

(2010) 01 BOM CK 0095

In the Bombay High Court

Case No : Criminal Appeal No. 467 of 2009

Smt. Nanda Nandanwar represented through PAO Dharam
Nandanwar

APPELLANT

Vs

Nandkishor Thaokar

RESPONDENT

Date of Decision : 12-01-2010

Acts Referred:

Bombay Money Lenders Act, 1946 — Section 10, 10(1)
Contract Act, 1872 — Section 23
Evidence Act, 1872 — Section 114
Negotiable Instruments Act, 1881 (NI) — Section 118, 138, 139, 2

Citation : (2010) 2 CivCC 288 : (2010) 1 Crimes 708 : (2010) 3 MhLj 268 :
(2011) 7 RCR(Criminal) 697

Hon'ble Judges : A.P. Bhangale, J

Bench : Single Bench

Advocate : P.K. Mishra, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Bhangale, J.—This Appeal at the instance of original complainant, is directed against the judgment and order dated 26th March, 2009 passed by learned Judicial Magistrate First Class, Nagpur in Criminal Complaint Case No. 9037/2007, whereby the respondent accused was acquitted of the charge u/s 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the N.I. Act").

2. The facts in nutshell which gave rise to this appeal are: The complainant claimed that she is carrying on the business in lending money to needy persons. It is her case that the accused had approached her on 3.2.2006 and 8.4.2006 with a request for loan in the sum of Rs. 18,000/- and Rs. 19,000/- respectively for a period of two months and agreed to pay interest at the rate of Rs. 21% per annum, under two promissory notes executed before a Guarantor and accepted the cash. Further, according to the complainant, the accused had on 17.11.2006 issued a cheque in the sum of Rs. 40,000/- towards repayment of loan amount

and part of interest. The cheque bearing No. 767789 was drawn upon Canara Bank, Sadar Bazar Nagpur. The cheque was presented by the complainant on 4.5.2007 to the State Bank of Indore, Gandhibagh, Nagpur, which came to be dishonoured with remarks "funds insufficient" as informed by the Bank, on 5.5.2007. The complainant by notice dated 21.5.2007 demanded a sum of Rs. 40,000/- and interest at the rate of 21 per cent within 15 days of the receipt of notice. The accused received the notice on 22.5.2007; but did not repay the amount. Hence the complainant filed complaint on 26.6.2007 in the Court of learned Judicial Magistrate, First Class 2, Nagpur seeking trial and punishment of the accused for offence punishable u/s 138 of the N.I. Act.

3. The accused did not dispute the fact that he had issued the cheque under his signature and had received notice (Exh.22) from the complainant; but out rightly denied the complaint and any liability on the ground that the complainant was doing business of money lending without any requisite licence for money lending and that the complainant has failed to prove legally enforceable or recoverable debt or legal liability as against accused, in view of the provisions of the Bombay Money Lenders Act, 1946. The accused opposed the complaint stoutly on the ground that u/s 139 of the N.I. Act, there can not be presumption of preexisting liability and complainant had failed to prove that the cheque was issued towards legally enforceable debt or liability.

4. The trial Court, after considering the evidence led and submissions at the Bar, recorded finding of "not guilty" and acquitted the accused of the offence punishable u/s 138 of the N.I. Act.

5. Learned Advocate for the appellant, in support of the appeal, submitted that the accused ought to have been convicted by the trial Court for offence punishable u/s 138 of the N.I. Act, since the accused had admitted issuance of cheque under his signature, which was returned dishonoured and remained unpaid. It is further contended that the complainant was not bound to produce money lending license in operation. Learned Advocate for the appellant submitted that the accused ought to have been held guilty. According to learned Advocate for the appellant, mere non-production of money lending license in the trial Court, was cited as the prime reason for acquitting the accused and, therefore, judgment and order impugned, be set aside.

6. None appeared for the respondent at the time of hearing of this Appeal.

7. In Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, , the Apex Court in Para No. 20 observed that Section 138 of the N.I. Act has three ingredients, viz:

(i) that there is a legally enforceable debt;

(ii) that the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability which presupposes legally enforceable debt; and,

(iii) that the cheque so issued had been returned due to insufficiency of funds.

It is further observed in Para No. 21 while considering presumption u/s 139 of the N.I. Act;

Existence of legally recoverable debt is not a matter of presumption in favour of the holder of the cheque that the same has been issued for discharge of any debt or other liability.

In order to prove offence punishable u/s 138 of the said Act, five ingredients are required to be proved as laid down by the Apex Court in Paragraph No. 10 in *Kusum Ignates and Alloys Ltd. v. Pennar Peterson Securities Ltd.* (2002) 2 SCC 745. They are as follows:

(i) A person must have drawn a cheque on an account maintained by him in a Bank for payment of certain amount of money to another person from out of that account for the discharge of any legally enforceable debt or other liability.

(ii) that cheque has been presented to the Bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(iii) that cheque is returned by the Bank unpaid, either because the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the Bank;

(iv) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing to the drawer of the cheque within 15 days of the receipt of the information by him from the Bank regarding return of the cheque as unpaid.

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 30 days of the receipt of such notice.

Under Section 139 of the N.I. Act, there is presumption in favour of holder that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole in part of any debt or other liability. The explanation to Section 138 makes it clear that "debt or other liability" means legally enforceable debt or other liability. u/s 118 of the N.I. Act it can legally be inferred that the cheque was made or drawn for consideration on the date which the cheque bears.

8. Thus, bearing in mind the relevant provisions of the N.I. Act, it must be emphasized that only legally enforceable debt or liability can be enforced in the proceedings u/s 138 of the said Act, because the explanation to the penal provision is abundantly clear that the dishonoured cheque must have been received by the complainant against a legally enforceable debt or liability.

9. The complainant in the present case, is a money lender who had advanced loan to the accused on the basis of the two promissory notes dated 3.2.2006 and

8.4.2006 respectively for loan of Rs. 18,000/- and Rs. 19,000/- respectively, at interest at the rate of 21 per cent per annum. It is thus case of the complainant that the accused had issued cheque No. 767789 drawn upon Canara Bank, Sadar Bazar, Nagpur for Rs. 40,000/- towards repayment of loan amount and interest. Thus, it was incumbent upon the complainant to establish the fact that she held valid money lending license in accordance with the provisions of Bombay Money Lenders Act, 1946 for the relevant period of the transaction. The complainant money lender did not produce such a valid money lending license at the time when complaint was instituted nor till it is decided although required. Furthermore, no such valid money lender's license is produced even during pendency of this Appeal. Section 10 of the Bombay Money Lenders Act, 1946 runs thus:

10(1) No Court shall pass decree in favour of 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 loan or any part thereof to which the suit relates was advanced the money lender held a valid license and if the Court is satisfied, the money lender did not hold a valid license, it shall dismiss the suit. The words "No court" and "in any suit" used in the Section are wider in scope to embrace any suit or proceeding initiated by a money lender who is required to hold and prove valid license for money lending for the relevant period of the loan transaction or transactions. The trial Court was, therefore, entitled to insist upon the complainant for production of valid license for money lending and also to infer in view of Section 114(g) of the Evidence Act that the document withheld was unfavourable to the complainant who withheld it. Thus, the legal position cannot be disputed that Courts are bound to dismiss the suit by money lender for recovery of loans when such money lender was found carrying on business of money lending on the date or dates of the transaction without having valid money lending license. The Court, in view of Section 10(1) of the Bombay Money Lenders Act, 1946 is bound to dismiss the suit instituted without production of valid money lending license operative at the time of suit loan transactions. In other words, a money lender can not enforce such loan transaction lawfully without production of valid money lending license operative at the time of transaction of loan to be recovered. Thus, no fault can be found with the trial Court as it was duty bound to dismiss the complaint by the complainant a money lender who was engaged in business of money lending without a valid money lending license at the time of transaction in view of clear provisions of Section 10 of the Bombay Lenders Act, 1946 as the learned Court could not have assisted the complainant to facilitate or further the illegal claim or claim prohibited by law in the complaint. Since explanation to Section 138 of the N.I. Act clearly stipulated that the debt or liability means legally enforceable debt or other liability the claim by money lender against her borrower without production of valid and operative money lending license covering period of transaction was unenforceable claim u/s 138 of the N.I. Act was bound to be

dismissed. The complainant moneylender despite availing of sufficient opportunity in the trial Court could not produce valid and operative money lending license at the time of transaction of loan, hence dismissal of complaint can not be faulted as the complainant failed to establish legally enforceable debt or liability of the accused. Section 5 of the Bombay Money Lenders Act prohibits business of money lending except in accordance with terms and conditions of money lending license. In the present case, it was claimed that the loans were advanced at interest on the basis of two promissory notes executed in front of a guarantor. Thus, when transaction of money lending without valid license was prohibited by law, no court can help or assist a party money lender to enforce or recover a claim, except in accordance with law i.e. the Bombay Money Lenders Act, 1946 in this case. The complainant withheld important document without any explanation; hence presumption arose against the complainant in view of Section 114(g) of the Evidence Act for non-production of license. Learned Advocate for the appellant made a reference to ruling in *Rajesh Varma v. Aminexs Holdings and Investments and Ors.* 2008 (3) Mah.L.J. 460 to submit that every loan is not covered by the provisions of the Act inasmuch as Section 2(g) expressly excluded advance of any sum exceeding Rs. 3000/- made on the basis of negotiable instrument other than a promissory note. In the case in hand, the money lender had advanced loans at interest on the basis of two promissory notes hence the ruling cited can not be come to the rescue of the complainant in the facts and circumstances of the present case as the complainant could not establish legally enforceable debt or liability from the accused towards complainant. Since the complainant has failed to establish salutary or basic ingredients of offence punishable u/s 138 of the said Act or observed in *Kusum Ingots 's case (supra)*, the complaint was rightly dismissed and the finding as to acquittal was correct and logical by the trial Court. No ground is made out so as to interfere in this Appeal. The acquittal of the accused is justified, as the cheque in question was, in fact, had not been issued for any legally enforceable debt or liability in view of the provisions of the Bombay Money Lenders Act, 1946.

10. It would be pertinent to note that business of money lending is invalid without licence. According to law of Contract, it would not be possible to enforce any agreement or consideration, the object of which is unlawful, within the meaning of Section 23 of the Indian Contract Act, 1872, which is couched in the following terms:

23. What considerations and objects are unlawful, and what not The consideration or object of an agreement is lawful, unless it is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful, is void.

Thus, pithily put, the transaction in question, is also hit by the provisions of Section 23 of the Indian Contract Act, 1872.

11. Hence this Court is of the considered view that the complainant could not establish her case against the accused so as to bring home the guilt on the part of the accused. The cheque in question was not issued to discharge loan enforceable according to law and, therefore, notwithstanding that it was dishonoured by nonpayment of loan remaining unpaid despite demand notice in writing, it cannot come within the purview of Section 138 of the N.I. Act. As such, it would not be possible for this Court to reverse the acquittal and to fasten criminal liability upon the accused, u/s 138 of the N.I. Act. The Appeal is, therefore, dismissed.