

SHREEDHAR GOVIND KAMERKAR
v.
YESAHWANT GOVIND KAMERKAR AND ANR.

DECEMBER 12, 2006

[S.B. SINHA AND MARKANDEY KATJU, JJ.]

Partnership Act, 1932—Section 14—Property belonging to the firm—First partner claiming share in tenancy rights of second partner when partnership not in existence on the date of acquiring of the said premises by the second partner and no contribution by first partner towards acquisition of premises—Held: Premises acquired when partnership not in existence—No direct evidence that second partner brought the same as his investment in the partnership at the initial stage but it is evident that it was done later—Also in absence of deed of partnership, it cannot be held that the same had been originally brought in the stock of the firm—Agreement not being decisive, conduct of the parties assumes significance—Admission of second partner that the royalty received from the tenanted premises was being deposited in the partnership account thus, the property formed part of the assets of the partnership—Evidence Act, 1872—Section 58.

The original tenant of the premises died in 1966 leaving behind him the assignors. The business as also the tenanted premises was assigned for valuable consideration. Appellant allegedly acquired the tenancy right in respect of the suit premises in terms of a deed of assignment. Appellant started business of DP Store in the said premises. He executed leave and licence agreement in relation to the self-same premises in favour of W in 1970. W was running a business in the said premises under the name and style of DP Store. Dispute arose between parties. W filed suit which was compromised. Appellant, respondent no 1 and one more entered into a partnership in the name of M/S Shreedhar Govind Kamerkar. Since appellant claimed full ownership in relation to tenanted premises as also in Shree Medicos, the same was dissolved in 1977. The deed of dissolution postulated that the said tenancy was a part of the assets of the partnership. Thereafter, appellant obtained possession of the premises in 1978. He started a business under the name and style of 'Shree Medico'. Appellant refused to render accounts and started claiming partnership business and partnership premises as his own.

A Respondent no.1 filed suit claiming 1/3 share in suit business of Medical and General Store and also tenancy rights. Though in the suit respondent did not claim any relief in respect of the business of DP Store, but at the hearing, he claimed business running under the name and style of 'Shree Medico' and also interest in 'DP Store'. Trial Judge dismissed the suit. Single Judge of High Court allowed the appeal holding that the respondent and appellant had 1/3rd share each in the business of DP Store carried in the premises and also equal tenancy rights in the premises where DP Store business was being carried out and that the partnership business of DP Store at the aforesaid premises stood dissolved from 1981. Hence the present appeal.

C Dismissing the appeal, the Court

D HELD: 1.1. Although a claim was made by the respondent no. 1 that the tenancy had been acquired by the partnership from the beginning, from the deposition of the respondent no.1, the following facts have been elicited : (i) DP Store was not run by the partners; (ii) All licences of Shree Medico were standing in the name of appellant. Respondent no 1 had never signed on any document pertaining to Shree Medico; (iii) He had no source of income in 1966; (iv) There is no documentary evidence to show that the said premises were acquired out of the funds of partnership firm and that the business of partnership was carried out at the same premises; (v) The property was under attachment from 1969 to 1978; (vi) The possession of the property was obtained in 1978; and (viii) respondent no. 1 claimed a share in the business which was running under the name and style of 'Shree Medico'. Despite that it appears, a statement was made by respondent no. 1 which was recorded by trial court that he is not claiming any right in the business of 'Shree Medico' but is claiming the right only in respect of the business of 'DP Store' and the tenancy rights in respect of the shop premises. [760-H; 761-A-E]

G 1.2. Appellant may be right in his submission that in view the pleadings of the parties as also the statements of the respondent no. 1 in his deposition before the trial court, the respondent could not lay any claim in respect of any business which was being carried in the premises under the name and style of 'DP Store', but the same, may not be decisive to arrive at a conclusion that the right in respect of the tenanted premises in question never formed the part of the assets of the partnership. [761-F-H; 762-A]

H 1.3. The parties have entered into the deed of dissolution voluntarily. Appellant is not an illiterate. He has been carrying on business. He had

acquired tenancy right on his own showing and in his own name and also been fighting litigation with W for a long time. [763-E-F] A

1.4. From the preamble of the deed of dissolution, it is evident that the partnership had been carrying on business under the name and style of 'M/s Shreedhar Govind Kamerkar' at X place, a tobacco shop at Y place and a tobacco godown at Z place but also 'DP Store' at the disputed premises. Clause (1) of the deed also refers to 'DP Store'. In clause (3) of the deed, royalty in relation to a hotel, was assigned to respondent No.2. In relation to the 'DP Store', it was categorically stated that the matter was pending in the court. Clause (4) of the deed of dissolution suggests that the parties intentionally left out division of their properties in respect of 'DP Store'. [763-F-H; 764-A-B] B C

1.5. All properties of the owner may not be partnership property and each case, thus, must be determined on the basis of fact materials on record. The very fact that the parties had referred to the business carried out under the name and style of 'DP Store' which was not and could not be the subject-matter of the partnership as the same was entered into in the year 1971 and dissolved in 1977, the admission of the appellant that the royalty received from the said tenanted premises was being deposited in the partnership account assumes significance. If the said property was the exclusive property of the appellant, and he had been dealing therewith as the sole owner thereof, the question of any reference being made thereto in the deed of dissolution would not have arisen. It may be true that in absence of the original deed of partnership having been brought on records, it is difficult for the court to arrive at a finding that the same had been originally brought in the stock of the firm. There is also no direct evidence that the appellant had brought the same as his investment in the partnership at the initial stage thereof but it is evident that the same was done at a later point of time. What, formed 'the assets' of the partnership must be gathered from the admission of the parties as also the other materials available on records. The said agreement having been in dispute, it may not be decisive. In a case of this nature, the conduct of the parties assumes significance. Admission, as is well-known, is the best proof of a claim. Section 58 of Evidence Act states that the facts admitted need not be proved. The very fact that the royalty received in respect of the said premises was being deposited in the partnership account is a clear pointer to show that the same was the property of the partnership. [764-B-G] D E F G

Dwijendra Nath Mullick and Anr. v. Rabindra Nath Chatterjee and Ors., AIR (1987) Cal 289; *Jayalakshmi v. Shanmugham and Ors.*, AIR (1988) Ker H

A 128 and *Arm Group Enterprises Ltd. v. Waldorf Restaurant and Ors.*, [2003] 6 SCC 423, referred to.

'Lindley & Banks on Partnership', 18th Edn., referred to.

B 2. Mere execution of deed of dissolution did not discharge the parties thereto from their rights and liabilities. The rights and liabilities of the partners in respect of the partnership property would be discharged only when the firm is finally wound up and the properties of the firm are distributed. The partner of a dissolved firm can not only exercise his right under section 50, he may also restrain the use of the firm's name and firm's property in terms of section 53 of the Partnership Act. Section 37 determines the rights of the outgoing partner in certain cases to avoid shares to subsequent profits. If the tenancy right was being subjected to any profit by one of the partners, the cause of action arose. Therefore, the cause of action for the suit did not perish with the execution of the deed of dissolution. [768-F-H; 769-A-B]

C 1.8. With regard to the applicability section 15 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, the instant case is not where a landlord has brought any suit for eviction of the tenant on the ground that he had wrongfully assigned his right, title and interest in the tenanted premises in contravention of Section 15 of the Bombay Act, thus, liable for eviction. Instant case is with regard to partnership. Assignment of tenancy having regard to the statutory provision would not attract section 23 of Contract Act. Even otherwise in a case of this nature, the said question does not arise. [765-C-F]

CIVIL APPELLATE JURISDICTION : Civi! Appeal No. 5720 of 2006.

F From the Final Judgment and Order dated 25.2.2005 of the High Court of Judicature at Bombay in First Appeal No. 213 of 1995.

Uday Lalit, Chinmoy Khaladkar, P.N. Patwardhan and S.K. Nandy for the Appellant.

G Shekhar Naphade, Shivraj M. Jadhav for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J. Leave granted.

H Parties herein are brothers. The dispute between them is tenancy right

in respect of a premises known as 'Navalkar Building' situate at N.C. Kelkar Road, Dadar in the town of Mumbai. Appellant herein allegedly acquired the said tenancy right in terms of a deed of assignment entered into by and between him and one Saraswati Balkrishna Pawar and three others. One Krishna Tatoba Pawar alias Balkrishna Tatoba Pawar was the original tenant of the said premises. He was running a hair cutting saloon therein under the name and style of 'Anant Hair Dressing Saloon'. He died leaving behind him the assignors of the said deed of assignment dated 18.10.1966. The business as also the tenanted premises was assigned for valuable consideration. He was allegedly carrying on business therein. Leave and licence agreement was executed by him in relation to the self-same premises in favour of one Shri Walke on 01.02.1970. The said Walke was running a business in the said premises under the name and style of 'Deepak Provisional Store'. A dispute arose between the parties resulting in initiation of a proceeding under Section 145 of the Code of Criminal Procedure. The properties were attached. The said Walke also filed a suit. The said suit is said to have been compromised. Appellant herein is said to have obtained possession of the said premises on 23.3.1978, whereafter he started a business under the name and style of 'Shree Medico'.

The parties hereto i.e. the three brothers, entered into a partnership on 1.4.1971. The same was dissolved on 31.03.1977, *inter alia*, on the premise that the appellant had been claiming full ownership in relation to the said tenanted premises as also the business in Shree Medico. A suit was filed by Respondent No.1 in the City Civil Court, Mumbai, which was registered as S.C. Suit No.5903 of 1981 wherein, *inter alia*, the following prayers were made :

- (a) It be declared that the Plaintiff and the Defendants Nos. 1 and 2 have 1/3 shares in the suit business of Medical and General Store carried on Navalkar Building on the ground floor, N.C. Kelkar Road, Dadar, Bombay 400 028 as also the tenancy rights in the premises as also the premises on the ground floor of Navalkar Building, N.C. Kelkar Road, Dadar, Bombay-400 028.
- (b) It may be declared that the partnership business of Medical and General Stores carried on in Navalkar Building on the ground floor, N.C. Kelkar Road, Dadar, Bombay-400 028, stood dissolved as from the date of the suit or from such other date as this Hon'ble Court may deem fit.

- A (c) The accounts of the partnership business of Medical and General Stores be made up and the Plaintiff be awarded the amount found due to his share at the foot of the account.”

B Although in the said suit allegedly no relief was claimed in respect of the business of the Deepak Provisional Store, at the hearing, the plaintiff made his claim in respect of the business running under the name and style of ‘Shree Medico’ and claimed interest in the said ‘Deepak Provisional Store’. The appellant in his written statement did not raise any question as regards legality or otherwise of the said tenancy right in the partnership in terms of Section 15 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, ‘the Bombay Act’).

C In the said suit, *inter alia*, the following issues were framed :

- D “1. Whether the Plaintiff proves that the partnership firm of M/s Shreedhar Govind Kamerkar was/is registered under the Indian Partnership Act?
2. Is the answer to the above issue is in the affirmative, whether the Plaintiff proves that the business known as Deepak Provision Centre and the shop premises on the Ground Floor, Navalkar Building, N.C. Kelkar Road, Dadar, Bombay-400 028 ?
- E 3. If the answer of the above issues in the affirmative, whether the Plaintiff proves that on 31st March, 1977 the said business of Deepak Provision Centre was in existence ?
- F 4. If the answer to the above issues is in the affirmative, whether the Plaintiff proves that the said business of Deepak Provision Centre and the said premises were excluded from the dissolution of the said firm of M/s Shreedhar Govind Kamerkar ?
5. Whether the Plaintiff proves that the business of M/s Shree Medico carried on by the Defendant No.1 in the said premises is a partnership business of the parties to the suit ?
- G 8. Whether the Plaintiff proves that he is entitled to 1/3rd share in the said business of the 1st Defendant and in the tenancy rights in the said premises ?
- H 9. Whether the Plaintiff proves that he is entitled to the dissolution and accounts of the said business of the 1st Defendant and the tenancy rights of the said premises ?”

Issue Nos. 2, 8 and 9 were answered in the negative, whereas Issue Nos. 3, 4 and 5 were held to be not surviving. The learned Trial Judge, *inter alia*, on the aforementioned findings dismissed the suit. On an appeal preferred by the respondents herein, a learned Single Judge of the High Court, however, allowed the appeal directing :

- (a) It is declared that the plaintiff and defendant Nos. 1 and 2 have 1/3rd share each in the business of Deepak General Stores carried on the ground floor in Navalkar building at N.C. Kelkar Road, Dadar, Mumbai-400 028 and also equal tenancy rights in the premises where Deepak General Stores business was being carried out.
- (b) It is declared that partnership business of Deepak General Stores at the aforesaid premises stood dissolved as from July 1981.
- (c) The accounts of the partnership business of Deepak General Stores shall be made and the plaintiff and the defendants will be entitled to amount found due to their share at the foot of the account.
- (d) Partnership premises where Deepak General Stores was being run shall be partitioned by metes and bounds and they will be entitled to possession of 1/3rd share and will be placed in possession.
- (e) There will be an enquiry into the mesne profits from the date of the suit till delivery of possession in respect of Deepak General Stores and that of the premises.

Plaintiff will be entitled to costs of this suit as well as of the Appeal.”

The High Court in its judgment, *inter alia*, relied upon the admission of the appellant herein that the royalty received in respect of the said tenanted premises used to be deposited in the partnership account.

The deed of dissolution dated 31.03.1977 clearly postulated that the said tenancy was a part of the assets of the partnership (Ex.P-3) and agreement dated 01.02.1977 (Ex. P-4), whereby and whereunder the parties thereto agreed that the partnership should be dissolved.

Mr. U.U. Lalit, the learned Senior Counsel appearing on behalf of the appellant, would *inter alia* submit :

- A (1) Having regard to the stand taken by the learned counsel for the respondents before the City Civil Court as also before the High Court to the effect that no share was being claimed in respect of the business of 'Shree Medico', and the said claim having been kept confined only to 'Deepak Provisional Store', the High Court committed a manifest error in passing the impugned judgment.
- B (2) Having regard to the finding of fact arrived at by the City Civil Court that the tenancy right in respect of the premises in question had been acquired by the appellant in his individual capacity and he having obtained possession thereof from the licensee only in the year 1978, prior where to the partnership was dissolved, the question of the said property being an asset of the partnership did not and could not arise.
- C (3) The plaintiff-respondent, in his deposition having clearly admitted that he had no concern with the said tenanted premises, the impugned judgment cannot be sustained.
- D (4) In any event having regard to the provisions contained in Section 15 of the Bombay Act, the tenancy right could not have been assigned.
- E (5) Partnership having been dissolved on 31.03.1977 and the suit having been filed on 16.10. 1981, the same was clearly barred by limitation.

Mr. Shekhar Napadhe, the learned Senior Counsel appearing on behalf of the respondents, on the other hand, would contend :

- F 1. It is not a fit case where this Court should exercise its discretionary jurisdiction under Article 136 of the Constitution of India.
2. Having regard to the provisions contained in Section 17 of the Partnership Act, the suit was not barred by limitation.
- G 3. No question as regards applicability of Section 15 of the Bombay Act having been raised in the written statement, nor any issue having been framed in that behalf, the same should not be permitted to be raised for the first time before this Court.

H The deed of partnership admittedly has not been produced. The parties, however, had entered into a formal deed of partnership. Non production of the said document has, however, not been taken serious note of by the High

Court. What was produced was extract from the certificate of registration issued by the Registrar of Firms. A

In absence of the deed of partnership, it might not be possible for us to arrive at a finding that the partnership was originally brought in the stock of the firm.

We will, therefore, have to proceed to determine the said question on the basis of the materials which are available on records. B

We may at the outset notice the admission of the appellant in his deposition before the learned Civil Court, which is in the following terms : C

“Q. You have stated that the business of M/s Shridhar Govind Kamerkar was carried on at Navalkar Bldg. So what was this premises at Navalkar Bldg. used ?

Ans. The said premises were given for running the business to one Shri Walke and the royalty was received therefrom was credited to the accounts of M/s Shridhar Govind Kamerkar a partnership firm. D

Q. I put it to you that prior to giving the premises in Navalkar Bldg. to Shri Walke Deepak Provision Centre was being run therefrom. What have you to say? E

Ans. I started the said business of M/s Deepak Provision Centre in the said premises.”

Indisputably, a deed of dissolution was entered into by and between the parties. The said instrument was executed on 31.03.1977, the relevant portions whereof are as under : F

“WHEREAS the parties above named were partners in a partnership, a will for carrying on the business of Bidis, Tobacco, Cigarette and other sundry articles under the name and style of M/S SHREEDHAR GOVIND KAMERKAR, at 203/205, Haji Habib Chawl, N.M. Joshi Marg, Bombay 13 and the tobacco shop at Harharwala Building, Delisle Road, (N.M. Joshi Marg), Bombay and Deepak Provision Centre, Navalkar Bldg. N.C. Kelkar Road, Dadar, Bombay-28, and a tobacco godown at Rangari Chawl, Maidan, Patra Shed, N.M. Joshi Marg, Bombay 13, under the terms and the conditions of a deed of partnership duly executed on the day of January, 1971, Between the H

A Party of First Part, Second Part & Third Part.”

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xxx

B 1. The parties hereby agreed that the partnership between them to carry on the said business in the name and style of Messers SHREEDHAR, GOVIND KAMERKAR and other sundry articles at 203/205 Haji Babib Chawl, N.M. Joshi Marg, Bombay 13 and a tobacco shop at Harharwala Building, N.M. Joshi Marg, known as Ganesh Tea House and Deepak Provision Centre, Navalkar Building, N.C. Kelkar Road, Dadar, Bombay 28 and tobacco godown at Rangari Chawl Maidan, Patra Shed, N.M. Joshi Marg, Bombay 13 and Mor Brand

C Chuna (Lime) and the parties had agreed the terms under which the said partnership was dissolved on the further terms and conditions.

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xxx

xxx

D 3. In respect of Bidi shop at Harharwala Bldg., N.M. Joshi Marg, Bombay-13, known as Hotel Ganesh Tea House which is given on royalty shall remain with the party of the Third Part Shri P.G. Kamekar and he shall be responsible to repay the deposit amount received.

E 4. In respect of Deepak Provision Centre at N.C. Kelkar Road, Dadar, Bombay 28 the case is pending in court of the said shop and after the court decision the decision will be taken with the mutual consent of all the partners. And secondly in respect of Mor Brand Chuna (Lime) the matter is under dispute with other parties and that matter will be decided with the mutual consent of these partners.”

F Although the agreement dated 01.02.1977 is a disputed document, but having regard to the fact that the High Court had placed reliance thereupon, we may also notice clause 8 thereof which is in the following terms :

G (8) The closed shop viz. Deepak Provisional Stores with the room situated at Nawalkar Building, N.C. Kelkar Road, Dadar, Mumbai-400028 is of the ownership of all the three partners and all the three shall bear the expenditure to be incurred therefor. Further, all the three shall equally bear the entire expenditure viz. its rent etc.”

H We may also notice that although a claim was made by the plaintiff that the tenancy had been acquired by the partnership from the beginning, from the deposition of the plaintiff-respondent no.1, it appears that the following

facts have been elicited : (i) Deepak Provisional Store (Centre) was not run by the partners (page 61); (ii) All licences of Shree Medico were standing in the name of defendant no.1. He had never signed on any document pertaining to Shree Medico (page 62); (iii) He had no source of income in 1966 (page 71); (iv) There is no documentary evidence to show that the said premises were acquired out of the funds of partnership firm (page 72); (v) No documentary evidence exists to show that the business of partnership was carried out at the same premises (page 82); (vi) The property was under attachment from 1969 to 1978 (page 82); (vii) The possession of the property was obtained in 1978 (page 84); and (viii) Plaintiff claimed a share in the business which was running under the name and style of 'Shree Medico' and not of 'Deepak Provisional Store' (page 94).

However despite a claim having been made by the plaintiff in respect of 'Shree Medico', it appears, a statement was made at the Bar by the learned counsel for the plaintiff on 17.03.1994, which had been recorded by the learned Trial Judge as under :

- (1) That the Plaintiff is not claiming any right in the business of 'Shree Medico'.
- (2) The Plaintiff is claiming the right only in respect of the business of 'Deepak Provision Centre'.
- (3) The tenancy rights in respect of the shop premises being Shop No.1."

The High Court also in para 6 of its judgment noticed the said statements in the following terms :

"....Counsel for the appellants however fairly conceded that the plaintiffs-appellants are not making any claim in respect of Shree Medico."

The learned Senior Counsel appearing on behalf of the appellant may, thus, be right in his submission that keeping in view the pleadings of the parties as also the statements of the plaintiff in his deposition before the learned City Civil Court, the respondent could not lay any claim in respect of any business which was being carried in the premises in question under the name and style of 'Deepak Provisional Store, but the same, in our opinion, may not be decisive to arrive at a conclusion that the right in respect of the tenanted premises in question never formed the part of the assets of the

A partnership.

We have noticed hereinbefore that either there was no deed of partnership, or in any event the same had not been produced. What, therefore, formed 'the assets' of the partnership must be gathered from the admission of the parties as also the other materials available on records.

B

What forms the property of the firm is stated in Section 14 of the Indian Partnership Act, 1932 (for short, 'the Act'). It reads as under :

C

"14. *The property of the firm.*— Subject to contract between the partners, the property of the firm includes all 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 business of the firm, and includes also the goodwill of the business.

D

Unless the contrary intention appears, property and rights and interests in property acquired with money belonging to the firm are deemed to have been required for the firm."

With a view to determine the said question, we may notice some other provisions of the Act as well.

E

"17. *Rights and duties of partners.*—Subject to contract between the partners -

after a change in the firm

F

(a) where a change occurs in the constitution of a firm, the mutual rights and duties of the partners in the reconstituted firm remain the same as they were immediately before the change, as far as may be;

after the expiry of the term of the firm, and

G

(b) where a firm constituted for a fixed term continues to carry on business after the expiry of that term, the mutual rights and duties of the partners remain the same as they were before the expiry, so far as they may be consistent with the incidents of partners at will; and

where additional undertakings are carried out,

H

(c) where a firm constituted to carry out one or more adventures or undertakings carries out other adventures or undertakings, the mutual

rights and duties of the partners in respect of the other adventures or undertakings are the same as those in respect of the original adventures or undertakings.” A

“50. *Personal profits earned after dissolution.*- Subject to contract between the partners, the provisions of clause (a) of section 16 shall apply to transactions by any surviving partner or by the representatives of a deceased partner, undertaken after the firm is dissolved on account of the death of a partner and before its affairs have been completely wound up : B

Provided that where any partner or his representative has bought the goodwill of the firm, nothing in this section shall affect his right to use the firm name.” C

“53. *Right to restrain from use of firm name or firm property.*- After a firm is dissolved, every partner or his representative may, in the absence of a contract between the partners to the contrary, restrain any other partner or his representative from carrying on a similar business in the firm name or from using any of the property of the firm for his own benefit, until the affairs of the firm have been completely wound up : D

Provided that where any partner or his representative has bought the goodwill of the firm, nothing in this section shall affect his right to use the firm name.” E

The parties have entered into the deed of dissolution voluntarily. The appellant herein is not an illiterate. He has been carrying on business. He had acquired tenancy right on his own showing. He had acquired the tenancy right in his own name. He had also been fighting litigation with the said Walke for a long time. F

We have also noticed hereinbefore clause (8) of the agreement dated 01.02.1977. From the preamble of the deed of dissolution dated 31.03.1977, it is evident that the partnership had been carrying on business *inter alia* in Bidis, Tobacco, Cigarettes etc. under the name and style of ‘M/s Shreedhar Govind Kamerkar’ situated Haji Habib Chawl, N.M. Joshi Marg, Bombay and a tobacco shop at Harharwala Building, Delisle Road and a tobacco godown at Rangari Chawl, Maidan, Patra Shed, N.M. Joshi Marg, Bombay but also ‘Deepak Provisional Store’, Navalkar Building. G

A Clause (1) of the said deed of dissolution also refers to 'Deepak Provisional Store'. In clause (3) of the said instrument, royalty in relation to a hotel, namely, Hotel Ganesh Tea House was assigned to P.G. Kamerkar, Respondent No.2 herein. In relation to the 'Deepak Provisional Store', it was categorically stated that the matter was pending in the court. Clause (4) of the said deed of dissolution suggests that the parties intentionally left out division of their properties in respect of 'Deepak Provisional Store' as also 'Mor Brand Chuna (Lime)', as litigations were pending.

The very fact that the parties had referred to the business carried out under the name and style of 'Deepak Provisional Centre' at N.C. Kelkar Road, Dadar, Mumbai, which was not and could not be the subject-matter of the partnership as the same was entered into in the year 1971 and dissolved in 1977, the admission of the appellant herein that the royalty received from the said tenanted premises was being deposited in the partnership account assumes significance. If the said property was the exclusive property of the appellant, and he had been dealing therewith as the sole owner thereof, the question of any reference being made thereto in the deed of dissolution would not have arisen. It may be true that in absence of the original deed of partnership dated 1.4.1971 having been brought on records, it is difficult for the court to arrive at a finding that the same had been originally brought in the stock of the firm. There is also no direct evidence that the appellant had brought the same as his investment in the partnership at the initial stage thereof but it is evident that the same was done at a latter point of time. An inference in relation thereto must be drawn for the other materials on records. The said agreement dated 1.4.1971 having been in dispute, we may not be decisive. In a case of this nature, the conduct of the parties assumes significance. Admission, as is well-known, is the best proof of a claim. Section 58 of the Indian Evidence Act states that the facts admitted need not be proved. The very fact that the royalty received in respect of the said premises was being deposited in the partnership account is a clear pointer to show that the same was the property of the partnership.

G We may at this juncture also consider the submission of Mr. Lalit, in regard to the applicability of the provisions of Section 15 of the Bombay Act, which reads as under :

"In absence of contract to the contrary, tenant not to sub-let or transfer or to give on licence.

H (1) Notwithstanding anything contained in any law but subject to

any contract to the contrary, it shall not be lawful after the coming into operation of this Act for any tenant to sub-let the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein and after the date of commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Act, 1973, for any tenant to give on licence the whole or part of such premises.

Provided that the State Government may by notification in the Official Gazette, permit in any area the transfer of interest in premises held under such leases or class of leases or the giving on licence may premises or class of premises and no such extent as may be specified in the notification.

It is not in dispute that the State of Maharashtra had issued a notification in terms of the proviso appended to Section 15 of the Bombay Act, in terms whereof assignment of a business together with tenancy right was permissible. Furthermore, Section 15 does not contain an absolute bar. It is subject to a contract to the contrary between the landlord and the tenant. A landlord may also in a given situation by reason of acceptance of rent or otherwise from the sub-tenant or assignee may acknowledge the sub-tenancy or assignment and thus accept him to be his tenant. It is not a case where a landlord has brought any suit for eviction of the tenant on the ground that he had wrongfully assigned his right, title and interest in the tenanted premises in contravention of Section 15 of the Bombay Act and, thus, liable for eviction. We are concerned with a partnership. Assignment of tenancy having regard to the statutory provision would not attract Section 23 of the Indian Contract Act. Even otherwise in a case of this nature, the said question does not arise.

In any event, a transaction may be void so far as landlord is concerned. Such a void transaction may not have any effect on the application of the property towards partnership. To some extent, the point appears to have been covered by this Court in *Arm Group Enterprises Ltd. v. Waldorf Restaurant and Ors.*, [2003] 6 SCC 423, wherein this Court opined :

“...Mere carrying on by the tenant a partnership business as partner in the leased premises, no doubt, does not *per se* amount to sub-letting unless it is shown that he withdrew his control of the leased premises and parted with the possession of the property and thereby surrendered his individual tenancy rights in favour of the partnership

A firm..."

We may, in this connection, usefully notice that in 'Lindley & Banks on Partnership', 18th Edn., it is stated :

B "8-13 Lord Lindley observed that "a partnership may be illegal upon the general ground that it is formed for a purpose forbidden by the current notions of morality, religion, or public policy". On that ground, he considered that a partnership formed for the purpose of deriving profit from the sale of obscene or blasphemous prints or books, or for the procurement of marriages or of public offices of trust, would be "undoubtedly illegal."

C 8-14 It has already been seen that a partnership between a resident British citizen or a resident alien and an alien enemy is illegal and incapable of creation or continuation; on the same basis, a partnership formed in order to trade with an enemy nation would clearly be illegal. However, since a neutral may lawfully trade with one of the belligerent nations, a partnership formed for that purpose would be unobjectionable."

D 8-16 Equally, although a statute may appear to prohibit certain activities and impose a penalty for failure to observe its provisions, it does not follow that conduct which would attract the penalty is necessarily illegal. If the statute can genuine be classed as prohibitory, as will be the case if the penalty is imposed for the protection of the public, then such conduct will be illegal Per contra if, on a true construction of the statute, the penalty merely represents, as Lord Lindley put it, "the price of a licence for doing that the statute apparently forbids". Thus, in *Brown v.*

F *Duncan*, it was held that a partnership of distillers was not illegal, even though one partner carried on business as a retail dealer in spirits within two miles of the distillery (contrary to the Duties on Sprits Act 1823, ss. 132, 133) and was not registered as a member of the firm in the excise books (as required by the Excise Licences Act 1825, s. 7). Lord Lindley did, however, doubt whether the statutes in question were properly construed by the court.

G The following alphabetical list of businesses and professions contains the most important example of partnership whose legality is or may be affected by statute."

H

8-31 By virtue of the Financial Services and Markets Act 2000, no person may carry on, or purport to carry on, a regulated activity in the United Kingdom unless he is duly authorized so to do or is exempt from the provisions of the Act in relation to that activity. Contravention of this general prohibition constitutes an offence and any agreement made by a person whilst carrying on a regulated activity in breach of the prohibition will be unenforceable against the other party.

10.44 What is of greater importance is to ensure that the occupation rights of the firm are clearly established where the premises are to remain in the sole ownership of one or more of the partners.

If a lease in favour of the firm is to be granted, then it must be in writing. The termination of such a lease may, however, not be without difficulty and its existence may conceivably have adverse inheritance tax consequences.

If the agreement omits any reference to such occupation rights then, in the absence of any other evidence, it will not be assumed, merely because the premises are indispensable to the partnership business, that they belong to the firm or are subject to the firm's right to (i) a lease or tenancy or, where that is still relevant, (ii) an exclusive licence to occupy within the meaning of the Agricultural Holdings Act, 1986. It will rather be inferred that each individual partner who is not beneficially interested in the premises has been granted a non-exclusive licence to enter them in order to carry on the partnership business. Such licence would seem to be contractual in nature and might, as a matter of implication, not be terminable during the currency of the partnership, particularly if it can be shown that the partnership business can only be carried on from those premises and that the termination of the licences would strike at the substratum of the partnership agreement. In such circumstances the only effective way of determining the licence would be to dissolve the partnership but, even then, they would *prima facie* continue until the winding up is complete."

We are not oblivious that all properties of the owner may not be partnership property and each case, thus, must be determined on the basis of fact materials on record.

In *Dwijendra Nath Mullick and Anr. v. Rabindra Nath Chatterjee and*

A *Ors.*, AIR (1987) Cal 289, it is stated :

B “18. It is for the partners to determine by agreement amongst themselves what shall be the property of the firm and the quantum of their beneficial interests therein inter se and what shall be the separate property of one or more of them. If there is no express agreement, then the source from which the property was obtained, the purpose for which it was acquired, and the mode in which it has been dealt with, are to be considered to ascertain such intention.”

C In *Jayalakshmi v. Shanmugham and Ors.*, AIR (1988) Ker 128, it is stated:

D “...It is not necessary that every partnership for the purpose of its business should own and utilize its own partnership property. Therefore mere user of a shop for the business will not make the shop or the tenancy right in it a partnership asset. Something more is required. It was so held by the Supreme Court in *Arjun Kanoji Tankar v. Santaram Kanoji Tanker*, [1969] 3 SCC 555 also.”

We, however, in this case are of the opinion that as the usufruct of his lease hold was to be deposited in the partnership account, the same formed the part of the assets of the partnership.

E The question as to whether the suit was barred by limitation or not also must be judged from the aforementioned context. The cause of action for the suit was said to have been arisen, as stated by the plaintiff in his plaint in the following terms :

F “The plaintiff says that the cause of action arose at the end of July, 1981 when the Defendant No.1 refused to render accounts and started claiming the partnership business and the partnership premises as his own.”

G The question which would, therefore, arise is as to whether running of ‘Shree Medico’ without complying with clause 4 of the deed of dissolution would give rise to a continuous cause of action. Mere execution of deed of dissolution did not discharge the parties thereto from their rights and liabilities. The rights and liabilities of the partners in respect of the partnership property would be discharged only when the firm is finally wound up and the properties of the firm are distributed.

H Sections 50 and 53 of the Act indicate to the said effect. The partner of a dissolved firm can not only exercise his right under Section 50, he may

also restrain the use of the firm's name and firm's property in terms of Section 53 of the Partnership Act. Section 37 of the Partnership Act determines the rights of the outgoing partner in certain cases to avoid shares to subsequent profits. If the tenancy right was being subjected to any profit by one of the partners, the cause of action arose. The cause of action for the suit, therefore, did not perish with the execution of the deed of dissolution on 31.3.1977.

For the reasons aforementioned, there is no merit in this appeal. It is dismissed accordingly. The parties shall pay and bear their own costs.

N.J.

Appeal dismissed.