

RAJENDRAN AND OTHERS

v.

SHANKAR SUNDARAM AND OTHERS  
(Civil Appeal No. 802 of 2008)

JANUARY 30, 2008

[S.B. SINHA AND HARJIT SINGH BEDI, JJ.]

*Code of Civil Procedure, 1908 – O. 38 r. 5 – Attachment before judgment – Application for, against partnership firm and its partners – Challenge to, on the ground that borrower was not a partner and borrowal of money was not for the benefit of the firm – Held: All of them were partners at the relevant time – Plaintiff could enforce his claim against the firm as also its partners – Lender filed application for attachment to protect his interest in the event suit is decreed – Court was to form prima facie opinion at that stage without going into the correctness of the contentions raised – On facts, partners would not be seriously prejudiced on furnishing security, thus, interference under Article 136 not called for – Constitution of India, 1950– Article 136 – Partnership Act, 1932.*

The appellant-defendant nos. 4 to 7 were partners of the defendant no. 1 firm. Defendant no. 3 was also the partner. It is alleged that defendant no. 2, who was described as the managing partner of the firm fraudulently obtained loan from the plaintiff-respondent and also furnished a personal guarantee. The cheque was issued in the name of defendant No. 1. Defendant no. 3 executed a pronote. Plaintiff-respondent filed suit for realisation of the amount against all the defendants. It also filed application under O. 38 r. 5 CPC for attachment before judgment. The High Court rejected the application since the defendant no. 2 took the loan in connivance with defendant no. 3 and 8 not for the benefit of partnership firm. Aggrieved, plaintiff filed appeal which was allowed. Hence the present appeal.

A Appellants-defendants contended that in obtaining  
the loan from the plaintiff-respondent, defendant Nos. 2,  
3 and 8 played a prime role; that a defendant No.2 was  
stated to be the Managing Partner of the firm, which he  
was not; that only defendant No.3-son of defendant No.2  
B was a partner; and that the purported loan was granted  
by the plaintiff without even caring to ascertain as to who  
are the partners of the said firm.

Dismissing the appeal, the Court

C HELD: 1.1 The firm would be bound only when a  
transaction is entered into by a partner of the firm subject  
to the limitations contained in the Partnership Act, 1932.  
[Para 9] [213-G]

D 1.2 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 Single Judge of High Court 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  
E year 2001 and the transaction between the parties are of  
the year 2000, prima facie the liability of the appellants  
could not have been ignored. [Para 11] [214-A, B, C]

F 1.3 The application for attachment before judgment  
was filed by the plaintiff so as to protect his interest in the  
event the suit is decreed. In such a situation, the court  
exercises jurisdiction under Order XXXVIII Rule 5 CPC. It  
need not go into the correctness or otherwise of all the  
contentions raised by the parties. Allegations against  
defendant Nos. 2, 3 and 8 are required to be gone into at  
G the hearing of the suit. The plaintiff is entitled to secure  
his interest keeping in view the amount involved in the  
suit. A cheque had been issued in the name of the firm.  
The appellants are partners thereof. A pronote had been  
executed by a partner of the firm. Thus, even under the  
H Partnership Act prima facie the plaintiff could enforce his

claim not only as against the firm but also as against its partners. [Paras 12, 13 and 14] [214-D, F, G, H; 215-A] A

1.4 In any view of the matter as the appellants are not seriously prejudiced if they furnish the security, this, is not a fit case where this Court should exercise its jurisdiction under Article 136 of the Constitution of India. [Para 15] [215-B] B

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 802 of 2008.

From the Judgment and Order dated 27.2.2004 of the High Court of Judicature at Madras in O.S.A. No.108/2003. C

K. Ramamurthy, Kawaljit Kochar, Rishi Dewan and Kusum Chaudhary for the Appellants.

Amit Sharma and B.V. Anupam Lal Das for the Respondents. D

The Judgment of the Court was delivered by

**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. E

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 wherefor 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. F G

4. Plaintiff-Respondent filed the aforementioned suit for realisation 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 therefor. An application under Order XXXVIII Rule 5 of the Code of Civil Procedure was filed by the plaintiff. H

A 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  
B 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 10<sup>th</sup> December, 2002 opining :-

C "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 2<sup>nd</sup>  
Defendant was not a partner in the 1<sup>st</sup> defendant firm.  
Moreover, the plaintiff had also not filed any record to  
show that the 2<sup>nd</sup> defendant was already in a partner (sic)  
D in the 1<sup>st</sup> defendant firm and the borrowal 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."

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

F "The Learned Judge has not appreciated that the 3<sup>rd</sup>  
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 3<sup>rd</sup> parties for  
the purpose of business. The 2<sup>nd</sup> Defendant gave a letter  
which is only for personal guarantee. So, the reasonings  
given by the Leaned Judge that since the 2<sup>nd</sup> defendant is  
G not a partner, the borrowal 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  
H 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 2<sup>nd</sup> 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

A provisions.

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

B 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  
C 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.

D 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  
E directed the appellants herein to furnish security within the time  
specified thereunder. It was directed that only on their failure to  
do so, an order of attachment of the 2<sup>nd</sup> item on the schedule to  
the petition shall be issued.

F 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  
G appellants are partners thereof. A pronote 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.

H 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.

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

N.J.

Appeal dismissed. D