

(1979) 07 PAT CK 0004
In the Patna High Court
Case No : S.A. No. 96 of 1976

Newa Lal Rai and Others

APPELLANT

Vs

Sri Mahendra Rai

RESPONDENT

Date of Decision : 06-07-1979

Acts Referred:

Bihar Money Lenders Act, 1938 — Section 2, 4

Citation : (1979) PLJR 563

Hon'ble Judges : Umesh Chandra Sharma, J

Bench : Single Bench

Advocate : S.C. Mukherjee and L.N. Yadav, for the Appellant; Prabha Shankar Mishra and Ganesh Prasad Singh, for the Respondent

Judgement

Umesh Chandra Sharma, J.—This appeal by the defendants is directed against the judgment of reversal arising out of a suit passed on a hand note. Briefly stated, plaintiff's case was that defendant No. 1 as Karta of his joint family, took a loan of Rs. 2,88/- from the plaintiff with interest on 15.4.1963 and executed a hand note. The defendants inspite of the repeated demands did not repay the loan. Hence the suit.

2. The defendant admitted that he had taken the loan from the plaintiff on execution of the handnote but his substantial defence was that he repaid the loan and in token of the re-payment the plaintiff granted him stamped receipt. In those circumstances it was contended that the plaintiff had no cause of action to file the suit.

3. Both parties adduced evidence in support of their respective case. The defendant produced the receipt purported to be granted by the plaintiff in his favour in support of the plea of re-payment of the loan. That receipt was marked as Ext. E/1 in this case. The parties went to trial on the question whether the plea of payment raised by the defendants was correct. Naturally, the question of genuineness or otherwise of the receipt fell for consideration in the courts below. The trial court found the receipt genuine, accepted the plea of payment raised by

the defendants and dismissed the plaintiff's suit. The lower appellate court reversed the findings and rejected the receipt. As the execution of the handnote and passing of consideration thereunder were admitted, the lower appellate court decreed the plaintiff's suit.

4. Learned counsel appearing for the appellants did not dispute any finding recorded by the court below, but contended that the suit is hit by the provisions of Section 4 of the Bihar Money Lenders Act (old) and Section 8 of the new Act. It would appear that this question was not raised in the pleadings of the parties nor did they raise this question at any stage of the suit. It was for the first time that this question has been raised at the second appeal stage. This court, while admitting the appeal, framed the question in the following terms.

was the suit maintainable in absence of any pleading or proof as to whether the plaintiff was a registered moneylender.

The learned counsel appearing for the respondent contended that the question now being raised, having not been raised at any stage of the suit, the court below was quite justified in deciding the suit on the pleadings of the parties and it cannot be allowed to be raised for the first time in second appeal.

5. Section 4 of the Bihar Money Lenders Act (hereinafter to be referred to as "the Act") reads thus:

No court shall entertain a suit filed by a moneylender for the recovery of a loan advanced by him after the commencement of this Act unless such moneylender was registered as such under this Act at the time when such loan was advanced.

This section thus prohibits a court from entertaining suit filed by a money lender for recovery of a loan unless such money lender was registered under the Act.. The word "loan" has been defined in Section 2 of the Act. It means a loan on interest advanced by a money lender. According to the definition, "money lender" means a person advancing loan-----From these definitions it is clear that if a person advances loan on interest, he is a money lender. It has been observed in some of the decisions that when Section 4 of the Act refer to "money-lender" it means professional money lender; profession implies repetition, habit, continuity etc. and, therefore, stray advances would not be covered by the expression "money-lender" in Section 4 of the Act. It may however, be pointed out that Section 4 of the Act speaks of a money lender and not a professional money lender. So far as professional money lender is concerned, the observations as referred to above may be correct but since the act does not speak of professional money lender, I do not think these observations would apply to a case arising out of the present Act. I have referred to the definitions of the "money lender" and "loan". If the intention of the framers of the law had been that Section 4 of the Act shall apply to a professional money lender, there was no difficulty for them in saying so. Since the legislature did not use the expression professional ""money lender" in Section 4 of the Act; it is not possible to say that the legislature intended that Section 4 would apply to a professional money lender. We cannot,

perhaps, read something in the provision of law which is not there and then try to constructs meaning. We have to proceed on the simple expressions as defined in the Act. In my view, the word "Money lender" used in Section 4 of the Act means a person who advances loan on interest in the present case the plaintiff admittedly advanced loan on interest. Therefore, according to the Act, he was a money lender and his suit shall be barred unless he proves certain facts avoiding the said bar.

6. On the question under consideration both parties relied on Full Bench decision of this court in the case of (1) Smt. Fula Devi Vs. Mangtu Maharaj and Others, . It would appear that two Division Bench cases namely, (2) 1963 B.L.J.R. 361 and (3) 1965 B.L.J.R. 774 (4) Lakhi Narayan Sao Vs. Smt. Bhagwati Kuer and Others, had taken different views on the question relating to the interpretation of Section 4 of the Act. In order to resolve the said conflict, the matter was referred to Full Bench. In the case of (4) Lakhi Narayan Sao Vs. Smt. Bhagwati Kuer and Others, . It was held that Section 4 of the Act is an exception to the pro-visions of Section 9 of the CPC and a party who alleges this exception has to prove it. Therefore, in order to bring a suit of a money lender within the mischief of Section 4 the defendant must prove that the plaintiff is a professional money lender and after the defendant has done so, the plaintiff may rely on the exemption contained in any notification issued u/s 3 of the Bihar Moneylenders Act, which empowers the State Government to exempt any money lender from the provisions of that Act, including the provision contained in Section 5 for registration of money lenders. In the case of (3) Dr. Nilkanth Prasad V. Bhola Nath and others (1965 B.L.J.R. 774) their lordships held that Section 3 of the Money lenders Act 1938 provides for notification to be issued by the State Government exempting, any money lender or class of money lenders from the operation of all or any of the provisions of the Act. A party who wants to rely upon such exemption; has to plead and prove it because according to the general rule one who relies upon an exception has to substantiate it. Notification u/s 3 no doubt is an exception to the provisions u/s 4, but the fact whether a person is a money lender or not is not an exception to Section 4. It is a basic fact which may or may not attract at all, the application of the Act itself. If Section 4 of the Money lenders Act is taken as an exception to Section 9 of the Code of Civil Procedure, according to the learned counsel's argument, then Section 3 of the Act will have to be taken as an exception to an exception, which can never be so. Therefore, the contention that Section 4 by itself, being of the nature of an exception, called for the discharge of the initial burden of proof in that respect from the defendant cannot be correct. Their lordships of Full Bench took into account the two views stated above and held as follows:--

On that interpretation of law, the essential onus to prove that a suit is not hit by Section 4 of Bihar Act VII of 1939 and is maintainable must be upon the plaintiff. Therefore; It must be held that the onus to prove as a matter of law, that the suit is entertainable without registration, is on the plaintiff, in view of the bar under the first paragraph of Section 4.

7. In view of the above decision of the Full Bench, the matter is concluded so far as this court is concerned, and it has to be held that it is for the plaintiff to prove that his suit is entertainable. In other words he must allege and prove that he is a registered money lender or that his case falls within the exception created in the Government Notification.

8. In the present case, the question was never raised either in the pleadings or at the hearing and it has been raised for the first time in second appeal by the defendants-appellant. The question is whether such plea can be allowed to be raised at this stage. In absence of the necessary facts in the pleadings or in evidence claiming exemption by the plaintiff from the mischief of Section 4 of the Act, his suit is bound to be hit by that section. It is obvious that it is for the plaintiff to allege and prove those facts. Since the plaintiff did not make out that case, he cannot be said to have discharged the burden which lay on him. It has, therefore, to be held that the plaintiff's suit was not entertainable.

9. Learned counsel appearing for the appellants contended that since this is a question of law it can be raised for the first time in second appeal. Learned counsel appearing for the respondent agreed with the proposition, but contended that this is not a pure question of law in as much as; It requires investigation of facts and, therefore, it cannot be allowed to be raised at the second appeal stage. In my view the only matter which has to be seen in this case is whether the plaintiff has made out a case in his pleadings claiming exception from the rigorous of Section 4 of the Act. That question requires only the pleadings to be seen the list of which has been given in the statements of facts in the judgment. No investigation of facts for that purpose is necessary. The appellants, however, filed a copy of the plaint in this Court. Admittedly, no such plea was raised in the pleadings of the plaintiff. Thus, in absence of any pleadings and proof that the plaintiff is a registered money lender or that he made casual advance within the meaning of Government Notification issued u/s 3 of the Act, I do not think there is any difficulty in entertaining the point as raised for the first time in this court. The plaintiff's suit depended upon the pleadings and proof of certain facts which having not been pleaded and proved; his suit is bound to fall. In the result, the appeal is allowed and the judgment and decree passed by the lower appellate court are set aside. In the circumstances of the case, however, there will be no order as to costs.