

(1980) 04 MP CK 0026

In the Madhya Pradesh High Court

Case No : First Appeal No. 168 of 1976

Jaisukhlal Deve

APPELLANT

Vs

M/s Shankar Theatres (Firm) Astravati and Others

RESPONDENT

Date of Decision : 08-04-1980

Acts Referred:

Madhya Pradesh Money Lenders Act, 1934 — Section 2(7)(e), 3
Negotiable Instruments Act, 1881 (NI) — Section 80

Citation : (1982) J LJ 199

Hon'ble Judges : U.N. Bhachawat, J

Bench : Single Bench

Advocate : M.M. Sapre, for the Appellant; Y.S. Dharmadhikari, for the Respondent

Final Decision : Allowed

Judgement

U.N. Bhachawat, J.—This is an appeal by the plaintiff against the judgment and decree dated 5th of May, 1976, in Civil Suit No. I7-B of 1974 of the Court of First Additional District Judge, Raipur.

2. The plaintiff had filed the present suit for Rs. 13,762.50 paise (Rs. 10,000 principal and Rs. 3,762.50 paise interest at the rate of Rs. 1.75 paise per cent per month) against the defendants 1 to 4 on the basis of the two documents Ex. C-1 and Ex. C-2 for Rs. 5,000 each dated 3-11-1971 and 4-11-1971, respectively which in the plaint the plaintiff has described to be promissory notes whereas during the course of the argument in this Court, it has been contended that these documents are hundis.

3. The defendant No. 1 is a partnership firm and defendants Nos. 2, 3 and 4 are its partners. The defendant-firm has been carrying on its business at Amrawati and other places.

4. The case of the plaintiff, as laid in the plaint, was that the defendant No. 3 took from plaintiff at Raipur Rs. 5,000 on 3-11-1971 and 4-11-1971 for and on

behalf of the defendant firm against two promissory notes of Rs. 5,000 each executed by defendant No. 3 in favour of the plaintiff for the respective loans on the respective dates promising to pay the suit amount 90 days afterwards i. e. on 1-2-1972 and 2-2-1972, respectively. -

5. It was further alleged that defendant No. 3 had at the time of taking the suit loans, orally agreed to pay interest at the rate of Rs. 1.75 paise per cent per month; that the defendants failed to repay the suit loan amount on the stipulated dates and did not pay the same despite demand by registered notice dated 12-9-1973.

6. The defendants Nos. 1, 2 and 4 filed a joint written statement and defendant No. 3 filed a separate written statement. All the defendants resisted the claim of the plaintiff. While controverting the material allegations of the plaint, on which the plaintiff has based his claim, the defendants 1, 2 and 4 filed an inter alia contention that defendant No. 3 had no authority to take loan for and on behalf of the defendant firm nor was the loan taken for the business of the firm nor the plaintiff who was aware of the limitations of the powers of borrowing of defendant No. 3 as partner of the defendant firm, had made inquiries as to whether defendant No. 3 was taking loans for the business of the firm and whether he had prior to this "unsuccessfully approached the other partners for loan. It was also alleged that the suit loans were advanced by the plaintiff to Shri V.Y. Solao, uncle of defendant No. 3 who was carrying on the business of exhibiting film at Nagpur and as a conspiracy between plaintiff, defendant No. 3 and defendant No. 3's uncle Shri V.Y. Solao for that loan the suit promissory notes were executed by defendant No. 3 in the name of the firm.

7. Defendant No. 3 while admitting the execution of the suit promissory notes, denied the receipt of consideration of Rs. 10,000; executed the suit promissory notes for himself as well as for the defendant-firm and that he had affixed the rubber seal of the defendant firm while executing the suit promissory notes. It was also contended by him that the suit promissory notes were executed by him at Amarawati and therefore the trial Court had no jurisdiction.

8. It may also be mentioned that defendant Nos. 1, 2 and 4 had also contended that plaintiff was a moneylender governed by the provisions of the Moneylenders Act but did not get himself registered as a moneylender and also did not comply with the provisions of the Moneylenders Act and was, therefore, not entitled to maintain the suit and also to get costs and interest.

9. The trial Court framed the following issues and recorded its finding on these issues as noted against each of them:-

Issues Findings

I Whether the plaintiff is a moneylender ? Yes.

II (a) Whether the plaintiff is not registered under the Moneylenders Act ? He is registered.

(b) If so, its effect ? Redundant.

III (a) Whether the defendant No. 1 firm is dissolved? Yes.

(b) If so, its effect ? Nil.

Issues Findings

IV (a) Whether the defendant No. 3 took a loan of Rs. 10,000 from the plaintiff at Raipur ? Yes.

(b) If so, whether the said loan was taken by defendant No. 3 on behalf of the defendant No. 1 ? No.

(c) Whether there was an oral promise to pay interest at the rate of 1.75% per month ? Not proved.

V Whether the defendants Nos. 1, 2 and 4 are not liable to repay the amount ? Yes.

VI Relief and costs. Suit decreed against defendant No. 3 and dismissed against the rest.

Consequent to the aforesaid findings on the various issues, the trial Court decreed the suit of the plaintiff for the principal amount of Rs. 10,000/- against defendant No. 3 with costs and dismissed the suit against all other defendants directing that they shall bear their own costs as incurred. The plaintiff being aggrieved by the aforesaid judgment and decree to the extent that interest and decree against defendants Nos. 1, 2 and 4 have been refused, filed the present appeal.

10. The questions for determination in this appeal are two: (i) Whether the plaintiff is entitled to interest, and (ii) Whether the claim could be decreed against the defendants Nos. 1, 2 and 4 also.

11. At the outset it may be mentioned that defendant No. 3 has filed no appeal.

12. I shall deal with the aforesaid questions ad seriatim.

13. It is an admitted position that the plaintiff is a moneylender. The contention of the learned counsel for the plaintiff was that even if the contract with regard to the payment of interest on the suit loan has not been proved, the plaintiff is entitled to the interest on suit amount at the rate of six per cent per annum from the due date of payment. This argument of the learned counsel was based on the following two submissions:-

(i) that the documents Exs. C-1 and C-2 are bills of exchange /hundi and thus governed by the Negotiable Instruments Act (hereinafter referred to as the Act) and as no interest at specified rate is expressly made payable on these documents, section 80, of the Act would apply; and

(ii) that the documents Exs. C-1 and C-2 are not promissory notes and,

therefore, in view of the definition of loan given in section 2(7)(e) of the M. P. Moneylenders Act, the suit amount is not a loan governed by the provisions of the M. P. Moneylenders Act.

14. The argument of the learned counsel for the defendants was that the documents Exs. C-1 and C-2 are promissory notes, the plaintiff has also described them to be promissory notes and, therefore, the advance made on the basis of these documents is covered in the definition of loan in the M.P. Moneylenders Act. The plaintiff has not complied with the requirements of maintenance of accounts by moneylenders and supply of statement thereof to debtors as contained in section 3 of the Moneylenders Act, the plaintiff is not entitled to interest as well as to costs in case the suit is found worth decreeing.

15. Promissory note is defined in section 4 of the Act as under:-

A "promissory note" is an instrument in writing not being a banknote or a currency-note containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument." On the analysis of the aforesaid section, it is obtainable that in order that a document should be a promissory note, it is necessary that there should be:

- (a) an unconditional undertaking to pay;
- (b) the sum should be a sum of money and should be certain;
- (c) the payment should be to or to the order of a person who is certain, or to the bearer of the instrument, and
- (d) the maker should sign it.

If these four conditions are present, a document becomes a promissory note. The mere description of an instrument as a promissory note will not make it a promissory note, if it fails to satisfy the statutory requirements.

16. The definition of bill of exchange given in section 5 of the Act reads as under:-

"A" bill of exchange" is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of a certain person or to the bearer of the instrument." On the comparison of the definition of promissory note and the bill of exchange the remarkable difference that is obtainable is that the essential character of a promissory note is that it shall contain a promise and the essential character of the bill of exchange is that it shall contain an order. In other words, a bill of exchange contemplates three parties: a drawer, drawee and payee. It may be that the same person may fill the role of the drawer and the drawee/ acceptor.

17. In the back drop of the aforesaid discussion about the distinction between

the promissory note and bill of exchange, it is pertinent to set out herein below one of the documents (Exs. C-1 and C-2) as both are alike in form to determine as to whether these documents can be categorised as promissory notes or bills of exchange:-

R. No. ---- 2 Rs. 50 nP.

Rs. 5000/- ---- Date 2-2-1972

Date 4-11-1971 At (90) Ninety days after date without grace days we promise to pay

to Seth Jaisukhlal Dave or order at----the sum of Rupees FIVE THOUSAND only for value received in cash this day.

Amarnath For Shankar Theatres A. Y. Solao Partner.

On a plain reading on the document, it is obtainable that it contains a promise to pay and not an order to pay. Thus, the essential ingredient of the bill of exchange is absent in the instant documents. These documents (Exs. C-1 and C-2) fill in all the characteristics of a promissory note. They have, therefore, to be categorised as promissory notes neither as bill of exchange nor as hundi. 18. The view taken by me is in line with a Full Bench decision of the Calcutta High Court in Harsukhdas v. Dhirendra Nath AIR 1911 Cal. 498. In that case, the document under consideration was as under:-

Rs. 2500 83, Cossipore Road, Calcutta,

1st June 1936.

Sixty days after date without grace we promise to pay to Messrs. Hursookhdas Balkisendass or order at Calcutta the sum of rupees two thousand five hundred only for value received.

Sd /- Dhirendranath Roy.

Sd /- Girindranath Roy.

Sd/-Birendranath Roy.

Across the above document was an endorsement " "Accepted. Dhirendranath Roy, Girindranath Roy, Brrendranath Roy". With respect to the aforesaid document, it was contended on behalf of the person who had lent the money on the strength of this document, it was a hundi or a bill of exchange and as such outside the purview of the Bengal Money Lenders Act which sought to affect liability of debtors under promissory notes but not under bill of exchange. Deciding the contention, it was held by the full bench that the document was a promissory note. Delivering the judgment of the Full Bench, Derbyshire, C. J. observed at page 500 of the report as under :-

To determine the character of the document we must look to the provisions of

the document itself. From the definitions of "promissory notes" and "bills of exchange" it will be seen that the essential character of a promissory note is that it shall contain a promise and the essential character of a bill of exchange is that it shall contain an order. In this particular case each one of these instruments contains a promise. None of them contains an order. They, therefore, satisfy the definition of a promissory note, but do not satisfy the definition of a bill of exchange. Certainly it is not usual for the maker of a promissory note to write "accepted" across it, but it is sometimes the case that the maker of a bill of exchange writes "accepted" across it. But that in my view is not conclusive. The word "accept" simply means with regard to bills of exchange, to take responsibility for or to agree to meet. That is according to common language. In section 7, Negotiable Instruments Act, where reference is made to the acceptor of a bills of exchange, it is provided:

After the drawee of a bill has signed his assent upon the bill.....and delivered the same, or given notice of such signing to the holder or to some person on his behalf he is called the "acceptor."

That indicates what acceptance means according to the Negotiable Instruments Act. It means assent, but it means assent on the part of the drawee. Here there is no drawee because there is no order. The effect of the word "acceptance," if it has any effect at all, which I very much doubt, is simply to add the assent of the maker of the note to the promise he has already given. In other words, it repeats the promise the promisor has already made. That can have no further legal effect. In my view it is clear from the definition of "promissory note" and "bills of exchange" that these particular documents are nothing but promissory notes.

19. The upshot of the foregoing discussion is that Exs. C-1 and C-2 are promissory notes and as such the advance of the loan by the plaintiff against these promissory notes is governed by the provisions of the Madhya Pradesh Money Lenders Act. Admittedly the plaintiff is a money-lender and it is not proved that the provisions of the Money Lenders Act contained in section 3 have been complied with. In such a situation even in face of section 80 of the Act interest in the right exercise of the discretion of this Court on the amount of loan has to be refused. Thus, finding of the trial Court regarding refusal of interest upto the date of the decree is sustained.

20. I now advert to the consideration of the second question. The contention of the learned counsel for the plaintiff was that the trial Court has incorrectly interpreted the under-quoted term of the partnership deed and committed an error in holding that the express authority given to defendant No. 3 for borrowing on behalf of the firm was not unabridged and was conditional and as the condition precedent that the other partners were not in position to give the loan in question and, therefore, he had to raise the loan from the plaintiff was not proved, the defendant firm and its other partners are not liable. The relevant term in the partnership deed reads as under:-

If and when more capital would be required for the business of the firm the same will be raised from any or all the partners of the firm by way of loan to the firm and such creditor partner or partners will be entitled to receive an interest to the maximum extent of Re. 1/- (one) p. c. p. m. In case any or all the partners are not in a position to give loan to this partnership, Shri S. L. Rathi or Shri A. Y. Solao is at liberty to raise loans at the above rate of interest from the outsiders and execute the loan documents and such loan will be binding to the partnership.

The learned counsel relying on Division Bench decision of this Court in Jayantilal Chauhan v. M/s. Shanker Theatres and 2 Others F.A. No. 122 of 1975. decided on 10-7-1979, wherein this very term was construed, argued that the only limit on the power of defendant No. 3 was about the rate of interest that the rate of interest payable was not to exceed 12% per annum and it was not necessary for him first to exhaust the possibility of raising such a loan from the partners of the firm before deciding to borrow from the outsider. The argument of the learned counsel for the defendants 1, 2 and 4 was that the express authority given by the fore-quoted term to defendant No. 3 for borrowing money for the firm was conditioned with three conditions and unless the compliance of those conditions is proved, the firm and its other partners cannot be held liable for the loan taken by defendant No. 3. In his submission the conditions were that:

(i) the borrowing was for the business of the firm; (ii) before borrowing from an outsider, the other partners should be approached for the loan and if they do not advance then alone loan should be contracted from an outsider; and (iii) the rate of interest on the loan should not exceed 12% per annum. Interpreting the fore quoted express authority in favour of defendant No. 3 in the aforesaid manner, the learned counsel for the defendants 1, 2 and 4. Shri Dharmadhikari argued that neither there is an allegation nor a proof about the compliance of these conditions precedent, the finding of the trial Court that the firm and the other partners are not bound has to be sustained. The learned counsel in support of his argument that a partner can borrow a loan so as to bind the firm only when it is shown that it was contracted for the business of the firm relied upon decisions in Higgins v. Beauchamp 1915 AER 937 and M.M. Abbas Brothers and Others Vs. Chethandas Fathechand and Another, . He also argued that in view of section 4 of the Partnership Act, a partner is an agent so as to bind the firm and other partners for the borrowings made by him in the name of the firm only if it is for the purposes of the business of the firm. It was also argued by the learned counsel that the construction of the fore quoted term of the partnership deed regarding the authority to the defendant No. 3 for borrowing by the Division Bench of this Court is not binding as a precedent. 21. It is undisputed that the fore quoted term regarding the authority for borrowing to defendant No. 3 had come up for consideration in Jayantilal Chauhan v. M/s Shankar Theatre and Others (supra) arising out of a suit filed against these very defendants. The present plaintiff, of course, was not a party to that suit, The decision in that appeal may, therefore, not have the effect of res judicata but the decision on the construction of the fore quoted term regarding the authority to borrow to the

defendant No. 3 operates as a binding judicial precedent. In this respect, I can do no better than to refer to a decision of the Supreme Court in *Sahu Madho Das and Others Vs. Mukand Ram and Another*, wherein their Lordships of the Supreme Court said :

Now to go back to the year 1864 when Mst. Pato made the so-called will of 1864. This document was construed by the Privy Council in *Mst. Hardei v. Bhagwan Singh* AIR 1919 PC 27 -A and their Lordships said-

In the events which happened this document did not become operative, but it is relevant as showing that at the date of its execution Pato was claiming an absolute right to dispose of "was claiming an absolute right to dispose of the whole of the scheduled property."

Mukund Ram was not a party to that litigation and "litigation and the decision does not bind him but it operates as a judicial precedent about the construction of that document, precedent with which we respectfully agree." It may also be mentioned that the authorities relied on by the learned counsel Shri Dharmadhikari relate to the implied power, of a partner, of borrowing money and it is in that context it has been held in those authorities that the implied power of borrowing like every other implied power of a partner only exists when it is to carry on, in the, usual way, business of the kind carried on by the firm and then alone the firm and other partners are bound. In the instant case, the case is of an express authority given under the forequoted term and that term having been construed by the Division Bench, I am bound by it and, therefore, it is not necessary for me to go into the question of construing the said term. The Division Bench in *Jayantilal's case* (supra) while construing the forequoted term regarding express authority has said :

This term is not qualified by saying that such a loan would be binding on the partnership firm only if the same was taken for the business of the firm. The contention, therefore, that in spite of this express authority to borrow conferred by this term contained in the partnership deed it must be further shown that the loan was contracted by defendant No. 3 A. Y. Solao for the business of the firm, has no basis. There is no such further rider contained in the partnership deed subject to which alone it could be declared that the loan would be binding on the partnership.

* * * *

All that the term says is that whenever money in excess of the capital of the firm is needed for the business of the firm, the specified partners, which include defendant No. 3 A. Y. Solao, had the express authority to raise loans either from the partners of the firm or from outsiders, subject only to the condition that rate of interest payable on such loan was not to exceed 12 p. c. p. m. or 12 p. c. p. a. Thus, the only limit imposed on the power to borrow was that interest payable was not to exceed 12 p. c. p. a. It was left to the specified partners to decide in their discretion when the raising of such a loan was necessary and it was not

necessary for them to first exhaust the possibility of raising such a loan from the partners of the firm before deciding to borrow money from an outsider. It was, therefore, unnecessary in the present case to require the plaintiff to further prove that the partners of the firm were- unable to advance the loan which the authorized partner defendant No. 3 A. Y. Solao had chosen to take from the plaintiff.

22. The documents Exs. C-I and C-2 are executed by defendant No. 3 in the name and on behalf of the defendant firm. It was contended by defendant No. 3 in the written statement that the rubber stamp of the firm was not affixed by him but that part of the contention has been negatived by the trial Court and there is no reason to take a view contrary to that as absolutely there is no evidence to support that contention. It would be significant here to point out that even defendant No. 3 had not entered the witness box and there is no other evidence also to support that contention. It may also be pointed out that the learned counsel did not stress much on that contention. The central core of his argument was about the construction of the forequoted term regarding the express authority. The documents Exs. C-1 and C-2 having been executed in the name and on behalf of the firm by the defendant No. 3, who had an express authority as already discussed hereinabove, the transaction is binding on the defendant firm and as such all the defendants are liable to repay the loan taken from the plaintiff, in view of the said express authority and section 22 of the Partnership Act.

23. In the result the plaintiff's appeal is allowed to the extent that the plaintiff's suit for Rs. 10,000 is decreed also against defendants Nos. 1, 2 and 4. In other words, the suit of the plaintiff for Rs. 10,000 principal amount stands decreed against defendants 1, 2, 3 and 4 with proportionate costs throughout. It is further decreed that the plaintiff shall be entitled to get interest on this principal amount of Rs. 10,000 from the defendants at the rate of six per cent per annum from the date of decree till realisation. The plaintiff's claim for interest claimed in the suit as well as pendente lite interest, i.e., upto the date of the decree, stands dismissed. The defendants shall bear their own costs throughout. Counsel's fee, as per schedule, if certified.