

---

**(2009) 11 RAJ CK 0050**  
**In the Rajasthan High Court**

Bohara Trading Company and Others

APPELLANT

Vs

Praveen R. Patel and Another

RESPONDENT

---

**Date of Decision :** 19-11-2009

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 2, Order 38 Rule 5  
Constitution of India, 1950 — Article 226(3), 227

**Citation :** (2010) 3 RLW 2550

**Hon'ble Judges :** Narendra Kumar Jain, J

**Bench :** Single Bench

---

## Judgement

Narendra Kumar Jain, J.—The respondent No. 1 has filed an application under Article 226(3) of the Constitution of India for vacating the interim stay order passed by this Court on 17.7.2009, but at the request of the learned Counsel for both the parties, the arguments were heard and writ petition is being disposed of finally.

2. The plaintiff-respondent No. 1 filed a suit in the trial Court against the defendant-petitioners under Order 37 Rule 2 CPC based on "hundi" for recovery of original amount of Rs. 5,00,000/- and interest of Rs. 1,00,000/- total Rs. 6,00,000/-. The defendants filed an application under Order 37 Rule 5 CPC to allow the defendants a leave to defend the suit on two grounds namely that plaintiff has no licence under Money Lenders Act, therefore, suit is not maintainable and that defendants have already paid a huge amount of interest, therefore, also the suit is not maintainable. The application was contested by plaintiff by filing written reply that provisions of Money Lenders Act are not applicable in the present case and defendants have not furnished any details about payment of interest alleged to have been paid to plaintiff, therefore, there is no valid defence so as to grant a leave to defend the suit.

3. During the pendency of the application under Order 37 Rule 5 CPC, the plaintiff filed an application under Order 38 Rule 5 CPC, which was allowed by trial Court vide order dated 31.1.2008 and defendants were directed to furnish a

security of sum of Rs. 10,00,000/- within a period of 15 days to the effect that in case the plaintiff's suit is decreed, then they will pay the decretal amount. Being aggrieved with the said order, the defendants preferred S.B. Civil Misc. Appeal No. 662/2008 before this Court. The learned Counsel for defendant-petitioners while arguing the civil misc. appeal submitted before this Court that appellant is willing to deposit the amount of Rs. 6,00,000/- with the trial court which is being claimed in the suit by the plaintiff. In view of statement of learned Counsel for appellants (petitioners herein), this Court while disposing of the appeal on 3.4.2008 directed that in case the appellant deposits an amount of Rs. 6,00,000/- within the trial Court within eight weeks then impugned order passed by trial Court dated 31.1.2008 shall stand vacated, till then the appellant was restrained from alienating the property belonging to him in any way. However, the petitioners did not deposit the amount of Rs. 6,00,000/- as contended by them before this Court within time given to them and in these circumstances, the trial Court vide its order dated 4.7.2008 passed an order for attachment of properties of the petitioners, descriptions of which were given in the order. Since some of the properties attached had already been mortgaged with the bank, therefore, on an application filed by bank, the said property was released from attachment vide order dated 16.1.2009. Similarly, the other property was also released on the application of other persons, meaning thereby, the petitioners neither furnished any security, nor deposited the amount of Rs. 6,00,000/- as agreed by them before this Court at the time of disposal of their Civil Misc. Appeal No. 662/2008, nor any property remained under attachment.

4. The learned trial Court heard the arguments on the application of petitioners under Order 37 Rule 5 CPC and vide its order dated 29.5.2009 dismissed the same by a detailed order. Being aggrieved with the same, the defendants have preferred the present writ petition.

5. The submissions of the learned Counsel for petitioners is that petitioners took two defences in their application under Order 37 Rule 5 that suit is not maintainable because plaintiff has no licence under the provisions of Money Lenders Act and another is, that defendants have already paid huge amount of interest, therefore, also the suit is not maintainable. Both the defences were legal one and arguable, therefore, leave to defend the suit should have been granted in the facts and circumstances of the present case." The trial Court committed an illegality in rejecting the application of petitioners vide order dated 29.5.2009 and the same is liable to be set aside by this Court.

6. The learned Counsel for respondents contended that "hundi" is not covered by the provisions of Money Lenders Act and in support of his submission, he also referred the judgment in Suresh Chand v. Naval Kishore Goyal 2004(3) DNJ (Raj.) 1116 and Mangu Singh Vs. Mehra Ram, He further contended that so far as payment of so-called amount of interest is concerned, the defendant has not furnished any details whatsoever as to when and how much amount was paid by them to plaintiff, therefore, both the defences are baseless. He further contended

that looking to the facts and circumstances of the case, particularly the conduct of the petitioners they are not entitled for any leave to defend the suit. They submitted before this Court that they are willing to deposit a sum of Rs. 6,00,000/- in this case in the trial Court and on their submission this Court while deciding Civil Misc. Appeal No. 662/2008 on 3.4.2008 directed that in case the appellants deposit an amount of Rs. 6,00,000/- with the trial Court to recover the claim of the respondent within eight weeks, then the impugned order dated 31.1.2008 shall stand vacated, he contended that despite specific submission, rather undertaking of the petitioners, they did not deposit the amount in the trial Court. He also contended that trial Court vide its order dated 16.1.2009 while releasing the property of defendants mortgaged with the bank from its attachment, observed that both the parties shall move an application before the appropriate Tribunal for auction of the property wherein the plaintiff will be at liberty to move an application in the Tribunal to keep the balance amount for payment to the plaintiff. However, soon after release of property from attachment, it was not auctioned, but the same was sold by defendants in connivance with bank, directly to a private person without notice to plaintiff, for the amount which was due of the bank and the amount was paid to bank whereas property was of high value, which shows that transaction was undervalued and remaining amount was received by them underhand, therefore, looking to the facts and circumstances the trial court rightly rejected the application of the petitioners.

7. I have considered the submissions of learned Counsel for the parties and examined the impugned order as well as other documents placed on record with the writ petition. There is no dispute in between both the parties that plaintiff filed a suit for recovery of a sum of Rs. 6,00,000/- and it was a case of the plaintiff that the amount of Rs. 5,00,000/- was advanced as loan against "hundi". A copy of "hundi" has also been placed on record as Annexure-3. As per contention of the learned Counsel for petitioners it is not a "hundi", but it is a promissory note, therefore, provisions of Money Lenders Act are attracted whereas as per submissions of respondent it is nothing except "hundi" itself and the provisions of the Money Lenders Act are not applicable at all. From the perusal of Annexure-3, it appears prima facie that it is a "hundi", therefore, the learned trial Court rightly observed that provisions of Money Lenders act are prima facie not applicable in the present case. So far as other defence regarding payment of interest is concerned, the defendants have not furnished any evidence whatsoever as to when and how much amount has been paid on this account, therefore, this defence also becomes baseless. It is relevant to mention that defendants did not mention in the application that they have not taken the amount as loan. The learned Counsel for respondents argued that non-denial of amount of loan should be treated as admission of defendants having received the loan and as per provisions of Rule 5 of Order 37, this amount should be treated as admitted amount and no leave to defend can be granted unless the amount itself is deposited by defendants in the Court. During course of arguments, the

learned Counsel for petitioners contended that leave to defend suit should be granted unconditionally as petitioners are not ready for any condition including deposit of amount in Court or furnishing bank guarantee of the suit amount. In these circumstances, I find that order passed by learned trial Court rejecting the application of the petitioners under Order 37 Rule 5 CPC is perfectly legal and justified and no interference in it is called for under Article 227 of the Constitution of India.

8. In AIR 1975 1297 (SC) the Hon"ble Apex Court, while considering the scope of Article 227 of the Constitution of India, held that the power of Superintendence of High Court under Article 227 of the Constitution of India being extraordinary is to be exercised most sparingly and only in appropriate cases. This power, as in the case of certiorari jurisdiction, cannot be invoked to correct an error of fact which only a superior court can do in exercise of its statutory power as a court of appeal. The High Court cannot in guise of exercising its jurisdiction under Article 227 convert itself into a Court of appeal when the legislature has not conferred a right of appeal and made the decision of the subordinate Court or Tribunal final on facts. The High Court cannot, while exercising jurisdiction under Article 227 of the Constitution of India, interfere with findings of fact recorded by the subordinate Court or Tribunal. Its function is limited to seeing that the subordinate court or Tribunal functions within the limits of its authority. It cannot correct mere errors of fact by re-appreciating evidence.

9. In view of above discussion, I do not find any merit in this writ petition and the same is accordingly dismissed with no order as to costs.

10. Consequently, the application under Article 226(3) of the Constitution of India of India filed by respondent stands disposed of automatically.