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of execution, the present application can be held to be an application to execute the decree, and as such must be taken to be in time.

On these grounds, I would confirm the order of the lower appellate Court and dismiss the appeal with costs.

SHAH, AG. C. J.:—I concur. I only desire to add that I am conscious of the weight to be attached to the observations in *Ramji* v. *Pandharinath*[1]. But the observations in *Hirachand Khemchand* v. *Aba Lala*[2] support the view taken in *Kashinath Vinayak* v. *Rama Daji*[3] : and my learned brother is distinctly of opinion that the view taken in *Kashinath Vinayak* v. *Rama Daji*[3] is correct. Under the circumstances I do not see any need to refer this matter to a Full Bench.

Decree confirmed.

J. G. R.

(1) (1918) 43 Bom. 334, 477. (2) (1921) 46 Bom. 761.

(3) (1916) 40 Bom. 492.

ORIGINAL CIVIL.

Before Mr. Justice Mulla.

1923. *September 5.*

SAREMAL PUNAMCHAND, PLAINTIFF *v.* KAPURCHAND PUNAMCHAND AND ANOTHER, DEFENDANTS *.

Indian Contract Act (IX of 1872), section 251—Trading firm—One partner borrowing money for purposes of the firm—Liability of partners.

In March 1920, defendants Nos. 1 and 2 entered into a partnership for carrying on the "business of buying and selling copper and brass utensils". On May 23, 1920, defendant No. 1 borrowed Rs. 6,000 from the plaintiff on

*O. C. J. Suit No. 1379 of 1923.

promissory notes passed by him in the name of the firm for purposes of the business. The partnership business came to an end on 28th idem. In April 1923, the plaintiff having sued both the defendants on the promissory notes:—

Held, that the partnership in question having been one of a commercial nature, defendant No. 1 had an implied authority to borrow money for the firm; and that, therefore, defendant No. 2 was also liable for the loan.

SUIT on promissory notes.

In April 1920, Seshmal (defendant No. 2) entered into partnership with Kapurchand (defendant No. 1) for carrying on the business of buying and selling copper and brass utensils. During the continuance of the business defendant No. 1 borrowed from the plaintiff a sum of Rs. 6,000 on promissory notes signed by him, for purposes of the business. The business was closed on May 28, 1920.

On April 9, 1923, the plaintiff sued both the defendants to recover the amount due on the promissory notes. Defendant No. 2 contended that neither he nor his firm borrowed the money from the plaintiff and that "in the event of its being proved that defendant No. 1 had borrowed the same amount from the plaintiff, this defendant cannot be held liable for the said debt as no such loan was necessary for or usual in the course of business of the partnership of which this defendant was a member".

Munsiff, for the plaintiff.

Vakeel, for defendant No. 2.

MULLA, J.:—This is a suit to recover Rs. 6,000 lent and advanced by the plaintiff to the defendants.

The plaint states that on May 23, 1920, the plaintiff advanced to the defendants, who then carried on business in partnership, Rs. 6,000 at interest at the rate of six per cent. per annum, but that the loan has not been repaid. The first defendant appeared in person

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and denied the loan. The second defendant filed his written statement. He admits the partnership, but denies all knowledge of the loan, and contends that if it be proved that the loan was made, he is not liable for it as no loan was necessary or usual in the business of the kind carried on by the firm.

At the trial of the suit the following issues were raised :—

(1) Whether the plaintiff advanced Rs. 6,000 to the firm of Kapurchand Sheshmal on May 23, 1920, as alleged in para. 3 of the plaint ?

(2) Whether the second defendant is liable for the loan or any part thereof ?

The plaintiff carries on business at Belgaum as shroff and commission agent. Vajingji Onkarmal are his Bombay agents and he has an account with them. Whenever the plaintiff comes down to Bombay he lives in rooms attached to the firm of Vajingji Onkarmal. One Ganeshmal was the Munim of that firm in 1920.

The defendants at all times material to this suit carried on business in partnership in Bombay in the name of Kapurchand Sheshmal. The partnership was formed on March 11, 1920, and it was dissolved on May 28, 1920. The business of the partnership consisted in buying brass and copper utensils and selling them. The capital brought in by the second defendant was Rs. 671. Some capital was also brought in subsequently by the first defendant. It transpired at the hearing that there were two other partners. The share of each of the two defendants was six annas in the rupee, the share of the other two being two annas each.

The first and second defendants are first cousins. The said Ganeshmal is the paternal uncle of the second defendant's wife. The second defendant used to go to the firm of Vajingji Onkarmal to see Ganeshmal. The plaintiff knew both the defendants before the date of the loan. On April 27, 1920, the defendants borrowed Rs. 3,000 from Ganeshmal at interest at the rate of six per cent. per annum. This sum was borrowed by the firm admittedly for the partnership business. The loan was repaid on May 26, 1920.

The plaintiff's case, as disclosed in his evidence, is that in May 1920, he had come down to Bombay and that he had taken quarters with Vajingji Onkarmal. On May 22, the first defendant saw the plaintiff at the Pedhi of Vajingji Onkarmal, and told him that he had borrowed Rs. 3,000 from Ganeshmal, and asked for a loan of Rs. 6,000, saying that he would repay the loan within two or three months. The plaintiff asked the first defendant why he wanted the loan. The first defendant said that the loan was required for the business of his firm. The plaintiff admitted that he did not know what the business of the defendants was. The plaintiff asked the first defendant to see him the next day when, he said, he would give the loan. The next day the first defendant went to the Pedhi of Vajingji Onkarmal. The plaintiff asked Kundunmal, Onkarmal's son, for Rs. 6,000. Kundunmal directed his Munim Dipchand to give Rs. 6,000 to the plaintiff. Dipchand paid Rs. 6,000 to the plaintiff and the plaintiff was debited with Rs. 6,009-6-0 in Vajingji's cash-book, Rs. 9-6-0 being the commission charged by Vajingji on the loan. Three Chithis (Exhibit A) were then written out by Ganeshmal each for Rs. 2,000, and they were signed by the first defendant in the name of Kapurchand Sheshmal. The plaintiff then paid the Rs. 6,000 to the first defendant.

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The plaintiff's evidence was corroborated by Kundunmal. Entries were produced both by the plaintiff and by Kundunmal from their respective books of account. Ganeshmal was at Marwar when the suit was heard and he was not called as a witness.

The first defendant said in his evidence that he never asked for a loan from the plaintiff and that the first time he saw the plaintiff was in the Court house after the summons was served on him. He said that he knew the firm of Vajingji Onkarmal for three years, that he knew Ganeshmal who, he said, was a partner in that firm, and that he had, on April 27, 1920, borrowed Rs. 3,000 from Ganeshmal for the business of the firm. He further said that on or about May 23, 1920, he went to Ganeshmal and asked for a further loan of Rs. 6,000 Ganeshmal said that he would pay Rs. 5,000 only and that the defendant would have to pass Chitis for Rs. 6,000. The first defendant agreed, and Ganeshmal wrote out three Chitis each for Rs. 2,000, being the Chitis sued upon, and he signed them. Ganeshmal then said that he would not pay any money unless the second defendant also signed the Chitis. The first defendant then saw the second defendant and told him what had happened. The second defendant told the first defendant that the first defendant was a *devalio* (spendthrift), for he had agreed to pass Chitis for Rs. 6,000 for a loan of Rs. 5,000, and said that he did not want to continue in partnership with him. The first defendant also said in his evidence that the second defendant having refused to sign, saw Ganeshmal. Ganeshmal then took out from a box some pieces of paper, saying that they were the Chitis and tore them up. I think that the first defendant's denial of the loan is false and he told a deliberate untruth to save the second defendant from liability. I accept the evidence of the plaintiff and of Kundunmal and hold that

the plaintiff lent to the firm of Kapurchand Sheshmal on May 23, 1920, Rs. 6,000 at interest at the rate of six per cent. per annum.

The firm, as stated above, was dissolved on May 28, 1920. Different versions are given by the first and second defendants as to the circumstances in which the firm was dissolved. The first defendant's version has been set out above. The second defendant denied in his evidence that the first defendant ever told him that he had arranged for a loan of Rs. 5,000 by passing Chitis for Rs. 6,000 or that he ever called the first defendant a *devalio*. The second defendant says that the reason why he did not want to continue as a partner was that the first defendant lived at Dahisar and that he did not attend regularly to the business of the firm. I accept the second defendant's version.

The next question is, whether the second defendant is liable for the loan. The plaintiff admitted in his cross-examination that the second defendant had no conversation with him about the loan, but he added that two or three days after the loan was made, the second defendant saw him near the Pydhowni temple and told him that he had paid Rs. 3,000 to Ganeshmal out of the money borrowed by the firm from the plaintiff. The second defendant denied that he ever had any such conversation with him. I do not accept the plaintiff's evidence on this point. I think that the plaintiff's object in saying what he did was to fix the second defendant with knowledge of the loan.

Such being the facts of the case the question arises whether the second defendant is liable for the loan. It was contended on his behalf that no loan was necessary or usual in the kind of business done by the partnership and that no liability, therefore, attached to him in respect of the loan; and reliance was placed on

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section 251 of the Indian Contract Act, 1872. The section is as follows:—

"Each partner who does any act necessary for, or usually done in, carrying on the business of such a partnership as that of which he is a member binds his co-partners to the same extent as if he were their agent duly appointed for that purpose."

The question, therefore, is whether the act of the first defendant in borrowing the money from the plaintiff for the partnership business was an act necessary for, or usually done in, carrying on business of such a partnership as that of which the first defendant was a member. The leading English case on the subject is *Bank of Australasia* v. *Breillat*[1]. In that case the Judicial Committee of the Privy Council observed as follows:—

"Every partner is, in contemplation of law, the general and accredited agent of the partnership, or, as it is sometimes expressed, each partner is *præpositus negotiis societatis*, and may, consequently, bind all the other partners by his acts, in all matters which are within the scope and objects of the partnership. Hence, if the partnership be of a general commercial nature, he may pledge or sell the partnership property; he may buy goods on account of the partnership; he may borrow money, contract debts, and pay debts on account of the partnership; he may draw, make, sign, indorse, accept, transfer, negotiate, and procure to be discounted, promissory notes, bills of exchange, checks, and other negotiable paper, in the name and on account of the partnership."

The above case is an authority for the proposition that any partner in a trading firm has an implied authority to borrow money for the purposes of the business on the credit of the firm. But the firm must be a trading firm. A firm is a trading firm if its business consists in buying and selling: *Higgins* v. *Beauchamp*[2]. Where, however, the business is not of a commercial nature, *e. g.*, where it is a professional business (*Hedley* v. *Bainbridge*[3]), or even the business

[1] (1847) 6 Moo. P. C. 152 at p. 193. [2] [1914] 3 K. B. 1192 at p. 1194.
[3] (1842) 3 Q. B. 316.

of a farmer (*Greenslade* v. *Dower*[1]), or a quarry worker (*Thicknesse* v. *Bromilow*[2]) where there is no buying and selling of goods, or an auctioneer (*Wheatley* v. *Smithers*[3]), no partner can borrow or pledge the partnership property so as to bind his co-partners. In the auctioneer's case referred to above, the question was whether an auctioneer was a trader, and the Court held that he was not, Ridley J. saying that buying and selling were essential features of trading and that an auctioneer does not buy and only sells the goods of others. Upon appeal that decision was reversed upon the ground that the partnership had a shop, that the business was something further than that of an auctioneer and that it "contemplated the sale and the purchase of goods and property as part of the business of the partnership".

Where a firm is a trading firm, so that one partner can borrow money for the purpose of the business on the credit of the firm, no duty is cast on the person advancing the money to make any further inquiries: per Blackburn J. in *Okell* v. *Eaton*[4], and the other partners are liable though the borrowing partner may misappropriate the money: see ill. (*b*) to section 251.

The partnership business in the present case consisted in buying copper and brass utensils and selling them. It was a partnership of a commercial nature, and the first defendant had, therefore, an implied authority to borrow money for the firm. I, therefore, hold that the second defendant is liable for the loan.

The conclusion to which I have come is confirmed by further facts proved in the case. The loan from the plaintiff was not the first loan obtained by the firm. Before that loan was obtained, the firm had, on April

(1) (1828) 1 M. & R. 640; R. 138. 7 B. & C. 635.
(2) (1852) 2 Cr. & J. 425.
(3) [1907] 2 K. B. 684.
(4) (1874) 31 L. T. 330 at p. 331.

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27, 1920, borrowed Rs. 3,000 from Ganeshmal admittedly for the partnership business. Moreover, the second defendant admitted that, if it became necessary, any one partner could borrow money for the firm. In this connection it may be observed that about the time the loan was obtained from the plaintiff, the firm had utensils of a value of between Rs. 700 and Rs. 1,000 only, the cash in hand was about Rs. 115, and the outstandings due to the firm were between Rs. 200 and Rs. 400. If the business had to be continued—and it was a business in which there were four partners—it was necessary, I think, to buy further stock in trade. I have no doubt in my mind that the object of the loan taken from the plaintiff was for the purposes of the partnership business as stated by the first defendant.

There is one more point to which I may here refer. It relates to the application of the money borrowed from the plaintiff. It is admitted that the loan made by Ganeshmal was repaid on May 26, 1920. The second defendant said that the first defendant paid it, but he *did not know from what source.* The first defendant admitted that he repaid the loan. The question is, whence came the money to repay the loan? The first defendant's evidence on this point was full of contradictions. He first said he got the money from a Marwari named Foja. He then said that he got it from a box in his shop at Dahisar. When he was asked how the monies came in his box, he said that he had sold gold ornaments about two or two and a half months prior to May 26, 1920, and that the sale proceeds were kept by him in the box. He was unable to give the name of the person to whom he sold the ornaments nor could he, he said, point out the shop where he sold the ornaments. I decline to believe the first defendant when he says that he repaid Ganeshmal out of money realised from the sale of ornaments. The story about

the sale of ornaments seems to me to be a pure invention. I am inclined to think that Ganeshmal was paid out of the Rs. 6,000 borrowed from the plaintiff.

I, therefore, pass judgment for the plaintiff against both defendants for Rs. 6,000 with interest thereon at the rate of six per cent. per annum from May 23, 1920, costs and interest on judgment at six per cent.

The findings on the issues will be: No. (1)—In the affirmative. No. (2)—In the affirmative.

Solicitors for plaintiff: Messrs. *Purnanand, Clubvalla and Jasubhai.*

Solicitors for defendant No. 2: Messrs. *Payne & Co.*

Suit decreed.

R. R.

PRIVY COUNCIL.

J. C.
1923.
October 19.

KHANDERAO VITHOBA KORE, SINCE DECEASED (PLAINTIFF) *v.* THE MUNICIPAL CORPORATION OF BOMBAY AND ANOTHER (DEFENDANT).

[On Appeal from the High Court at Bombay.]

Bombay Municipality—Land acquisition—Laying out and improvement of streets—Power to acquire additional land—Recoupment—City of Bombay Municipal Act (Bombay Act III of 1888), section 296.

Under section 296 of the City of Bombay Municipal Act, 1888, the Municipal Commissioner, in laying out a new public street or in the improvement of a street, has power to acquire land outside the intended regular line of the street, provided it is in contiguity therewith, although it is acquired merely with a view to recoupment of the cost of the work by reselling. The exercise of the power is subject to section 91 under which it is within the discretion of the Government whether proceedings for compulsory acquisition should be ordered.

Judgment of the High Court affirmed.

**Present* : Lord Dunedin, Lord Phillimore, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.