

WHITE, C.J., section 15 of the Indian Contract Act : even if they fall short of
 AND
 MILLER, J. that it may be open to the plaintiff to recover (*Narayanasami*
 Reddi v. Osuru Reddi(1)) ; and we have no doubt that here the
 LUTCHMEE
 DOSS
 v
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 OF
 STATE FOR
 INDIA. payment was made to avoid a threatened distraint and was not
 voluntary

We must in these circumstances substitute for the decree of the learned Judge a decree declaring the right of the plaintiff to irrigate free of charge over and above the extent admitted by the Government, 36 cawnies 9 visams and 14 chataks of punjai land, and a second crop on 141 cawnies 1 visam and 2 chataks of nanjai and directing the refund to him of such amount as this modification may render necessary.

As regards costs we think the plaintiff should recover his costs of the appeal and the parties should pay their own costs in the Court below.

The Government Solicitor for the respondents.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Sankaran-Nair.

1909.
 April 14.
 15, 19, 22.

THE ADMINISTRATOR-GENERAL OF MADRAS AND AS SUCH
 THE ADMINISTRATOR OF THE PROPERTY AND CREDITS
 OF PATRICK MACFADYEN (DECEASED) (PLAINTIFF), APPELLANT.

v.

THE OFFICIAL ASSIGNEE OF MADRAS AND SUCH THE
 ASSIGNEE OF THE REAL AND PERSONAL ESTATE AND
 EFFECTS OF SIR GEORGE GOUGH ARBUSHNOT, AN
 INSOLVENCY DEBTOR (DEFENDANT). RESPONDENT.*

*Contract Act IX of 1872, s. 253 (10), 263—Indian Insolvency Act, s. 7—
 Insolvency of sole surviving partner—Official Assignee takes subject to
 the rights and obligations of such surviving partner.*

On the death of a partner, the partnership is dissolved under section 253 (10) of the Indian Contract Act and under section 263, the rights and

(1) (1902) I.L.R., 25 Mad., 548. * Original Side Appeal No. 20 of 1908.

obligations of the partners continue in all things necessary for the winding up of the partnership business. WHITE, C.J.,
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It becomes therefore the duty of the surviving partner to wind up the partnership; and as between such partner and the representative of the deceased partner, the former has, by virtue of this overriding duty, the power, if necessary, for the purpose of winding up the partnership business, to continue the business, to borrow moneys or to sell the partnership assets, real or personal. ADMINIS-
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D.

On the insolvency of the surviving partner, the interest of the insolvent in the partnership vests in Official Assignee, under section 7 of the Indian Insolvency Act, subject to the obligation of the surviving partner to wind up the partnership. The rights incidental to such obligation, *i.e.*, the right to realise the partnership assets and do all things necessary to wind up the partnership also vest in the Official Assignee. OFFICIAL
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The right and obligation of the insolvent as surviving partner can be made available for the benefit of the firm in the insolvency proceedings under the vesting order and it is not necessary for the Official Assignee to institute a suit against the representative of the deceased partner for winding up the partnership.

ORIGINAL Side appeal from the judgment of Wallis, J., dated 24th January 1908, in the exercise of ordinary original civil jurisdiction of this Court in Civil Suit No. 90 of 1907.

The facts are stated in the judgment of the learned Judge appealed against. The material portions are as follows.

“This is a suit by the Administrator-General of Madras as administrator of Patrick Macfadyen, deceased, against the Official Assignee of Madras as assignee of the real and personal estate of Sir George Arbuthnot, an insolvent-debtor, for a declaration that the plaintiff as representative of the side Patrick Macfadyen is entitled to a half share in all the Indian assets of Arbuthnot & Co., under which style the deceased and Sir George Arbuthnot carried on business together with John Montgomery Young, who, it is agreed for the purposes of this suit, was only a salaried partner and had no share in the partnership property. The facts so far as material are that on Saturday, 20th October 1906, Patrick Macfadyen died in London, that on Monday 22nd October the surviving partners filed their petition and a vesting order was made in Madras and that on 5th March 1907 Letters of Administration Limited to the Presidencies, of Madras, Bengal and Bombay as defined in Act II of 1874 were granted to the plaintiff of the property and credits of the said Patrick Macfadyen. It may also be mentioned that the insolvency petition was at first filed in the name of Patrick Macfadyen as well as the other

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two partners, but in consequence of its having been ascertained that he had died before the filing of the petition, the petition and the vesting order were amended by striking out his name and the proceedings against him were annulled so that they do not affect the present question. The defendant's plea is that the legal estate in the moveable and immoveable properties of the firm of Arbuthnot & Co. was vested in the three partners although one of them had no beneficial interest therein, and that on the death of Patrick Macfadyen the said moveables and immoveables remained vested in the surviving partners who alone had power to deal with them for the purposes of winding up the business, and that by virtue of the vesting order they became vested in the defendant for the benefit of the creditors and that the plaintiff has only a right to have the business wound up and an account taken and to receive a half share of any surplus assets, which in this case do not exist.

In India under section 263 of the Indian Contract Act after a dissolution the rights and obligations of the partners continue in all things necessary for winding up the business of the partnership. Under this section the surviving partners have, I think, the right to realise the partnership property for the purposes of meeting its liabilities. The section says nothing of the representatives of the deceased partner and I cannot see why in India any more than in England the representatives of the deceased partner should be held to have more than a claim to share in the surplus assets and this was recently held to be so by Subramaniya Aiyar, J., in the present insolvency. It is however necessary to consider the bearing of section 45, Indian Contract Act, in this question. All the High Courts except that of Calcutta are agreed that this section does not prevent surviving partners from suing for partnership property without joining the representatives of a deceased partner (9 Allahabad, 486; 17 Bombay, 6; 17 Madras, 108 *contra*; 18 Calcutta, 86). This ruling appears to rest on the view that section 45 embodies a rule of substantive law abolishing among joint contractors generally the *Jus accrescendi* which was never applied to partners and so putting other joint contractors on the same footing as partners in this respect, and should not be read as affecting the rule by which the surviving partners are entitled to realise and distribute the partnership assets leaving it to the representatives of a deceased partner if dissatisfied to sue

for a winding up and get a Receiver appointed to recover the WHITE, C.J., partnership assets.

If then the plaintiff as representative of Patrick Macfadyen would have had no right to interfere with the surviving partners in the winding up except by the institution of a suit for winding up, it is not apparent why the subsequent insolvency of the surviving partners should give him such a right as claimed in the plaint, even if the right to wind up the partnership did not pass to the Official Assignee on the insolvency of the surviving partners.

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I am however of opinion that it did so pass whether under section 7 or section 30 of the Insolvency Act. The right of a father to dispose of his sons' share in ancestral immoveable property for the payment of his debts has been held to pass under section 7 to the Official Assignee in his insolvency in 7 Bombay, 441 and this was followed in 19 Madras, 74 which again was followed in 21 Bombay, 205, the case of a Joint family business. The words of section 7 are that 'all the real and personal estate of such petitioner and all debts due to him and all the future estate, right, title, interest and trust of the said petitioner in or to any personal estate or effects which such petitioner may purchase or which may revert descend be devised or bequeathed or come to him and all debts growing due to him before the Court shall have made its order in the nature of a certificate do vest in the Official Assignee.

I am inclined to think that these words are large enough to pass the entire interest which the surviving partners have in the whole of the partnership assets to the Official Assignee. If however it should be held that as regards the share of the deceased partner in any part of the partnership property the survivors have only a power of disposal in satisfaction of the partnership debts and discharge of their own personal liability thereon, then, I am of opinion that such power of disposal which arises as incident to the contract of partnership is a power within the meaning of section 30 and passes to the Official Assignee under that section. In this connection I may observe that *In re Bourne*, 1906, 1 Ch., 113 Mr. (now Lord) Justice Farewell, the author of the Standard work on Powers, speaks of the rights of the surviving partners over the whole partnership assets as powers. If they are powers they are powers which the surviving partners could certainly execute for their own benefit, the benefit being the discharge of their personal liability for the partnership debts.

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Whichever view is taken it follows that the suit must be dismissed."

C. F. Napier for appellant.

M. A. Tirunarayana Charariar for respondent.

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JUDGMENT (THE CHIEF JUSTICE) — The point raised in this case is by no means free from difficulty.

The effect of the death of Mr. Macfadyen was to dissolve the partnership, Indian Contract Act, section 253 (10). After the dissolution, the rights and obligations of the partners continued in all things necessary for winding up the business of the partnership (section 263). Mr. Napier, on behalf of the appellant, did not contend that Sir George Arbuthnot as the surviving partner had not the right to realize the property of the partnership and discharge its liabilities. I may omit Mr. Young's name since it is not disputed that Sir George Arbuthnot and Mr. Macfadyen were alone interested in the partnership assets Mr. Young being what is known as "a salaried partner," Mr. Napier's argument was that this being a personal right, based on the mutual confidence between the partners (see Lindley on "Partnership," 7th edition, page 648) it did not pass to the Official Assignee, and that for the purpose of realizing the estate the only course open to the Official Assignee (there being no provision in the Indian Insolvency Act, which corresponds to section 125 of the English Bankruptcy Act, 1883) was to bring a suit against the Administrator for the winding up of the partnership

I do not think it can be disputed that, on the death of Mr. Macfadyen, it became the duty of Sir George Arbuthnot to wind up the partnership. Vaughan Williams, L.J., *In re Bourne* (1) puts the law thus—"The real truth of the matter is that, leaving out all questions of legal estate, there is, as between the surviving partner and the representatives of the deceased partner, an overriding duty to wind up the partnership assets and to do such acts as are necessary for that purpose, and if it is necessary for that winding up either to continue the business or borrow money or to sell assets, whether those assets are real or personal, the right and the duty are co-extensive."

I take it that if Sir George Arbuthnot instead of filing his insolvency petition had as surviving partner entered into a private

arrangement with the firm's creditors for the purpose of winding up the business, he could have done so without bringing a suit for winding up, and that Mr. Macfadyen's representative would have been bound thereby. Does it make any difference if the business is wound up in insolvency proceedings instituted by the surviving partners. It would appear from the judgment of the House of Lords in *Lovell v. Beauchamp*(1) that the rule that when a receiving order is made against a firm of which one partner is a minor an adult partner has the right to insist that the partnership assets shall be applied in payment of the liabilities of the partnership, and that until these are provided for no part of them shall be received by the infant partner, can be made available for the benefit of the creditors in bankruptcy proceedings. I think the right and obligation of Sir George Arbuthnot as surviving partner can be made available for the benefit of the firm in the insolvency proceedings under the vesting order made against the firm. In Seton on Judgments and Orders, vol. III, page 2190, the law is thus stated. Where all the surviving partners or a sole surviving partner become bankrupt, the proper *forum* for the decision of all questions relating to the estate is the Court of Bankruptcy and an action on the part of persons claiming under the deceased partner will be restrained by injunction; *secus*, where the survivors or any of them remain solvent: *ex parte* Gordon, *Morley v. White*(2). Lord Lindley says, "If there is only one partner living in this country his co-partners being either dead or abroad, and he becomes bankrupt, the trustee in that case winds up the affairs of the partnership as well as the private affairs of the bankrupt." Lindley on 'Partnership,' 7th edition, page 740. The estate which vested in the Official Assignee was as it seems to me Sir George Arbuthnot's interests in the partnership assets but this interest was subject to the obligation to realize the property of the partnership and to discharge its liabilities.

If Sir George Arbuthnot's right was a personal right and nothing more, Mr. Napier's argument would have been more difficult to answer. But the right was subject to the correlative obligation and it seems to me the Official Assignee took the estate subject to this obligation. Assuming Mr. Macfadyen's interest in

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(1) (1894) A.C., 607.

(2) (1872) L.R., 8 Ch., 214.

WHITE, C.J., the partnership assets became vested in his administrator on his death that interest was subject to the obligation on the surviving partner to sell the partnership property to pay the partnership debts. I think this obligation devolved upon the Official Assignee as an incident of the estate which vested in him under section 7 of the Insolvency Act.

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I think the case (*Fraser v. Kershaw*(1)) on which Mr Napier relied is distinguishable. In that case an injunction was granted to the Assignee in Bankruptcy of an insolvent partner restraining a judgment-creditor of a solvent partner who had purchased the interest of the solvent partner in partnership goods from delivering the goods to a purchaser under a sale which the judgment-creditor professed to have made.

All that that case decided was that the power of a solvent partner upon the bankruptcy of his co-partner to sell the partnership property cannot be transferred.

As it seems to me the decision might well have proceeded on the short ground that the surviving partner's right to sell is for the purpose of winding up the partnership and not for the purpose of satisfying the separate debt of the surviving partner. I think the principle of this decision does not apply when the estate of an insolvent surviving partner vests in the Official Assignee. It vests subject to the obligation which the surviving partner, as surviving partner was under, viz., an obligation to wind up the partnership business.

I do not wish to be taken to dissent from the grounds on which Wallis, J., based his judgment, but I prefer to rest my judgment on the ground which I have stated.

I think this suit was rightly dismissed by Wallis, J., and I would dismiss this appeal with costs. I certify for two counsel.

SANKARAN-NAIR, J.—I am not prepared to differ.

Attorneys for appellant—Messrs. *Devid & Brightwell*.

Attorneys for respondent—Messrs. *King & Josselyn*.