and both cannot be mixed or acted upon simultaneously. If the act of a person is discharged of liability is not done, then the security comes in picture. If the act in discharge of a liability is performed, then security would not have any legal force”.

9. On the basis of above observations, the Appellate Court made following observations ---

“There was promissory note to repay on or before 21st January 2002 along with interest at the rate of 12%. If it is so, then the complainant ought to have taken action on the basis of this promissory note. If

accused has not repaid on the basis of said promise, question of depositing cheque could have arisen at that time only. That's why it is observed that cheque was issued not for repayment but by way of security".

10. The differentiating factor is that in case of Pawan Enterprises (supra) prior to deposit of the cheque, accused has paid some of the amount from remaining purchase price. The Respondent supports this finding and Ms. Ilsa Shaikh places reliance on the observations in case of ***Sudhir Kumar Bhalla vs. Jagdish Chand and Others***². High Court has convicted the accused for the offence under section 138 of the NI Act and it was set aside by the Hon'ble Supreme Court. It was for the reason that the High Court failed to come to finding as to whether the cheque was issued towards discharge of liability or security. There were counter cases, one under section 138 of NI Act and another for perjury against the complainant for interpolation in the cheque. In the nutshell any Court has to record finding as to whether cheque is towards discharge of

² (2008) 7 SCC 137

liability or security.

11. This issue has been clarified by the Hon'ble Supreme Court in various judgments. One of such judgment is in the case of *Sampelly Satyanarayan Rao vs Indian Renewable Energy Development Agency Limited*³. "When cheque was issued, was there any liability existing" is relevant consideration. If liability is there, it falls within purview of section 138 of NI Act. Some time it happens that the cheque is issued for certain commitment to be performed in future, and if that transaction is cancelled, section 138 of NI Act does not get attracted.

12. In this case there was existing liability of Rs.4,00,000/- when cheque was issued. Mere reference, in the promissory note that it was issued by way of security does not make any difference. The purpose of executing promissory note is to seek a promise from the borrower to pay the amount. On that basis a summary suit for recovery of money can be filed. However, that remedy does not debar the lender/complainant to initiate action

3 (2016) 10 SCC 458

for the offence under section 138 of the NI Act. The agreement dated 24th July 2001, thereby evidencing advancement of loan does not require registration. The interest column of promissory note was blank. The authorised representative through Vinod Sharma was not instructed to send letter, (asking the accused to make payment otherwise the cheque will be deposited). All above facts does not affects liability. It was there at the time of issuance of cheque. Hence, I am of considered opinion that the first Appellate Court has not appreciated evidence properly and correctly applied law. This observation needs to be set aside.

Money lending license

13. The Appellate Court concluded that the complainant was not holding money lending license and hence debt cannot be legally enforceable debt. The Appellate Court referred to the provisions of section 29 of Bombay Money Lenders Act. It will be material to consider the background in which those findings are given. The complainant has admitted that he is not possessing the money lending license. The promissory note mentions

assurance to pay the amount. The rate of interest is not mentioned. The judgment reported in 1999 (1) ALO, 719 Andhra Pradesh, is referred in para 12 of the impugned judgment. The name of party is not mentioned. Learned Advocate for the Appellant finds it difficult to trace that judgment. He is right.

14. As against this he relied upon the following judgments :

- (i) ***Manishbhai Bharatbhai Shah***⁴
- (ii) ***Gajanan and Others Vs. Seth Brindavan***⁵
- (iii) ***M/s. Rushabh Precision Bearings Ltd. Vs. M/s. Marine Container Services (India) Pvt. Ltd.***⁶

I have read the observations therein. It is held consistently that isolated transaction of money lending does not fall within the expression of “money lending”. If primary object was not to carry on business of money lending, the said transaction is excluded from the provisions of the said Act. If the transaction is

4 2007 SCC Online Guj 452

5 1970 (2) SCC 360

6 (1999) 3 Bom CR 760

done on the basis of Negotiable Instrument, that transaction also does not fall within purview of the Money Lenders Act.

15. It will be relevant to consider material provisions of the said Act. Section 2(2) gives meaning of expression :

“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”.

16. Wheres section 2(9) lays down meaning of the word :

“loan” means an advance at interest whether of money or in kind but does not include –

- (a)
- (b)
- (c)
- (d)
- (e)

There are certain exceptions. The relevant clause is clause (f). It reads as follows :

“(f) an advance (of any sum exceeding rupees three thousand) made on the basis of a negotiable instrument as defined in the Negotiable Instruments Act, 1881, other than a promissory note”.

Above provisions does not expects that there is continuous transaction of lending of money. However, it is interpreted by the Courts. So if money is advanced on the basis of Negotiable Instrument, it does not fall within meaning of word “loan”. There are three recognised kinds of negotiable instrument. They are – Bill of Exchange, Promissory Note and cheque. So if the loan is advanced in the course of business of money lending and if cheque is issued towards repayment of loan, such loan does not come within purview of expression “business of money lending”. However, if the loan is advanced and promissory note is executed, primary requirement for invoking the provisions of the said Act is fulfilled. However, in this case there is promissory note and also a cheque is issued. Furthermore, if giving of loan is not a part of business of money lending, single instance will

not fall within meaning of the expression “loan”. It has not come in evidence that the complainant is engaged in business of money lending continuously, if it is not there it was wrong on the part of the Appellate Court to treat the transaction falling under the expression “business of money lending”. Those findings cannot be sustained and needs to be set aside.

Conclusion

17. So I hold that the cheque in question was issued towards discharge of existing liability and the transaction is not hit by the provisions of the Bombay Money Lenders Act, 1946. There are compliances about proving reason for dishonour “as not arranged for”, issuing notice in time, receipt of notice and failure to make payment. There are two witnesses from the bank, one is Pradeep Vaidya, from Syndicate Bank, who is banker of the complainant and another is Atul Jadhav from Thane Janta Sahakari Bank on whom the cheque was drawn. So the complainant has satisfied all ingredients for the offence punishable under section 138 of the NI Act. He has proved commission of offence by accused.

Hence, accused is liable to be dealt with as per law.

18. The trial Court has sentenced the accused to undergo rigorous imprisonment for six months and to pay fine of Rs.5,000/-. Considering the long period that has lapsed, I am not inclined to sentence Respondent to rigorous imprisonment. Section 138 of NI Act gives various options, either there may be imprisonment or there may be fine being twice the amount of cheque or both. In this case, the accused can be sentenced to fine of double the amount of cheque which comes, to Rs.8,00,000/- out of that compensation can be paid to the Appellant. Hence, the following order is passed :

ORDER

- (a) The Appeal is allowed.
- (b) The order dated 28th June 2004, passed by the Additional Sessions Judge, Thane is quashed and set aside.
- (c) Respondent-accused is convicted for the offence punishable under section 138 of Negotiable Instruments Act.

- (d) Respondent-accused is sentenced to fine amount of Rs.8,00,000/- (Rupees Eight Lakhs only). It be deposited in the trial Court within two months from today.
 - (e) Out of this amount, the amount of Rs.7,50,000/- be paid to the complainant.
 - (f) Learned Advocate Ms. Ilsa Shaikh is appointed by this Court. Office to pay fees.
19. Appeal is disposed of in the aforesaid terms.

(S. M. MODAK, J.)