

**(1997) 12 BOM CK 0063**

**Bombay High Court**

**Case No:** Appeal No. 1201 of 1997 in Summons for Judgment No. 519 of 1996 in Summary Suit No. 2693 of 1996

Ashok Jaiswarup Jain

APPELLANT

Vs

Ms. Annamma Verghese and  
others

RESPONDENT

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**Date of Decision:** Dec. 16, 1997

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 37 Rule 2, Order 37 Rule 3
- Negotiable Instruments Act, 1881 (NI) - Section 138
- Partnership Act, 1932 - Section 32(3)

**Citation:** (1998) 1 ALLMR 555 : (1998) 3 BomCR 663 : (1998) 1 CivCC 708 : (1998) 1 MhLj 350

**Hon'ble Judges:** V.P. Tipnis, J; R.P. Desai, J

**Bench:** Division Bench

**Advocate:** Shaliesh Shah and Ms. Sadh, instructed by A.G. Shah, for the Appellant; S.F. Rego, for the Respondent

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**Judgement**

@JUDGMENTTAG-ORDER

V.P. Tipnis, J.

As the point involved was short, at the time of the admission itself, we had fixed this matter for hearing.

2. The appeal impugns-the order dated 6th October 1997 passed by the learned Single Judge in Summons for Judgement No. 519 of 1996 in Summary Suit No. 2693 of 1996. The suit was filed on the basis of dishonoured cheque issued by the defendant NO. 1 which is a firm dealing in construction. The case of the plaintiff is that for the purposes of giving a flat, certain amounts were accepted by the defendant No. 3. The defendant No. 3 who is a Partner of the defendant No. 1 firm also represented to be an estate agent. The cheque was issued in favour of the defendant NO. 1 firm. The flat not having been made available, the amount was

repaid by the defendant No. 3 by issuance of different cheques on behalf of the defendant No. 1. Out of these cheques, one cheque was dishonoured and payment of other two cheques was stopped. Summons for Judgement was taken out on the basis of the dishonoured cheque. Affidavits were filed on behalf of the defendants Nos. 2, 3 and 4. So far as the defendant No. 3 is concerned, he has stated that the amounts repaid in cash have not been given credit and, therefore, the summary suit should not be entertained. The defendants Nos. 2 and 4 raised defence by filing an affidavit to the effect that at the relevant time when the transaction took place, they were not Partners of the firm inasmuch as they had retired long back by a document dated 31 -8-1987. The document was annexed to the affidavit of the defendant No. 4. The learned Judge read the title of the document which reads as a document of partnership. However, the learned Counsel who appeared before the learned Judge stated that it should be read as a document of retirement. The learned Judge held that nothing has been brought on record by way of affidavits that the document of 1987 was, in fact, acted upon. The learned Judge also noted that the names of the defendants Nos. 2 and 4 continued to be shown as Partners in the register of firm. The Counsel for the plaintiff has produced certified extract from the register of firm issued in March 1997. No change has been indicated in the entries since 1986. The learned Judge held that therefore, the plaintiff cannot be blamed and cannot be foisted with the knowledge of the internal agreement between the Partners inter se. A person dealing with the firm would obviously be guided by the entries in the register of firm. The defence taken, according to the learned Judge, appears to be an after-thought. Accordingly, the learned Judge granted conditional leave to defend the suit on depositing an amount of Rs. 1 lakh within ten weeks from the date of the order. The learned Judge also passed consequential orders.

3. In this appeal, the learned Advocate for the appellant has urged that the learned Judge should have gone through the contents of the document. Though the document is titled as "Deed of Partnership", it clearly shows that it is a deed of retirement. In fact, para 1, after the preliminaries are mentioned, clearly shows that the appellant and one Anil Advani have gone out and retired from the said partnership firm known as "Apollo Construction" with effect from 3rd August 1987 and the parties of the second and third part, viz., Manmohan Goyal and Rekha Goyal will be the continuing Partners of the said firm, viz., Apollo Construction. The appellant filed affidavit categorically stating that himself and the 2nd defendant have retired from the 1st defendant firm as its Partners with effect from 3rd August 1987 and the said deed, though wrongly mentioned as Deed of Partnership, is a deed of retirement, a copy of which was annexed to the affidavit.

4. The learned Counsel for the appellant contended that in view of the provisions of section 32 of the Indian Partnership Act and especially the proviso to sub-section (3) of section 32, a retired Partner is not liable to any party who deals with the firm without knowing that he was a Partner.

5. The facts and circumstances of the case and the material on record prima facie show that the plaintiff had been dealing with the defendant No. 3 and the defendant No. 1 without knowledge that the appellant was a Partner. Whether the appellant had actually retired and whether he is liable or not will have to be decided at the trial on evidence. However, one thing is clear that these facts certainly entitle the appellant to unconditional leave to defend and he cannot be equated with the defendant No. 1 or the defendant No. 3. We must add that these are our prima facie observations as we are considering only the issue of grant or otherwise of unconditional leave.

6. On the basis of material on record and in view of the provisions of section 32, sub-section (3) and the proviso thereof, we are of the view that the appellant had made out a case for unconditional leave.

7. In the result, the appeal succeeds and we direct that insofar as the appellant (original defendant No. 4) is concerned, he is granted unconditional leave to defend the suit. The appeal is allowed in the aforesaid terms. There shall be no order as to costs.

8. Appeal allowed.