SUPREME COURT OF INDIA

Rajendran and others

Vs.

Shankar Sundaram and others

C.A.No.802 of 2008

(S.B. Sinha and Harjit Singh Bedi JJ.)

30.01.2008

JUDGMENT

S.B. Sinha, J.

1. Leave granted.

2. Appellants herein were defendant Nos. 4 to 7 in the suit. Plaintiff-respondent No.1 filed the suit against them and four others. They are admittedly partners of defendant No.1 firm, M/s. AR. AS & P.V.PV , registered under the Partnership Act, 1932. Defendant No.3 P. Shankar (Respondent No.4 herein) was also a partner in the said firm.

3. Allegedly, Defendant No.2, P.V. Purushothaman (Respondent No.3 herein), who has been described as the Managing Partner of the said firm, fraudulently obtained an advance from the plaintiff where for a personal guarantee was furnished by the defendant No.2. Indisputably a cheque for a sum of Rs. 50 lakhs was issued in the name of the defendant No.1.

4. Plaintiff-Respondent filed the aforementioned suit for realization of a sum of Rs.70,30,000/- with interest @ 20% per annum inter alia alleging that all the defendants were jointly and severally liable there for. An application under Order XXXVIII Rule 5 of the Code of Civil Procedure was filed by the plaintiff.

5. Appellants in their written statement inter alia raised a contention that since the amount of Rs. 50 lakhs purported to have been taken in advance by defendant No.2 in connivance with defendant Nos. 3 & 8 had not been used for the benefit of the partnership firm, no order of attachment could be issued as against the appellants herein. The said contention of the appellants was accepted by a learned Single Judge of the High Court by his order dated 10th December, 2002 opining :-

> “The copy of the partnership deed date 01-4-1996 has been filed by the contesting defendants in the typed set. A perusal of the same clearly disclosed that the 2nd Defendant was not a partner in the 1st defendant firm. Moreover, the plaintiff had also not filed any record to show that the 2nd defendant was already in a partner (sic) in the 1st defendant firm and the borrowable was also made only for the firm. Unless and until, it is established by the plaintiff, I am of the view that the plaintiff is not entitled to seek any interim order calling upon the defendants to execute a security.”

6. An intra court appeal was preferred there against wherein a Division Bench of the High Court by reason of the impugned judgment opined :-

> “The Learned Judge has not appreciated that the 3rd Defendant who is the partner of the firm as per the partnership deed dated 1-4-1996 executed the promissory notes and clause 10 of the partnership firm gives power to a partner to borrow monies (sic) from the 3rd parties for the purpose of business. The 2nd Defendant gave a letter which is only for personal guarantee. So, the reasoning given by the Leaned Judge that since the 2nd defendant is not a partner, the borrowable of money is not for the benefit of the partnership cannot be countenanced. When the cheque was given in the name of the firm by the Plaintiff, prima facie, it has to be taken that it is borrowed on behalf of the partnership firm. When the payment of the money by the Plaintiff in the firm is not in dispute and in the absence of any specific allegation that the amount was paid personally to the defendants, 2, 3 and 8, though the cheque was issued in the name of the firma and the Plaintiff also colluded with them, the argument of the Learned Counsel regarding the alleged collusion cannot be accepted. Whether the amount is used for the firm or personally by the defendants 2, 3 and 8 can be gone into only after adducing evidence. Prima facie, we find that since the amount was paid in the name of the firm and promissory notes were executed by the partners of the firm and no other partnership deed is produced before the Court other than that the partnership dated 1-4-1996, the learned Judge is not correct in rejecting the Application as if the plaintiff has no prima facie case. The learned Judge has not given any other finding as to the necessity for attachment, but rejected the application only on the ground that the 2nd defendant is not the partner of the firm. On the said findings the appeal preferred by the plaintiff-respondent was allowed. Appellants are thus before us.”

7. Appellants are, thus, before us.

8. Mr. Ramamurthy, learned senior counsel appearing on behalf of the appellants, would take us through the plaint as well as the written statement to contend that from a perusal thereof it would appear that in obtaining the said purported loan from the plaintiff-respondent, defendant Nos. 2, 3 & 8 played a prime role As defendant No.2 was stated to be the Managing Partner of the firm, which he was not, and in fact only his son (defendant No.3) was a partner, the purported loan was granted by the plaintiff without even caring to ascertain as to who are the partners of the said firm.

9. Our attention was furthermore drawn to various provisions of the Partnership Act and in particular, Section 2(a); Section 18; Section 19; Section 22 and Section 28 thereof for advancing the proposition that the firm would be bound only when a transaction is entered into by a partner of the firm and that too subject to the limitations contained in the aforementioned provisions.

10. Mr. Amit Sharma, learned counsel appearing on behalf of the respondents, on the other hand supported the impugned judgment.

11. Concededly, the amount of loan was advanced by a cheque. The said cheque was drawn in the name of the partnership firm. Concededly again, the appellants were the partners thereof at the relevant time, although an Endeavour was made before the learned Single Judge to show that they ceased to be so. Having regard to the fact that they purported to have retired from the partnership firm in the year 2001 and the transaction herein between the parties are of the year 2000, prima facie the liability of the appellants could not have been ignored.

12. The application for attachment before judgment was filed by the plaintiff so as to protect his interest in the event the suit is decreed. The court exercises, in such a situation, jurisdiction under Order XXXVIII Rule 5 of the Code of Civil Procedure. The Division Bench of the High Court merely directed the appellants herein to furnish security within the time specified there under. It was directed that only on their failure to do so; an order of attachment of the 2nd item on the schedule to the petition shall be issued.

13. Appellants, in our opinion, are not seriously prejudiced thereby. The court while exercising its jurisdiction under Order XXXVIII Rule 5 of the Code of Civil Procedure is required to form a prima facie opinion at that stage. It need not go into the correctness or otherwise of all the contentions raised by the parties. A cheque had been issued in the name of the firm. The appellants are partners thereof. A promote had been executed by a partner of the firm. Thus even under the Partnership Act prima facie the plaintiff could enforce his claim not only as against the firm but also as against its partners.

14. Sections 2(a); 18; 19; 22 and 28, to which our attention has been drawn, instead of assisting the appellants, prima facie assist the plaintiff-respondent. Allegations against defendant Nos. 2, 3 and 8 are required to be gone into at the hearing of the suit. The Court at this stage is required only to form a prima facie opinion. The plaintiff is entitled to secure his interest keeping in view the amount involved in the suit. For the said purpose a detailed discussion in regard to the question as to whether defendant No.2 was a partner or not is not of much relevance.

15. In any view of the matter as the appellants are not seriously prejudiced if they furnish the security, this, in our opinion, is not a fit case where this Court should exercise its jurisdiction under Article 136 of the Constitution of India.

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16. For the reasons abovementioned this appeal fails and is dismissed. No order as to costs.

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