

M/S.Ashok Commercial Enterprises & Anr vs Parekh Aluminex Limited on 24 February, 2014

Author: S.C. Gupte

Bench: S.C. Gupte

sat

1/12

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO. 21 OF 2013

IN

SUMMARY SUIT NO. 203 OF 2013

M/s.Ashok Commercial Enterprises & Anr.

vs.

Parekh Aluminex Limited

Mr.Virag Tulzapurkar with Mr.Sandeep Parikh, Mr.Abhishek Sawant, Mr.Amit

Pradhan i/b. M/s.Subhash Pradhan & Co. for Plaintiffs.

Mr.Sanjay Jain with Mr.Rohit Chakraborty i/b. M/s. S. Mahomedbhai & Co.
Defendant.

CORAM : S

24 FEBRUARY 2014 P.C. :

The Summary Suit is for recovery of a sum of Rs. 68,37,96,666/-

which comprises of principal amount of Rs. 67 crores and interest of Rs.

1,37,96,666/- calculated at the rate of 12% p.a. The suit is filed inter alia on the basis of dishonoured cheques.

2. The Plaintiffs had given short term loans aggregating to Rs. 67 crores for business purposes to the Defendant, the amounts of which were duly credited to the Defendant's account through RTGS. Towards repayment of these loans, the Defendant drew cheques of varying sums aggregating to Rs. 67 crores in favour of the Plaintiffs. The Defendant also by its letters (Exhibits D1 to D12 of the Plaintiff) acknowledged each of the loans advanced and promised to repay the sat 2/12 sj 21-2013.doc amounts and also to honour the cheques. The cheques were dishonoured upon presentation for "insufficient funds". The Plaintiffs, therefore, seek to recover the amounts with interest as aforesaid. The Plaintiffs rely upon both the dishonoured cheques as well as the letters, referred to above, for filing the suit as a Summary Suit.

3. The Defendant has filed a reply to the Summons for Judgment through one Manish Maru (who is said to be an authorised representative and to have filed the affidavit on the basis of the records available with the Defendant).

The following defences have been raised by the Defendant in its reply:

(i) The suit is not maintainable as a Summary Suit because there was a running account between the parties and the Plaintiffs could not pick up a few items from this running account to found a case under Order 37;

(ii) The cheques issued were a mere collateral security or "comfort" and did not amount to a negotiable instrument;

(iii) There was no valid presentment of the cheques for payment, as the signatory of the cheques had expired before such presentment;

(iv) The signatory of the said cheques, one Amitabh Parekh, who was the Managing Director of the Defendant, was unwell from sat 3/12 sj 21-2013.doc September 2012 and on 14 December 2012 was admitted to the Breach Candy Hospital in a very critical condition and died on 6 January 2013. It is claimed in the reply that Plaintiff No.2 visited Amitabh Parekh on 22 December and 29 December 2012 in the hospital and "the Defendant suspects that on the documents referred to and relied upon by the Plaintiff in the plaint, the purported signature of the late Mr Parekh would have been obtained during the aforementioned visit taking undue advantage of the fact that at that point in time the late Mr Parekh was under

heavy medication and in all probabilities was unable to understand what he was signing"

4. The learned Counsel appearing for the Defendant, in addition to the defences noted above, submitted that the transaction between the parties was a money lending transaction hit by the provisions of Section 10 of the Bombay Money Lenders Act, 1946. The learned Counsel submitted that the present suit to recover a loan given by the Plaintiff as a act of money lending without holding a valid licence under that Act is barred by the provisions of the Bombay Money Lenders Act. The learned Counsel relied upon the Judgments in the cases of M/s.Rushabh Precision Bearings Ltd. Vs M/s.Marine Container Services (Indai) Pvt.Ltd.¹, Bharati Surendra Khandhar Vs Deepak M. Shah ², Jatin Jashwantra Bhagat Vs Dayaram Waghji Thakar ³, Sha Damji Deraj Vs Megraj Bhikumchand & Co.⁴ and Khyati Realtors Pvt. Ltd. Vs M/s. Zenal ⁵ 1999(3) Bom.C.R.760 2 Summons for Judgment No.727/1998 decided on 8.10.2001 3 Summons for Judgment No.309/2006 decided on 4.10.2006 4 1958 Bombay Law Reporter Vol.LX 1366 sat 4/12 sj 21-2013.doc Construction Pvt. Ltd.⁵ in support of his contention. The learned Counsel also submitted that the letters acknowledging the loans advanced and purporting to promise to repay the loans, are insufficiently stamped and that these cannot be led in evidence on that account.

5. As for the defence of running account, the learned Counsel relied upon the statement of account between the parties as reflected in the bank statement which shows certain debits and credits between the parties apart from the debits and credits concerning the short term loans advanced as claimed in the present suit. Even if it is assumed for the sake of argument that there were other transactions between the parties, apart from the suit transactions, the defence has no merit. As far as the present suit is concerned, the same is based on dishonoured cheques and not on any antecedent liability based on any account. The consideration for such cheques can very well be an account stated between the parties or some items in a running account. Because such consideration is based on an account between the parties, the suit based on dishonoured cheques cannot be termed as a suit on the basis of such account.

In other words, a running account may well form a consideration of a negotiable instrument such as a cheque but the suit is still a suit on a negotiable instrument which is supported by a lawful consideration. The defence of running account is thus even not a statable defence to a suit filed on dishonoured cheques.

6. It is next contended by the Defendant that the cheques were merely a collateral security for repayment of the loan. The defence is merely illusory.

5 Company Petition No.243/2012 decided on 29.8.2013 sat 5/12 sj 21-2013.doc One fails to see the significance of an alleged collateral security, which is not meant to be enforced. If a cheque is issued as a security to repay the amount, it would necessarily mean that in the event of non-payment of the

amount secured by the cheque, the cheque can be deposited and would be honoured. The defence that the cheque was a mere collateral security and did not, therefore, amount to a negotiable instrument, can only be termed as bogus.

7. The next submission of the Defendant that there was no valid presentment for payment as the signatory of the cheque had expired before such presentment, is merely required to be stated to be rejected. The signatory of the cheque was the Managing Director of the Defendant (a public limited company) and his death has nothing to do with the validity of the presentment of the cheques for payment.

8. It is submitted by the learned Counsel for the Defendant that drawing of the cheques and execution of other documents are disputed by the Defendant. It is submitted that these documents may have been caused to be executed whilst the executant was in a hospital. The cheques are all drawn much prior to the alleged hospitalization of Amitabh Parekh. Apart from the cheques, there are letters acknowledging (i) the amounts lent by the Plaintiff to the Defendant aggregating to Rs.67 crores and (ii) the cheques issued towards repayment of such amounts as also promissory notes executed in relation thereto. The execution of the cheques as well as the various writings referred to above were never disputed at any time by the Defendant till the filing of the present suit. Even in the reply filed to the Summons for Judgment, what is sat 6/12 sj 21-2013.doc claimed is that there is a suspicion that the signatures of late Amitabh Parekh "would have been obtained" during the visits of Plaintiff No.2 to the hospital to meet late Amitabh Parekh, when the late Parekh "in all probabilities was unable to understand what he was signing". The defence, on the face of it, is a matter of conjecture on the part of the deponent of the affidavit, who in any event claims to be an authorized signatory of the Defendant (a public limited company) who could not, and obviously even does not, claim any personal knowledge of the execution of these cheques or documents or indeed the circumstances attending upon the alleged visits of Plaintiff No.2 to the hospital. His affidavit is based on records available with the Defendant. This defence also can only be termed as sham and moonshine.

9. Coming now to the main defence of the Defendant that the suit is barred under the provisions of the Bombay Money Lenders Act, 1946 ("said Act"), a loan is defined under Section 2(9) of the said Act as follows:

"(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).....

(c).....

(d).....

(cc).....

(d).....

(d1).....

(d2).....

(e).....

(ee) loan to, or by, or deposit with, anybody (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 States;

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(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, other than a promissory note;

(f1)

(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) of the said Act provides as follows :

"2(17) "suit to which this Act applies" means any suit or proceeding-

(a) for the recovery of a loan made after the date on which this 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 of the said Act is in the following terms:

"10. 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.] (5) 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 sat 8/12 sj 21-2013.doc that Act, or of a liquidator under the Companies Act, 1956, to realise the property of a money-lender."

The defence on the basis of these provisions is that the monies were advanced by the Plaintiffs to the Defendant admittedly by way of a loan; that this loan is covered under the definition of 'loan' under Section 2(9) of the said act; that the present suit is 'a suit to which this Act applies' within the meaning of Section 2(17) of the said Act; that at the time when the loan was advanced, the Plaintiffs did not have any valid licence under the said Act; and that the suit is, therefore, liable to be dismissed. The learned Counsel for the Defendant has relied on the judgments referred to above. These judgments lay down the following propositions:

(i) Loan to companies incorporated under the Companies Act are not excepted from the definition of 'loan' by virtue of Section 2(9)(ee) of the Act; what Section 2(9)(ee) excepts is loan to, or by, companies enacted under any law;

(ii) In a suit to which the said Act applies, it is difficult, if not impossible, to apply the procedure of Order 37;

(iii) The defences that the suit transaction was a money lending transaction; that the amount was not kept as a deposit with the company, but a loan advanced to it; that the amount was not advanced on the basis of a negotiable instrument, may all give rise to triable issues, in which case an unconditional leave would sat 9/12 sj 21-2013.doc ordinarily be granted.

10. The central question in our case, however, is whether the suit is for recovery of a loan. It is no doubt true that the amounts originally advanced were termed as short term loans. Though cheques were issued for return of the amounts, it is possible to argue that the advances themselves were not on the basis of negotiable instruments. The cheques were issued much after the advances were made. It is also possible to argue that the advances were not in the nature of deposits of money in a company. Had the suit been a suit for recovery of a loan, these defences would have given rise to triable issues. But the suit is based on dishonoured cheques. These cheques were issued towards refund of the loan. In other words, these were negotiable instruments issued in consideration of an

antecedent transaction, namely, the loan. Whilst the loan forms the consideration of these negotiable instruments, the suit is filed not for recovery of loan, but for recovery of amounts covered under the negotiable instruments which were dishonoured upon presentation for payment. The loan itself is not a forbidden consideration so as to render the negotiable instrument void.

11. A loan advanced against a negotiable instrument is in terms excepted from the application of the said Act. Such a loan is not only a valid consideration of the negotiable instrument, but would itself be recoverable even if the creditor were not to sue on the negotiable instrument. It would be preposterous to hold that whereas in a case where an advance is made against a negotiable instrument, recovery of both the original advance and the negotiable instrument is permissible under the said Act, in a case where a negotiable instrument is issued in consideration of an advance already made, the negotiable instrument cannot be enforced by reason of the provisions of the said Act.

12. The Judgments relied upon by Mr. Jain, the learned Counsel for the Defendant, in support of his contention that the suit is barred under Section 10 of the said Act are not relevant for our purposes, since, as explained by me above, the suit is not for recovery of a loan, but based on negotiable instruments which are dishonoured on presentation for payment. There is absolutely no substance in the defence of the bar under Section 10. It is neither a bonafide defence nor a credible defence.

13. The other defence of the Defendant is that the letters relied upon by the Plaintiffs cannot be read in evidence as documents containing an agreement to pay, for want of payment of stamp duty thereon. The submission is that if the letters are mere acknowledgements of loans and cheques issued, a case under Order 37 cannot be founded on them and on the other hand, if they are read as agreements to pay, they are inadmissible in evidence. Since I have held that there is no credible or bona fide defence to the suit based on negotiable instruments, this objection by itself cannot raise a triable issue or offer any bona fide defence to the suit. There is no need to consider the judgments cited on the issue of insufficiency of stamp duty, in the circumstances.

14. Having regard to the discussion as above, none of the defences raised by the Defendant to the Summons for Judgment appears to be either substantial or bona fide. The defences can only be termed as illusory and moonshine. However, with a view to give an opportunity to the Defendant to prove his case at the trial and at the same time to protect the Plaintiffs, the Defendant can be appropriately granted leave to defend the suit on a condition of its depositing in the Court the principal amount of Rs.67 crores claimed in the suit.

15. In the premises, the following order is passed:

(i) The Defendant is granted leave to defend the suit on, and subject to, the condition of deposit of Rs. 67 crores in the Court within a period of eight weeks from today;

(ii) On such deposit being made, the suit to be

transferred to the list of commercial causes;

(iii) Written Statement to be filed within a period of six weeks thereafter;

(iv) The amount deposited by the Defendant may be invested by the Prothonotary and Senior Master of this Court in a fixed deposit in a Nationalized Bank initially for a period of two years and thereafter to be renewed from time to time till the disposal of the present suit;

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(v) Suit to appear on board before the learned Judge

taking commercial causes after fourteen weeks, i.e. on 16 June 2014.

(S.C. Gupte, J.)