

(2009) 12 MAD CK 0027

In the Madras High Court

Case No : A. 3244 of 2008 in C.S. No. 564 of 2006

P. Manthiramurthy, Partner Yule Engineering Corporation APPELLANT
Vs

P. Marimuthu, Partner Yule Engineering Corporation and RESPONDENT
Another

Date of Decision : 15-12-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1
Contract Act, 1872 — Section 11
Partnership Act, 1932 — Section 45
Provincial Insolvency Act, 1920 — Section 16

Citation : (2010) 1 LW 388

Hon'ble Judges : G. Rajasuria, J

Bench : Single Bench

Advocate : R. Krishnaswamy for G. Gurulingam, for the Appellant; T.R. Rajaram for Karthick, Mukundan and Neelakantan for 1st Respondent and P. Ravishankar Rao, for 2nd Respondent, for the Respondent

Judgement

G. Rajasuria, J.—Pithily and precisely, compendiously and concisely, the relevant facts absolutely necessary and germane for the disposal of

this application would run thus:

(a) Already the preliminary decree for dissolution of partnership firm, namely, M/s. Yule Engineering Corporation was passed by this Court, as

against which, OSA was filed before the Division Bench of this Court in O.S.A. No. 90 of 2008. The relevant portion of the order passed in the

O.S.A. No. 90 of 2008 is extracted hereunder for ready reference:

2. By consent of the parties, the judgment and the decree passed by the learned single Judge dated 19.12.2007 is set aside, and the following

preliminary decree is passed for dissolution of partnership as under:

(1) It is declared that the proportionate shares of the parties in the partnership are as follows:

First Respondent/Plaintiff Mr. P. Mandiramoorthy 50%, and the Appellant/first Defendant Mr. P. Marimuthu and the 2nd Respondent/2nd

Defendant Mr. P. Arun 25% each.

(2) It is declared that the partnership shall stand dissolved (or shall be deemed to have been dissolved) as from 03rd day of July, 2006, and it is

ordered that the dissolution thereof as from that day be advertised in the Tamil Nadu Government Gazette.

And it is ordered that Mr. S. Raghunathan, Advocate be the receiver of the partnership estate and effects in the suit and do get in all the

outstanding book-debts and claims of the partnership.

And it is ordered that the following accounts be taken:

(i) An account of the credits, property and effects now belonging to the said partnership;

(ii) An account of the debts and liabilities of the said partnership;

(iii) An account of all dealings and transactions between the Plaintiff and Defendants, from the foot of the settled account exhibited in the suit and

marked (A), and not disturbing any subsequent settled accounts.

And it is ordered that the goodwill of the business heretofore carried on by the Plaintiff and the Defendants as in the plaint mentioned, and the

stock-in-trade, be sold on the premises, and that Mr. S. Raghunathan, receiver may, on the application of any of the parties, fix a reserved bidding

for all or any of the lots at such sale, and that either of the parties is to be at liberty to bid at the sale.

And it is ordered that the above accounts be taken and all the other acts required to be done be completed, before the 15th day of September,

2008 and that Mr. S. Raghunathan, Receiver do certify the result of the accounts, and that all other acts are completed, and have his certificate in

that behalf ready for the inspection of the parties on the 30th day of September 2008.

(3) It is declared that the joint receivers ceased to be receivers w.e.f. the date of the order of the learned single Judge i.e. 19.12.2007 and shall

hand over all the assets of the partnership firm both movable and immovable and all account books, ledgers and invoices, bank account details and

other relevant records of the partnership firm to Mr. S. Raghunathan, Receiver within two weeks from the date of receipt of a copy of this order.

(b) Subsequently, on mentioning, the same Division Bench, added the following also.

2. Heard the advocates for the parties.

3. Paragraph 2(1) of our order dated 3.3.2008 be substituted by the following:

(1) It is declared that the proportionate shares of the parties in the partnership are as follows:

The first Respondent/Plaintiff Mr. P. Mandiramorthy and the second Respondent/second Defendant Mr. P. Arun are each entitled to 25% and

the Appellant/first Defendant P. Marimuthu is entitled to 50%.

Similarly, the paragraph appearing in page-3, after paragraph 2(iii), of our order be substituted by the following:

And it is ordered that the goodwill of the business heretofore carried on by the Plaintiff and the Defendants as in the plaint mentioned, and the

stock-in-trade, as well as movable and immovable properties of the partnership firm, by sold on the premises, and that Mr. Raghunathan, Receiver

may, on the application of any of the parties, fix a reserved bidding for all or any of the lots at such sale, and that either of the parties is to be at

liberty to bid at the sale.

(c) Earlier Mr. Raghunathan was appointed as receiver and subsequently he has been replaced by the present receiver by name Mr. S.

Ramalingam.

(d) In the process of carrying out his duties, as per the directions contained in OSA, the receiver filed this memo, seeking the following directions:

2. It is humbly submitted that it appears that when my learned predecessor receiver attempted to take physical possession of the entire properties,

the same was strongly opposed on the ground that the first Defendant and his partners are in possession under Lease Deeds and they cannot be

disturbed except by due process of law. Hence, my learned predecessor filed a memo on 28.4.2008 to this Hon"ble Court seek directions as as

to enable him to take physical possession of entire premises. Directions by the Hon"ble First Bench include taking of physical possession. Then

only, sale of the machineries and the premises is possible to the advantage of both parties. It is submitted that there are practical difficulties in taking

physical possession. There are several employees working in the firms belonging to the first Defendant and his associates and several machines are

fixed for manufacturing goods. I am of the opinion that these premises including the machineries may be directed to be removed after giving time to

them at the discretion of this Hon''ble Court (30 to 40 days). The prevailing situation viz., ill-feeling and hatred attitude against each other party is

not conducive to take physical possession, unless the receiver is armed with the directions of this Hon''ble Court and police assistance is rendered.

3. It is humbly requested that this Hon''ble Court may be pleased to pass appropriate directions in the matter of taking physical possession after

giving some time to the first Defendant and his associates to vacate the suit premises voluntarily and if not with police assistance.

(e) Whereupon notice was given to both sides and both sides filed their counters.

2. The matter has been heard at length and this Court felt that notice has to be sent to Arun Enterprises, of which, Marimuthu-D1 is the proprietor

and also to Arun Plasto Moulders India Pvt. Ltd., of which Marimuthu is the Managing Director, for being heard, because the receiver and the

Plaintiff and D2 wants those organisations, namely, Arun Enterprises and Arun Plasto Moulders India Pvt. Ltd., should be evicted from the suit

premises pending final decree, so as to enable the receiver to sell the immovable properties concerned for a lucrative price. According to them if

the buildings as such keeping those organisations in occupation, are brought for auction, it would not fetch good price, because no prudent

purchaser would come forward to purchase any property when it is in the occupation of a tenant. In this factual matrix alone all the parties

concerned advanced their arguments and this order is necessitated ultimately.

3. The tour d''horizon of the learned Counsel for the Plaintiff and the learned Senior counsel for D2 would run thus:

(a) Indubitably and indisputably, the organisation, by name, M/s. Yule Engineering Corporation is a partnership firm, of which, D1-Marimuthu and

the then two minors, namely, the Plaintiff and D2 happened to be the partners.

(b) D1-Marimuthu was the Managing Partner and he was managing the whole affairs. While so, he acted to the detriment of the minors and he

simply siphoned the funds of the partnership firm and got it credited in the accounts of Marimuthu''s own organisations, namely, Arun Enterprises

and Arun Plasto Moulders India Pvt. Ltd.

(c) The leases also allegedly emerged in favour of Arun Enterprises and Arun Plasto Moulders India Pvt. Ltd.

(d) In the building bearing No. M6, RMD Yard, Sidco Industrial Estate, Guindy, there is a five storied building and in that the second floor is under

the occupation of the partnership firm, namely, M/s. Yule Engineering Corporation and the remaining four storeys, so to say, ground floor, 1st

floor, 3rd and 4th floors are in the occupation of Arun Plasto Moulders India Pvt. Ltd.

(e) The building bearing Shed No. C3(3rd phase) Thiru-vi-ka Industrial Estate, Guindy, is occupied partly by Arun Enterprises and partly by Arun

Plasto Moulders India Pvt. Ltd.

Both the buildings belong to the partnership firm, which is the subject matter of the suit.

(f) As per Section 19 of the Partnership Act, there could not have been any valid lease entered into between the Partnership firm comprised of

three partners, out of which, two are minors and the organisations Arun Enterprises and the Arun Plasto Moulders India Pvt. Ltd.

(g) The so called payment of advance by D1-Marimuthu, representing the private limited company in favour of the partnership firm is nothing but a

bogus one and the auditors report, as found set out at page No. 13 of the report filed by the auditor, would reveal the same.

Accordingly, the learned Counsel for the Plaintiff as well as the Senior counsel for D2 pray for ordering eviction of those alleged tenants from the

premises, as prayed for by the receiver.

4. By way of torpedoing and pulverising the arguments, as put forth and set forth on the side of the Plaintiff and D2, the learned Senior counsel Mr.

T.R. Rajagopalan appearing for D1-Marimuthu would put forth his arguments; the gist and kernal of them would run thus:

(a) Arun Enterprises is the proprietary concern of D1-Marimuthu and Arun Plasto Moulders India Pvt. Ltd., is a legal person by itself having a

separate legal personality and the said partnership firm M/s. Yule Engineering Corporation validly entered into lease agreements with those two

organisations and only on the strength of the same, they are in the occupation of those respective areas referred to supra.

(b) If at all the partnership firm is interested in evicting those two organisations, who are the lessees, it has to go before the rent controller and file

necessary applications and as such, the Plaintiff and D2 cannot, at the request of the receiver, press this Court to pass orders so as to evict those

two organisations from the suit premises concerned.

(c) The sum of Rs. 95,00,000/- (ninety five lakhs) was paid by Arun Plasto Moulders India Pvt. Ltd., in favour of the Partnership firm-M/s. Yule

Engineering Corporation and it cannot be disputed.

(d) The auditors report, which the learned Senior counsel for D2 relied upon has not achieved finality and no recognition of the Court has been

given to it as of now. In fact, one other auditor also has been appointed in this matter.

(e) Unless oral evidence is adduced, the question of this Court deciding in one way or other determining the rights of the rival parties would not

arise.

(f) The said lease agreements, emerged between the parties are valid ones and Section 19 of the Partnership Act cannot be pressed into service at

all.

(g) In fact, the Division Bench of this Court in the said order in O.S.A. never intended that during the pendency of the final decree proceedings, the

said two organisations should be evicted and that is something unknown also in the partnership proceedings.

(h) Only after obtainment of the final decree, at the execution stage, the question of evicting the tenant would arise.

(i) In such an eventuality, it is for the partnership firm to approach the Rent Controller for getting evicted the tenants. Accordingly, the learned

Senior counsel prays for rejection of the prayer made by the receiver.

5. Adopting the arguments of the learned Senior counsel for D1, Mrs. Chitra Sampath, the learned Counsel appearing for the Arun Plasto

Moulders India Pvt. Ltd., even though not a party, on receipt of the notice, submitted her arguments as under, based on the objections filed by the

said organisation:

The Bank Statement and the typed set of papers filed on the side of the Arun Plasto Moulders India Pvt. Ltd., would clearly evince and expatiate,

demonstrate and display that the sum of Rs. 95,00,000/- (rupees ninety five lakhs) was paid by Marimuthu-D1 as Managing Director of the said

Private Limited company in favour of the partnership firm and the partnership firm cannot try to wriggle out of its liability and simply snatch away

the property from the possession of them and that too, bye-passing the provisions of the Rent Control Act.

6. The learned Counsel for the Arun Enterprises adopting the arguments of the learned Senior counsel Mr. Rajagopalan appearing for D1 as well

as the arguments put forth by the learned Counsel appearing for Arun Plasto Moulders India Private Ltd., would submit that at the instance of the

receiver, no such eviction order could be passed.

7. The point for consideration is as to whether the organisations, namely, Arun Enterprises and Arun Plasto Moulders India Pvt. Ltd., should be

evicted summarily, as requested by the receiver, pending the final decree proceedings, so as to enable the receiver to sell the properties lucratively

as per the said direction of the Division Bench of this Court.

8. At this juncture, I would like to refer that when the matter was brought before the Division Bench on mentioning, the Division Bench was

pleased to order that the receiver shall sell the movable and immovable properties of the partnership firm and the parties to the lis were also

permitted to participate in the public auction. As such, this is a case in which the Hon'ble Division Bench of this Court specifically ordered so.

Wherefore, it is too late in the day on the part of the D1 to contend otherwise that pending final decree proceedings the immovable properties

cannot be sold etc. The receiver has been authorised by the Division Bench of this Court to sell the movable as well as the immovable properties of

the partnership firm. Only in that process the receiver, while taking steps to sell the immovable properties, felt that selling the properties as such

would not fetch good price and necessarily the occupants should be removed from the suit buildings.

9. The core question arises as to whether there is any valid lease created in favour of Arun Enterprises as well as the said private limited company,

namely, Arun Plasto Moulders India Pvt. Ltd. Section 19(g) of the Partnership Act is extracted hereunder for ready reference.

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)....

(b)....

(g) transfer immovable property on behalf of the firm

10. It is clear from a bare reading of the above extract that a partnership firm cannot transfer immovable property belonging to the firm, if it is

having no nexus with the business of that firm.

11. Unarguably and irrefutably, the purpose of partnership firm, namely, M/s. Yule Engineering Corporation is not to lease out the properties or do

lease financing. If the partnership firm itself is for lease financing then the matter would be entirely different. But here, the said partnership firm was

for the purpose of manufacturing nuts and bolts. It is therefore obviously and axiomatically, pellucidly and palpably clear that the alleged leases in

favour of those organisations, namely, Arun Enterprises and Arun Plasto Moulders India Pvt. Ltd., were unwarranted. I could see considerable

force in the submission made by the learned Senior counsel appearing for the Plaintiff as well as D2 that as on the date of leasing out the properties

in favour of Arun Plasto Moulders India Pvt. Ltd., and Arun Enterprises, D2 was a major and there is no dispute over it and when such was the

position, nonetheless he was not added as a party to the alleged leases.

12. This is a peculiar case in which, a partnership emerged among Marimuthy- the uncle of the then two minors, namely, the Plaintiff and D2. Be

that as it may, at this stage this Court need not delve deep into those facts as to whether such partnership firm could validly be held to have

emerged at all, but parties, by consent agreed for dissolution of the partnership firm and have proceeded with the matter accordingly and the

Division Bench of this Court also passed necessary orders. Whatever be the circumstances, the Managing partner, namely, Marimuthy-D1, was

not, as per law, authorised to lease out suit buildings in favour of the

organisations, in which he himself is playing a major role.

13. In fact, indisputably the firm Arun Enterprises happens to be the proprietary firm of D1-Marimuthu himself and so I could see considerable

force in the submission made by the Plaintiff and D2 that as to how Marimuthy himself, as Managing partner of the partnership firm, namely, M/s.

Yule Engineering Corporation, can lease out the property in favour of his own firm and also when he had not been authorised to lease out, as per

Section 19 of the Partnership Act.

14. Advocates appearing for D1 as well as the Arun Enterprises and Arun Plasto Moulders India Pvt. Ltd., would try to put forth and set forth

their arguments highlighting and spotlighting that an individual is different from a legal person.

15. It is also a trite proposition of law that the doctrine of "lifting the veil" should necessarily be applied whenever it is brought to the knowledge of

the Court that certain dubious and suspicious transaction took place under the garb of corporate veil.

16. Here even Marimuthu-D1 has not leased out the property in favour of some 3rd party so as to improve the business of the partnership firm.

But the lease was in favour of his own proprietary concern as well as in favour of the company, which is manned by board of directors, in which

Marimuthy is the Managing partner, his wife, his brother and his father-in-law are the other directors. As such, this is a fit case in which the

doctrine of "lifting the veil" can rightly be applied and see the reality. It is not as though this Court is incapable of seeing the wood for trees.

17. I am also of the opinion that the principle of "ubirime fiedi" also could be ushered in. When Marimuthu, being the close relative of the minors,

undertook the administration of that partnership firm on his behalf and on behalf of the two minors, he was duty bound to perform everything to the

benefit of the minors truthfully and not to the detriment of the minors interest.

18. But in this case my discussion supra would show that D1-Marimuthu's conduct was otherwise. In fact, the learned Counsel for the Plaintiff and

D2 brought to the attention of this Court the relevant portion in the counter filed by the advocate receiver, which is extracted hereunder:

4. The lessees namely Arun Plasto Moulders India Pvt. Ltd. and Arun Enterprises are statutory tenants. They are running business, manufacturing

goods and have employed machineries and several employees. Hence they are entitled to a reasonable time period to vacate the premises.

(emphasis supplied)

19. Placing reliance on the said portion extracted supra the learned Counsel for the Plaintiff and D2 would implore and entreat that now D1 cannot

veer round and take a plea quite antithetical to what he committed himself in black and white in paragraph 4 of his counter and that this Court might

not drive the Plaintiff and D2 to the Rent Control Court for evicting those two organisations. It is also the contention of the Plaintiff and D2 that

ample time has already been gained by those occupants.

20. I could see considerable force in such an argument put forth on the side of the Plaintiff and D2.

21. The learned Senior counsel Mr. T.R. Rajaraman for D1 cited the following decisions and it is just and necessary to consider them in seriatim.

(i) *Shriram Sardarmal Didwani Vs. Gourishankar alias Rameshwar Joharmal*, , an extract from it would run thus:

20. Moreover, according to the plaint, the dealings between the Plaintiffs firm ""Gangaram Premasukhdas"" and the Defendant started in 1948 and

continued after 1951. In 1948 all the three brothers Shriram, Satyanarayan and Ratanlal were minors and there could be no partnership of all

minors. A minor can be admitted to the benefits of partnership provided the partnership existed before the minor can be admitted to the benefit of

the partnership. In 1948 as all the three brothers Shriram, Satyanarayan and Ratanlal were minors, they could not have formed a partnership firm.

For these reasons it is clear that the trial Court erred in dismissing the suit on the ground that it was a partnership firm consisting of Shriram,

Satyanarayan and Ratanlal and that the partnership firm was not registered.

The said decision would highlight the point that a minor can be admitted to the benefits of the partnership firm and over such a proposition, there

could be no quarrel.

(ii) AIR 1951 Nagpur 448 - *Chhotelal Ratanlal and Anr. v. Rajmal Milapchand and Ors.*, an excerpt from it would run thus:

10. The trial Court held that there could not be any partnership between Bhimraj and Hukumchand because of the minority of the latter at the

alleged date of the inception of the partnership. Section 5 of the Partnership Act

makes it clear that the relationship of partnership arises from contract. But according to Section 11 of the Contract Act a minor is incompetent to contract. A minor cannot therefore be a partner in a firm (See "Sanyasi Charon v. Krishnadhan Banerji", 49 Cal 560 at p.570) u/s 30 of the Partnership Act a minor can however be admitted to the benefits of a partnership. But then a partnership must be already in existence independently of the minor. For he cannot be admitted to what does not exist.... The point for decision in the instant case is not whether the partnership originated or could have originated during the minority of Hukumchand but whether at the date of the accrual of the cause of action and of the institution of the suit Hukumchand was a partner along with Bhimraj.

The aforesaid decision also would clearly highlight the point that a minor could be admitted for the benefit of a partnership firm, but according to the said decision, if a partnership firm is in existence already, independent of a minor, then the minor could be admitted for the benefit of the partnership firm.

(iii) Mathura Nath Choudhury Vs. Sreejukta Bageswari Rani and Others, , an excerpt from it would run thus:

.... It is next argued that Defendant 1 exceeded, his authority in entering into an agreement like the present. This objection should also be overruled

on the ground that it was not taken in any of the Courts below; and it is an objection which must be decided on the evidence and on the facts of the

case. The learned Subordinate Judge in dealing with the liability of the Appellant u/s 251, Indian Contract Act, observed that not a word was said

in the written statement to suggest that he was not liable for or was not bound by the act of Defendant 1 for the business.

22. Placing reliance on the said decision, the learned Senior counsel for D1 would develop his argument that a partner is liable for the bona fide contract entered into by the other partners.

23. This decision is not relevant in the facts and circumstances of this case for the reason that the said partnership firm was not one for leasing

financing, but it emerged for the purpose of manufacturing nuts and bolts and in such a case, as per Section 19(g) of the Partnership Act, the

alleged lease transactions, which virtually emerged between D1 on the lessor side

and D1 himself in some other capacity on the lessee side would not bind the remaining partners and that too, when in the said partnership firm, out of the remaining two partners, one was a minor and another was a major at that relevant time and that the major was not added as a party in those leases. Hence, in these circumstances, the said leases cannot be taken as valid ones in the eye of law.

24. At this juncture, I would like to point out that in this case, as already highlighted by me supra, both the parties agreed for passing a preliminary decree for dissolution of partnership firm and the Honourable Division Bench also passed relevant order relating to the dissolution of the partnership and only further steps have to be taken and hence, as of now, this Court is not concerned with the fact as to whether the partnership firm, emerged between D1 on the one side and the Plaintiff and D2 the then minors on the other side, is valid or not.

(iv) Devji @ Deviji Shivji Vs. Maganlal R. Athrana and Others, , an excerpt from it would run thus:

6. In view of the fact that both the courts below have found concurrently that the sub-lease in question was taken by Respondent 4 alone, the only point urged by Mr. Sarjoo Prasad in support of the appeal is that Respondent 4 being a partner in the Saurashtra Coal Concern, all the partners of the firm are liable under the lease inasmuch as the firm admittedly came into possession of the demised colliery. He points out that even according to Respondents 1 to 3, they came into possession of the demised colliery immediately after the execution of the sublease, and wants this Court to infer from this that the partnership had already come into existence before the lease was obtained. This, however, has never been the case of the Appellant in the courts below. The only case which he put forward was that the lease was taken by Respondent 4 on behalf of all the Respondents. In other words his case was that Respondent 4 was a benamidar for the partnership firm. It is only this case which the Respondents had to meet, and in our judgment, it would not be proper to permit the Appellant to make out an entirely new case at this stage. Apart from that, Section 22 of the Indian Partnership Act, 1932, clearly provides that in order to bind a firm by an act or an instrument executed by a partner on behalf of the firm, the act should be done or the instrument should be executed

in the name of the firm, or in any other manner expressing or implying an intention to bind the firm. The sub-lease was not executed in the name of the firm, and it has been found by the courts below that Respondent 4 in obtaining the lease, did not act on behalf of the firm. This in substance means that in obtaining the sub-lease, the parties to it did not intend to bind the firm by that transaction.

25. This decision also is not applicable to the facts and circumstances of this case and the aforesaid comments made by this Court relating to the

decision reported in Mathura Nath Choudhury Vs. Sreejukta Bageswari Rani and Others, , would also be applicable to this decision.

(v) Rajnikant Hasmukhlal Golwala and Others Vs. Natraj Theatre and Others, , an excerpt from it would run thus:

24. Looking to the legal position incorporated in Section 19 of the Act, it is very clear that Defendants Nos. 1 to 11 who are partners of Plaintiff

No. 1 firm could not have sold the property of the firm to Defendant No. 12 in pursuance of the implied authority. Normally, only with consent of

all the partners, immovable property of the firm can be sold. In the instant case, some of the partners, without consent of the other partners, have

disposed of immovable property of the firm in favour of Defendant No. 12. The said transaction is definitely hit by the provisions of Section 19 of

the Act. In the circumstances, it is very clear that Defendants Nos. 1 to 11 could not have sold the property of the firm to Defendant No. 12.

Section 15 of the Act reads as under:

15. Application of the property of the firm.-Subject to contract between the partners, the property of the firm shall be held and used by the

partners exclusively for the purposes of the business.

Thus, Section 15 of the Act declares that subject to contract between the partners, the property of the firm shall be held and used by the partners

exclusively for the purposes of partnership business. This legal position precludes the possibility of any property of the firm being shown as

separate property of any partner so long as the partnership subsists.

(emphasis supplied)

26. The cited decision is not in support of the D1's case or the said two occupants' case, in view of the fact that the facts involved in this case are

entirely different and it is quite obvious. However, the above excerpt from the judgment would support the contention on the side of the Plaintiff

and D2.

(v) Shivagouda Ravji Patil and Others Vs. Chandrakant Neelkanth Sedalge and Others, certain excerpts from it would run thus:

5. But the question is whether the first Respondent could also be adjudicated insolvent on the basis of the said acts of insolvency committed by

Respondents 2 and 3. He could be, if he had become a partner of the firm. It is contended that he had become a partner of the firm, because he

did not exercise his option not to become a partner thereof u/s 30(5) of the Partnership Act. u/s 30(1) of the Partnership Act a minor cannot

become a partner of a firm but he may be admitted to the benefits of a partnership. Under Sub-sections (2) and (3) thereof he will be entitled only

to have a right to such share of the properties and of the profits of the firm as may be agreed upon, but he has no personal liability for any acts of

the firm, though his share is liable for the same. The legal position of a minor who is admitted to a partnership has been succinctly stated by the

Privy Council in Sanyasi Charan Mandal v. Krishnadhan Banerji ¹ after considering the material provisions of the Contract Act, which at that time

contained the provisions relevant to the law of partnership, thus:

A person under the age of majority cannot become a partner by contract... and so according to the definition he cannot be one of that group of

persons called a firm. It would seem, therefore, that the share of which Section 247 speaks is no more than a right to participate in the property of

the firm after its obligations have been satisfied.

It follows that if during minority of the 1st Respondent the partners of the firm committed an act of insolvency, the minor could not have been

adjudicated insolvent on the basis of the said act of insolvency for the simple reason that he was not a partner of the firm. But it is said that Sub-

section (5) of Section 30 of the Partnership Act made all the difference in the case. Under that Sub-section the quondam minor at any time within

six months of his attaining majority, or of his obtaining knowledge that he had been admitted to the benefits of partnership, whichever date is later,

may give public notice that he has elected to become or that he has elected not to become a partner in the firm and such notice shall determine his

position as regards the firm. If he failed to give such a notice, he would become a partner in the said firm after the expiry of the said period of six months. Under Sub-section (7) thereof where such person becomes a partner, his rights and liabilities as a minor continue up to the date on which he becomes a partner, but he also becomes personally liable to third parties for all acts of the firm done since he was admitted to the benefits of partnership and his share in the property and profits of the firm shall be the share to which he was entitled as a minor. Under the said two Sub-sections, if during the continuance of the partnership, a person, who was admitted at the time when he was a minor to the benefits of the partnership, did not within six months of his attaining majority elect not to become a partner, he would become a partner after the expiry of the said period and thereafter his rights and liabilities would be the same as those of the other partners as from the date he was admitted to the partnership. It would follow from this that the said minor would thereafter be liable to the debts of the firm and could be adjudicated insolvent for the acts of insolvency committed by the partners. But in the present case the partnership was dissolved before the first Respondent became a major; from the date of the dissolution of the partnership, the firm ceased to exist, though u/s 45 of the Act, the partners continued to be liable as such to third parties for the acts done by any of them which would have been the acts of the firm if done before the dissolution until public notice was given of the dissolution. Section 45 proprio vigore applies only to partners of the firm. When the partnership itself was dissolved before the first Respondent became a major, it is legally impossible to hold that he had become a partner of the dissolved firm by reason of his inaction after he became a major within the time prescribed u/s 30(5) of the Partnership Act. Section 30 of the said Act presupposes the existence of a partnership. Sub-sections (1), (2) and (3) thereof describe the rights and liabilities of a minor admitted to the benefits of partnership in respect of acts committed by the partners; Sub-section (4) thereof imposes a disability on the minor to sue the partners for an account or payment of his share of the property or profits of the firm, save when severing his connection with the firm. This Sub-section also assumes the existence of a firm from which the minor seeks to sever his connection by filing a suit. It is implicit in the terms of Sub-section (5) of Section 30 of the Partnership Act that the partnership is

in existence. A minor after attaining majority cannot elect to become a partner of a firm which ceased to exist. The notice issued by him also

determines his position as regards the firm. Sub-section (7) which describes the rights and liabilities of a person who exercises his option under

Sub-section (5) to become a partner also indicates that he is inducted from that date as a partner of an existing firm with co-equal rights and

liabilities along with other partners. The entire scheme of Section 30 of the Partnership Act posits the existence of a firm and negates any theory

of its application to a stage when the firm ceased to exist. One cannot become or remain a partner of a firm that does not exist.

27. There could be no quarrel over the said proposition set out supra and in fact, the said decision is not supporting the case of D1 and the

comments offered in respect of the aforesaid decisions (i), (ii) and (iii) are applicable for this decision also.

(vi) AIR 1922 P C 237 : (1922) 16 L.W. 536 - Sanyasi Chaudhary v. Krishnadas Banerji and Ors., an excerpt from it would run thus:

A person under the age of majority cannot become a partner by contract, *Mohori Bibee v. Dhurmodas Ghose* (1) and so according to the

definition he cannot be one of that group of persons called a "firm." It would seem, therefore, that the nature of which Section 247 speaks is no

more than a right to participate in the property of the firm after its obligations have been satisfied.

Though there may be this right, in fact it is not claimed by the Defendant. On the contrary, the written statements deny his membership of the

partnership; this denial was made on his behalf during his minority, and it was adopted by him when he attained his majority. This attitude he still

maintains, and it can only be regarded as a relinquishment of all claim to a share in the property of the firm. It is still the property of the firm and is

liable as such to the obligations of the firm.

But all the property of the firm vested in the Receiver on the making of the order of adjudication (Provincial Insolvency Act, Section 16), and if any

part of it has got improperly into the possession of the minor, the right to recover it is in the Receiver. This is not disputed by the Defendant; and it

is only by its coming into the hands of the Receiver that its rateable distribution among the general body of creditors can be secured. Nor does it

make any difference that the business was conducted by the male adult members of a Hindu family governed by the Dayabhaga; the right and liabilities of a minor members of such a family would be measured by similar principles for the purpose now under consideration.

(vii) Anthony C. Leo Vs. Nandlal Bal Krishnan and others, , at page 387:

29. Since the properties in a suit is being managed, maintained and administered by the court through the receiver, the receiver is under an

obligation to take all reasonable steps for preservation and maintenance of such properties. If for such preservation, action in civil or criminal court

is necessary, the receiver is to draw the attention of the court of relevant facts necessitating such legal action and take leave of the court to institute

appropriate legal proceedings for the preservation of the property. As the property does not vest free from encumbrances in custodia legis by

annulling all rights and obligations attached to the property, the receiver cannot interfere with any right of the third party. Sub-rule (2) of Rule 1 of

Order 40 of the Code of CPC provides:

Nothing in this rule shall authorise the court to remove from possession or custody of property any person whom any party to the suit has not a present right to remove.

30. Such sub-rule clearly indicates that the court and its officer, the receiver, does not possess any right higher than the right a party to the suit possesses.

31. Where a Rent Act is applicable, the inter se rights and obligations of the landlord and tenant are regulated and controlled by such Rent Act. In

areas where any special law governing the incidences of tenancy is not applicable, the law relating to lessor and lessee as envisaged by the general

law of the land, namely, Transfer of Property Act, will regulate and determine inter se rights of landlord and tenant. In dealing with the rights and

obligations which a third party may have in respect of a property in which a receiver has been appointed, the receiver, like a party to the suit, will

have same limitation. The receiver will be bound by the incidences of tenancy flowing from the statute regulating and determining inter se rights of

landlord and tenant. Therefore, there is no manner of doubt that no order for eviction of the tenant can be passed by the court at the instance of its

officer, the receiver, without taking recourse to appropriate proceedings for

eviction of the tenant under the appropriate statute regulating and governing the inter se rights of landlord and tenant. It may also be emphasised here that even apart from an eviction proceeding, any incidence of tenancy which is regulated and controlled by a special statute cannot be altered, varied or interfered with except in accordance with the provisions of such statute. The court in such cases has no jurisdiction to pass orders and direction affecting the right of the tenant protected, controlled or regulated by the Rent Act on the score of expediency in passing some order or direction for the maintenance and preservation of the property in custodia legis.

32. It is to be indicated that though a tenant of a property in custodia legis cannot be deprived of statutory protection of the rights of tenant vis-a-vis landlord, a tenant cannot claim protection of any assumed right not flowing from the incidences of tenancy. For example, if a tenant starts making some unauthorised construction in the tenanted premises threatening safety and security of the tenanted premises or of the building as a whole, the landlord can certainly prevent such activities by the tenant by bringing appropriate action in court seeking prohibitory and mandatory order against the tenant without seeking his eviction. Such right of the landlord must be held to be in addition to his right to seek eviction under the appropriate tenancy law, if permitted.

28. Placing reliance on the said judgments, the learned Senior counsel for DI and also the advocates for the said two occupants would develop their arguments that simply because the receiver has been appointed out of the passing of the preliminary decree to carry out the activities as contemplated in the preliminary decree, he cannot ignore the independent rights of 3rd parties, who are tenants and it is not a case that the receiver had put those two occupants in possession.

29. No doubt I am fully aware of the trite proposition that if independently and legally the 3rd parties are in occupation of the suit property, then certainly, the purchaser of the suit property in the Court auction sale could only take symbolic delivery and thereafter he has to initiate appropriate proceedings as per law, for evicting those two tenants. But this is a singularly singular case, in which, there were no valid leases emerged in favour of those occupants for the reasons already set out supra.

30. To the risk of repetition without being tautologous I would like to point out that those decisions emerged with reference to different sets of

facts, but here the facts involved are entirely different. The partnership firm itself was not doing any lease financing business and there is nothing to

indicate and display that such leasing out of the property was for the benefit of the partnership firm. Even though one of the minors attained

majority as on the date of leasing out the property, he was not been added as one of the parties to the alleged lease agreements.

31. The learned Counsel for the Plaintiff and D2 also invited the attention of this Court to the various typed set of papers and submitted that D1-

Marimuthu, one of the partners of the partnership firm, even projected himself before the Central Excise authorities as though he is the proprietor

of the said partnership firm, namely, M/s. Yule Engineer Corporation.

32. As such it is clear that he was responsible as single individual for all the transactions. In such a case there is no question of treating those

alleged leases as valid ones, operating as against the partnership firm.

33. Regarding the payment of advance is concerned, there are controversies and I am of the considered opinion that during final decree

proceedings both sides should be given opportunity to adduce evidence in that regard and ultimately that could be decided.

34. As of now the partnership firm's properties have to be sold and the Division Bench of this Court also safe-guarded the interest of the parties

concerned by allowing them to participate in the auction, which would be conducted by the receiver. In the event of D1-Marimuthu being

successful bidder there would not be any necessity for him to vacate the premises which are under the occupation of Arun Enterprises as well as

Arun Plasto Moulders India Pvt. Ltd. and if other than Marimuthu happened to be the successful bidder then naturally those organisations, namely,

Arun Enterprises and Arun Plasto Moulders India Pvt. Ltd., should vacate the premises within six months from the date of such auction in favour of

such person concerned and this order will be executable as such for evicting them.

35. Accordingly, I am of the view that the receiver is directed to proceed further as aforesaid, as expeditiously as possible. The auditor appointed

shall submit report within a period of one month and the Advocates appearing

also are entitled to send communication to the present auditor and appear before this Court on the next hearing.

36. Since the learned Counsel for the Plaintiff entreats and implores that time limit may be fixed for the sale of the property, it is directed that within a period of one month the property should be brought for sale, as per the said directions of the Division Bench of this Court.

For submitting progress report the matter is adjd.to 12.1.2010