Angel''s Consultants Pvt. Ltd. and Another Vs Anand Mehta and Co. and Another

Court: Calcutta High Court

Date of Decision: Oct. 15, 2004

Acts Referred: Reserve Bank of India Act, 1934 â€" Section 45

Citation: (2005) 1 CHN 357

Hon'ble Judges: Narayan Chandra Sil, J

Bench: Single Bench

Advocate: O.P. Sharma, R. Mitra, Debasis Sharma and S. Tibrewal, for the Appellant;Ranjan Bachawat, Suman Dutt and G.S. Gupta, for the Respondent

Judgement

Narayan Chandra Sil, J.
Both the suits have been taken up together for hearing in terms of the order dated 15th July, 2002 passed by Mr.

Justice Sengupta in C.S. No. 32 of 2002. Accordingly common issues in both the suits which are, in fact, the cross-suits, were framed on

27.4.2004 and issue No. 1 reads as ""Is C.S. No. 32 of 2002 maintainable ?"" In the present discussion heroinbelow the said issue No. 1 on

maintainability of C.S. No. 32 of 2002 is taken up for disposal.

2. In C.S. No. 32 of 2002 M/s. Angel''s Consultants Private Limited and Ajay Singh Lodha arc the plaintiffs whereas Anand Mehta & Co. and

Mr. Anand Mohta are the defendants. The position is almost reverse in E.O.S. No. 6 of 2002. There Anand Chandra Mehta is the plaintiff and

M/s. Angel''s Consultants Private Limited is the defendant. In fact E.O.S. No. 6 of''2002 was initially filed before the City Civil Court, Calcutta

and it was pending before the learned Judge, VIIth Bench, City Civil Court and there it was registered as Commercial Suit No. 3 of 2002. I am

concerned with the maintainability of C.S. No. 32 of 2002.

3. Mr. Suman Dutt, learned Counsel along with Mr. Ranjan Bachawat, learned Counsel and Mr. G. S. Gupta, learned Counsel has appeared for

the defendants. It is submitted by them before me that E.O.S. No. G of 2002 was filed earlier. The only question raised by the defendants in

connection with the issue of maintainability is whether the suit can be filed by the plaintiff without having any money-lending licence and in this

connection Mr. Dutt has drawn my attention to the paragraphs 1, 4 and 5 of the plaint and tries to impress upon me that in paragraph 4 of the

plaint the plaintiffs have admitted the loan transaction. The learned Counsels for the defendants have also drawn my attention to the provisions of

Sections 2(13), 8, 13, 24, 25 and 27 of the Bengal Money-Lenders Act, 1940 (hereinafter referred to as ""B.M.L. Act""). It is also pointed out that

the plaintiffs claimed themselves to be a Non-Banking Financial Company and in that case they are to take permission from the Reserve Bank of

India. But there is no prima facie proof produced by the plaintiffs that they had obtained such permission as required by law.

4. Mr. O. P. Sharma, Mr. R. Mitra, Mr. Debasis Sharma and Mr. Tibrewal have appeared for the plaintiffs. It is pointed out that the question of

money- lending would arise only when the defendants admit that they took money as a loan. But in the absence of such admission they cannot raise

this question and in this connection some case laws have been referred to by them which I shall discuss later on. It is admitted by the learned

Counsels for the plaintiffs that the plaintiffs have no such money-lending licence because the plaintiffs firm is a non-banking financial concern which

can also advance loan. The learned Counsels for the plaintiffs have drawn my attention to the provisions of Section 45Q of the Reserve Bank of

India Act, 1934 (hereinafter referred to as ""R.B.I. Act"") and Section 2(4) of B.M.L. Act. It is claimed that the plaintiffs have got the proper

certificate issued by the Reserve Bank of India.

5. Mr. Tibrewal, the learned senior Counsel appearing for the plaintiffs has drawn my attention to Chapter IIIB and particularly Section 45-I(C)(i)

of R.B.I. Act and tries to impress upon me that the function of the ""financial institution"" is not only to take deposits but also to give (making) loan,

fie has also drawn my attention to the other provisions of the said Act. It is pointed out by Mr. Tibrewal from Section 45Q of the K.B.I. Act that

even if there is any other law, say, about the State laws, that will be superseded by the R.B.I. Act. It is further argued that Section 108 of the

Companies Act talks about transfer of share which is movable property and which carries rights and liabilities and as such execution of instrument

of stamped paper is mandatory. As regards the object of B.M.L. Act from sections of that Act Mr. Tibrewal has pointed out the object of that Act

to the extent that it was to prevent the creation of dishonest class who takes loan but not repays the same and in this connection he has also

referred to one case law which I shall discuss at the appropriate time. It is also submitted by him that there are two classes of money lenders-one

controlled by the Reserve Bank of India and the other under the provisions of B.M.L. Act. Mr. Tibrewal has concluded his submission taking the

issue as a very simple question and termed the same as to whether the plaintiff can do the business with the licence issued by the Reserve Bank of

India which the plaintiff has produced and if not whether the business of the plaintiff comes under B.M.L. Act and even if that be so whether the

plaintiffs are entitled to get protection u/s 13(2) of the B.M.L. Act.

6. In reply it is argued on behalf of the defendants that the licence produced by the plaintiffs goes to show that the transaction in question between

the parties was made before the licence was issued in favour of the plaintiffs. The learned Counsels for the defendants have also referred to

different sections of the R.B.I. Act and it is pointed out that terms of Section 45IA(1) of the R.B.I. Act show that the plaintiffs were required to

obtain licence under B.M.L. Act. The learned Counsels for the defendants have also referred to a number of case laws which will be dealt with

subsequently. It is pointed out further that money- lending is a State subject and as such the Parliament did not enact any law. It is further argued

that the mere fact of registration with the Reserve Bank of India has not exempted the plaintiffs from taking licence under B.M.L. Act. In terms of

Section 13 read with Section 8 of the said Act, there is a complete embargo to do money-lending business without licence, the learned Counsels

for the defendants further argued. My attention was drawn in this connection to Section 27 of the said Act. It is pointed out by Mr. Suman Dutt,

the learned Counsel for the defendants that in the B.M.L. Act the term ""'commercial loan"" was excluded after amendment.

7. I have perused the pleadings of the parties and the materials on records. I have also considered the submissions made by the learned Counsels

for the parties. It appears to me that the main issue to determine the question of maintainability of the suit lies in the determination as to whether the

plaintiffs are entitled to make the transaction in question even without any licence under the B.M.L. Act and in order to do so I must examine the

provisions of Section 8 read with Section 13 of the said Act along with the other provisions of the R.B.I. Act. Section 8 of B.M.L. Act reads as

under:

After such date not less than six months after the commencement of this Act as the State Government shall, by notification in the Official Gazette,

appoint in this behalf, no money-lender shall carry on the business of money- lending unless he holds an effective licence.

Explanation.-An effective licence for the purposes of this Act comprises a licence issued to a person who is not disqualified for holding a licence.

From the explanation given to that section definitely it denotes that holding of such licence under the said Act is not sufficient rather the entitlement

of the person concerned to hold such licence is also a matter of consideration. In any case on a plain reading of the above section it is clear that the

section is a complete prohibition of money-lending business without an effective licence held by a competent person. Section 13 of that Act

provides the alternative remedy of the plaintiff and the sub-section (2) of Section 13 of the said Act provides the same which reads as under :

If during the trial of a suit to which sub-section (1) applies, the Court finds that the money-lender did not hold such licence, the Court shall, before

proceeding with the suit, require the .money-lender to pay in the prescribed manner and within the period to be fixed by the Court such penalty as

the Court thinks fit, not exceeding three times the amount of the licence fee specified in Section 10.

By all necessary implications in order to invoke either Section 8 or Section 13 it is required that the plaintiff must be a money-lender.

8. Section 2(9) of the Act defines ""lender"" and it states that ""lender"" means a person who advances a loan and includes a money-lender. Clause

(12) of Section 2 of the said Act defines the term ""loan"" which means an advance whether in money or in kind, made on condition or repayment

with interest and includes any transaction which is in substance a loan. Clause (13) of Section 2 of the said Act defines ""money-lender"" which

means a person who carries on the business of money-lending in West Bengal or who has a place of such business in West Bengal and includes a

pawnee as defined in Section 172 of the Indian Contract Act. Clause (14) of the said Act defines ""money-lending"" business and business of money

lending"" which means the business of advancing loans either solely or in conjunction with any other business. Keeping all these provisions of the

B.M.L. Act in the background we shall now proceed with the nature of the business carried on by the plaintiffs.

9. From the plaint it appears that the plaintiff No. 1 which is a company under the Companies Act, 1956 carries on business from premises 19,

British Indian Street, Calcutta-700 069. So in order to meet the requirement of B.M.L. Act the plaintiff No. 1 carries on business from the State of

West Bengal. In paragraph 1 of the plaint it is stated that the plaintiff No. 1 is a Non-Banking Financial Company whereas the plaintiff No. 2 is the

Director of the said company. In paragraph 4 of the plaint it is clearly mentioned that on or about 27th February, 2001, the defendant No. 2 for

and on behalf of the defendant No. 1 approached the plaintiff company for a temporary loan of Rs. 50,00,000/- against security of 15,000/-

Equity shares of DSQ Softwares Ltd. and agreed to repay to the plaintiff No. 1 the said loan with interest @ 1 1/2% per month. It is further stated

in paragraph 5 of the plaint that the plaintiff No. 1 ""lent and advanced"" by way of temporary accommodation to the defendant No. 1 a sum of Rs.

50,00,000/- by cheque No. 748939 dated 27.2.2001 with interest at the agreed rate of 1 1/2% per month.

10. On scrutiny there appears nothing that the plaintiff in suit No. E.O.S. No. 6 of 2002 who are the defendants in C.S. No. 32 of 2002 had not

taken any ground of loan transaction as plaintiff in their suit.

11. Different provisions of the Reserve Bank of India Act, 1934 have been mentioned by the learned Counsels for both the parties. Section 45I of

the R.B.I. Act contains the definition of the different words and thus the term ""non- banking institution"" has been defined in clause (e) as a

company, corporation or co-operative society and clause (f) defines the term ""non-banking financial company"" as (i) a financial institution which is

a company, (ii) a non-banking institution which is a company and which has as its principal business the receiving of deposits, under any scheme or

arrangement or in any other manner or lending in any manner and (iii) such other non-banking institution or class of such institutions, as the bank

may, with the previous approval of the Central Government and by notification in the Official Gazette, specify. Section 45-IA of the Act says that a

non-banking financial company (hereinafter referred to as ""N.B.F. Company"" for convenience) shall commence or carry on the business as such,

despite anything contained in any other law for the time being in force obtained a certificate of registration issued under the said Chapter of the Act.

Section 45Q of the Act overrides the other laws. It is claimed by the learned Counsel for the plaintiff that the plaintiff obtained proper certificate

from the Reserve Bank of India as required under the said Act.

12. Mr. Bachawat has referred to the ratio decided in the case of Shriram Chits and Investment (P) Ltd. v. Union of India and Ors., 1993 Supp. 4

SCC 226. It was observed by the Apex Court at pages 251, 252 of the judgment that it will bo noticed from Section 3 of the Chit Funds Act,

1982 that the said section which overrides other laws, memorandum or articles of association or bye-laws or any agreement concerning the chit

fund business, as a result, to the extent to which it is repugnant to the provisions of the said Act becomes void. It was also observed there that

Non-Banking Financial Companies (Reserve Bank) Directions, 1977 apply to the deposit-taking activities of non-banking financial companies like

loan, investment, hire purchase finance and equipment leasing companies and those directions were issued under the provisions of Chapter IIIB of

the R.B.I. Act as amended. Section 45S of Chapter IIIC of the R.B.I. Act deals with acceptance of deposits from the public by unincorporated

bodies such as individuals, firms and associations of persons.

13. Mr. Bachawat has also referred to the ratio decided in the case of Mayavaram Financial-Corporation Ltd. v. Reserve Bank of India, 41

Company Cases 890. I quote the relevant portion from the judgment of the Supreme Court in that case which reads as under :

Mr. Nambiar next attacks the validity of Section 45Q on the ground of excessive delegation. Mr. Chari sought to uphold the said provision by

referring to the decision in Harishankar Bagla v. State of M.P. The effect of Section 45Q is not to repeal expressly or impliedly any of the

provisions of the pre-existing laws. Nor does it abrogate them. What it does is only to make the provisions of Chapter IIIB override the other

laws. We hold that Parliament being supreme, is entitled to make a law abrogating or replacing by implication the provisions of any pre-existing law

and no exception can be taken to such legislation on the ground of excessive delegation to the Act of Parliament itself.

14. Mr. Bachawat argues that money-lending is a State subject and so the Parliament cannot enact any laws in this regard. He has also submitted

that mere fact of registration with the Reserve Bank of India has not exempted the plaintiff from taking licence under the B.M.L. Act. In this

connection, he has referred to the provisions of Sections 13 and 27 of the B.M.L. Act. B.M.L. Act, 1940 is a subsequent Act to the R.B.I. Act of

1934. But Section 45Q of R.B.I. Act came into force long after 1940. However, sub-section (1) of Section 13 of the said Act has imposed an

embargo upon the Court against passing any order or decree in favour of a money-lender in any suit, instituted by a money-lender for recovery of

a loan unless the Court is satisfied that at the time or times when the loan or any part thereof was advanced the money-lender held an effective

licence in terms of the provisions of Section 8 of the said Act. Sub-section (2) of Section 13 of the said Act as quoted earlier which has it that in

the absence of any licence under that Act the suit can be cured by paying a fine not exceeding three times of the licence fee specified in Section 10

of the Act. Section 27 of the said Act deals with the procedure in a suit relating to loans by money-lenders.

15. Having pointed out the defence case that they did not admit the loan taken by them, the defendants have no authority to raise the questions for

determination at the moment that the plaintiff is a money-lender and in this connection he has referred to the ratio decided in the case of Exphar SA

and Another Vs. Eupharma Laboratories Ltd. and Another, . It was held in that case that when an objection to jurisdiction is raised by way of

demurrer and not at the trial, the objection must proceed on the basis that the facts as pleaded by the initiator of the impugned proceedings are

true. The submission in order to succeed must show that granted those facts the Court does not have jurisdiction as a matter of law. In rejecting a

plaint on the ground of jurisdiction, the Court should have taken the allegations contained in the plaint to be correct. Thus, the necessary implication

of the order is very clear to the extent that in determining the question of jurisdiction before the trial commences the trial is the paramount

consideration.

16. Before drawing conclusion in the matter I would like to discuss the defence made out in the written statement by the defendants. The details of

the defence have been averred in paragraph 7 of the written statement and it appears therefrom that the plaintiffs gave an account payee cheque for

Rs. 50 lakhs to the defendants on February 27, 2001 and the defendants at the instructions of the plaintiffs purchased 15,000 shares of DSQ

Software through Calcutta Stock Exchange Association Limited for and on behalf of the plaintiffs @ Rs. 373/- per share on March 1, 2001

aggregating to Rs. 55,95,000/- inclusive of brokerage. Subsequently, those shares were transferred by the defendants to the Demat Account of the

plaintiff No. 2 in terms of instructions of the plaintiff No. 1. It is also stated in the said paragraph of the written statement as follows ;

It is denied that the defendant No. 2 requested for or obtained any loan or that the said shares were or could have been security as alleged or that

the defendants agreed to pay the said sum of Rs. 50 lacs or interest as alleged or at all.

Para 4 of the plaint reads as under :

On or about 27th February, 2001 the defendant No. 2 for and on behalf of the defendant No. 1 approached, requested for a temporary loan of

Rs. 50,00.000/- against security of 15,000 Equity Shares of DSQ Software Ltd. hereinafter referred to as ''DSQ Shares'' and agreed to pay to the

plaintiff No. 1 said loan with interest at the rate of 1 1/2 percent per month."" (underlined for emphasis)

It is clear from the abovequoted paragraph that the plaintiff itself has taken up the specific case of advancing loan and in that case it becomes

absolutely immaterial whether the defendant had taken up any such case of loan in their written statement.

17. Mr. Tibrewal has drawn my attention to the provisions of Section 45- I(c)(i) of the R.B.I. Act and tries to impress upon me that the function of

the financial institution is not only to take deposits but also to give (making) loan. Section 45-I(c)(i) reads as below :

financial institution'' means any non-banking institution which carries on as its business or part of its business any of the following activities,

namely:-

(i) the financing, whether by way of making loans or advances or otherwise, of any activity other than its own."" Mr. Tibrewal has given emphasis

on the object and reasons of the several amendments of the R.B.I. Act, It appears that the object of the several amendments of the said Act is to

provide safeguards for the N.B.F.Cs. so as to ensure their validity. Thus, it includes compulsory registration of the N.B.F.Cs. with the Reserve

Bank of India. The Reserve Bank of India has also been vested with powers to issue guidelines encompassing aspects such as income recognition

accounting, standards, provision for bad and doubtful debts, capital adequacy, etc., which are intended to ensure sound and healthy operations

and the quality of assets of those companies. Reserve Bank of India is also being empowered to issue directions to the auditors of N.B.F.Cs., to

order special audit of N.B.F.Cs., prohibit acceptance of deposits by N.B.F.Cs. and to make application for winding up of N.B.F.Cs.

18. As a matter of alternative prayer Mr. Tibrewal has drawn my attention to the ratio decided in the case of Swaika Vanaspati Products Ltd. v.

Canbank Financial Services Ltd. 2000(2) CLJ 185. It was decided in that case that if it is found that the plaintiff is carrying on money-lending

business within the State without any licence u/s 8 of the B.M.L. Act it shall be mandatory for the Court to give an opportunity to the money-

lender/plaintiff to pay the penalty and as per provisions contained in sub-section (3) of Section 13 of the Act if the money-lender avails of that

opportunity and pays the penalty, the Court shall proceed with the suit and if such penalty is not paid even after the order Court shall dismiss the

suit.

19. Mr. Bachawat has tried to distinguish the case of Swaika Vanaspati (supra) as discussed above and submits that the Division Bench in that

case did not consider paragraphs 18, 19 and 20 of the ratio decided in the case of Mannalal Khetan and Others Vs. Kedar Nath Khetan and

Others, . It was held in that case as below :

Negative, prohibitory and exclusive words are indicative of the legislative intent when the statute is mandatory. Negative words are clearly

prohibitory and are ordinarily used as a legislative device to make a statutory provision imperative. The words ''shall not register'', are mandatory in

character. The mandatory character is strengthened by the negative form of the language. It cannot be said that provisions contained in Section 108

are directory because non-compliance with the section is not declared an offence. Section 629A of the Act prescribes the penalty where no

specific penalty is provided elsewhere in the Act. It is a question of construction in each case whether the legislature intended to prohibit the doing

of the act altogether, or merely to make the person who did it liable to pay the penalty. The provisions contained in Section 108 arc mandatory.

The decision made in the case of Mannalal (supra) as quoted above is on the interpretation of Section 108 of the Companies Act read with

Section 629A of the said Act. We arc concerned at the moment with the provisions of Section 8 read with Section 13(2) of the B.M.L. Act along

with the provisions of the R.B.I. Act. The Hon"blc Apex Court as it will be evident from the above quoted portion of the judgment, was very

candid to observe that it is a question of construction of each case whether the legislature intended to prohibit the doing of the act altogether or

merely to make the person who did it liable to pay the penalty. Mr. Bachawat has also drawn my attention to the provisions of Section 13(5) of

B.M.L. Act and tries to impress upon me that the said sub-section has given the proper indication for interpretation of the said Act. Sub-section

(5) of Section 13 of the said Act has it:

In this section, the expression "money-lender" includes an assignee of a money-lender, if the Court is satisfied that the assignment was made for

the purposes of avoiding the payment of licence fee and penalty which may be ordered to be paid under this section.

Virtually, sub-section (5) of the said section speaks of the provision for payment of penalty.

20. The learned Advocates for the plaintiffs have also referred to the ratio decided in the case of Shiv Kumar Tody v.Amolak Chand Champalal,

1993(2) CLJ 135 and it is submitted that probably the defendants had proceeded on the basis of the ratio decided in that case by the learned

Single Bench of this Court. But, it is further pointed out that the said judgment was overruled by the decision of the Division Bench of this Court in

the case of Swaika Vanaspati Products Ltd. v. Canbank Financial Services Ltd. (supra), with the following observations :

Even though a plain reading of sub-section (1) of Section 13 clearly suggests that no Court can pass a decree or order in favour of a money-

lender in any suit instituted by such a money-lender for recovery of a loan unless the Court is satisfied that at the time when the loan was advanced,

the money- lender held an effective licence. There is, thus, a clear embargo upon the Court passing a decree or order in a suit in favour of a

money-lender/plaintiff who at the time the loan was advanced did not hold an effective licence. What is noteworthy is that the embargo that relates

to the passing of the decree has, in point of time, relation to the period when the loan is advanced. Sub-section (2) of Section 13 then creates an

exception to the aforesaid embargo by providing that if during the trial of a suit to which sub-section (1) applies, the Court finds that the money-

lender/ plaintiff does not have a licence, the Court shall, before proceeding with the suit, require the money-lender/plaintiff to pay penalty which

may be three times the licence fee as specified in Section 10 of the Act. As per sub-section (3) of Section 13, if the plaintiff/money-lender, thus

pays the penalty, the Court shall proceed with the suit. This is the plain meaning as we can call out by a combined reading of sub-sections (1), (2)

and (3) of Section 13. In sum and substance, therefore, the position of law as emerges from a combined reading of these three provisions is that

even though there is no embargo or prohibition as such about the maintainability or the filing of a suit with respect to a loan by an unlicensed

money-lender, the Court in such a suit is precluded from passing a decree, or an order in favour of such a money-lender with respect to such a

loan if the money-lender does not hold a valid licence as per the Act, If, however, during the course of the trial, the Court finds that the money-

lender does not have a licence, an obligation is cast upon the Court to call upon the plaintiff/money- lender to pay penalty which cannot be more

than three times the licence fee, as prescribed in Section 10 of the Act. The expression "the Court shall, before proceeding with the suit, require the

money-lender to pay" clearly suggests that the legislature intended that in every case where the suit has been instituted by an unlicensed money-

lender, it shall be mandatory for the Court to give an opportunity to the money- lender/plaintiff to pay the penalty and, as per the provisions

contained in sub-section (3) of the Act, if the money- lender avails of this opportunity and pays the penalty, the Court shall proceed with the suit.

Undoubtedly, however, if the money-lender fails to pay the penalty the Court shall dismiss the suit.

On scrutiny it appears from the said judgment of the Division Bench as quoted above that the consideration of Their Lordships was whether the

provisions of Section 13 of the B.M.L. Act will come to play when an unlicensed money-lender had advanced loan and filed suit for recovery of

the same from the debtor. It is understood from the abovequoted portion of the judgment that it is always mandatory for the Court to give an

opportunity to the money-lender/plaintiff to pay the penalty under sub-section (3) of Section 13 of the B.M.L. Act. The ratio decided in the case of

Swaika Vanaspati Products Ltd. (supra), as quoted above has no scope to deal with the R.B.I. Act and as such the said ratio does not come to

guide us in the context of the present matter as regards the possession of the certificate under the R.B.I. Act is sufficient to exonerate the plaintiff to

obtain in the licence under the B.M.L. Act.

21. Now after having considered the submissions made by the learned Advocates for both the parties and the different provisions of the Acts as

discussed above the ratio decided in the case of Mayavaram Financial Corporation Ltd. (supra) stands as a beacon light for arriving at the correct

destination. In the said case the purport of the overlapping of different lists in the Schedules to the Constitution were discussed and it was also

shown there bow the money-lending and money-borrowing differs with each other. In doing that the decision of the Privy Council in the case of

AIR 1947 60 (Privy Council) was referred to by the learned Counsel of one of the parties. In the said judgment the Hon''ble Privy Council

observed that the extent of the invasion by the Provinces into subjects enumerated in the Federal List has to be considered because the validity of

an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the

impugned Act is also an important matter. It was also observed by the Privy Council as below :

Its provisions may advance so far into federal territory as to show that its true nature is not concerned with provincial matters, but the question is

not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not

money- lending but promissory notes or banking ? Once that question is determined, the Act falls on one or the other side of the line and can be

seen as valid or invalid according to its true content.

Our Hon''ble Judge of the Supreme Court came to the conclusion after considering the various case laws that the legislation on forward contracts

must be held to fall within the exclusive competence of the Union under Entry 48 in List I. In the said judgment of Mayavaram Financial

Corporation Ltd. (supra) the decision made in the case of State of Bombay Vs. Narothamdas Jethabai and Another, was referred wherein the

doctrine of pith and substance was described as follows :

The doctrine of pith and substance postulates, for its application, that the impugned law is substantially within the legislative competence of the

particular legislature that made it, but only incidentally encroached upon the legislative field of another legislature. The doctrine saves this incidental

encroachment if only the law is in pith and substance within the legislative field of the particular legislature which made it.

The Hon''ble Supreme Court thus observed that the contract entered into by the foreman of a chit fund with the subscriber was a special contract

falling under the Entry 7 of List III of the Seventh Schedule and the President''s assent to the Act confirms the view of the Supreme Court.

22. The distinction between the banking business and an ordinary money- lender was discussed in the case of Sajjan Bank (Private) Ltd., Alandur

Vs. Reserve Bank of India, Madras, and it is observed there as follows :

The essence of a banking business is, therefore, receiving money on current account for deposit from the public repayable on demand and

withdrawable by cheque, draft or otherwise.

An ordinary money-lender who does not accept moneys on terms enabling a depositor to draw cheques upon him would not, therefore, be a bank

or banker properly so called. The provisions of the Act would, therefore, apply only to the limited class of cases where the bank or banker allows

the withdrawal of money by the issue cheques.

The Supreme Court in the case of Mayavaram Financial Corporation Ltd. (supra) thus came to the conclusion which reads as under:

We are of opinion that there is a distinction between money-lending and money borrowing and the impugned provisions insofar as they control

money borrowing in the state of deposits from third parties and lending the same are valid.

Thus, it is clear that the Supreme Court held the State Act which deals with deposits from third party and lending the same as valid. Further to that

it was also held in the case of Mayauaram Financial Corporation Ltd, (supra) that Chapter IIIB containing Sections 45H to 45Q of the R.B.F. Act

dealing with non-banking institutions and financial institutions receiving deposits from third parties which has been introduced in the Reserve Bank

of India Act, 1934 in pith and substance relates to the control of credit by the Reserve Bank of India by virtue of its position as the central bank of

the country and, therefore, falls under Entries 38 (RBI) and 36 (currency) of List I of the Seventh Schedule of the Constitution and does not

entrench upon Entry 30 (money-lenders and money-lending) of List II thereof.

23. The scope of Section 45Q of the Reserve Bank Act came for discussion before the Hon''ble Apex Court in the case of Harishankar Bagla and

Another Vs. The State of Madhya Pradesh, and it was observed in that case by the Supreme Court that the effect of Section 45Q is not to repeal

expressly or impliedly any of the provisions of pre-existing laws. Nor does it abrogate them. What it does is only to make the provisions of

Chapter IIIB override the other laws. That being the position both the statutes namely R.B.I. Act and Bengal Money-Lenders Act shall remain in

their respective fields and nothing is invalid. As we have seen from the said judgment that money-borrowing in the State in the shape of deposits

from the third parties and lending the same are the same thing and valid, the conclusion can be drawn that the plaintiff company though having

fortified with the certificate of the Reserve Bank must be treated as money-lenders under the B.M.L. Act having its business within the State of

West Bengal and it does not exonerate the plaintiff company to obtain licence under the B.M.L. Act.

24. Now having followed the ratio decided in the case of Swaika Vanaspati Products Ltd. (supra), the plaintiff company must be given the

opportunity to obtain the licence u/s 13 of the B.M.L. Act and to pay statutory penalty under sub-section (3) of the said section. And the plaintiff

company is, therefore, directed to avail of that opportunity within a reasonable period of time and after having obtained such certificate on payment

of statutory penalty within a period of three months from the date the plaintiff company may proceed with the suit failing which the suit shall stand

dismissed.

25. The question of maintainability of the suit is, thus, disposed of accordingly. Later:

26. The learned Advocates for both the parties are present. Judgment is delivered in the open Court in separate sheets.

27. The learned Advocate for the defendant prays for stay of operation of the judgment.

28. The prayer is considered and rejected.

29. All parties are to act on a signed copy of the operative portion of the judgment on the usual undertaking.