(2009) 09 AP CK 0001

Andhra Pradesh High Court

Case No: A.S. No. 1388 of 1999

Maganti Raja Babu		APPELLANT
	Vs	
Vijaya Bank and Others		RESPONDENT

Date of Decision: Sept. 2, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 96
- Constitution of India, 1950 - Article 19(1), 301
- Partnership Act, 1932 - Section 18, 19, 22
- Penal Code, 1860 (IPC) - Section 268

Citation: AIR 2010 AP 54 : (2010) 1 ALT 91

Hon'ble Judges: G. Bhavani Prasad, J; B. Prakash Rao, J

Bench: Division Bench

Advocate: T. Ravi Kumar, for the Appellant; K. Mallikarjuna Rao, for the Respondent

Final Decision: Dismissed

Judgement

B. Prakash Rao, J.

In this appeal filed u/s 96 of the Civil Procedure Code, the appellant who is defendant No. 2 in the Court below, seeks to assail the correctness of the judgment and decree dated 5.4.1999 in O.S. No. 10 of 1991 on the file of the III Additional Senior Civil Judge, Vijayawada, Krishna district decreeing the suit filed by the first respondent-Vijaya Bank for recovery of a sum of Rs. 5,27,227.24 Ps against the defendants 1 to 5/partners and so far as defendants 6 and 7 are concerned from the estate of late Koganti Kesava Rao, along with interest at 18 % per annum from the date of suit till the date of realization and costs.

2. The brief version as can be made out from the pleadings in the Court below, is that in the suit, the case of the plaintiff was that it is a corporate body/a bank and the husband of the first defendant by name Mr Koganti Kesava Rao and defendants 1 to 3 constituted a firm viz., M/s. Sai Krishna Films, Gandhinagar, Vijayawada-3 and

applied for three types of loans for the purpose of business. Accordingly, the plaintiff bank has sanctioned a sum of Rs. 1,50,000/- under Clean Bills Purchased Account, Rs. 1,00,000/- towards Open Loan Cash Credit and another sum of Rs. 3,00,000/-towards Key Loan Cash Credit in favour of the said firm. Thereupon, on behalf of the firm, promissory notes were executed on 28.3.1985 for repayment of the said loans together with interest at 18% per annum with quarterly rests. Accordingly, accounts were opened with the bank in the name of the firm. The two loans viz., clean bills purchased account and open loan cash credit loan were closed, since the amounts due under them were adjusted and received by the plaintiff bank. The defendants 3 to 5 are guarantors for the debt and they executed a letter of guarantee on the even date, undertaking the liability7 to pay the debts due by the firm. Later, Sri K. Keshava Rao, one of the partners, died leaving behind defendant No. 1 and defendants 5 (sic. 6) and 7 as legal heirs. There is a due amount along with interest thereon, which has remained undischarged. Later, the first defendant on behalf of the firm and as a partner of the same, gave a letter of acknowledgment dated 3.7.1988 acknowledging the liability to pay the debt under the promissory notes dated 28.3.1985. In spite of several demands made by the plaintiff bank since no amounts were paid, the plaintiff got issued notice on 30.12.1990 but there was no response, hence the present suit has been filed.

3. Defendants 1, 3 to 7 remained ex-parte. The second defendant who is the appellant herein filed a written statement denying the entire allegations and pleading that the suit is barred by time and not maintainable. Further, it was his case that the letter of acknowledgment of the debt signed by defendant No. 1 does not bind him nor the firm, since the firm did not authorize the defendant No. 1 to make any such acknowledgment, therefore in the absence of valid acknowledgment, no liability can be fastened on him or other defendants and there is mismanagement apart from the bank itself in collusion with the defendant No. 1 and guarantors and thus, there is no valid claim and the same cannot be enforced and suit is liable to be dismissed.

4. All these and other pleas raised in the respective pleadings from both sides, viz, the plaintiff and defendants alone, the Court below framed the following issues;

1. Whether the plaintiff bank is entitled for decree as prayed for?

2. Whether the suit is barred by time?

3. Whether the suit claim is true and correct?

4. To what relief?

5. In the process of trial, the plaintiff examined PW.1 and marked documents Ex.A-1 to Ex A-18. On behalf of defendants, DW.1, who is General Power of Attorney was examined and copy of General Power of Attorney was marked as Ex.B-1.

6. Considering the evidence and material as produced from both sides, the Court below decreed the suit holding that the suit claim is true and correct and the plaintiff bank is entitled to decree as prayed for, while rejecting the plea of want of authority on behalf of defendant No. 1 to execute the acknowledgment of the debt. Hence the appeal.

7. Heard Sri Ravi Kumar Tolety, learned Counsel appearing for appellant, who taking us through the entire evidence and material on record, though not seriously contesting on the prime surrounding facts as to the obtaining of the loan and adjusting the amounts due as such, however, sought to raise a plea that but for the alleged acknowledgement which has been produced by the plaintiff bank under Ex.A.5, the suit claim is hopelessly barred. Further the defendant No. 1 has no authority to bind the other partners especially in view of the fact that the business of the firm is not a trading one. In support, he sought to place reliance on a decision of the King''s Bench Division in Higgins v. Beauchamp 1914 King''s Bench Division 1192, where it has been held that implied authority of the partner to borrow money for partnership purposes, cannot be extended to a non-trading firm.

8. Sri K. Mallikarjuna Rao, learned Counsel appearing on behalf of the first respondent bank repealing all those contentions on the material aspects, submitted that ample implied authority on behalf of the defendant No. 1 to bind the other partners and firm by Ex.A-5 is valid and can be enforced against the partners and further having regard to the nature of the business, it cannot be said that it is a non trading, therefore, the said decision relied upon by the appellant has no application to the facts of the case.

9. On an appraisal of the submissions and the perusal of the entire record, the point which emanates for consideration is as to whether in the facts and circumstances there exists a valid acknowledgment by defendant No. 1 to bind the other partners and whether such acknowledgment can be extended to the business of the firm, allegedly a non trading firm.

10. From the pleadings and evidence as produced from both the sides, the undisputed facts which emanates are that the firm of defendants under the name and style M/s. Sai Krishna Films, Gandhinagar, Vijayawada-3 obtained the above mentioned three loans and the said firm consist of deceased Mr K. Kesava Rao and defendants 1 to 3 as its partners. One of the partners, Mr K. Kesava Rao died subsequendy and his wife and other defendants have become legal heirs, whereas according to the plaintiff, the defendant No. 1 had made an acknowledgment on 3.1.1988 acknowledging the liability of the outstanding debt due under aforesaid promissory note dated 28.3.1985 which was marked as Ex A-1 and acknowledgment as Ex A-5. The consent letters are marked as Ex.A-2 and A-3, Account copy as Ex.A-4, Guarantee Deed as Ex.A-6, pledge of goods in favour of plaintiff bank as Ex.A-7. The notice issued by the plaintiff bank was marked as Ex.A. 8 and the returned covers were marked as Exs.A-10 to A-15 and Ex.A-17. The partnership deed of the firm was

marked as Ex.A-18. Therefore, on the entire appraisal of the said documentary evidence and on a reading of the deposition of P.W. 1 who only reiterates those checkered events and circumstances as mentioned about the loan and partial discharge thereof and ultimate existing due amount. On behalf of defendants, D.W.1 who is General Power of Attorney, reiterated about his denial as made in the written statement, apart from denying the existence of any authority to or in favour of defendant No. 1 by or on behalf of other partners.

11. In view of the plea regarding the extent of authority an implied one to take in the other partners as contended on behalf of the appellant herein, the main basis on which the appellant proceeds is on the alleged fact that the firm is a non-trading firm, therefore even if any such implied authority as contemplated under law is extended to the trading one, but it does not extend to the non-trading business firm. In Higgins case (cited 1 supra) relied upon by the appellant, it is a case where King''s Bench Division has to consider in respect of a liability on a loan obtained by a firm which was in the business of proprietors and managers of picture palaces, cinematographic theatres and exhibitions, variety entertainments, concerts, theatrical performances and all other forms of entertainment, under the name and style of "Sydney Milles Cinema Circuit". Considering the said nature of business, the King''s bench Division proceeded to hold that the partnership deed expressly negatived the power of any one partner without the consent of the others to borrow money so as to bind the partnership and there is no express authority to borrow, and the question being that of implied authority to accept the principle that the managing partner of a common trading partnership has implied authority to borrow money for partnership purposes, thus binds the others. However what constitutes is the aspect of trading has not been gone into much in detail to apply to the facts of that case, since that firm was doing the business of proprietors and managers of picture palaces, cinematographic theatres and exhibitions, variety entertainments, concerts, theatrical performances and all other forms of entertainment, under the name and style of "Sydney Milles Cinema Circuit". This aspect having not been considered by the Court below, therefore it was held that the firm is not a trading business of the kind from which authority to borrow money or accept bills of exchange is to be applied.

12. Apparently, on a reading of the said judgment, the conception of trading on the aspect of only buying or selling of the goods and not beyond and therefore the business as pointed out is not being of buying and selling of goods, it was held to be a non-trading one, yet, in detail, there is no reference to the conception or parameters required for holding the business of trading or a non trading business.

13. In this connection, it necessitates us to consider the law of the land viz., the provisions of Indian Partnership Act i.e., Sections 18, 19 and 22, which read as follows;

Section 18: Partner to be agent of the firm:

Subject to the provisions of this Act, a partner is the agent of the firm for the purpose of the business of the firm.

Section 19: Implied authority of partner as agent of the firm:

(1) Subject to the provisions of Section 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.

The authority of a partner to bind the firm conferred by this Section is called his "implied authority".

(2) In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to-

(a) submit a dispute relating to the business of the firm to arbitration,

(b) open a banking account on behalf of the firm in him own name,

(c) compromise or relinquish any claim or portion of a claim by the firm,

(d) withdraw a suit or proceeding filed on behalf of the firm,

(e) admit any liability in a suit or proceeding against the firm,

(f) acquire immovable property on behalf of the firm,

(g) transfer immovable property belonging to the firm, or

(h) enter into partnership on behalf of the firm.

Section 22: Mode of doing act to bind firm: In order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm name, or in any other manner expres sing or implying an intention to bind the firm.

14. Of the above three provisions, the implied authority of a partner or agent of the firm is emanating u/s 19 of the Act, which includes all such acts of partners which are done to carry on in the usual way of the business of the kind carried on by the firm and it is only such acts which bind the firm but not otherwise to have applying the implied extension. In this case, there is no dispute to the fact that the loan is obtained for the purpose of an activity, whatsoever may be called in its nomenclature. Therefore, it cannot be said that any such loan obtained is for any other purposes other than the purpose of the firm, even any such amount taken, had been mis-utilised, mis-appropriated or diverted for other causes, therefore it follows that the amount obtained from the plaintiff bank is one for the activity of the firm and not otherwise.

15. Coming to the aspect of implied authority on the trading and non-trading businesses, though there is no clear distinction as such statutorily contemplated under any of the aforesaid provisions or otherwise to draw a line in between,

however, apparently it is only on a reading of Section 19 of the Act, as mentioned above, since all such acts have become a close nexus to the activity of the firm, therefore, the business which is carried on or activity as involved is trading or non-trading.

16. The ordinary meaning as per ''Oxford dictionary'' of expression "Trade" means the activity of buying and selling or of exchanging goods or services between people or countries; "Trader" means a person who buys and sells things as a job; "Trading" means an activity of buying and selling.

17. In State of Gujarat Vs. Maheshkumar Dhirajlal Thakkar, considering the provisions of Section 268 of Indian Penal Code it was held that the word "Trade" in its narrow popular sense means "exchange of goods for goods or for money with the object of making profits. In its wider sense, it includes any business carried on with a view to earn profit (see Halsbury''s Law of England Vol.32 paragraph 487). Further, the word takes its meaning from the context."

18. In Narain Swadeshi Weaving Mills Vs. The Commissioner of Excess Profits Tax, the expression has been referred to in connotation with ''business''. That the word ''business'' is ordinarily more comprehensive than the word ''trade'', one is used as synonymous with the other. The word ''business'' connotes some real, substantial and systematic or organized course of activity or conduct with a set purpose.

19. In G. Giridhar Prabhu and Others Vs. Agricultural Produce Market Comtt., considering Karnataka Agricultural Produce Marketing (Regulation) Act, 1966, it was held that the definition of the term ''trader'' is not restrictive definition. The term trader impress the entire process of manufacturing and selling.

20. In The State of Bombay Vs. R.M.D. Chamarbaugwala, considering the activity of ''Gambling'' vis-a-vis Article 19(1)(g) or Article 301 of the Constitution of India, in respect of ''trade, commerce and intercourse'' contemplates thereunder held that it is not the purpose to decide the case to attempt an exhaustive definition of the word ''trade'', ''business'' or ''intercourse. However, held that in the nature of activity, gambling cannot certainly be taken as one of them.

21. In Secretary, Madras Gymkhana Club Employees'' Union Vs. Management of the Gymkhana Club, it was held that the word ''trade'' means exchange of goods for goods or goods for money or, any business carried on with a view to profit, whether manual or mercantile as distinguished from the liberal arts or learned professions and from agriculture.

22. In State of Punjab and Another Vs. Bajaj Electricals Ltd., Trade in its primary meaning is the exchanging of goods for goods or goods for money, in its secondary meaning for goods it is repeated activity in the nature of business carried on with a profit motive, the activity being manual or mercantile, as distinguished from the liberal arts or learned profession or agriculture.

23. In State of Gujarat v. Mahesh Kumar Dhirajlal Thakkar (2 supra) it was held that trade means exchange of goods for goods or for money with the object of making profits, in a wider sense, it includes any business carried on with a view to earn profit.

24. Therefore, from the aforesaid principles as laid down by the Apex Court, it amply follows that though the expression trade and business are though exclusive of each other, but runs on the same lines. The parameters and of umbilical cord is earning of the profit it need not necessarily be dealing in the goods either way, therefore any activity whether there is a binding motive or profit earning, it certainly takes in both as a business and trade. Therefore, trade cannot be restricted only where there is a simpliciter of buying and selling of goods and no other activity, whether it also involves earning of profit. These and all several such other aspects have not come up for consideration in the aforesaid decision in Higgins case (cited 1 supra) relied upon by the appellant, nor the same is viewed from the angle as now sought to be focused.

25. In view of the same, we hold that the aforesaid decision cannot be made applicable either to the facts of the case or proposition as we are now dealing with. In this case, it is nowhere a plea raised or substantiated to show that neither there was any object of non profit making, nor, no profits, as a fact, were ever made. Hence, we hold that the principle of extension of acknowledgment by a partner on behalf of the firm under implied authority can extend even to the business of the nature involved in the present case, i.e., cinematograph firm, which certainly cannot be said that it is a non-trading business as such, where, undisputedly profit making subsists.

26. In the circumstances, we do not find any merits in the above appeal warranting interference by this Court. Accordingly the appeal is dismissed, with costs.