
(1964) 10 PAT CK 0009
In the Patna High Court
Case No : A.F.O.O. No. 203 of 1964

Sudhansu Kanta

APPELLANT

Vs

Manindra Nath

RESPONDENT

Date of Decision : 05-10-1964

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 15, Order 40 Rule 1
Contract Act, 1872 — Section 196, 198
Mineral Concession Rules, 1960 — Rule 37
Mines and Minerals (Development and Regulation) Act, 1957 — Section 19
Partnership Act, 1932 — Section 14, 4
Transfer of Property Act, 1882 — Section 5

Citation : AIR 1965 Patna 144

Hon'ble Judges : H. Mahapatra, J;A.B.N. Sinha, J

Bench : Division Bench

Advocate : Lal Narayan Sinha and S.K. Mazumdar, for the Appellant; Balbhadra Prasad Singh, S.K. Jha and Nagendra Prasad Singh, for the Respondent

Final Decision : Allowed

Judgement

Mahapatra, J.—This appeal by the plaintiff is directed against an order of the 1st Additional District Judge, Hazaribagh, refusing to appoint a receiver in respect of suit property which is 500 bighas of coal mining area in village Topa, police station Mandu in the district of Hazaribagh. The appellant and the defendant-respondent were two partners of a partnership firm on the 12th of June 1957 when a registered instrument incorporating the agreement of partnership was executed by both of them for purposes of carrying on coal mining business. Plaintiff filed a suit on the 6th of September, 1962 for a declaration that by the deed of release which was executed by him on the 1st of July 1961 his interest in the partnership firm Topa colliery or his interest as a lessee in the suit property was not affected in any way. The other reliefs asked by him are the dissolution of the partnership business and for accounts of the firm and the mines from the defendant. Before the written statement was filed by the defendant, the plaintiff

made an application on the 14th of August 1963 for appointment of a receiver alleging therein several acts of waste, negligence, damage, loss committed by the defendant in respect of the suit property. The defendant filed his answer to that application and the Court below on hearing both sides refused to appoint a receiver. Against that the plaintiff has brought this appeal to this Court.

2. The point involved in this appeal is simple and straight: Has the plaintiff made out a strong prima facie case? Neither party adduced any evidence. The written statement has been filed by the defendant since the impugned order was passed in the trial court. One has to judge if the plaintiff has any fair chance of success in his case. In other words, whether he had made out a prima facie strong case in his favour so that the question of appointment of a receiver may be decided on that basis. It is well known that a receiver is to be appointed as a matter of course when a partnership is dissolved under the orders of a court, or if the partnership has already been dissolved and any of the parties has come to the court for seeking his reliefs due to him as an ex-partner. A receiver can be appointed to take charge of the partnership assets, collect the same and convert it into cash, if necessary, and to discharge the debts of the firm and thereafter divide the surplus between the partners. In a suit for dissolution of a partnership a receiver can also be appointed before the final adjudication if the circumstances of the case justify such a measure. In the present suit, apart from the dissolution of partnership and accounts, the plaintiff has asked for a declaration that his interest as a lessee in the suit leasehold mining land still subsists and has not been affected by the impugned deed of release which he alleged to have been taken from him under wrong and fraudulent representation by the defendant. This part of the case constitutes a separate cause of action in one way and has to be kept in view for determining if it will be just and convenient to appoint a receiver for the suit property at this stage.

3. It appears from the order under appeal that both the sides conceded before the court below that if the plaintiff's interest in the partnership assets (meaning thereby the suit mining area) continued after the execution of the deed of release a receiver should be appointed in this case in view of the nature of the suit and the reliefs sought therein. On this concession both parties asked the court not to go into the allegations of waste, negligence, damage, loss etc. made in the plaint against the defendant. Neither party desires, as it has been stated in the judgment, that the partnership should continue any further (see paragraph 21 of the order under appeal).

4. Before the plaintiff can have a receiver appointed, he has to satisfy the court that he has an interest in the property involved in the suit and that he has special equity in his favour. Appointment of a receiver is an equitable relief and will be granted on equitable grounds mainly. Though Order 40 Rule 1, Civil Procedure Code, has authorised the court to appoint a receiver when it is found just and convenient in a suit, it is nothing more than the equitable considerations that used to weigh in the mind of the court for giving an equitable relief by

appointment of a receiver to a suitor. This is only a provision which declares what used to be done before it was put under an enactment. There are certain guiding principles which the court takes into account when a party asks for the appointment of a receiver in respect of the subject matter of a suit. Some of those principles are that the applicant must have special equity in his favour and make out a strong prima facie case against the opposite party and show that he has a fair chance of success in the suit. If there is any apprehension of any danger or waste to the suit property or where the applicant makes out that the property is exposed to manifest peril, the court will feel inclined to prevent that by putting a receiver in charge of the same. A mere shadowy claim woven in the plaint with allegations which are inconsistent and apparently misleading cannot invoke the court's assistance in this respect. The cases of Bhupendra Nath Mookerjee Vs. Monohar Mukherjee, ; Banwari Lal Chowdhury Vs. Moti Lal Chowdhury ; Mele Vittil Kunhan Menon Vs. Mele Vittil Kannan Menon and Others, ; Benoy Krishna v. Satish Chandra 55 Ind App 131: AIR 1928 PC 49 Alkama Bibi and Others Vs. Syed Istak Hossain and Others, ; T. Krishnaswamy Chetty Vs. C. Thangavelu Chetty and Others, and Muniammal Vs. P.M. Ranganatha Nayagar and Another, lay down such tests.

In the instant case both parties agreed in the trial Court as well as before us that the plaintiff's allegation of waste and mismanagement of the suit property by the defendant and the exposure of the same to further peril need not be decided at this stage and the question of appointment of a receiver should be determined only on the footing if the plaintiff has got any subsisting interest in the leasehold property which is the subject matter of the suit. They also wanted that fraud, misrepresentation and the like alleged by the plaintiff in regard to the execution of the deed of release need not be decided at this stage, and that document may be taken on its face value for deciding the justifiableness of the plaintiff's claim for a receiver. In other words, if the plaintiff can show that he has got a strong prima facie case in his support and that he has got subsisting interest in the mining leasehold, he may get a receiver appointed in the suit.

5. It seems to me that the trial court's refusal to appoint a receiver was due to a basical misconception about the nature of the suit property. In paragraph 17 of the order under appeal the court stated:

"There can be no doubt that the suit property was the property of the partnership and that it had been acquired for the purposes of the partnership business. In fact, the position is so clear that there can be no doubt or dispute in this regard The learned lawyers for the plaintiff, who have addressed this court, have not disputed this position and they have not contended at any stage that the suit property was not the property of the partnership firm."

These facts have been seriously challenged in the grounds Nos. 12 to 16 in the memorandum of appeal. I do not understand from where the court drew this assumption. That is neither in the plaint nor in the show cause petition that was filed by the defendant in answer to the application for receivership. If the suit

mining leasehold was not the property of the partnership or did not belong to that, all other considerations which were discussed in the impugned order and influenced the final decision of the court below, become irrelevant.

6. Section 14 of the Indian Partnership Act describes what can be the property of a partnership firm. Property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm, constitute the property of the partnership. Property and rights and interests in property acquired with money belonging to the firm are also deemed to have been acquired for the firm, unless the contrary intention appears. In other words, either the partners can contribute property and their rights and interests in property to the partnership, or the partnership may acquire after its formation by purchase or otherwise any property. In the instant case the leasehold was acquired by the plaintiff and the defendant as co-lessees from the Jharkhand Mines and Industries, Ltd. by a registered indenture on the 8th of June 1951 for 99 years. This was a sub lease. The agreement of partnership between the plaintiff, defendant and another person Shibtara Banerji was formed on the 12th June, 1957 by a registered instrument. Shibtara Banerji retired soon after from the firm. Neither the deed of lease nor the partnership agreement mentioned that the sub-lease was taken by the plaintiff and defendant as partners or for the partnership. Learned Counsel for the defendant-respondent referred to paragraphs 4, 5 and 6 of the plaint and contended that they show that the sub-lease of the suit mining area was taken by and for the partnership. I cannot read either those paragraphs or the plaint as a whole to mean that.

We must be clear in our mind that the partnership business relating to the suit came into existence on the 12th of June 1957, six years after the sub-lease was taken by the plaintiff and the defendant on the 8th of June, 1951. It is true that there was another partnership between the plaintiff and the defendant as constituted on the 11th May 1951 and the purpose of that was "for running coal mining business" under the name and style of Topa Colliery; the respective shares of the plaintiff and the defendant were 75 and 25 per cent. Prior to that, in 1949 a prospecting license was obtained from the Jharkhand Mines and Industries, Ltd. in 1949. The other averments in the plaint show that the plaintiff belonged to a zamindar's family in the district of Myansingh in East Bengal and when there was a partition of the country, he migrated to Ranchi and settled there. He had some idle money which he wanted to invest profitably. The defendant was working then as a petty coal raising contractor but he had no financial resources of his own. He approached the plaintiff and persuaded him to undertake a joint venture of coal mining business and utilise the defendant's skill and experience in that direction. Following that a prospecting license was taken in 1949. In 1951 June a mining sublease was also obtained by the plaintiff and the defendant. Neither the deed of lease nor the agreement of partnership of the 11th of May, 1951 (the agreement has not been printed in the paperbook) show any reference to the acquisition of the mining sub-lease by or on behalf of that

partnership.

Learned counsel for the defendant stressed that it should be assumed in the context of the prospecting license and the formation of a partnership immediately before the grant of the mining sublease, that sub-lease was taken for that partnership. If it was so, one would have expected some reference to that partnership in the deed of lease. However, even assuming that the mining sub-lease was taken for that partnership, on the termination of that partnership the lease-hold became the personal property of the plaintiff and the defendant who were the two sub-lessees. Learned counsel for the defendant conceded that to be the position in law, even if the sub-lease is taken to have been acquired for that partnership.

If the plaintiff and the defendant were the sublessees in their own right after the termination of the 1951 partnership, then either they should have contributed their lease hold interest in the suit property to the new partnership when it was formed on the 12th of June 1957 or the new partnership might have acquired the same from them after its constitution. Neither of the things has been stated in the plaint, application for receivership, show cause petition by the defendant or in his written statement filed later in the case. The partnership agreement of 1957 also does not state that. It is true that no written document or registered instrument is necessary for contributing any Immovable property or rights and interest in such property by a partner to a partnership (see *Firm Ram Sahay Mall Rameshwar Dayal and Others Vs. Bishwanath Prasad*,). But all the same there must be evidence that such property was originally brought into stock of the firm. The pleadings, the deed of partnership of 1957 and the deed of release or the 1st of July 1961 do not make out such a case.

7. Learned counsel for the defendant urged that an implied contribution of the mining leasehold to the partnership business by the two partners (plaintiff and defendant) should be assumed in this case as admittedly the coal mining business for which the partnership was formed was being operated upon this lease-hold property right from the beginning. Persons may be mere co-owners of property and may yet be partners in the profits made from its use. Thus, persons may be co-owners of a coal-mine--take the case of two brothers to whom it may have been devised by the will of their father. The mere fact that they work the mine in partnership as a colliery business, does not make the mine part of the partnership property. A mere user of a property by the partnership for its business does not make the property as belonging to the partnership. In support of this I can usefully refer to the case of *Davis v. Davis* (1894) 1 Ch 393; *Lachhman Das and Another Vs. Mt. Gulab Devi and Others*, ; *Miles v. Clarke* (1953) 1 All ER 779. From the materials placed before us we do not find anything which would show that there was any intention on the part of the plaintiff and the defendant sub-lessees to contribute or to make the lease-hold property as that of the partnership firm. It is very significant that this basic fact has not been whispered at any place so far by the defendant in any of his statements filed in

court. That was also not the case of the plaintiff. In that view the trial court was entirely wrong in assuming that the mining lease-hold was the property of the 1957 partnership.

8. There is another serious difficulty which the trial court has overlooked. If it is assumed (though I do not see any justification for that) that the plaintiff and the defendant brought the base-hold to the stock of the firm in 1957 when they constituted the partnership, that would be nothing but a kind of transfer of the mining sublease. Although the formalities of a written and registered instrument are not required for such kind of contribution of Immovable property or interest therein to partnership, yet such a transaction is nothing but a transfer. The Transfer of Property Act is not exhaustive about the modes of transfer. The learned Judges of the Division Bench of this Court also held in the case of *Firm Ram Sahay Mall Rameshwar Dayal and Others Vs. Bishwanath Prasad*, such contribution to be a transfer. There can be little doubt that the change of ownership from that of individuals to a partnership firm will be a transfer. What will be the ultimate fate of such property on the dissolution of the partnership will not affect the nature of the transaction at the time such property is brought to the stock of the partnership. Rule 37 of the Mining Concession Rules, 1960, made u/s 13 of the Mines and Minerals (Regulation and Development) Act, 1957, prohibits any transfer of mining lease (which includes a sublease also) or any right, title and interest therein to any person (partnership is one in that sense) without the previous consent of the State Government in writing. Section 19 of the Act lays down that any mining lease granted, renewed or acquired in contravention of any provisions of the Act or the rules and orders made thereunder will be void and of no effect. It follows, therefore, that before any partner could bring his mining leasehold property or interest therein to the stock of a partnership, he must obtain the consent of the State Government in writing previous to that. If it is not done, then such transfer will be void and the leasehold interest will remain where it was before such transfer. On this test the suit partnership constituted on the 12th of June 1957 cannot be said to have included in its stock either by contribution or acquisition, express or implied, the mining leasehold property. In that view the plaintiff remained a co-lessee with the defendant for that property even though both of them formed a partnership, that is, they continued as joint tenants. If the plaintiff did not transfer his leasehold interest to the defendant by the deed of release executed by him on the 1st of July, 1961, then he has still a subsisting title as a sub-lessee in the suit property and that would show a strong prima facie case in his favour in the present suit.

9. Both parties agree that there was no transfer of the sub-lease or any right, title or interest therein by the plaintiff under the deed of release. Their reasons, however, are entirely different. The defendant contends that on the assumption that the leasehold belonged to the partnership, the share and interest of the plaintiff as a partner will be only his proportion of the partnership assets after they are realised and converted into money and the debts of the partnership are

discharged, if during the continuance of the partnership, a partner transfers his share and interest in the partnership, it will be not the transfer of any interest in Immovable property owned by the partnership but the transfer will be regarded only as of a moveable property; therefore, by the deed of release the plaintiff did not, as he could not, transfer his interest in the leasehold. Plaintiff's contention is that a deed of release is only a disclaimer and not a conveyance of title in Immovable property; secondly, if it purported to be a conveyance of leasehold interest, it was void for its contravention with Rule 37 of the Mineral Concession Rules, 1960; partnership is a relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all, and persons who have entered into partnership are known individually as partners and collectively as a. firm; in that view Immovable property owned by or belonging to a partnership is nothing but a property owned by joint owners; if a partner contributes or transfers his Immovable property or his interest therein to the partnership, he still continues to be one of the joint owners with other partners, and, as such, he can transfer his interest in the Immovable property during the continuance of partnership though subject to the terms of the agreement of partnership in regard to such property; in the present case the deed of release being a registered instrument if taken as a transfer of the plaintiff's interest in the leasehold as a partner, that will be void as it was without the previous consent of the State Government. Learned counsel for either side cited several decisions in respect of their respective contentions, but I do not think it necessary at this stage to refer to or deal with them. For whatever reason, if the parties accept the position that by the deed of release the plaintiff did not part with his leasehold interest, then that interest of his still subsists on the finding that the leasehold did not become the stock of the partnership firm.

10. It will be enough to say here that the concept of realty as distinguished from personalty under the English law and by the English lawyers and jurists is not always identical with what the Indian Law and lawyers understand. The idea of ownership of real estate by a Hindu coparcenary is unique, To some measure an Immovable property owned by a partnership is akin to such a property belonging to a Hindu Joint family. The ownership vests in each member of the coparcenary but there is a restriction on his power of disposal. The coparceners may agree not to partition the Joint property and that will be binding upon them though their heirs may not be bound by such agreement. Similarly during a partnership the partners cannot take away their property that they may put into the stock of partnership. The Individual owner becomes a joint owner with other partners. He retains an interest in that Immovable property. Partnership is only the relationship between the partners. The firm is only an alias for the partners. When a firm is said to own a property, it is same as saying that the partners jointly own the property. Though in the mercantile world the firm is used as a quasi corporation, for sake of convenience, it is really not so. It is different from an incorporated company, private or public. According to the definition of Immovable property in the General Clauses Act any profit arising from land is

also Immovable property. An Interest in the future sale proceeds of an Immovable property was held by the Judicial Committee to be Immovable property (see AIR 1936 230 (Privy Council)). A partner's interest or share in the firm's assets is his proportion in the surplus that may be left, on dissolution of partnership, after payment of the firm's debts and liabilities out of the assets. In that sense his interest in the partnership may be taken to be an interest in the Immovable property belonging to the firm. Many of the cases, both English and Indian, cited by learned Counsel for the defendant undoubtedly held such interest of partners not to be Immovable property. But, if I can say so with great respect, that view is not consistent with the Indian concept of realty and ownership, or the view of the judicial Committee referred above.

11. Defendant's counsel very strongly urged that the provisions of Section 19 of the Mines and Minerals (Regulation and Development) Act, 1957, and Rule 37 of the Mineral Concession Rules, 1960, should not be taken as they appear on their face. Stringent and penal provisions of this nature should, learned counsel continued, be viewed in the context in which the Legislature has used them. In short, learned counsel wanted to propound that in this statute the import of the words "void and of no effect" should not be taken in the sense of absolute avoidance, if there has been any violation of any of the provisions of the Act or the Rules in any particular transaction.

11a. Before I proceed to examine this argument, it will be convenient to reproduce Rule 37 and Section 19:

"Rule 37. Transfer of lease.--(1) The lessee shall not, without the previous consent In writing of the State Government, which in the case of a mining lease in respect of any mineral specified In the First Schedule to the Act shall not be given except after previous approval of the Central Government-

(a) assign, sublet, mortgage, or in any other manner, transfer the mining lease, or any right, title or Interest therein, or

(b) enter into or make any arrangement, contract or understanding whereby the lessee will or may be directly or indirectly financed to a substantial extent by, or under which the lessee's operations or undertakings will or may be substantially controlled by, any person or body of persons other than the lessee.

(2) Without prejudice to the provisions of Sub-rule (1), the lessee may, subject to the conditions specified in the proviso to Rule 35, transfer his lease or any right, title or interest therein, to a person holding a certificate of approval and an Income Tax clearance certificate in Form C from the Income Tax Officer concerned on payment of a fee of rupees one hundred to the State Government;

Provided that the lessee shall make available to the transferee the original or certified copies of all plans of abandoned workings in the area and in a belt 65 metres wide surrounding it.

(3) The State Government may, by order in writing, determine any lease at any

time if the lessee has, in the opinion of the State Government, committed a breach of any of the provisions of Sub-rule (1) or has transferred any lease or any right, title or interest therein otherwise than in accordance with Sub-rule (2);

Provided that no such order shall be made without giving the lessee a reasonable opportunity of stating his case."

"Section 19. Any prospecting licence or mining lease granted, renewed or acquired in contravention of the provisions of this Act or any rules or orders made thereunder shall be void and of no effect."

It will be seen from the above that Rule 37 prohibits any transfer of any mining lease or any right, title or interest therein by any lessee or sub-lessee to another without the previous consent in writing of the State Government. If a transfer is made without such consent, there is no doubt that that will be in violation of this rule. The object for which the Mines and Minerals Act was enacted is the regulation of mines and the development of minerals under the control of the Union Government. In the case of *The Mineral Development Ltd., Calcutta Vs. The Union of India (UOI) and Another*, their Lordships of the Supreme Court observed that this Act was made in the public interest providing for the regulation of mines and for the development of minerals. The intention was that the mineral wealth of the country should be conserved and should be worked properly without waste and by persons qualified in that kind of work. There are two main features in connection with the working of the mines and one of them is the person who would work such mines. His capacity, financial resources and experience are to be taken into account before a mineral lease is granted to him. He is also to be possessed with a certificate of approval and Income Tax clearance certificate. In order to ensure a proper check about the person who may actually control the working of any particular mine, the Mineral Concession Rules ensure that before a transfer of any mining lease is made the transferee's suitability must necessarily undergo the scrutiny of the State Government and in some case that of the Central Government; and that is why the transferor has been prohibited from making any such transfer before obtaining the consent of the Government in writing.

12. To find out the proper import and implication of any particular provision In an enactment, one has to keep in view the object for which that provision is made. One has to look to the import of the provision and the relation of that provision to the general object intended to be secured by the Act. Upon a review of the case in that respect one has to decide whether the statutory provision is what is called imperative or merely directive. Viewed in that light it cannot be accepted that Rule 37 is of a directive nature. If the requirements under that rule are not fulfilled, that will frustrate the very purpose for which the Act and the Rules were made the working of the mines will go to a person who may not be properly qualified or competent or financially capable for such work. If the Government is to control the mineral operations by persons of its choice they will not be able to perform that if lessees or sub-lessees indiscriminately transfer the mineral lease

to some other person. It may be that a transferee may not have been approved for the grant of a mining lease but he can still have the benefit of such a lease by taking a transfer from a mining lessee without complying with the provision of Rule 37. In other words, what a person cannot do directly he can do the same thing indirectly. It is well established that such a position is not to be countenanced by the courts. In that view also, Rule 37, must be taken as mandatory or imperative. A contract which is in violation of such a statutory provision becomes void. When there is a command in a statute, failure to obey that results in the nullification of the transaction involved in the contract. Sometimes statutes do not lay down the consequences of disobedience of a mandate given in the Act but all the same, if the mandate is of a peremptory or mandatory nature then its violation is taken to have the effect of nullification. Nullification may be expressly provided or impliedly inferred. Learned counsel for the defendant, however, cited some decisions before us to show that in these cases in respect of the words "void and of no effect" in particular enactments, the courts interpreted those expressions in the sense "voidable" and not "absolutely void".

In the case of *Edwards v. Dick* (1821) 106 ER 915 an indorsee of a bill of exchange provided an action against the drawer and indorser. The indorsee had received the bill for a good and valuable consideration. During the trial it appeared that it was accepted payable at a particular place. One of the arguments against that action was the statutory provision to the effect that

"all notes, bills..... .given, granted, drawn, or intered into or executed by any person or persons whatsoever, where the whole or" any part of the consideration of such conveyances or securities shall be for any money or other valuable thing whatsoever won by gaming etc. shall be utterly void, frustrate and of none effect, to all intents and purposes whatsoever."

The object of the statute was to prevent excessive and deceitful gaming and for that purpose the Act provided that the securities should be void to all intents and purposes. The plaintiff in that action wanted to recover the bill, the consideration of which was money lost at play. The question arose whether that bill of exchange would be taken as void. Chief Justice Abbott observed:

"But, I think we must understand the language of the Legislature with reference to the object which they then had in view viz. the prevention of gaming and that will be effectually accomplished, by holding the securities to be void for any purpose of enforcing payment of the money won at play. The drawer, therefore of such a bill of exchange cannot maintain any action against the acceptor. Now if he could, by passing the bill to a third person, enable him to sue the acceptor, that would be within the mischief of the Act. It follows, therefore, that no person deriving title through the drawer, can be in a different situation from him so as to sue the acceptor But there is no case upon the Statute of Usury, where a drawer, after having parted with a bill for a good consideration, can afterwards set up as a defence an antecedent usurious contract between himself and the

acceptor. For if so, a Court of Justice would enable him to commit a gross fraud upon an innocent person. Upon the whole, I am of opinion, that we shall best effectuate the intention of the Legislature, by saying that this bill is void for every purpose which it was the object of the statute to prevent. No person, therefore, who derives his title through the winner, can make the loser pay. But for the purpose of preventing fraud, we cannot permit the defendant to set up his own gaming as a defence and therefore I think that the words of the statute do not extend to the present case, and that this rule ought to be refused."

It will appear that the plaintiff in that action having received the bill for good consideration was allowed to recover the sum as that did not amount to recovery of money won at play. In that context the enactment in question was not applied to that case.

The facts of the case in *Hoyland v. Bremner* (1846) 135 ER 873 which learned counsel cited, are clearly distinguishable. There was a conveyance from one vendor to several persons who purchased with the intention of obtaining and multiplying votes by splitting and dividing the interest. The vendor was not cognizant of that purpose. The statute prevented conveyance of property for the purpose of multiplying votes by splitting. Since the vendor did not do that transaction with that intent or purpose, the court held that the transaction did not come within the scope of the Act, where such a conveyance was to be a void one. That statute was to prevent a fraudulent intention on that part of a conveyancer.

In another case, *In re Brali; Ex parte, Norton* (1893) 2 QB 381 Section 47 of the Bankruptcy Act, 1883, was under consideration, where voluntary settlement of property was to be void against the trustee in the bankruptcy if the settlor became bankrupt within two years after such settlement. In that case Mr. B. settled on his daughter T a lease-hold house in April 1892. The consideration for the settlement purported to be love and affection. B carried on business in partnership with his son W but the leasehold house in question was the separate property of B. In September 1892 the partnership being in financial difficulty, W without the knowledge of his father induced his sister to mortgage the leasehold house to secure a sum of money advanced to him on the joint promissory note of himself and his sister. The proceeds of this advance were carried to the partnership account. It did not appear that B had any knowledge of that, although as partner, he took in fact the benefit of that advance. B became then bankrupt. The trustee in his bankruptcy claimed as against the bank a declaration that the trustee was entitled to the leasehold house. The argument was that the settlement was a voluntary settlement without valuable consideration and that, as such, was void u/s 47 of the Bankruptcy Act. Therefore, the bank could not make any title through or under the donee of the settlement. For the bank it was contended that the valuable consideration given by them related back so as to prevent the settlement being without valuable consideration. It was further contended that the word "void" in Section 47 meant

"voidable" and, therefore, a purchaser for valuable consideration without notice prior to the avoidance of the settlement has a better title than the trustee, and that the fact that Section 47 contains no proviso in favour of purchasers for value, like that contained in another part of Section 48, was accounted for by the fact that the necessity for such a proviso in Section 48 arose from the fact that a conveyance by way of fraudulent preference was an act of bankruptcy, whereas a voluntary settlement u/s 47 was not an act of bankruptcy. On these arguments it was held that the word "void" in Section 47 of the Bankruptcy Act 1883 was voidable and, therefore, anyone who claimed under a settlement effected by that section as a purchaser for valuable consideration without notice, had a good title as against the trustee in bankruptcy.

The test on which the sense of the word "void" was taken was whether the object of public policy in view in that Section required any strict consideration or not. The learned Judge observed that the object of that section was one for which the legislature had made provision in the bankruptcy statutes and that in all the bankruptcy statutes prior to 1869 the wording of the section was such as to make the settlement voidable and not void because under those statutes the avoidance of a voluntary settlement was effected by an order in bankruptcy for the sale, by the trustee, of the subject-matter of the settlement, and neither the word "void", nor the word "voidable" was used. The learned Judge thought that the object of the legislature had remained unchanged and that the purpose of the alteration in the wording was merely convenience of drafting, and to make it clear that the title of the trustee could not be avoided by anything done between the date of the bankruptcy and the declaration of the trustee's title.

What emerges from this case is that if it appears from the previous enactment on the same subject that legislature always intended to make a transaction voidable on certain terms and if in a subsequent legislation on the same subject the drafting employs the word "void" instead of "voidable" in the enactment, the Court can very well understand the earlier intention of the legislature retained in spite of the change in the drafting. In the present case such an analogy cannot be brought. The earlier statutes and statutory rules which were replaced by the Act of 1957 and the Rules in 1960 did not reveal that a transfer of a mining lease without the previous consent of the Government was to be only voidable. In that view I do not think that the interpretation as given in this decision can have any application to the present case.

Similarly, the case of *Valentini v. Canali* (1890) 24 QB 166 in which the Infants' Relief Act, 1874, was under consideration, can be of little help to the defendant's contention. Section 1 of that statute said that all contracts henceforth entered into by infants for the repayment of all accounts stated with infants shall be absolutely void. The fact of that case was that the plaintiff as infant agreed with the defendant to become tenant of his house and to pay certain sum for the use of the furniture therein. The plaintiff had paid the defendant part of this sum and occupied the house and used the furniture. He later on sued for recovery of the

money on the ground that the contract was void u/s 1 of the Infants' Relief Act, 1874. Chief Justice Lord Coleridge held that when an infant had paid for something and had consumed or used it, it was contrary to natural justice that he should recover back the money which he had paid. He could not give back this benefit or replace the defendant in the position in which he was before the contract was made. The object of this statute, according to Lord Coleridge Chief Justice, seemed to have been to restore the law for the protection of infants upon which judicial decisions were considered to have imposed qualifications. The legislature never intended in making provisions for this purpose to sanction a cruel injustice. He therefore, Finally held that the defendant could not be called upon to repay the money paid to him by the plaintiff. In that the word "void" was taken in the sense of voidable to prevent failure of natural justice. The Court did not allow the plaintiff to get back the money which he had paid to the defendant and for which he had derived the benefits.

These cases were cited by learned counsel to support his contention that even if Rule 37 is contravened, the transaction involving such contravention will not be taken to be absolutely void as provided u/s 19 but it should be taken as voidable and voidable at the instance of the Government only. The whole question will actually depend if Rule 37 is or is not peremptory or mandatory. I have already held with reference to the object of the statute and the purpose for which the Rule is enacted that the provision is peremptory or mandatory and not directory.

13. Learned counsel referred us to the cases of *Howard v. Bodington*, (1877) 2 PD 203; *Macleod v. Attorney General for New South Wales* (1891) AC 455 ; *S.S. Kalibia v. Alexander Wilson* (1910) 11 CWLR 689; *Arunachala Nadar v. State of Madras* (1959) Su(1) SCR 92: (*M.C.V.S. Arunachala Nadar etc. Vs. The State of Madras and Others*,); *Mohd. Hanif Quareshi and Others Vs. The State of Bihar*, . *Mineral Development Ltd. Vs. The State of Bihar and Another*, ; *Catterall v. Catterall* (1847) 163 ER 1142 and *Heath v. Hubbard* (1803) 102 ER 771 to buttress his argument that a restricted meaning should be adopted with reference to the restrictions imposed u/s 19 and Rule 37. The circumstances in which a restricted meaning should be attributed to a particular provision or the tests that should be applied for that purpose, as spoken in those cases are undoubtedly very apt for general guidance. But every case has to be judged on its peculiar facts. The cap has to fit the head and not the other way about. Generally speaking, restrictions on fundamental rights have to be strictly construed even after they are found to be reasonable. When there is a violation within that compass, the inevitable consequence under the law must follow. In my view, Rule 37 is a reasonable restriction on one's power of disposal of property in the interest of the general public and its essential part is in regard to the previous consent of the Government.

14. Learned Counsel contended that in the present case the defendant was a co-lessee with a certificate of approval and Income Tax clearance certificate. A transfer of an interest in a mining lease to him only needed, at the most, a

formal consent of the State Government under Rule 37. Absence of that has not caused any real mischief and in that view, the contravention of this Rule should be lightly viewed and the penalty provided u/s 19 should not be attracted. The amount of real injury or mischief by a contravention in a particular case should determine to what extent, if at all, the statutory penalty should be visited upon the contravener. I am afraid such a view cannot be accepted. Either a statutory restriction is reasonable or unreasonable, legal or illegal, valid or invalid. If it is valid then it has to be observed in disregard of that it may lead to different results in different cases; otherwise, there will be no certainty of the application of law and that is one thing which has always to be avoided by the Courts. If a statute lays down a particular manner in which a thing will be done, it has to be done only in that way. The subjective satisfaction of the Government about the suitability of a transferee cannot be substituted by the transferor's judgment or the Court's opinion.

In this connection I should refer to the two cases decided by this Court in *Kamla Bala Devi v. Ojha Brothers Ltd.* ILR 41 Pat 412 and *Bishwanath Prasad Vs. National Coal Development Corporation (Private) Ltd.*, . In the former case Rule 40 of the Mineral Concession Rules, 1960, was under consideration. The respondent in that case obtained a decree against the appellant in the Calcutta High Court in its original civil jurisdiction and got that decree transferred to the Court of the Subordinate Judge at Dhanbad for execution. The mining lease held by the appellant judgment debtor in respect of certain collieries was attached and later sold. The judgment debtor filed an application u/s 47 of the CPC and also under the Bihar Money-Lenders Act objecting to the attachment and sale of the collieries on one of the grounds that the mining lease or any interest therein was not liable to sale except with the previous approval of the Central Government. The Court held that transfer either by the judgment-debtor or by the Court comes within the inhibition embodied in Rule 46 and, therefore, the Court had not the power to sell the mining lease in respect of the specified minerals or any right, title or interest therein except with the previous approval of the Central Government. Rule 46 is almost in the same terms as Rule 37. That rule is applicable to a mining lease in which the mineral vests in a person while Rule 37 is in regard to minerals that vest in the Government.

In the latter case, *Bishwanath Prasad Vs. National Coal Development Corporation (Private) Ltd.*, the consideration was about a notification u/s 4 of the Coal Bearing Areas Act. On the facts of that case the Court found that the land comprised in the petitioner's colliery in respect of which a notification u/s 4(1) of the Act had been issued by the Central Government was not the land in which coal mining operations were actually being carried on the date of the notification. The Court also proceeded to consider the effect of the notification assuming that the working of the colliery was in operation on the date of that notification. If the working of the colliery was in conformity with the Rules framed under Mines and Minerals (Regulation and Development) Act 1948, then that was to be exempted from the operation of that notification. The estate where the lands comprising

the colliery were situated had admittedly vested in the State under the Bihar Land Reforms Act, prior to the transfer in favour of the petitioner in that case. On the vesting of the estate, the lease in favour of the petitioner's predecessor became a statutory grant of mining lease in respect of the land in which the minerals belonged to Government and, therefore, Rule 37 of the Mineral Concession Rules was attracted and became applicable to such a transfer in favour of the petitioner. The transfer was not made admittedly with the previous sanction of the State Government as required under that rule. Therefore, it was illegal. This view of the Court clearly manifests that failure of Rule 37 would render a transfer invalid.

From the other case, ILR 41 Pat 412 it is also manifest that even a Court has to secure previous permission of the State Government before it could put to sale any mining lease or interest therein in execution of a decree. All these lead to only one conclusion that Rule 37 is mandatory and its failure results in the nullification of the transaction. These two cases were sought by learned counsel for the defendant to be distinguished on the ground that even if the words "void and of no effect" as used in Section 19 of the Act are taken in the sense of "voidable", both the transactions involved in the two above-mentioned reported cases could have been avoided at the instance of the Government. In the latter case the Government was a party. Learned counsel contended that these two decisions do not run counter with the proposition that Section 19 should not be interpreted in the sense of absolute avoidance but only in the sense of "voidable". I am unable to accede to this contention for two reasons. If it was merely voidable then the Court should not have been compelled to obtain the previous consent of the Government before putting a mining lease into sale in execution of the decree. The sale could have taken place and if the Government so chose might have avoided that. But to view of the peremptory character of the provision under Rule 37, this Court held in that case that no sale could be performed without the previous consent from the State Government. The same consideration is also seen in the latter case. It is true, as I have already said, that a particular statutory provision has to be viewed in its proper context and particularly with reference to the object with which the legislature provided that. Viewed in that light, I have no doubt in my mind that Rule 37 is mandatory and it is a command of the statute to be observed strictly so that the purpose of the Mines and Minerals Act, 1957, may be effectively pursued and preserved.

15. Another argument by learned counsellor the defendant was that a lease granted renewed, or acquired in contravention of the Act or the Rules or Orders made thereunder will be void. It does not refer to right, title or interest in a lease. In the present case what was impliedly transferred (as contended by the defendant) to the 1957 partnership was not the lease but only the interest therein. Though Rule 37 provides for previous consent in writing of the Government in case of transfer of an interest in the lease, failure to observe that will not come within the mischief of Section 19. This argument is equally unsound. The whole purpose of Rule 37 is to prevent a person not approved by

the Government from working a mine or carrying on mining operations in a particular mine area and that is bound to be taken to be within the reference u/s 19. If learned counsel's argument in this respect would be accepted, the result will be that a lessee can very well hand over the working of a mine to another person by merely transferring his right, title or interest in the lease. That will only be a device to avoid the requirements of the statute and cannot be upheld. In this case, if there was any transfer, it was of the sublease, which is included in the definition of "lease" in the Act.

16. Learned counsel again contended that assuming that there was failure of Rule 37 in the present case and that it would render the transaction void u/s 19, the circumstances of the case prove that it has been subsequently ratified by the State Government. The question of ratification can only arise in case of a voidable transaction but not in the case of a void contract. If a contract is void there will be little scope for its ratification by any of the concerned parties. There can be also no plea of estoppel available to the transferee. In the case of AIR 1937 114 (Privy Council) an Electric Company was under the statutory obligation to charge the consumers at one particular rate but they mistakenly under-charged General Dairies Ltd. a consumer. Later they discovered their mistake and sought to recover the balance. Against them, the plea of estoppel was pleaded. The Judicial Committee held that the acceptance of charges for consumption of electricity at a rate lower than the statutory rate by the Electric Co. did not amount to any ratification and did not put the Company in the hazard of any estoppel. Although the defendant (General Dairies Ltd.) had made their accounts and distributed their profits on the basis of the lower rate charged by the Electric Co. and as a result of the action by that Company the defendant would be very much out of pocket, yet the Judicial Committee held that where the statute imposes a duty of a positive kind, not avoidable by the performance of any formality, for the doing of the very act which the plaintiff Company sought to do, it was not open to the defendant to set up any plea of estoppel to prevent that. The result was that the defendant was made to pay at the statutory rate as claimed by the plaintiff Company.

The defendant in the present case stressed that subsequent to the deed of lease in 1961 he has been carrying on the mining operation as the sole lessee of the suit property and he has been dealing in that capacity with the State Government in making payment of statutory charges. We have not before us any details in that respect but even assuming that the defendant has made any payment in connection with the suit property to the State Government subsequent to the deed of re-lease that will not amount to ratification on the part of the State Government of the transfer of the lease made in favour of the 1957 partnership or the defendant (under the deed of release). There can be no ratification without an intention to ratify and there can be no intention to ratify an illegal act without knowledge of the illegality on the part of the person who is claimed to have ratified such a claim, Learned Counsel could not contend that in the present case the State Government, knowing that there had been an illegal

transfer in favour of the 1957 partnership or in favour of the defendant, did any act with the intention to ratify that illegal transfer. It will be useful in this connection to refer to the case of AIR 1938 284 (Privy Council) .

17. Another line of approach on behalf of the defendant before us was that the plaintiff having been a party to an illegal transaction cannot now turn back and challenge that transaction. Learned counsel wanted to rely on the maxim in part delicto potior est conditio possidentis and cited several decisions in support of his argument. That doctrine only means that one will not be assisted by any Court to derive any benefit out of a contract or a transaction to which he was a party and which was in violation of a statute or opposed to public morals or public policy. I cannot make out how in the present case the plaintiff can be said to be taking such a position. He wants to challenge the transaction, if any, which was in contravention of the statute or which was the result of practice of fraud, misrepresentation and the like. He does not want to gain any benefit out of that. I do not think it necessary to refer to the cases cited in this connection by learned counsel because in my view the doctrine of *pan delicto* cannot be invoked in the present action against the plaintiff. This plea does not appear to have found any place either in the counter that was filed by the defendant in answer to the application for appointment of a receiver or in his written statement which was filed at a later stage.

18. The defendant is admittedly claiming his exclusive right in the leasehold and disclaiming any interest of the plaintiff therein. That stand is clear from the reply that he filed in the court below. His claim over the leasehold either as the surviving partner of the partnership or as a transferee, is a clear jeopardy to the plaintiff, as I have already held the plaintiff's subsisting title in the leasehold as a lessee is still intact. In face of that and in view of the position that the defendant has taken from the date of the deed of release, there can be little doubt that a strong *prima facie* case has been made out by the plaintiff in the present suit to call for protection of his interest in the leasehold property and also for the preservation of that property against any loss or mismanagement.

19. According to the terms of the partnership, the defendant was virtually the managing partner in charge of the coal mining business for the first five years of the partnership, during which period the plaintiff as a partner reserved all his interest in the partnership confined to four per cent interest on his capital outlay of Rs. 64,000/-. It is also admitted that after the deed of release the defendant is continuing the management in the same way. Whether the partnership stood dissolved on the retirement of the plaintiff from the partnership, as purported to have been done by the deed of release and whether the defendant is still continuing as the surviving partner only for the purpose of realisation and collection of the partnership assets and for discharge of the debts and liabilities of the partnership are matters which will be conveniently determined in the trial of that suit I have not referred to those questions advisedly in the connection of the appointment of a receiver because even if the plaintiff has ceased to be a

partner by that document, he has still his leasehold interest in the suit property.

In case of a partnership constituted of two persons, when one partner retires, the other partner may still carry on the partnership for the limited purpose although the partnership would stand dissolved on the retirement of one of the two persons. But in view of the fact that the defendant was in charge of the affairs of the partnership assets on the date of the suit and in that connection was operating on the suit leasehold property, it will be proper not to oust him from that position completely. If by any arrangement the interest of the plaintiff can be safeguarded and the suit property can be preserved while the defendant continues his position as before in regard to that, neither party is likely to suffer. In that view and In consideration of all the circumstances of the case, the defendant shall be appointed as the receiver of the suit property both in regard to the leasehold as well as the partnership assets subject to the control of the trial court. The plaintiff will be entitled, if he so chooses, to keep a man authorised by him at his own cost on the suit property to keep the plaintiff informed of the activities of the defendant in relation to the suit properties. He will have access to all parts of the suit premises including the pit mouth, depots and railway siding. The defendant as a receiver will submit his accounts and copies of the returns that are required under the law to be filed with the different authorities in the court below and the plaintiff will have access to that in Court. The defendant will furnish security for Rs. 50,000/- to the satisfaction of the court below within six weeks from today. If he fails to do so, the trial court shall appoint another person as receiver and direct the defendant to make over charge to him. The appointment of the defendant as a receiver will take effect from tomorrow the 6th October, 1964. The defendant signified his consent through his counsel Mr. Nagendra Prasad Singh No. 1 to act as receiver subject to these conditions.

20. The result is that the appeal is allowed, and the order of the court below is set aside but in view of the circumstances of the case, the parties will bear their own costs of this Court.

A.B.N. SINHA, J.

21. I agree.