CHAPTER XIII

MONEY LENDERS ACT

Case No. 91

IV (2004) BC 146

Andhra Pradesh High Court

C.V. Ramulu, J.

KRISHNAM RAJU FINANCES .... Appellants

Vs.

ABIDA SULTANA & ANR. .... Respondent

Crl. Appeal No.333 of 1998—Decided on 16.3.2004

Andhra Pradesh Telungana Area Money Lenders Act - Special provision to dismiss the suit by money lender who is unlicensed - cheque issued in favour of unlicensed money lender - dishonoured - no enforceable liability - hence complaint under Section 138 of the Negotiable Instruments Act - not maintainable -

Negotiable Instruments Act, 1881—Section 138—Criminal Procedure Code, 1973—Section 255—A.P. (T.A.) Money Lenders Act, 1349 Fasli—Sections 2(4), 9(2)—Dishonour of Cheque: Legally enforceable debt: Liability: Appellant-complainant produced no licence to prove he is money lender as required under law: Amount alleged to have been advanced by complainant cannot be said to be loan as defined under A.P. Act: Appellant had no money lending business licence: No legally enforceable liability of respondent in view of Section 9(2) r/w Section 2(4) of Act: Sheetanchor of Section 138, N.I. Act is legally enforceable debt against respondent, which is conspicuously absent in this case: No legally enforceable liability against respondent; Impugned judgment suffers from no illegality or infirmity. (Para 13)

Result: Crl. Appeal dismissed.

Cases Referred:

1. 1997(1) ALD (Crl.) 719 (AP) (Referred) (Para 9)
2. 1980(2) ALT 178 (Referred) (Para 11)
3. 1(1997) BC 27=III (1997) CCR 643 =
   1997(1) ALT (Crl.) 359 (Kerala) (Referred) (Para 12)

4. 1998(2) ALD (Crl.) 99 (AP) (Referred) (Para 12)

Counsel for the Parties:

For the Appellant: Mr. Hari Sreedhar, Advocate,

For the Respondent No.1 : Mr. K.V. Subrahmanya Narusu, Advocate.

For the Respondent No.2 : The Public Prasecutor.

JUDGMENT

C.V. Ramulu, J.—This appeal is filed under Section 378(4) of the Code of Criminal Procedure aggrieved by the Judgment dated 18.8.1997 in C.C. No. 165 of 1997 on the file of the Court of XV Metropolitan Magistrate, Hyderabad, wherein the complaint field by the appellant herein to punish the accused under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the Act') was rejected and the accused was acquitted under Section 255(1) of the Code of Criminal Procedure.

2. The case of the complainant, in brief, is as under:

The complainant was dealing with financial business and the accused obtained a loan of Rs.30,000/- from it. Since the loan amount was not paid within a specific period, on demand, the accused issued cheques bearing Nos. 0175036 and 0175038 for Rs.1,000/- and for Rs.34,927/- respectively on 30.11.1996 drawn on the Andhra Pradesh State Cooperative Bank Limited, Hyderabad. The Cheque were presented for collection on 7.12.1996, but they were returned with endorsement 'insufficient funds.' On this, the complainant demanded for payment of amount through a notice dated 13.12.1996 with a demand to pay the said amount of Rs.35,927/- along with Rs.500/- towards legal fee within 15 days from the date of receipt of the notice. The respondent-accused having received the said notice, failed to make the payment and thus committed the offence punishable under Section 138 of the Act.

3. The plea of the respondent-accused was one of total denial and claim to be tried.

4. On behalf of the complainant, P.W.1 was examined and Exs. P1 to P12 were marked. For the defence, none was examined and no documents were marked. After considering the entire evidence on record, the Court below came to the conclusion that the complainant was not able to prove guilt against the accused for the offence under Section 138 of the Act beyond all reasonable doubt and acquitted him under

Section 255(1) of Cr.P.C. Aggrieved by the same, the complainant field the present appeal.

5. Heard both sides and perused the entire material on record and also the judgment of the Court below.

6. Now, the point that arises for consideration in this appeal is whether the prosecution is able to connect the respondent-accused for the offence under Section 138 of the Act?

7. In a case like this, the first thing, which needs to be examined, to connect the accused to the offence is as to whether there was any legally enforceable debt or liability. When the complainant is able to prove that there is a legally enforceable debt or liability, then only he is entitled for the relief claimed. Now, this Court will examine, whether the complainant is able to establish that there is a legally enforceable debt.

8. It is in the evidence of P.W.1 that the complainant is a licensed money lender and according to Ex.P3, it is a partnership firm doing money lending business, Ex.P2 is the firm registration certificate, P.W.1 stated that on 19.8.1994, the accused availed a loan of Rs.30,000/-, but failed to repay the amount and on 21.8.1995. Further, on demand, the accused issued two cheques—Exs. P6 and P7. When the cheques were presented for collection, they were returned with the endorsement 'insufficient funds'. Thereafter Ex. P10 notice was issued.

9. Though it is stated that the complainant was doing money lending business, no such money lending licence was filed into the Court P.W.1 in his cross-examination stated that the complainant has got money lending licence, but it was not field in the Court and was not also mentioned in the complaint. In fact, once a person claims that he/it is a money lender, unless the licence is filed and proved, such a person is not entitled to recover the loans lent by him/it. In this regard, the learned Counsel for the respondent-accused brought to the notice of this Court, a decision reported in Baba Finance Corporation v. Mohd. Nayeen and Another, 1997(1) ALD (Crl.) 719 (AP), in which it was held as under:

> "...if it is proved that the plaintiff is a money lender as defined under the Act [A.P. (T.A.) Money Lenders Act] and if he does not possess licence in question, the Court shall dismiss his suit. In other words, such a money lender cannot claim debt or liability from others, from his debtors without valid money lending licence. Explanation to Section 138 of the N.I. Act, further provides that the

dishonoured cheque shall relate to a debt or liability enforceable in order to constitute an offence…"

The Court below after considering the said judgment came to the conclusion that though in the instant case P.W.1 stated that the complainant is having money lending licence, no such licence was produced. Therefore, the only inference that could be drawn was that the complainant was not having any such money lending licence during the relevant period. Further, the lower Court found that Exs. P6 and P7 were not issued for discharge of legally enforceable debt or liability. Of course, the Court below also found the other points against the complainant and in favour of the accused.

10. Learned Counsel for the appellant strenuously contended that merely because then was no licence for money lending business held by the complainant, that itself does not mean that there was no legally enforceable liability on the part of the respondent-accused as required under Section 138 of the Act. He had drawn the attention of this Court to the provisions of the Andhra Pradesh (Telangana Area) Money Lenders Act, 1349 Fasli, particularly Section 9(2) thereof, which reads as under:

"9. Procedure of Court in suits for recovery of loans-Notwithstanding anything contained in any law for the time being force, in every suit relating to a loan:

(1) …..

(2) if it is proved that the plaintiff is a moneylender as defined in Sub-section (7) of Section 2, but does not hold a licence grated under Section 3, the Court shall dismiss his suit."

He had also drawn the attention of this Court to the definition of 'loan' in Section 2(4) of the A.P. (T.A.) Money Lenders Act, 1349 Fasli, which reads as under:

"4. 'loan' means a loan secured or unsecured, advanced on interest in cash or in kind and shall include every transaction which is in substance a loan, but shall not include the following:

(a) a deposit of money or other property in a Post Officer in a Bank or in company or with a cooperative society;

(b) a loan to or by and deposit with, any society or association registered under any law;

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

(d) a loan advanced by a Bank, cooperative society or a company;

(e) a sum of money advanced on the basis of a negotiable instrument as defined in the Negotiable Instruments Act, 1881 (Central Act 26 of 1881) other than a promissory note;

(f) a loan advanced to an agricultural labourer by his employer;

(g) a loan advanced by one trader to another trader in the ordinary course of business, in accordance with practice in trade;

(h) a sum of money payable to a trader by a person other than a cultivator or a labourer for articles sold on which interest is charged by reason of non-payment on due date."

And submitted that the concept of loan as defined above is altogether different. Insofar as Section 138 of the act is concerned, it is enough to prove that it was a legally enforceable debt, whether there was a money lending licence held by the complainant or not as required under the said Act. Simply because there is no money lending licence, the amount lent by the appellant cannot be said to be a 'loan' within the meaning of Andhra Pradesh (Telangana Area) Money Lenders Act, 1349 Fasil. The Court below was not right in relying upon the judgment reported in Baba Finance Corporation case (supra) and dismissing the case of the complainant. What all Section 2(4) of the Andhra Pradesh (Telangana Area) Money Lenders Act, 1349 Fasli contemplates is that loan means, it should necessarily state about the payment of interest by the loanee and in the absence of claiming any interest under Ex. 24, as per the judgment reported in Baba Finance Corporation case (supra), at the most the complainant may not maintain a suit against the accused-respondent as contemplated under Section 9(2) of the Andhra Pradesh (Telangana Area) Money Lenders Act, 1349 Fasli. This does not mean that the complainant has not proved that there was legally enforceable liability against the respondent. In this regard, the learned Counsel for the appellant trenuously contended that in view of Ex. P4 promissory note read with Ex. P5 confirmation letter issued by the respondent, the appellant-complainant has made out legally enforceable liability against the respondent. Therefore, the Court below was not right in holding that the complainant has not proved the legally enforceable liability against the respondent.

11. Whereas, the learned Counsel for the respondent-accused submitted that

the bindings of the Court do not suffer from any irregularity or illegality and do not call for interference at the hands at the hands of this Court. He contended that since the appellant had pleaded that it is a money lender and that no money lending licence was placed before the Court, the only course that was left open to the Court was to declare that there was no legally inforceable liability of the respondent in view of Section 9(2) read with Section 2(4) of the Andhra Pradesh (Telangana Area) Money Lenders Act, 1349 Fasli. Further, he stated that then in Ex.P4, there was no mention as to the interest and on this ground also Ex. P4-promissory note was not liable to be enforced. In this regard, he has drawn the attention of this Court to the decision of a Division Bench of this Court in Kamala Mani v. Subramanyam, 1980(2) ALT 178, in which it was held as under:

"It is clear from the definition that a loan advanced without interest is not included in the definition. It is true that in normal parlance or popular sense a loan implies a thing, specially money, lent to be returned with or without interest. But the Legislature has willfully an deliberately chosen to restrict the scope of the meaning of the expression 'loan' only to cases of advances made with interest. The paramount rule of construction is that a statute is to be expounded according to the intent of them that made it. It is not permissible for this Court to re-write the definition under Section 2(4) of the Act by adding or mending and include a loan advanced without interest. It is safer to presume that the omission is deliberate and that it is not due to forgetfulness or made per incuriam. Therefore, money lent without interest does not fall within the ambit of the definition 'loan.'

For proper appreciation of the above contentions, it is apt to extract Section 138 of the Act.

"Section 138. Dishonour of cheque for insufficiency, etc., of funds in the account—

Where any cheque drawn by a person on an account maintained by him with a Banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the Bank unpaid, either because of the amount of money standing to the credit of that 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 that Bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice

the amount of the cheuqe, or with both:

Provided that nothing contained in this section shall apply unless—

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

(b) The payee or the holder in due course of the cheque, as the case may be, 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 thirty days of the receipt of information by him from the Bank regarding the return of the cheque as unpaid and

(c) The drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.

Explanation – For the purpose of this section, "debt or other liability, means a legally enforceable debt or other liability."

The said section contemplates as to existence of debt or other liability, which is legally enforceable. What is illegal under one Act cannot be legal under any other Act or for any other purpose. Therefore, once the complainant stated to be a money lender and does not have licence for such business, it could not have maintain a legally enforceable right for recovery of the amount by filing a suit. Hence, even if Ex. P4-promissory note is execute by the respondent read with Ex. 5-confirmation letter, it is not a legally enforceable and a such, the amounts under cheques dishonoured connected to Exs. P4 and 5 cannot be realized. Further, for what purpose Ex. P4 was executed is not forthcoming.

12. Learned Counsel for the respondent countended that even otherwise, the …… statutory notice-Ex. P10 issued by the complainant was bad for the reason that not only it stipulates the amounts under the cheques, but also demands payment of interest at the rate 24% per annum. He also submitted that such a notice is bad in law and in support of his contention, he relied upon the decision in Raj V. Rajan, I (1997) BC 27 = (1997) CCR 643 = 1997(1) ALT (Crl.) 359 (Kerala), wherein it was held as follows:

"12. In the case at hand, the amount covered by the cheque is Rs. 40,000/-. But in the notice, it was not the said amount, which was claimed, but that amount together with interest without specifying the amount of interest or the rate of interest. That certainly makes a notice vague and insufficient. It cannot be treated as a notice as contemplated by proviso (b) to Section 138 of the Act. In the circumstances, for want of the proper and legal notice, the acquittal is sustainable."

On the other hand, the learned Counsel for the appellant relied upon a judgment of this Court in G.L. Modi v. Xedd Finance and Investments Pvt. Ltd.,, 1998(2) ALD (Crl.) 99 (A.P.), in which a learned Single Judge of this Court held as under :

'…….. When there is a specific demand in the demand notice for the payment of the dishonoured cheque amount together with interest thereon, it cannot be said that notice is in conformity with the proviso (b) of Section 138 of the Act and it does not invalidate the notice. The amount claimed towards interst would be a superfluous one and the drawer of the cheque could have complied with the demand for the cheque amount alone by paying the same and refusing to pay the amount towards interst claimed in the notice…."

And submitted that merely because the complainant made a demand in his statutory notice for repayment of the outstanding amount due under cheque together with interest a 24% per annum, it cannot be said that the notice is illegal and is not in conformity with law. When there is a specific demand in the notice-Ex. P1 for payment of dishonoured cheques' amount together with interest thereon, it cannot be said that the said notice is not in conformity with proviso (b) of Section 138 of the Act and it does not invalidate the very notice.

13. In am in complete agreement with the submissions made by the learned Counsel for the appellant. But, as seen above, admittedly, the appellant-complainant claimed that it is a money lender, but has not produced any licence as required under law and further the amount alleged to have been advanced by the complainant cannot be said to be a loan as defined under the Andhra Pradesh (Telangana Area) Money Lenderes Act, 1349 Fasli. Since the appellant had no money lending business licence, it cannot be said that there was a legally enforceable liability of the respondent in view of Section 9(2) read with Section 2(4) if the Andhra Pradesh Telangana Area) Money Lenders Act, 1349 Fasli. Once an Act declares that a particular transaction is illegal, it cannot be made legal for the purpose of any other Act. The sheet-anchor of Section 138 of the Act is as to legally enforceable liability against the respondent,

which is conspicuously absent in the case on hand. Therefore, there was no legally enforceable liability against the respondent. I am of the opinion that the judgment of the Court below is a well reasoned one and does not supper from any irregularity illegality. There are no grounds to interfere with the judgment of the lower Court.

14. Accordingly, the Criminal Appeal is dismissed.

Criminal Appeal dismissed.