

Ashok Kumar Mittal Vs Ashwani Kapoor and Another

Court: Delhi High Court

Date of Decision: May 27, 2005

Acts Referred: Arbitration and Conciliation Act, 1996 â€” Section 9
Civil Procedure Code, 1908 (CPC) â€” Order 40 Rule 1
Partnership Act, 1932 â€” Section 41, 43, 45, 46, 47

Citation: AIR 2005 Delhi 323

Hon'ble Judges: Ramesh Chandra Chopra, J

Bench: Single Bench

Advocate: Arun Khosla and Rajesh Luthra, for the Appellant; Valmiki Mehta and Sanjiv Sindhvani, for the Respondent

Judgement

R.C. Chopra, J.

This order shall dispose of OMP No. 49/2005 and OMP No. 121/2005 which are petitions u/s 9 of the Arbitration and

Conciliation Act, 1996 (hereinafter referred to as the "Act" only) filed by the partners, who were running a hotel named "Hotel Ashoka

Continental" at 8370, Arakashan Road, Paharganj, Delhi.

2. In OMP No. 49/2005, the petitioner, Ashok Kumar Mittal, who continues to be in possession of the hotel and running its business seeks

protection, as an interim measure, restraining the other partner and his son from obstructing him in running the hotel and also seeks to restrain them

from getting revoked the license granted to the partnership firm for running the hotel.

3. On the other hand, the other two partners Ashwani Kapoor and his son Naresh Kapoor, who are the petitioners in OMP No. 121/2005, seek

interim orders to restrain Ashok Kumar Mittal, from running the business of the said hotel and using the goodwill, assets and properties and

removal of the assets of the partnership business, books of accounts etc., till the Award is made and published by the Arbitrator.

4. The facts relevant for the disposal of these two petitions, briefly stated are that the three partners, Ashok Kumar Mittal, Ashwani Kapoor and

his son Naresh Kapoor, entered into a partnership for running a hotel under the name and style of "Hotel Ashoka continental" vide a Partnership

Deed dated 1st April, 1994. Ashok Kumar Mittal as Karta of HUF was having 50% share and Ashwani Kapoor and his son Naresh Kapoor

were having 25% share each therein. Therefore, in a way, both the groups were having 50% share each. The wives of Ashok Kumar Mittal and

Ashwani Kapoor purchased properties No. 8370 to 8374 and 8376, Arakashan Road, Ram Nagar, Paharganj, New Delhi, from various persons

and after making additions, alterations, renovations therein developed it as one single building which was leased to the partnership firm vide a

Lease Deed dated 1st April, 1994. The said composite building was re-numbered as 8370, Arakashan Road, Paharganj, New Delhi. The

business continued for about 11 years but then certain disputes and differences arose between the partners on account of which Ashwani Kapoor

and his son served a notice dated 27th January, 2005, upon Ashok Kumar Mittal dissolving the partnership firm and calling up him to either

purchase the entire unit from them or hand over the unit to them and in case it was not feasible, go to Arbitration for adjudication of disputes in

terms of arbitration clause contained in the Partnership Deed. It is stated that an Arbitrator has already been appointed who is seized of the matter.

5. The petitioner, Ashwani Kapoor and his son Naresh Kapoor in OMP No. 121/ 2005, pray for restraining Ashok Kumar Mittal for carrying on

the business of the aforesaid hotel inasmuch as he is indulging in illegal activities and using the premises, cash and assets of the partnership firm to

their exclusion which is likely to cause irreparable loss/injury to them.

6. On the other hand, petitioner Ashok Kumar Mittal in OMP No. 49/2005, who is in control of the hotels, pleads that there are no good grounds

for stopping the running business as the accounts between the partners would be settled in the course of the arbitration proceedings and any

partner, who is in a position to pay to other partners would be permitted to run the hotel.

7. I have heard learned counsel for the parties and gone through the records.

8. Learned counsel for the petitioners, Ashwani Kapoor and his son Naresh Kapoor, in OMP No. 121/2005 contends that after the dissolution of

the partnership, which is admitted, the other partner, Ashok Kumar Mittal, has no right to continue the business of the erstwhile partnership to the

exclusion of other partners and only winding up proceedings have to be undertaken in terms of Sections 43, 45, 47 and 53 of the Indian

Partnership Act. It is argued that Sections 41(c) and 41(e) do not permit the grant of any injunction in such situations to permit the continuation of a

contract which is determinable and already stands terminated and as such, Ashok Kumar Mittal, has no right to the relief, as prayed in his petition.

It is submitted that the appointment of a Receiver is the only way out for the reason that no partner can run the business after the dissolution of the

partnership firm by excluding the other partner there from. It is submitted that Courts must not put premium upon the muscle power of a party

which is in a position to grab the partnership business and throw the other party out forcibly.

9. Learned counsel for the petitioner, Ashok Kumar Mittal, in OMP No. 49/2005, argues that there are no grounds for appointment of a Receiver

or restraining his client from running the hotel inasmuch as the documents placed on record amply show that after the exit of partner Ashwani

Kapoor and his son, the hotel business is giving much better returns out, of which erstwhile partners even are being paid their share every month. It

is submitted that there are no allegations that Ashok Kumar Mittal is squandering or dissipating the partnership assets. It is submitted that upon

completion of the arbitral proceedings whatever amount is due to one party from other shall be paid. He submits that the partnership firm being a

lessee of the property from the wives of the parties is still in occupation of the property as the lease has not been terminated so far and as such

petitioner Ashok Kumar Mittal, in OMP No. 49/2005 cannot be enjoined from running the business. He argues that no Receiver can be

appointed as the hotel business is such which cannot be managed or run by a Receiver appointed by the Court. In support of his submissions, he

relies upon the judgments- Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc., . Rajeshwar Nath Gupta Vs.

Administrator General and Others, , Narendra Bahadur Singh Vs. Chief Inspector of Stamps, U.P., and an unreported judgment of this Court in S.

Balbir Singh v. Mr. A. S. Puri in OMP No. 362/1998 (decided on 6th April, 2000).

10. Learned counsel for Ashwani Kapoor, on the other hand, relies upon a judgment of this Court in Vidya Devi v. Mani Ram; reported in 1974

Raj LR 346, a judgment of J & K High Court in Tilak Chand Jain Vs. Darshan Lal Jain and Another, and a judgment of this Court in Rajasthan

Breweries Ltd. Vs. The Stroh Brewery Company, .

11. In the Apex Court judgment Firm Ashok Traders Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc., , their

Lordships interfered with the order of the High Court appointing one of the partners as Receiver upon consideration of the question whether it was

just and convenient to do so. Their Lordships found that the Groups holding 80% of the shares had been ousted by the holders of the Group

having 20% interest only, which had been appointed Receiver for running the business. Another consideration which weighed with their Lordships

to interfere with the orders was that the case related to the running of the business of liquor outlets which were to be run for a period of 12 months

only out of which nine months had already elapsed and during the said nine-months, the Group which Was having 80% interest was running the

business. Therefore, this judgment does not advance the case of petitioner, Ashok Kumar Mittal, that, he should be allowed to run the business in

spite of the fact that the partners, who have been ousted are having equal share and were working partners.

12. In *Rajeshwar Nath Gupta Vs. Administrator General and Others*, , a learned single Judge of this Court turned down the prayer for

appointment of a Receiver to take possession of the immovable property from the defendants inasmuch as a plea was being raised that the

defendants were trespassers in the premises and the question as to whether they were in lawful possession or not as partners was awaiting trial.

13. In *Narendra Bahadur Singh Vs. Chief Inspector of Stamps, U.P.*, , the Allahabad High Court was not considering the question of the

appointment of a Receiver but was merely considering the implications of the dissolution of firm. It came to the conclusion that dissolution of a firm

is the starting point of the process by which the legal existence of the firm comes to an end but the firm continues to exist unless its affairs are finally

and completely wound up. This question was being considered with reference to the nature of a document which was a document containing the

dissolution of a partnership-cum-mortgages-cum-conveyances and the issue was of its stamping under the U.P. Stamp (Amendment) Act. Section

47 of the Partnership Act was referred to according to which, after the dissolution of a firm, the authority of each partner to bind the firm and the

other mutual rights and obligations as partners continue so long the winding up is not complete.

14. In *S. Balbir Singh v. Mr. A. S. Puri*; (OMP No. 362/1998), a learned single Judge of this Court while dealing with an application u/s 9 of the

Arbitration and Conciliation Act, 1996, declined to appoint a Receiver in respect of running of a restaurant for various reasons including that the

letter of termination of lease of the restaurant appeared to be manipulated and motivated with a view to oust the petitioner in a clandestine manner.

15. On the other hand, in *Vidya Devi 1974 R LR 346 (supra)*, a learned single Judge of this Court was directly dealing with a question as to

whether a Receiver should be appointed or not under Order 40 Rule 1 CPC upon the dissolution of a firm which was at will and came to the

conclusion that where the partners had fallen out and debts and liabilities of the firm were to be ascertained and assets and profits distributed, a

Receiver should be appointed as there was a reasonable apprehension that the partnership property, assets or income were in danger of being

misused or dissipated. It was held that a Receiver should be appointed as a matter of course where a partnership has already been dissolved and

the suit for distribution of assets has been filed. It was also held that in such contingencies the appointment of a Receiver was a beneficial course.

His Lordship was pleased to observe as under in para 21 and 22 of this judgment:

The question is : will it be just and convenient to appoint a receiver? There seems to be no other way except to appoint a receiver in order to

protect the interest of the plaintiff. The assets of the partnership have to be collected and preserved. The parties are at loggerheads. There are

bitter feelings. In the beginning a commissioner was appointed to prepare an inventory. The inventory was prepared with great difficulty. The

plaintiff has made no secret of the fact that she is not willing to retire and that all that she wants is a dissolution of the firm and a separation of her

share. She does not agree that the defendants may be allowed to use the assets of the partnership so long as her share is not paid off. The plaintiff

has at no time in the notice or in the suit expressed any intention to retire. She is firm in her claim of dissolution. In Kerr on Receivers (13th edition)

it is said :--

The readiness of the Court to appoint a receiver in partnership cases depends upon whether the partnership has been dissolved at the time when

the application is made. If a dissolution has clearly been effected by the service of the writ, or if the partnership has expired by efflux of time, a

receiver will readily be appointed, though the appointment is not a matter of course; it will be enough to show that one of the former partners is

delaying the winding up and realisation of the business.

16. The Jammu & Kashmir High Court also in Tilak Chand Jain Vs. Darshan Lal Jain and Another, , held that where the share of outgoing partner

is retained by another partner and property of the firm is used by him to his own advantage, the appointment of a Receiver is necessary to protect

the interest of the outgoing partner. Their Lordships were of the view that the misconduct on the part of a partner would be inferred if one partner

carries on trade on his own account with partnership property and the assets of the dissolved firm and employs the share of the outgoing partner to

his own use without his permission. It was held that the principles which govern the appointment of a Receiver as regards dissolved partnership are

not the same, which are taken into consideration in this regard in relation to a running partnership business though the element of mismanagement of

partnership property and its income is present in both the cases. In para 17 of the judgment, it was held that in a dissolved partnership, as matter of

course, appointment of Receiver should be made to wind up the partnership business completely and to divide the surplus between the partners

according to their rights.

17. In Rajasthan Breweries Ltd. Vs. The Stroh Brewery Company, , a Division Bench of this Court held that specific performance of a contract

cannot be enforced which is in its nature determinable. The plea of learned counsel for the petitioner, Ashwani Kapoor, is that the partnership was

at will and determinable in nature and as such the other partner cannot be permitted to seek any injunction which tantamounts to specific

performance of such a contract.

18. The facts of this Case are clear that Ashok Kumar Mittal, Ashwini Kapoor and Naresh Kapoor had entered into a partnership on 1-4-1994

to run the business of hotel at Paharganj under the name and style of "Hotel Ashoka Continental". This business was to run in a property No.

83,70, Arakashan Road, Paharganj. Delhi comprised of several properties which had been purchased, demolished and then re-constructed as a

single unit by the wives of Ashok Kumar Mittal and Ashwini Kapoor. The investments in the business, Therefore, were enormous and it cannot be

believed as suggested by Ashok Kumar Mittal, that the Hotel was being run with investments of a few lacs only in the form of furniture and fixtures

and other ancillary items required for running a hotel. The: business continued to run for about 11 years during which period, it appears, that the

partners were either not having the income as it is today or were concealing their income by indulging in cash transactions. In the year 2005, on

account of some disputes and differences between Ashok Kumar Mittal on one hand and Ashwini Kapoor and his son on the other, the

partnership was dissolved vide a notice dated 27-1-2005 issued on behalf of Ashwini Kapoor and his son. The partnership now stands dissolved

and the disputes stand referred to arbitration in terms of the arbitration agreement between the parties.

19. It is clear that Ashok Kumar Mittal has taken over physical control of the Hotel now and according to Ashwini Kapoor, he and his son have

been ousted from the business forcibly. Section 43 of the Indian Partnership Act, 1932 clearly says that where a partnership is at will, the firm may

be dissolved by any partner giving notice in writing to other partners of his intention to dissolve the firm and the firm shall stand dissolved from the

date mentioned in the notice as the date of the dissolution or if no date is mentioned from the date of the communication of the notice. According to

Section 47 of the Partnership Act, after the dissolution of the firm, the authority of each partner to bind the firm and the other mutual rights and

obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the firm and to complete

the transactions begun but unfinished at the time of the dissolution but not otherwise. This provision read with Section 46 of the Partnership Act,

which says that every partner has a right to have the property of the firm applied in the payment of the debts and the liabilities of the firm and to

have the surplus distributed amongst the partners convey that once the firm is dissolved, no partner has a right to take over and continue its

business to the exclusion of others except so far as it may be necessary to wind up the affairs of the firm and to complete the transactions begun

but not unfinished at the time of the dissolution. Section 53 of the Partnership Act creates a further right in every partner of the dissolved firm or his

representative, in the absence of a contract to the contrary, to 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.

20. A combined reading of the aforesaid provisions and the judgment pronounced by this Court in ""Vidya Devi" 1974 R LR 346 (supra) as well as

the judgment of the J& K High Court in Tilak Chand Jain Vs. Darshan Lal Jain and Another, , reflects that after the dissolution of a partnership

firm, no partner has a right to continue the business of the firm except for winding up and to complete the commitments prior to dissolution. None

of the partners can be permitted to forcibly oust other partners and take over the business driving others to go to Courts or before the Arbitrators.

Courts cannot encourage the tendency to grab business of a dissolved firm by some of the partners only to the exclusion of others, who are law

abiding and unable to indulge in violence. It is anathema to Rule of Law. After dissolution of the firm only winding up of the business of firm has to

be undertaken which does not mean continuing with day-to-day business of the firm as it was prior to dissolution. Winding up is only for the

purpose of terminating the business finally and setting the accounts between the partners and distributing the assets/cash left after meeting the

liabilities of dissolved firm. This is the purport of above referred provisions of Indian Partnership Act. The hijacking of the business of a dissolved

firm by one of the partners and its running by him to the exclusion of others by force is sufficient to raise doubts against the bona fides of such a

partner and an inference can be drawn that he intends to gobble the profits, assets as well as goodwill of the firm to the exclusion of his erstwhile

partners to unduly enrich himself. It should be taken as a patent misconduct calling for Courts intervention to put an end to the highhandedness and

prevent the mockery of law, justice and courts. Lindley on Partnership 14th Edition Page 425 has observed that nothing is considered as so loudly

calling for interference; of the Court when there is an improper exclusion of one of the partners. This Court, Therefore, is persuaded to follow the

judgments in "Vidya Devi" and Tilak Chand Jain" (supra), and is of the considered view that where the control of business is forcibly retained by

one of the partners to the exclusion of others, interference of the court is essential to put an end to highhandedness and protect the interests of an

ousted partner, who is knocking at the doors of Courts.

21. In such cases, the Receiver has to be appointed as a course. However, this course may not be followed by the Courts where the outgoing

partner appears to be himself not participating in the partnership business before the dissolution of the partnership or holds only a minor share in the

partnership firm or where the partners under the control of the dissolved firm are majority share holders and appear to be bona fide trying to wind

up the business and complete the commitments of the firm prior to dissolution, which are so much that the Receiver may not be in a position to

fulfill the same. In such cases, the partners under the control of the dissolved firm may be permitted to continue with winding up process and day-

to-day control of the business subject to appropriate terms and conditions, which adequately protect and safeguard the financial interests of the

partner out of control. In such exceptional cases the Court may hold that it would not be just and convenient to appoint a Receiver.

22. Learned counsel for Ashok Kumar Mittal has tried to justify the continuance of business by his client on the plea that after the dissolution and

exit of Ashwini Kapoor, the business has improved and in terms of the orders of this Court, Ashok Kumar Mittal is ready to file the copies of the

accounts regularly. He is also prepared to deposit Rs. 5 lacs in court to safeguard the financial interests of Ashwini Kapoor. However, he is unable

to show any good reason to allow him only to run the business and not the other partners excluding him. Mere fact that after the taking over of

Hotel by him its income has increased, does not justify his continuance as it appears that earlier the firm was not declaring its real income. It

appears that the petitioner-Ashok Kumar Mittal, who has forcibly taken over control of the business of the Hotel, knows fully well that the arbitral

proceedings and Court proceedings thereafter by way of objections etc., are likely to take considerable time and as such, he intends to hold on to

make undue gains from the business established by all the partners not by investments of few lacs but heavy investments in building also through

their wives, which was constructed after purchasing many buildings, demolishing them and then converting them into one hotel building.

23. The judgments relied upon by learned counsel for Ashok Kumar Mittal do not advance his plea for running the business to the exclusion of the

other partners for the reason that neither the provisions of the Indian Partnership Act nor the principles of equity, justice and good conscience

permit the Court to countenance unfair advantage to those who take law in their hands to gain undue benefits. The judgments relied upon by

learned counsel for Ashok Kumar Mittal were on different facts and are not applicable to the facts and circumstances of this case. It is true that the

appointment of a Receiver is within the discretion of the Court and the Receiver has to be appointed only when it appears to be just and

convenient but in such like cases where one partner is taking undue advantage out of the assets and business of a dissolved firm and is trying to

exclude other partners by show of force, appointment of Receiver is just and convenient to make parties abide by law and not go by their muscle

power. The forcible ousting of a partner by another and use of the assets of a dissolved firm by one only is an ample proof of misconduct and the

intention of holding over to make-undue gains for himself and undue loss to the ousted partner. A message must go to the citizens that they should

abide by their contracts as well as law and should not remain under an impression that by use of force. They can make undue gains and Courts of

law can do nothing. This Court, Therefore, must exercise its discretion in favor of appointing a Receiver to protect and preserve the assets of the

dissolved firm so that the same are not misused or dissipated by Ashok Kumar Mittal to the detriment of others, who have been ousted.

24. The prayer of the petitioner-Ashok Kumar Mittal in OMP No. 49/2005 for restraining the other partners from interfering in his business and

from not taking any steps for the withdrawal of the license by the authorities cannot be allowed. Since the firm already stands dissolved, its license

also should be revoked by authorities concerned. Petitioner-Ashok Kumar Mittal has no right to seek injunction as prayed which aims at

enforcement of a contract, which is not only determinable but has been actually determined.

25. Under the facts and circumstances discussed above, the prayer of the petitioner -Ashwini Kapoor and his son in OMP No. 121/2005 for the

appointment of a Receiver has to be allowed and Ashok Kumar Mittal has to be removed and restrained from running the business inasmuch as

the partnership already stands dissolved. It is ordered accordingly. A Receiver also has to be appointed to take charge of the business of

partnership firm with a view to complete the winding up proceedings. Shri Prem Kumar, Advocate, a retired Additional District and Sessions

Judge, is appointed as Receiver with directions to immediately take over the charge of "Hotel Ashoka Continental" 8370, Arakashan Road,

Paharganj, New Delhi and ensure that within two weeks, its existing business commitments come to an end. He shall take all steps for the winding

up of the business of the firm in terms of provisions of the Indian Partnership Act, 1932. During the period the Hotel remains under the control of

the Receiver, none of the parties shall try to interfere with his duties. They shall fully co-operate in the smooth and peaceful winding up of the

business. After the winding up is over, the Receiver shall put the Hotel under his lock and key and hand over the keys to the learned Arbitrator

along with his report, who at the time of the passing of the Award may decide as to whom the keys of the building in question have to be handed

over.

26. The SHO as well as ACP of the area shall render full assistance to the Receiver as and when required. Any default on their part shall be

viewed seriously. The fee of Receiver is fixed at Rs. 30,000/- to start with, which shall be paid to him by petitioner in OMP No. 121/2005

immediately. Thereafter, a sum of Rs. 20,000/- per month as fee shall be paid to him till completion of winding up proceedings. The Receiver is

permitted to take assistance of a Chartered Accountant also, if required, whose fee also shall be paid by Ashwini Kapoor and his son.

27. Both the petitions stand disposed of accordingly.