

(1985) 01 MAD CK 0036
In the Madras High Court
Case No : App. No. 639 of 1979

M/s. Balaji Finance Corporation, by Managing Partner, P.V.
Thangaraj

APPELLANT

Vs

R. Venugopal and Prakash alias Jayaprakashnarayanan

RESPONDENT

Date of Decision : 25-01-1985

Acts Referred:

Partnership Act, 1932 — Section 18, 19, 22

Citation : (1985) 01 MAD CK 0036

Hon'ble Judges : Nainar Sundaram, J

Bench : Single Bench

Advocate : K.V. Subramaniam, for the Appellant; M.N. Padmanabhan and Mr. D. Krishnan, for the Respondent

Final Decision : Dismissed

Judgement

Nainar Sundaram, J.—The plaintiffs in O.S. No. 115 of 1976 on the file of the Subordinate Judge, Vellore, are the appellants in this appeal. The respondents are defendants 3 and 4. They, along with the second defendant, were partners of the first defendant firm. The plaintiffs laid the suit for recovery of amounts due under two promissory notes. According to the plaintiffs, the second defendant, as representing the first defendant firm as well as the other partners, defendants 3 and 4, executed the promissory notes in the course of chit transactions. We are not concerned with the defence of the second defendant, because the second defendant has suffered a decree and he is not before this Court by way of further agitation. Defendants 3 and 4, against whom alone this appeal is directed, contended in substance before the Court below that the first defendant was not a trading firm and a mercantile firm; the second defendant did not and could not have implied or express authority to borrow; the borrowing could only be by all the partners; and in any event, the benefit of the borrowing did not reach the first defendant firm. The Court below countenanced this case of defendants 3 and 4 and exonerated them. The appeal by the plaintiffs is directed against the

judgment and decree of the Court below in so far as defendants 3 and 4 were so exonerated. Mr. K.V. Subramaniam, learned counsel appearing for the plaintiffs, would submit that the first defendant firm, of which defendants 2 to 4 were partners, was a trading concern; the second defendant did have an implied authority to borrow for the purpose of the business of the first defendant firm in the usual course of such a business; and the question of the benefit of the borrowing not reaching the first defendant firm and other partners is not germane and they cannot escape their liability on this basis. Learned counsel covets for a decree against defendants 3 and 4 also.

2. As against this, learned counsel appearing for defendants 3 and 4 would contend that the first defendant firm, even according to the case of the plaintiffs, was only carrying on the business of a commission agent and the first defendant firm was not a trading concern and the second defendant could not be held to have had either implied or express authority to borrow, and in the evidence, it has come out that all the partners should join for the purpose of borrowing and the second defendant, by himself, did not have any express authority to indulge in such borrowing.

3. The moot question that arises for consideration in this appeal is as to whether the second defendant could have had an implied authority or express authority to borrow so as to mulct the liability of the borrowing under the suit promissory notes on defendants 3 and 4. In the plaint, the first defendant firm is described as commission agents. Under S. 18 of the Indian Partnership Act, 1932, hereinafter referred to as the Act, subject to the provisions of the Act, a partner is the agent of the firm for the purposes of the business. S. 19 of the Act states that subject to the provisions of S. 22, the act of a partner, which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. S. 22 of the Act lays down the mode of doing the act to bind the firm. In the instant case, there is no dispute that the suit promissory notes were, in fact, executed by the second defendant on behalf of the first defendant firm and under I the seal of the first defendant firm. The implied authority to borrow will depend upon the nature of the business. It is well settled that such an authority is presumed to exist in the case of trading or commercial partnerships. The concept of a trading business takes in the element of purchase and sale of goods. Trade in its primary meaning is the exchange of goods for goods or goods for money. The following passages occurring in Lindley on Partnership, Fourteenth edition, require noting:

"The question whether a given act can or cannot be said to be done in carrying on a business in the way in which it is usually carried on must evidently be determined by the nature of the business, and by the practice of persons engaged in it."

"One of the most important of the implied powers of a partner is that of borrowing money on the credit of the firm. The sudden exigencies of commerce render it absolutely necessary that such power should exist in the members of a

trading partnership. (sic) At the same lime, the implied power of borrowing money, like every other implied power of a partner, only exists where the business is of such a kind that it cannot be carried on in the usual way without such power."

Hence the attempt on the part of the learned counsel for the plaintiffs to state that the first defendant firm waft only a trading and a commercial firm and hence the second defendant must be held to have had an implied authority to borrow. In this case, I find that the documents set compiling the evidence, oral and documentary, has not been prepared. Hence, i am obliged to go by the discussion of the materials placed in the case as found in the judgment of the Court below. There is no deed of partnership. The business of the first defendant firm apparently appeared to be one where there was charging and receiving of commission over goods of others marketed through it. Hence the passing of the goods of others through the first defendant firm and sale through it is not decisive to characterise it as a trading firm. If, in fact, the first defendant only markets the goods of others through it for commission, it cannot be strictly characterised as a commercial or a trading firm. It is true that by mere nomenclature as a commission agent, a partner of such a firm cannot be said to lack the implied power to borrow, if in fact, the business the firm carries on is of a commercial or trading nature, involving buying and selling. The implied authority to borrow is attributed not only to partners of a trading firm, bat also to partners of a business which cannot be carried on in the usual way without exercising such a power. The test, in the language of S. 19 itself is as to whether the borrowing is made to carry on, in the usual way, business of the kind carried on by the firm. If the business of the firm of commission agent consists merely of obtaining orders and dividing the expenses, or making the goods of others getting marketed through it for commission without any element of buying or selling, there is no presumption of implied authority to borrow. But, if the-firm of commission agent has to purchase goods for its constituents and has to pay for such purchases, whether with the money of its constituents or not, the firm has to be characterised as a trading firm which requires borrowing to enable it to carry on its business effectively and implied authority could be attributed to a partner of such a firm in the absence of express prohibition. But the normal presumption in the case of a firm of commission agent is that it does not indulge in trading in the sense, there is no buying and selling, and only goods of others pass through it for commission, but the contrary position could be shown that borrowing is necessary to carry on in the usual way of the said business or there is an element of buying and selling. If it is made out that in the course of the business of commission agent, borrowing is usual for the purpose of carrying on the said business, an implied authority can be attributed to a partner to borrow money on behalf of the firm, so as to bind the other partners. Nothing has come out in evidence that the business of the first defendant firm was such that borrowing was necessary to carry on the business in the usual course. On the other hand, the evidence of defendants 3 and 4 is to the effect that all the

partners should join together to borrow and no one partner has got an individual authority to borrow. The witness P.W. 1, examined on the side of the plaintiffs cannot improve the case with regard to the implied authority of the second defendant to borrow on behalf of the firm. Since P.W. 1 is an utter stranger to the firm, any amount of bare assertion by him with regard to the implied authority of the second defendant to borrow cannot be accepted. On the facts disclosed, I have to hold that the second defendant did not have either implied or express authority to borrow so as to bind the other partners, defendants 3 and 4. In the said circumstances, I do not find any merit in this appeal and accordingly it deserves dismissal, and the same is dismissed with costs of defendants 3 and 4, the respondents herein.