(2010) 01 MAD CK 0039

In the Madras High Court

Case No : O.S.A. No. 15 of 2010

P. Marimuthu APPELLANT

Vs

P. Mandiramoorthy and P. Arun RESPONDENT

Date of Decision : 12-01-2010

Acts Referred:
Partnership Act, 1932 — Section 19

Citation : (2010) 1 LW 901

Hon'ble Judges : T. Raja, J;M. Chockalingam, J

Bench : Division Bench

Advocate : Karthik, for the Appellant; Ravishankar Rao, for R1 and C. Gurulingam, for R2, for the Respondent

Judgement

M. Chockalingam, J.—This intra-court appeal challenges the order of the learned single Judge of this Court made in Application No. 3244

of 2008, the application seeking production of certain documents in C.S. No. 564 of 2006, a suit for partition.

2. The Court heard the learned Senior Counsel for the appellant and also for the Caveator.

3. The appeal came to be filed on the following facts and circumstances.

In a suit for dissolution of partnership firm consists of the appellant who is the first defendant, the plaintiff and the second defendant, a preliminary

decree came to be passed against which the appeal was preferred in OSA. No. 30 of 2008. By consent, the preliminary decree which was

originally passed was withdrawn and substituted by another preliminary decree. The above application was filed seeking a direction to the first

defendant to file the original documents. Pending the same, a memo was filed by the Receiver seeking a direction from the Court to vacate the

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tenants and also for sale of the immovable property belonged to the partnership firm. The learned single Judge, after giving opportunity to all sides

and hearing the submissions made, passed an order that the Receiver could sell the property calling for the bids as expeditiously as possible and

also ordered for eviction of the tenants. Aggrieved over the same, the first defendant has brought forth this appeal.

4. As could be seen from the available materials, originally, a preliminary decree came to be passed by the learned Single Judge. Aggrieved over

the same, the appeal was preferred there from and thereafter, the same was set aside. Again, a preliminary decree came to be passed. Originally,

an order came to be passed appointing joint receivers, an Advocate and the first defendant. Later, it was modified, whereby, the first defendant

were removed from the Receivership and the Advocate Receiver was permitted to continue .Aggrieved first defendant, took it on appeal,

challenging the said preliminary decree, whereby the First Bench of this Court in O.S.A. No. 90 of 2008 passed an order which reads as follows:

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;

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(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. Mandiramoorthy 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), or 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 ash 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

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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.

5. When the appeal is pending, instead of the earlier Advocate who was actually holding as Receivership, another Advocate was appointed. When

the proceedings are pending before the trial Court, a memo was filed by the Receiver seeking two directions (1) to vacate the persons in

occupation of the premises and take physical possession, if necessary with police assistance and (2) for sale of the property. The said memo

seeking directions reads thus:

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 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.

6. The learned single Judge passed the order under challenge whereby he directed the Receiver to proceed with the sale process as expeditiously

as possible and directed the auditor to submit a report within a period of one

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month and further directed that the property should be vacated and

possession should be handed over within a period of six months. Aggrieved first defendant, has brought forth this appeal.

7. Advancing the arguments on behalf of the appellant, the learned Senior counsel would urge, the learned single Judge has passed the order

directing the tenants to vacate and hand over possession within six months from the date of the said auction in favour of the successful bidder. Such

an eviction order could not be passed arbitrarily. The eviction order was passed without following any procedure known to law, whereas the

tenants could not be evicted without following the process of law. In the instant case, the final decree proceedings are pending. Apart from that,

even the receiver appointed has not taken any accounts. Even after the completion and finalisation of the accounts and settling the same, no

question of sale of the immovable property would arise. Thus, a direction to bring the firm''s property to auction before the finalisation of accounts

is neither just nor proper. There was an order passed on 27.4.2007 and a preliminary decree was passed on 3.3.2008 by the Division Bench

directing the accounts to be finalised. The orders of the learned Single Judge and also order of the Division Bench have become final. Even then,

the accounts are neither taken nor completed. Under such circumstances, the immovable properties of the Partnership Firm should not be sold.

The order of the Division Bench, if perused, would clearly indicate that it was actually reproduction of Form 21 of Appendix-D of the Civil

Procedure Code.

8. It is true that the sale of movable and immovable property are mentioned therein but the earlier two clauses would clearly indicate that the

Advocate Receiver is directed to take accounts of the Partnership firm and the third clause also directed to bring the property to auction. Thus, if

all the clauses are read out jointly, it would be quite clear that without completion of the accounts of the properties, it cannot be sold. While the

accounts are not taken and when it remain unascertained as to the encumbrances, charges, lien, third party interest affecting the title of the property

of the firm, no question of ordering sale would arise. The Receiver has filed a memo stating that pursuant to the orders of the Court, the property

was put to sale and the possession of the tenants was found to be an

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impediment and hence, they should be vacated.

9. It is pertinent to point out that the learned single Judge has passed an order in an interlocutory application seeking for production of certain

documents from the opposite party, namely, the first defendant. It is a matter of surprise to note how the Court could pass an order of eviction, on

memo, directing the tenants to vacate the premises and hand over possession, while they filed documents to establish that there was advance

payments made and they have been making payment of rental. In the instant case, the learned single Judge has pointed out that the second

defendant has become major but he was not made as a party to the lease agreement, cannot be reason to order eviction to vacate the tenants

without following the procedure of law. So long as the tenants are carrying on their organisation, this was found to be a hurdle for sale of the

property and eviction cannot be ordered.

10. Added further learned Counsel that in the instant case, though the order of preliminary decree was passed by the First Bench, on consent

made, it was misinterpreted to mean that there was consent given by appellant for sale of the immovable property. Even assuming, there was a

clause for sale of immovable property, nowhere, it was mentioned at what point of time the property is to be sold. When the first two clauses viz.,

rendition of accounts and taking of accounts by receiver are made, then only the third clause viz., sale of property, would come into operation.

Under such circumstances, the order of the learned single Judge, either ordering for sale or for evicting the tenants, cannot be sustained. Hence, the

said order has got to be set aside.

11. Contrary to the above contention, it is contended by the Caveator that the preliminary decree made by the trial Court was challenged before

the Division Bench and the order has been passed. The opening of the preliminary decree would indicate it was by way of consent decree. If to be

so, it is quite clear that the first defendant who is adjudicating before this Court was a party to the consent decree where it is clearly stated that the

receiver was permitted to sell the property of the firm both movable and immovable properties. Having been a party to such a course and obtained

a preliminary decree, now, the appellant should not put forth such a contention at this stage. Apart from that, a memo was filed by the Receiver

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appointed by the Court. He has stated the reasons under what circumstances eviction should be made. It was a case where the partnership firm

owns two buildings and one of the buildings is a storied building with four to five floors and only in the second floor, the said partnership firm is

carrying on business. All other floors are occupied by the so called tenants under the tenancy created by the first defendant who is the Managing

Partner of the firm in question. So far as those concerns are concerned, who are called as tenants, one is the proprietary firm of the first defendant

and in the other firm, the first defendant and his family members are Directors. Thus, the so called lease itself is a created one which acts

detrimental to the minor partners. At the time when the lease was alleged to have been entered into, the second defendant actually attained majority

but he was not added as a party. All would clearly indicate the act of detriment to the interest of the parties concerned. One such incident is the

creation of the lease agreement. It is quite clear that so long as the so called tenants are not vacated, the property could not be sold. Apart from

that, u/s 19 of the Partnership Act, the partners of the partnership firm was barred from making any alienation of the property. All these would go

to show that untenable allegations were putforth before the learned trial Judge and it was rightly rejected and the appeal has been brought forth.

Under such circumstances, the order of the learned single Judge has got to be sustained.

12. The Court paid its anxious consideration on the submissions made and looked into the materials available on record.

13. It is not in controversy that the suit was filed for dissolution and a preliminary decree came to be passed. Originally, there were two receivers.

Thereafter, it was appealed against as stated above before the Appellate Court and there was a consent preliminary decree made. It is an admitted

position that the final decree proceedings are yet pending. Pending proceedings, the said interlocutory application was filed seeking for production

of certain documents. A memo was also filed by the Receiver seeking two directions, one for vacating the persons in occupation who are carrying

on certain organisations and secondly, for sale of the property and the learned trial Judge has ordered both.

14. At the outset, it has to be pointed out, in a given case like this, in a suit for partition, where the preliminary decree has been passed, the other

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reliefs have got to be worked out. It is also an admitted position that the final decree proceedings are pending. The preliminary decree is one where

the rights of the parties are adjudicated and they have got to be worked out only in the final decree. As could be seen from the modified

preliminary decree made by the First Bench of this Court, the first two clauses would read as follows:

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.

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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.

15. Subsequently, the matter came before the Division Bench under the caption ''for being mentioned.'' and the following order came to be passed.

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. Mandiramoorthy

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), or 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 ash 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.

16. At this juncture, it is pertinent to point out that the preliminary decree came to be passed by the consent of the partners. It was made clear that

the accounts of the credits, property and effects now belonging to the partnership; the accounts of the debts and liability of the partnership; and

also the accounts of all dealings and transaction between the plaintiff and the

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defendants, were to be taken. It is an admitted position that the reports were given by the auditors and the second report was also called for and the accounts are not yet settled. Pending the same, at no stretch of imagination, the property of the partnership firm can be sold.

17. In a given suit for dissolution like this, when the accounts are yet to be settled and apart from that, all the dealings and transaction between the plaintiff and the defendants are also yet to be settled, and who is liable to the others is yet to be ascertained, the sale of the property of the partnership firm would not arise at all. The respondent/caveator before the trial court wanted to take advantage of the clauses that the sale of the immovable property has actually found place in Clause 3. Clause 3 viz., sale of the property, cannot be put in operation even before settling the accounts between the parties. Therefore, Clause 3 cannot be given a separate treatment, giving permission to the Receiver to bring the property for sale.

18. Under such circumstances, the Court is of the considered opinion that the memo filed by the Receiver for sale of the property even before the settlement of accounts, at this juncture, was unwarranted. The trial Judge without considering the same has ordered for sale. Hence, that part of the order directing sale of the immovable property has got to be set aside. Insofar as the eviction of the so called tenants is concerned, the Court is of the considered opinion that the order of the learned single Judge has got to be sustained for more reasons than one. It was a partnership firm consisting of the first defendant/appellant, the managing partner and two others partners, plaintiff and the second defendant and the other minor partners. The first defendant was actually carrying on the business of the firm. It is also brought to the notice of the Court that the building is a storied building consisting of four to five floors and the second floor was occupied by the partnership firm while the other floors were occupied by two concerns, one is the proprietary firm of the first defendant and in the other proprietary firm, the first defendant and the family members are Directors. Certain lease deeds were entered into by the first defendant as the managing partner of the firm in question in which he is also the Director. Thus, the trial Court has pointed out that it was all nothing but a created one. In the instant case, in view of the bar under the Partnership

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Act, that too, when the second defendant became major, the lease deeds were created to defeat the rights of the other partners of the firms. So far

as the documents were created to defeat the rights, the Court has to necessarily intervene. Now, the contention putforth by the appellant that they

are the tenants and eviction has got to be done by following the due process of law and they must approach the Court by way of rent control

proceedings is concerned, this Court is unable to countenance. In the counter filed by the first defendant, he has stated that reasonable time has to

be given to him to evict and hand over possession. Under such circumstances, it would be fit and proper to fix a reasonable time namely six months

from today for those organisations to evict and hand over possession to the Receiver. If not done, the Receiver can approach this Court by way of

necessary relief to vacate.

19. Insofar as the order passed by the learned single Judge for sale of the immovable property is concerned, the order of the learned single Judge

is set aside. So far as the vacating of the premises is concerned, six months time from today is granted. To that extent, the order of the learned

single Judge is modified. According the appeal is disposed of.

20. Since the Receiver has entrusted with the work of taking accounts and file the report before the Court, the appellant is directed to produce the

accounts before Receiver, since he has been managing the firm all along the period admittedly. The Receiver is to take accounts and file the report

before the Court within a period of six months here from. No costs. Consequently, connected M.P. No. 1 of 2010 is closed.

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