

(2014) 11 BOM CK 0020

In the Bombay High Court

Case No : Appeal (Lodging) No. 252 of 2014 in Summons for Judgment No. 21 of 2013 in Summary Suit No. 203 of 2013

Parekh Aluminex Limited

APPELLANT

Vs

Ashok Commercial Enterprises

RESPONDENT

Date of Decision : 20-11-2014

Acts Referred:

Bombay Money Lenders Act, 1946 — Section 10, 2(17), 2(9), 2(9)(f)
Civil Procedure Code, 1908 (CPC) — Order 37 Rule 2

Citation : (2015) 2 ALLMR 679

Hon'ble Judges : S.J. Vazifdar, J;Revati Mohite Dere, J

Bench : Division Bench

Advocate : Aspi Chinoy, Senior Counsel, Z.T. Andhyarujina and Ajay Fernandes i/ b Kanga and Co, Advocate for the Appellant; J.P. Sen, Sandip Parikh, Abhishek Sawant and Amit Pradhan i/b Subhash Pradhan and Co, Advocate for the Respondent

Judgement

Revati Mohite Dere, J.—This is an appeal against the order of the learned Single Judge granting the appellant leave to defend the suit, conditional upon its depositing only the principal sum of Rs. 67 crores.

2. On merits, there is no defence whatsoever. The appellant admits the receipt of the amount claimed in the suit. The appellant admits that it has failed to repay the same. The appellant admits having drawn cheques and bills of exchange in the respondents favour and having executed writings admitting the receipt of Rs.67 crores and assuring the respondents that the cheques would be honoured on presentation.

3. The appellant, however, contends that the claim is barred in view of the provisions of Bombay Money Lenders Act, 1946 (hereinafter referred to as "the Act or the BML Act"). To substantiate the contention, the appellant also contends that the suit is based only on the loan and not on the cheques and bills of exchange admittedly drawn and accepted by the appellant.

The respondents / plaintiffs answer to the contention under the BML Act is based, inter-alia, upon the cheques and the bills of exchange issued in their favour by the appellant. We will, therefore, deal with the second contention first.

4. The contention that the cause of action in the summary suit is based on the loan and not on the cheques, bills of exchange and agreements in writing to pay is totally misconceived. It would be necessary to recite a few facts before dealing with the appellant's contentions.

5. Between 20th January, 2012 to 31st July, 2012, the respondents lent and advanced an aggregate sum of Rs.67 crores to the appellant by RTGS transfers. The appellant in turn issued several cheques from the period 30th November, 2012 to 31st December, 2012. Almost all the cheques were dated 31st December, 2012 with the exception of four cheques which were dated 30th November, 2012. The factum of receipt of the loan amount and issuance of cheques has been admitted to by the appellant. As is evident, a major part of the amount was to be repaid by 31st December, 2012, and some amount on 30th November, 2012. Bills of exchange were also drawn by the appellant payable to the respondents. The same were accepted.

6. Letters were addressed by the appellant to the respondents between 13th September, 2012 to 20th October, 2012, promising to repay the loans and assuring the respondents that the cheques would be honoured. The letters are identical and read thus :

"Dear Sir,

Re : Repayment of Bill of Exchange.

We have received from you a sum of Rs. 10,00,00,000/- (Rupees TEN CRORE ONLY) by way of business loan @ 12% interest per annum. We have assured you that we will make repayment of the loan. We are giving you our Cheque No. 51210284 dated 31.12.2012 for 10,00,00,000/- (Rupees TEN CRORE ONLY) drawn on Union Bank of India, Sethna House, Tardeo Branch, Mumbai towards repayment of loan.

We assure you that when you deposit the above mentioned cheque with your bank, the same will definitely be honoured and we will neither stop the payment thereof by requesting our bank nor will we dishonour the same you will be at liberty to take legal action against us under the provisions of the Negotiable Instrument Act.

However, we assure you that such a stage will never come. Thanking you,

Yours faithfully,

For PAREKH ALUMINEX LIMITED

Sd/-

AUTHORISED SIGNATORY"

(Emphasis supplied)

These letters and the contents thereof have also been set out in the plaint. It is stated in para 5 of the plaint that the respondents vide the aforesaid letters between 13th September, 2012 to 20th October, 2012 had acknowledged the amounts lent by the respondents to the appellant and have promised and agreed to repay the amounts and honour each of the cheques drawn in favour of the respondents on their respective due dates. There is no dispute about the fact that the cheques were dishonoured on presentation.

7. Sometime in January, 2013, the respondents demanded repayment of the short term loan of Rs.6 crores, which fell due for payment on 30th November, 2012. Vide a letter dated 2nd January, 2013 the respondents also stated that there was an interest due on the said sum of Rs. 6 crores from 1st December, at 12% per annum as was agreed. Accordingly, the respondents called upon the appellant to repay the same forthwith, failing which, it is stated that the respondents would be constrained to take steps in order to secure the said amount. A similar letter dated 2nd January, 2013, was also sent claiming the repayment of the short term loan of a sum of Rs. 61 crores, which fell due for payment on 31st December, 2012. In fact, it may be noted that the respondents addressed another letter to the appellant on 4th January, 2013, calling upon the appellant to repay the short term loan which was due and payable and which was the admitted liability, for which cheques were drawn in favour of the respondents by the appellant. It was further stated in the said letter that they would be depositing the cheques, which they held towards repayment of the loan, retaining their right to recover the interest. Thereafter, on 16th January, 2013, as no reply was received from the appellant, the respondents addressed another letter stating therein that they were constrained to deposit the cheques held by them towards repayment and requested the appellant to ensure that the said cheques are honoured. Respondent No. 2 addressed yet another letter to the appellant dated 30th January, 2013 stating therein that the cheques towards repayment of the loan were dishonoured on presentation, for insufficiency of funds. As no response was received from the appellant, a legal notice dated 1st February, 2013 came to be addressed by the respondents' advocate to the appellant calling upon them to make payment in view of the admitted liability, failing which, legal proceedings would be initiated as against the appellant.

8. As we mentioned earlier, we will first deal with Mr. Chinoy's second contention that the cause of action in the suit is based only on the loan and not on the cheques, bills of exchange and promises to repay the loan.

9. It is pertinent to note that all the aforementioned documents have been relied upon by the respondents in their plaint. Infact, in paragraph 3 of the plaint, it is clearly averred by the respondents that for the purpose of making repayment, the appellant had issued cheques, which have been tabulated in the plaint. In para 4, it has been averred that for valuable consideration, the appellant had also executed bills of exchange in favour of the respondents for the aforesaid

amount aggregating Rs. 67 crores. As stated earlier, in para 5 of the plaint, the letters dated 13th September, 2012 to 28th October, 2012, have been relied upon evidencing acknowledgment of a debt by the appellant with a promise to repay the same on their respective due dates. By the aforesaid letters, the appellant had promised, agreed and undertaken to repay the entire debt of Rs. 67 crores to the respondents on the due dates mentioned. The plaint also states that as the appellant failed to repay the loan to the respondents, the respondents deposited all the said cheques for realization with its bank; that the appellant received a memo from its bank stating that all the said cheques have been dishonoured due to "insufficiency of funds" and that thereafter, a statutory notice was sent to the appellant. The doubt, if any, is set at rest by paragraph 16 of the plaint, which reads as under :

"16. The present Suit is filed as a Summary Suit to recover a liquidated sum of money based on the dishonoured cheques issued by Defendant and also on letters of Defendant admitting acceptance of loan and promising and agreeing to repay the said loan to the Plaintiffs, which constitutes a written contract between the Plaintiffs and the Defendant. The Defendant has therefore no defence on the merits of the case. This suit is filed as a Summary Suit under Order XXXVII Rule 2 of the Code of Civil Procedure 1908 and no relief not falling within the suit. This suit is required to be tried as a Summary Suit."

(emphasis supplied)

10. Thus, from a perusal of the entire plaint and the documents relied upon by the respondents, it is clearly beyond doubt that the suit is also based on the dishonoured cheques, the bills of exchange and the promises in writing to repay the loan. From a perusal of the plaint, it cannot be said that there are only stray sentences claiming repayment on the basis of dishonoured cheques.

11. The second contention is, therefore, rejected. This brings us to Mr. Chinoy's first contention that the claim is barred in view of the provisions of the Bombay Money Lenders Act, 1946.

12. It may also be noted that the summary suit was filed on 28th February, 2013; that the respondents preferred the summons for judgment in the said suit on 8th April, 2013; that in the said summons for judgment, the appellant herein filed its affidavit in reply on 20th May, 2013; and that thereafter, three more affidavits came to be filed by the appellant herein i.e. the affidavit in sur-rejoinder dated 10th July, 2013, further affidavits dated 25th July, 2013 and 4th September, 2013. For the first time in the further affidavit dated 4th September, 2013, the appellant raised the defence that the respondents were carrying on money lending business and hence the suit was barred by the provisions of the Bombay Money-Lenders Act. It was averred in the said affidavit that the transaction which was the subject matter of the suit was a "loan" within the meaning of the term, under the provisions of the Act and that the respondents did not have a money lending license. It was, therefore, sought to be contended

that the suit could not be tried as a summary suit and that the appellant was entitled to unconditional leave to defend the suit. The respondents in their reply to the further affidavit dated 4th September, 2013 categorically denied that the respondents were money lenders and that the transactions forming the subject matter of the suit were barred by the Act. It was further averred that the suit was also based on the dishonoured cheques and bills of exchange, as set out in the plaint.

Thus, the fact that the respondents were money-lenders, was categorically denied by the respondents. It appears to us, that the defence raised by the appellant is not only taken belatedly, but is clearly an afterthought. It is not a bonafide defence.

13. Mr. Chinoy relied on Section 2(17) of the Bombay Money-Lenders Act and Section 10 in support of his contention to show that the suit is not maintainable and is barred under the Act, as according to him, the suit was for the recovery of the loan amount. Mr. Chinoy further contended that even otherwise, even assuming the suit is based on the dishonoured cheques it is, in effect, a suit to recover the loan and is, therefore, barred under the Act. He submitted that if repayment of the loan is barred under the Act, it would not make any difference, whether the suit was instituted on the basis of a dishonoured cheque or otherwise, as any form of enforcement of the 'loan' is barred under the Act. He further submitted that under Section 2(9)(f), a loan made on the basis of a negotiable instrument must mean a negotiable instrument given at the time of the loan and not subsequently or later. He submitted that giving of a loan and issuance of cheque must be contemporaneous. He relied on the judgments in the case of Khyati Realtors Pvt. Ltd. v. M/s. Zenal Construction Pvt. Ltd.¹, Kaloji Talusappa Gangavathi Vs. Khyanagouda and Others, and Smt. Nanda Nandanwar represented through PAO Dharam Nandanwar Vs. Nandkishor Thaokar, , in support of his contention.

14. Mr. Sen, learned Senior Counsel for the respondents refuted the submissions. He submitted that Section 2(17) cannot be read in isolation only with Section 10 of the Bombay Money-Lenders Act and that it will necessarily have to be read with Section 2(9)(f) of the said Act, in order to give it a harmonious construction. He submitted that if the interpretation as sought to be contended by Mr. Chinoy is accepted, Section 2(9)(f) including certain acts/documents from the term 'loan' the provision will be rendered otiose. He submitted that it is not necessary that the negotiable instrument has to be handed over at the time when the loan is advanced as long as it is agreed by the parties to hand over the same later. He further submitted that the letters acknowledging the amount due and payable to the respondents constitute a contract and as such would make the appellant liable to pay the amounts under the dishonoured cheques.

15. The relevant provisions of the Bombay Money-Lenders Act relied upon by the parties are as follows :-

"2. Definitions.

(9) "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 with a co-operative society;

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

(c) a loan advanced to a Government or by any local authority authorised by Government;

(cc) 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;

(d) a loan advanced by a co-operative society;

(d1) 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;

(d2) a loan to or by an insurance company as defined in the Insurance Act, 1938 (IV of 1938);

(e) a loan to, or by bank;

(ee) loan to, or by, or deposit with, any body (being a body not falling under any of the other provisions of this clause), incorporated by any law for the time being in force in the State;

(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 (XXVI of 1881); other than a promissory note;

(f1) an advance, of any sum exceeding rupees three thousand made on the basis of a hundi (written in English or any Indian language);

(f2) an advance made bona fide 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."

Section 2(17) reads thus :

"suit to which this Act applies" means any suit or proceeding-

(a) for the recovery of a loan made after the date on which the Act comes into force;

(b) for the enforcement of any security taken or any agreement, made after the

date on which this Act comes into force in respect of any loan made either before or after the said date; or

(c) for the redemption of any security given after the date on which this Act comes into force in respect of any loan made either before or after the said date."

Section 10 reads thus;

"10. (1) No court shall pass a decree in favour of a money-lender in any suit to which this Act applies [including such suit pending in the court before the commencement of the Bombay Money-lenders (Amendment) Act, 1975] unless the court is satisfied that at the time when the loan or any part thereof, to which the suit relates was advanced, 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 -

(a) suits in respect of loans advanced by a money-lender before the date on which this Act comes into force;

(b) 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, to realise the property of a money-lender."

16. The Bombay Money-Lenders Act was intended to do away with a very serious evil in our society. It was intended to keep control over money-lending transactions and to see that excessive rate of interest was not charged by money-lenders and the only way that such control could be maintained was by providing penalties for doing money-lending business without a proper license from the State. Therefore, in construing an Act of this nature which takes away vested rights and curtails freedom of contract in order to give relief to a particular class, the Court should guard against giving it an interpretation which would extend its scope. The provisions of the Act should be interpreted literally and strictly. Section 2(9)(f) expressly excludes an advance made on the basis of the negotiable instrument as defined under the Negotiable Instruments Act, from the definition of the term 'loan'.

17. Section 10 provides that no Court shall pass a decree in favour of a money-lender to which the Act applies unless the moneylender held a licence at the relevant time. Section 2(17) states that the expression "suit to which this Act applies" means any suit or proceeding of the nature mentioned in clauses (a), (b) and (c) thereof. Clause (a) refers to a suit or proceeding "for the recovery of a loan made after the date on which the Act comes into force." Thus if a loan falls within the ambit of the expression "suit to which this Act applies" in section 2(17), a suit or proceeding to recover the same would have to be dismissed in view of section 10 unless the money-lender holds a licence at the relevant time.

18. The question therefore, is whether the loan in the present case falls within the ambit of sections 2(17) and (10). The appellant's contention that the suit is barred by the provisions of the Bombay Money Lenders Act is not well founded. Section 2(9) defines a loan to mean an advance at interest whether of money or in kind, but does not include a loan or advance of the nature stipulated in clauses (a) to (f2) thereof. The above suit is not hit by the Bombay Money Lenders Act in view of clause (f) of section 2(9) of the Bombay Money Lenders Act. In view of clause (f), the loans do not fall within the purview of the Act as they were advances made on the basis of the negotiable instrument as defined in the Negotiable Instruments Act, 1881 viz. the cheques and the bills of exchange.

19. In our view, in the present case, the loans were advanced by the respondents to the appellants on the basis of negotiable instruments other than promissory notes. This is clear from the facts and circumstances of this case especially the manner in which the amounts were advanced and cheques were drawn. The fact that the cheques were forwarded by the appellants to the respondents after the loans were advanced by RTGS transfers makes no difference. The amounts were advanced by the respondents to the appellants and the cheques and the bills of exchange were issued by the appellant to the respondents as a part of one composite agreement. In other words, this agreement was entered into at the same time. This is not a case where the amounts were first advanced and thereafter the parties agreed that the borrower would draw the cheques and bills of exchange and execute the said writings. The entire arrangement was agreed upon at the same time. The cheques and bills of exchange were forwarded subsequently in accordance with and pursuant to this agreement which had already been arrived at. There is nothing on record that militates against this view. The appellant has not even pleaded anything to the contrary. It is not the appellant's case that the cheques and the bills of exchange were drawn and the writings were executed independent of the loan pursuant to any understanding arrived at subsequently. It follows therefore that the said loans were made on the basis of the said negotiable instrument viz. the cheques and the bills of exchange drawn by the appellants in favour of and payable to the respondents.

20. The mere fact that a negotiable instrument is handed over subsequent to the loan being disbursed makes no difference if the loan was made on the basis of the negotiable instrument. Where it is agreed as part of a composite agreement to advance a loan against a negotiable instrument covered by section 2(9)(f), it makes no difference that the negotiable instrument is handed over subsequently.

21. In the circumstances, there is in fact no defence to the suit. Despite the same, the learned Judge has granted leave conditional upon the appellants depositing only the principal sum claimed. The appellant can, therefore, have no grievance against the said order. The appeal is, therefore, dismissed.

The time to deposit the amount is extended upto and including 31.12.2014.

1 Company Petition No. 243/2012 dated 29th August, 2013