

(1984) 03 BOM CK 0009

In the Bombay High Court

Case No : Civil Revision Application No. 633 of 1981

Sitaram Laxminarayan Rathi

APPELLANT

Vs

Sitaram Kashiram Koli and Others

RESPONDENT

Date of Decision : 29-03-1984

Acts Referred:

Bombay Money Lenders Act, 1946 — Section 2(9)
Civil Procedure Code, 1908 (CPC) — Section 34
Negotiable Instruments Act, 1881 (NI) — Section 5, 6

Citation : (1984) 2 BomCR 819 : (1985) MhLj 430

Hon'ble Judges : Sharad Manohar, J

Bench : Single Bench

Advocate : R.D. Soni, for the Appellant; S.M. Dandekar, for the Respondent

Judgement

Sharad Manohar, J.—The short question that arises in this revision application is whether a post dated cheque is a negotiable instrument within the meaning of the Bombay Money Lenders Act.

2. The relevant facts are as follows :---

On 19-5-1973, a sum of Rs. 1,500/- was purported to be advanced by the petitioner (hereinafter "the plaintiff") to respondent No. 1 acting on behalf of the respondents (hereinafter "the defendants"). Admittedly the amount was paid against three post dated cheques of Rs. 5000/- each but the total amount actually paid was not Rs. 1,500/- but Rs. 1,410/- only. A sum of Rs. 90/- was purported to be deducted as commission payable by the defendants to the plaintiffs. However, it is fairly conceded by Mr. Soni, the learned Advocate appearing before me for the petitioner that this was in fact a deduction of interest in advance. But his explanation is meaningless because if the interest was deducted even before the advance was made it only means that the sum advanced was the lesser amount. Mr. Soni conceded this position and the entire petition was argued on the basis that what was advanced by the plaintiff to the defendants against the three post-dated cheques was a sum of Rs. 1,410/- and

not Rs. 1,500/-. The exact dates of the three post dated cheques could not be gathered from the record available before this Court. But there was no dispute before me nor even before the lower Court for the matter of that, that the cheques were payable before 12-7-1973.

The cheques were dishonoured when they were duly presented and hence the requisite notice dated 12-7-1973 was given by the plaintiff to the defendants for payment of the amount of Rs. 1500/- and upon their failure in that behalf, the suit was filed by the plaintiff in the year 1976 for the recovery of Rs. 1,500/- as principal sum and for the interest on the same.

3. The defence of the defendants was that out of the sum of Rs. 1500/- only a sum of Rs 750/- was received by them and further that even that amount was repaid by him. It was also contended by defendant No. 1 that he was a debtor within the meaning of Maharashtra Debt reliefs Act and that the debt was extinguished. There were other defences raised which need not be discussed here.

4. On these pleadings the issues were framed by the learned trial Judge. In addition to the issue relating to the position resulting from the Maharashtra Debt Reliefs Act, the learned Judge also framed issue as to whether the plaintiff was a money lender and as to whether he had complied with the provisions of the Bombay Money Lenders Act in order to entitle him to file a suit in connection with the transaction.

5. The plaintiff led evidence to prove that the amount of Rs. 1,500/- was advanced by him as against the three post dated cheques issued by defendant No. 1 on behalf of the defendants for the sum of Rs. 1500/-. In the cross-examination it was suggested that a sum of Rs. 90/- was deducted by him while giving advance of a sum of Rs. 1500/- and this fact was admitted by him. However, nothing in the cross-examination went to suggest that only a sum of Rs. 750/- was paid by him to the defendant or that the balance of amount of Rs. 750/- was repaid by them to the plaintiff.

6. As against the plaintiff's evidence the defendants did not even step into the witness box. It thus follows that so far as the factum of advance was concerned the plaintiff had sufficiently proved the advance of Rs. 1,410/- paid by him to the defendants.

Since the defendants did not step into the witness box there was no question of their having proved that they were debtors within the meaning of Maharashtra Debts Reliefs Act. The only question, therefore, that remained for decision of the trial Court was as to whether the plaintiff was a money lender within the meaning of the Bombay Money Lenders Act and whether the transaction in question was hit by any of the provisions of the said Act. In this connection the question to be decided by the Court was as to whether the advance made by the plaintiffs to the defendant was "a loan" within the meaning of Bombay Money Lenders Act. The learned Judge in this connection held that the plaintiffs have

charged interest on the advance and hence he was a money lender within the meaning of the Money Lenders Act. The learned Judge also held that if the plaintiff was a money lender, it was incumbent upon him to comply with the requirements of the Bombay Money Lenders Act and since he had not done so, the suit filed by him for the recovery of the amount of Rs. 1500/- alleged to have been advanced by him was not maintainable. The suit was, therefore, dismissed by the trial Court.

7. In this revision application Mr. Soni, the learned advocate appearing for the petitioner-plaintiff has rightly pointed out that the learned Judge has committed a manifest error in assuming that the plaintiff was money lender or that the suit transaction was a transaction of loan within the meaning of the Act. This is so because, in the first place, no such plea was raised in the written statement by the defendants and in the second place the loan was admittedly against the three post-dated cheques issued by the defendants and as per the provisions of section 2(9)(f) of the Money Lenders Act as it stood on the date of the transaction any payment made as an advance against cheques stood removed out of the mischief of the Money Lenders Act because such payment was not a loan within the meaning of the Act. This much position is indisputable.

8. Normally speaking, therefore, this transaction would not be hit by the Money Lenders Act and no licence would have been required to be held by the plaintiff for filing the suit based upon the advance made as against the cheques. However, a small ticklish question arises as to whether a post-dated cheque can be said to be a cheque within the meaning of the Negotiable Instruments Act. Section 2(9)(f) of the Act takes the transaction out of the purview of the concept of loan only, if the loan is advanced as against the cheques. But the "cheque" has been defined in section 6 of the Negotiable Instruments Act to mean a bill of exchange draws on a specific banker and not expressed to be payable otherwise than on demand. In other words, a cheque is a bill of exchange payable on demand and drawn upon a specified bank. The requisite condition, therefore, is that the drawee must be bankers and the cheques must be payable by them on demand. The question, therefore, is whether a post-dated cheque can be said to be an instrument payable on demand.

9. Mr. Soni, the learned Advocate for the plaintiff, contended that no doubt post-dated cheques was payable not immediately on demand. In fact, he conceded that until the date mentioned in the cheque had arrived, no demand in respect of cheques could be made at all and in that limited sense, it was not a negotiable instrument payable on demand; he conceded that it was only after the date had arrived, that the instrument becomes a cheque.

But he contended, with evident force that till that it was a bill of exchange drawn on a banker and as such was a negotiable instrument which is all that section 2(9)(f) demanded.

10. In this connection, Mr. Soni invited my attention to the judgment of the

Allahabad High Court, in the case of the Partab Chand Ratan Chand Vs. Gilbert, . In that the trial Court had taken the view that on proper construction of section 6 of the Negotiable Instruments Act, a post-dated cheque was not a valid negotiable instrument. Reacting to the view, the learned Single Judge of the High Court observed as follows :---

"If the learned Judge were right one of the most common methods of financing commercial operations would be suddenly put an end to."

The learned Judge further observed that the cheque was after all u/s 6 of the Act, a bill of exchange drawn in a special manner but was a bill of exchange nonetheless and as a bill of exchange it was negotiable. The learned Judge was, therefore, of the view that even a post dated cheque was a negotiable instrument.

11. Mr. Soni also relied upon the judgment of the Calcutta High Court reported in Bank of Baroda Ltd. Vs. Punjab National Bank Ltd. and Others, in the case Bank of Baroda Ltd. v. Punjab National Bank Ltd. In that case, in similar context the Calcutta High Court held that even a post-dated cheque was a negotiable instrument and for that purpose the learned Judges of the Division Bench of the High Court relied upon not only the provisions of section 6 of the Negotiable Instruments Act which defines a cheque, but also section 5, para 2 of the Act which defines a negotiable instrument. Para 2 of the said section 5 leaves no room for doubt that a bill of exchange is a negotiable instrument even cases where the payment was to be made at a future date. If the cheque is a post-dated cheque and if it otherwise satisfies the condition of a bill of exchange, the fact that it is a post-dated cheque would not, therefore, make it less of a bill of exchange. A post-dated cheque, therefore, is as much as negotiable instrument as contemplated by the Negotiable Instruments Act.

12. This being the legal position, there is no escape from the conclusion that the plaintiff had advanced a sum of Rs. 1410/- to the defendants as against three negotiable instruments and as the position under the Money Lenders Act then stood, a loan made against such negotiable instruments stood outside the admit of the definition of "loan" within the meaning of the said Act. The plaintiff, therefore, cannot be non-suited on the ground that the suit transaction was hit by the provisions of the Money Lenders Act.

The question then arises is that how much amount the plaintiff is entitled to. In the first place, it may be noted that on his own admission he had paid to the plaintiff only a sum of Rs. 1410/- and not Rs. 1500/-. This is so, because on his own admission he had deducted a sum of Rs. 90/- from the amount of Rs. 1500/- which was to be advanced to the defendant.

Further, on the plaintiff's own statement made in the cross-examination, it was his practice not to charge any interest to the debtor at all. If that was so, then until the date of the suit he was not entitled to any interest on the sum of Rs. 1410/- advanced by him to the defendant.

13. The position would, however, be different from the date of the suit. From the date of the suit, the defendant would be duty bound to pay interest to the plaintiff at a reasonable rate. To my mind, in the instant case only 9 percent would be quite reasonable. From the date of the suit onwards, the defendant shall have to pay interest on Rs. 1410/- at the rate of 9% per annum till the date of payment.

14. The Rule is made absolute.

The defendant shall pay to the plaintiff the costs of the suit.

There shall be no order as to costs so far as the present petition is concerned.