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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Date of Decision: 24.09.2010**

% **O.M.P. 269/2010**

LALIT KUMAR Petitioner
Through: Mr. Harish Malhotra, Senior
Advocate with Mr. Rajender
Agarwal and Mr. Tanuj Khurana,
Advocates.

versus

ANIL KUMAR Respondent
Through: Mr. A. K. Singla, Senior Advocate
with Mr. Ajay Malhotra and Ms.
Hema Arora, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may
be allowed to see the judgment? : No
2. To be referred to Reporter or not? : Yes
3. Whether the judgment should be reported
in the Digest? : Yes

VIPIN SANGHI, J. (Oral)

1. This petition has been preferred under section 9 of the Arbitration and Conciliation Act, 1996 (the Act) by the petitioner to seek the following reliefs:

“(a) appoint a receiver in the above case with
the direction to the receiver to immediately

take possession of 2436, Ajmal Khan Road, Karol Bagh, New Delhi-110005 and to seal the same and to keep the keys in his custody till such time the affairs of the partnership firm are totally wound up and both the parties are paid their respective due shares and the award is made by the arbitral tribunal in this regard;

(b) restrain the respondent, its representatives, nominee etc. from in any manner creating any third party interest and parting with possession in respect of shop No. shop No.2436, Ajmal Khan Road, Karol Bagh, New Delhi-110005 in favour of anyone except in favour of the petitioner;

(c) restrain the respondent, his representatives, nominee(s) etc. from in any manner carrying on the business by utilizing the assets of the partnership firm and the trading name of the partnership firm 'D C Fashion' at shop No.2436, Ajmal Khan Road, Karol Bagh, New Delhi – 110005, or at any place or places either directly or indirectly either in his name or in the name of any firm or company including his or his wife company D.C. Creations Pvt. Ltd., till the award is made by the arbitral tribunal in this regard;"

2. The petitioner and the respondent are real brothers. The parties along with their mother Smt. Kamla Devi purchased the property bearing No.2435-2438, Gali Nos.10 & 11, Ajmal Khan Road, Karol Bagh, New Delhi-110005 vide registered sale deed dated 04.03.1993.

3. The parties and their mother entered into a partnership deed dated 12.08.1997 to carry on retail business in textiles, clothing and garments such as shirts, suits, dupattas, sarees, dress materials etc. in

partnership under the name and style of M/s. Dal Chand Gupta & Co. in the premises bearing No.2436, Ajmal Khan Road, Karol Bagh, New Delhi, which is a part of the aforesaid larger property bearing No.2435-2438, Ajmal Khan Road, Karol Bagh, New Delhi.

4. The business taken over by the partnership was, in fact, the business left by the late father of the parties, late Sh. Dal Chand Gupta, which the father was carrying out in the name of his proprietary concern M/s Dal Chand Gupta under the trade name DCM Retail Store. Upon the demise of the mother of the parties on 18.01.2004, the partnership was reconstituted with the petitioner and the respondent as the two partners on 20.01.2004. The entire business carried on by the erstwhile partnership firm was taken over by the new partnership firm and the name of the firm also remained unchanged. Both the parties had equal shares in the newly constituted firm.

5. According to the petitioner, Smt. Kamla Devi, the mother of the parties left a Will dated 19.12.2003, whereunder she bequeathed her share in the property bearing No.2435-2438, Ajmal Khan Road, Karol Bagh, New Delhi equally in favour of the parties herein. Consequently, it is the case of the petitioner that he and the respondent have 50% share each in the aforesaid properties.

6. The petitioner further states that various improvements were made in the premises wherein the partnership business was being

carried, to remain upto date with the changing trends. The partnership firm started trading in the name and style of "D.C. Fashion" and this name became the brand and trade name of the partnership firm. The firm also installed the ICICI Bank Credit Card Machine/Terminal in the trade name "D.C. Fashion" and the receipts from the sales made through the said credit card machine were directly credited to the bank account of the partnership firm, namely Dal Chand Gupta & Co. maintained with the ICICI Bank, Karol Bagh Branch.

7. The petitioner alleges that the wife of the respondent started interfering in the partnership business being carried on in property bearing No.2436, Ajmal Khan Road, Karol Bagh and this led to differences between the parties. The petitioner, it appears, lodged a police complaint with the allegation that he apprehended danger to his life and liberty and sought police action against the respondent and his wife. The petitioner further states that the respondent started restraining the petitioner from entering the said shop every now and then and even took control of the business in the said shop.

8. It is further submitted by the petitioner that he came to know that the respondent had opened a bank account in the name of D.C. Fashion by showing himself to be the proprietor of the said firm bearing Account No.600800301000298 with Vijaya Bank, Karol Bagh

Branch and similarly opened another bank account with HDFC Bank, Karol Bagh Branch bearing Account No.04392560004226.

9. It is further alleged by the petitioner that the respondent started illegal misappropriation of stocks and property of the partnership concern and diverted the same in his proprietary business stated under the name and style of "D.C. Fashion". The petitioner alleges that the respondent is carrying on the business of the partnership firm by treating the same as his own proprietary concern by using the same trade name, assets, stocks and the goodwill of the partnership and has illegally diverted and converted the property of the partnership concern to his own personal use.

10. The petitioner further alleges that proper accounts of the firm have not been drawn and taken since 01.04.2006. The petitioner also alleges siphoning of the partnership business funds and assets by the respondent by diverting them to his own proprietary business.

11. Since the partnership deed dated 20.01.2004 contained an arbitration agreement for resolution of inter se disputes between the parties, the petitioner preferred a petition under section 9 of the Act before the Court of the Senior Civil Judge, Tis Hazari Courts, Delhi seeking the following reliefs:

"a) Pass necessary ex parte orders and directions thereby restraining the respondent

from carrying on the sole proprietorship business from premises No. shop No.2436 Ajmal Khan Road, Karol Bagh, New Delhi, under the business name of 'DC Fashion' to the detriment of the business of the partnership firm whether directly or through his wife, children, representatives, workmen, employees, agents, attorney holders etc.

b) Pass necessary ex parte orders and directions thereby restraining the respondent from obstructing the entry of the petitioner to the premises No. shop No.2436 Ajmal Khan Road, New Delhi, wherein partnership business has been running and has been conducted under the terms and conditions incorporated in the Partnership Deed dated 20th January, 2004;

c) Pass necessary ex parte orders and directions thereby restraining the respondent from interfering with the participation of the petitioner in the partnership business from the premises No. shop No.2436, Ajmal Khan Road, Karol Bagh, New Delhi in any manner whether directly or through his employees, wife, children, agents, workmen, attorney holders etc."

12. In those proceedings, the respondent appeared upon issuance of notice and took the stand that the partnership between the petitioner and the respondent had been dissolved w.e.f. 01.04.2008. The respondent claimed that he was in exclusive possession of the shop in question through his proprietary concern "D.C. Fashion". He further alleged that the shop in question was never under the possession of the partnership firm.

13. The petitioner submits that even though he had not received any notice of dissolution of the partnership firm allegedly served by the respondent, he was agreeable to the dissolution of the partnership firm. The petitioner submits that this stand of his was communicated to the respondent in a reply filed by the petitioner to an application moved by the respondent before the learned Senior Civil Judge on 19.08.2009.

14. In the meantime, the respondent preferred a petition under section 11(6) of the Act before this Court for appointment of an arbitrator since the parties could not mutually agree upon an arbitrator. On 28.08.2009, this Court allowed the arbitration petition and appointed Mr. Justice V.S. Aggarwal (Retd.) as the sole arbitrator to adjudicate upon the disputes between the parties.

15. The petitioner states that after the arguments were heard by the learned Senior Civil Judge on the application seeking appointment of a Receiver, the respondent moved yet another application alleging that the said proceedings had become infructuous as the respondent had stopped the business activities of "D.C. Fashion" of which he was the proprietor, and that the premises had been let out to a company known as "D.C. Creation Pvt. Ltd." and that the said company was carrying on its own business in the premises.

16. Vide order dated 08.09.2009, the Senior Civil Judge allowed the application preferred by the petitioner to seek the appointment of a Receiver and appointed Ms. Anu Arora, Advocate as the Receiver. The Receiver was directed to take over the premises in question and the stocks and registers, and other items in the said shop. It was directed that the premises would remain under the control of the Receiver and none of the parties would interfere with the same, and the parties were directed to cooperate in the winding up of the business. The Receiver was directed to keep the premises under her lock and key and to provide the key to the arbitrator along with her report.

17. The petitioner further alleges that the Receiver sought to execute the order on 09.09.2009. However, the respondent locked the shop premises and vanished from the site. It appears that the Receiver then sealed the premises on the same day. My attention is drawn to the letter dated 09.09.2009 addressed by the receiver to the SHO, Karol Bagh Police Station, wherein the receiver recorded that she has sealed the shop bearing No.2436, Ajmal Khan Road, Karol Bagh, New Delhi on the same day.

18. The respondent preferred an appeal against the order appointing the Receiver passed by the learned Senior Civil Judge. The petitioner alleges that on 03.10.2009, the respondent, without taking

permission from the Court, broke open the seal put by the Receiver. The petitioner then preferred a contempt petition alleging willful disobedience of the order passed by the learned Senior Civil Judge.

19. The appeal preferred by the respondent against the order of the Senior Civil Judge was disposed of on 08.01.2010. The said appeal was allowed and the order appointing the Receiver was set aside on the ground that the learned Civil Judge was not competent to try the proceedings under section 9 of the Act, since the value of the dispute was beyond the pecuniary jurisdiction of the learned Senior Civil Judge. It was further held that since the arbitrator had been appointed, the petitioner herein ought to have moved the arbitrator for the said relief and not the Court.

20. The petitioner then preferred a petition under Article 227 of the Constitution of India before this Court being C.M. (Main) No.284/2010. The said CM (Main) No.284/2010 was disposed of by this Court on 05.05.2010. This Court observed that the learned ADJ could have disposed of the appeal preferred by the respondent herein on the short ground of lack of pecuniary jurisdiction of the Senior Civil Judge without discussing the merits of the case. The Court further observed that despite the order of the learned ADJ, the right of the petitioner to approach the High Court with a petition under section 9 of the Act remained intact. The observations made by the learned Senior Civil

Judge and by the learned ADJ in the proceedings above referred to, were to be treated as non-est and not to influence the decision of any Court in the application that may be moved by the petitioner under section 9 of the Act.

21. Thereafter, the petitioner has preferred the present petition before this Court on or about 08.05.2010.

22. The submission of Mr. Harish Malhotra, learned senior counsel for the petitioner is that the conduct of the respondent has been absolutely dishonest. Firstly, by use of might, the respondent prevented the petitioner from participating in the partnership business. Despite the petitioner's police complaint, the petitioner was kept out of the partnership business. He submits that the respondent clandestinely opened another bank account in the name of "D.C. Fashion" showing himself to be the sole proprietor and usurped the partnership business completely without even dissolving the partnership which existed between him and the petitioner. All the stocks, goodwill, furnitures & fixtures and other assets of the partnership firm were misappropriated and converted to personal use by the respondent.

23. Mr. Malhotra submits that the entire property bearing No.2435-2438, Ajmal Khan Road, Karol Bagh, New Delhi is owned in equal shares by the petitioner and the respondent after the demise of

their mother, by virtue of the Will dated 19.12.2003. The partnership business was being carried on only in one of the shops bearing No.2436, Ajmal Khan Road, Karol Bagh, New Delhi.

24. Mr. Malhotra submits that even if the dissolution of the firm w.e.f. 01.04.2008, as alleged by the respondent, were to be accepted, the respondent had no right to use the name, goodwill, stocks and assets of the partnership for his own exclusive benefit and to continue the business of the partnership in his own proprietary name. Mr. Malhotra submits that the so-called letting out of the shop to M/s. D.C. Creations Pvt. Ltd. is completely a sham transaction and a fraudulent modus operandi adopted by the respondent to apparently distance himself from the continuing business being carried on in the shop in question. Mr. Malhotra points out that the company M/s D.C. Creations Pvt. Ltd. was incorporated only on 24.08.2009. The address of the said company furnished was 2436, Ajmal Khan Road, Karol Bagh, New Delhi i.e. the premises in which the partnership business was being conducted. He submits that according to the respondent, the lease was created in favour of "D.C. Creations Private Limited" only on 01.09.2009. He submits that if the respondent had no concern with the said company, there was no question of the address of the partnership's showroom being given as that of the said company, even before the so-called letting of the premises on 01.09.2009. Mr. Malhotra submits that the so called company "M/s D.C. Creations

Private Limited”, in fact, continued with the same business as was being carried out by the partnership concern, which was subsequently usurped by the respondent. He places reliance on photographs taken on 05.09.2009 which shows that the same business was carried on uninterruptedly with the same decor and under the same name i.e. “D.C. Fashion”. It is, therefore, submitted that the respondent has clearly resorted to a fraudulent exercise on paper to distance himself from the ongoing business in the premises, whereas it is respondent himself who is carrying on the business under the garb of the sham lease deed purportedly executed in favour of the company M/s D.C. Creations Private Limited.

25. He submits that steps to incorporate the said company were initiated by none other than the respondent. However, it appears that during the course of its incorporation, the respondent realized the need to distance himself from the said company and therefore, introduced his wife and son as the shareholders and directors of the said company. He submits that D.C. Creations Pvt. Ltd. is, in fact, the alter ego of the respondent and the respondent has merely sought to create a façade to not only defraud the petitioner, but also for the purpose of creating hyper technical defence and to pull wool over the eyes of the Court and the arbitrator.

26. Mr. Malhotra submits that the shop in question had been directed to be sealed by the Court of the Senior Civil Judge vide order dated 08.09.2009. The Receiver appointed by the learned Senior Civil Judge had put her seal on 09.09.2009. No order for desealing had been passed. The respondent, however, took illegal possession of the shop even before the appeal preferred by the respondent was allowed by the Appellate Court on 08.01.2010. On 05.10.2009 the petitioner lodged a complaint with the SHO, Karol Bagh Police Station that the seal put by the receiver had been broken by the respondent. Mr. Malhotra submits that the conduct of the respondent in taking the law into his own hands needs to be taken into account by this Court as well, while considering the prayers made in this petition.

27. Mr. Malhotra has also drawn my attention to the various credit card transaction slips of the year 2005 to submit that the trade name under which the partnership was carrying on its business was "D.C. Fashion". He also relies on the advertisements published by the partnership firm dated 11.12.2004 and 01.01.2005 in Hindustan Times, West Delhi Life with the trading name "D.C. Fashion". That is the same name that the respondent claims to have adopted for running his proprietary concern from 01.04.2008 onwards.

28. Mr. Malhotra submits that the petitioner is entitled to restrain the respondent and his representatives from carrying on any similar

business in the name of the firm, 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. He further submits that the affairs of the firm have never been wound up; accounts have never been settled; assets have never been distributed and the liabilities have never been discharged. The respondent could not, therefore, appropriate to himself the goodwill, stocks, fixtures, furnitures and other assets of the firm. He submits that the goodwill of the partnership firm resides in the name of “D.C. Fashion” as also the place of business. Mr. Malhotra in support of his submissions has placed reliance on the following decisions:

- (a) ***Addanki Narayanapa & Anr. v. Bhaskara Krishnappa (dead) and thereafter his heirs & Ors.***
AIR 1966 SC 1300
- (b) ***Rajinder Singh & Ors. v. Kartar Singh & Ors.***
2001 V AD (Delhi) 1107
- (c) ***Ashok Kumar Mittal v. Ashwani Kapoor & Anr.***
AIR 2005 Delhi 323
- (d) ***Ganpat Rai & Anr. v. Abnash Chander & Anr.***
AIR 1973 Jammu & Kashmir 74

29. In support of his submission that this petition is maintainable and that merely because the arbitral tribunal has been constituted, the jurisdiction of this Court to entertain a petition under Section 9 is not

denuded, he places reliance on “**NHAI v. M/s China Coal Construction Group Corpn.**” AIR 2006 Delhi 134.

30. Mr. Singla, learned senior counsel for the respondent, has opposed the petition. He submits that the petitioner started his business under the name and style of “D.C.G. Fabs Pvt. Ltd.” in a premises situated in the City Square Mall, Rajouri Garden, New Delhi. He submits that, though in the said business, the respondent or his family members have no share or interest, the premises in which the said business is being carried on is jointly owned by wives of the parties and their respective sons. He further submits that the said business was set up from the funds of the partnership firm M/s Dal Chand Gupta & Co.

31. Mr. Singla submits that the accounts of the partnership firm Dal Chand Gupta and Co. were last signed by the petitioner for the period ending 31.03.2006. According to the respondent the petitioner had stopped attending to the partnership business since 20.01.2007. Thereafter, the audited accounts had been prepared for the financial years ending 31.03.2007 and 31.03.2008.

32. Mr. Singla submits that the petitioner filed a civil suit being CS(OS) No.1668/2007 in this Court against the wife and son of the respondent to restrain them from interfering in his business being carried on in the City Square Mall. After the filing of the said suit, a

meeting took place between the parties and other family members in February, 2008, wherein it was decided to dissolve the partnership firm M/s Dal Chand Gupta and Co. w.e.f. 31.03.2008, and it was further decided that the respondent would continue with the business at the premises No.2436, Ajmal Khan Road, Karol Bagh, New Delhi as the proprietor thereof.

33. Mr. Singla submits that the petitioner had never raised any dispute regarding the said accounts for the financial years ending 31.03.2007 or 31.03.2008. He submits that the petitioner has, till date, not raised any claim in any proceedings much less before the sole arbitrator appointed by this Court, namely, Mr. Justice V.S. Aggarwal (Retd.). He further submits that the shop in question was never intended to be a partnership asset. This was also expressly provided for in the partnership deed between the parties. He submits that since the partnership business came to an end on 31.03.2008, the respondent being one of the co-owners was entitled to take over the possession and to carry on his proprietary business therefrom. He further disputes that the mother of parties late Smt. Kamla Devi, upon her demise, had bequeathed her share in the property bearing Nos.2435-3438, Gali Nos.10 & 11, Ajmal Khan Road, Karol Bagh, New Delhi upon the petitioner and the respondent. He submits that the share of late Smt. Kamla Devi had fallen to the share of all her legal heirs i.e. the parties herein and the three daughters. He submits that

all the co-owners, except the petitioners, had let out the said premises to M/s D.C. Creations Private Ltd. by a registered lease deed w.e.f. 01.09.2009. Mr. Singla submits that the petitioner cannot seek any relief in these proceedings in relation to the said shop as it was not a partnership asset. The petitioner is also not entitled to claim any relief in respect of the lease transaction entered into between the co-owners and M/s D.C. Creations Pvt. Ltd. as the said transaction is beyond the scope of the arbitration agreement contained in the partnership deed between the parties. The said lessee M/s D.C. Creations Pvt. Ltd. is also not a party to these proceedings.

34. Mr. Singla submits that the partnership had been wound up and the accounts had been taken and no dispute had been raised in relation thereto. Mr. Singla submits that even though the petitioner sought to invoke the arbitration agreement vide letter dated 03.08.2009 proposing to nominate Mr. G.P. Thareja as the sole arbitrator, the petitioner did not raise any dispute with regard to the accounts as finalized for the financial years ending 31.03.2007 and 31.03.2008. Mr. Singla relies on the reply sent by the respondent dated 08.08.2009 to the letter of invocation sent by the petitioner dated 03.08.2009.

35. Mr. Singla further argues that none of the prayers made by the petitioner in the present petition can be granted in the facts of the

present case. The possession of shop No.2436, Ajmal Khan Road, Karol Bagh, New Delhi, cannot be taken as the said shop was not even a partnership asset. The same cannot be sealed and taken custody of. He submits that after the dissolution of the partnership on 31.03.2008, the premises vested in the respondent and other co-owners.

36. Similarly, the second relief prayed for by the petitioner to restrain the respondent, his nominees or representatives from creating third party interest and parting with possession of the said shop in favour of anyone except in favour of the petitioner is not maintainable, for the same reason. So far as the third relief is concerned, he submits that the premises already stands leased out by the co-owners since 01.09.2009 in favour of "D.C. Creations Pvt. Ltd.", which is now carrying on its business in the said premises. He submits that accounts have already been drawn up and business having been wound up, there is no question of the respondent being restrained from utilizing any assets of the erstwhile partnership firm.

37. It is further argued by the respondent that even from the statement of account of M/s Dal Chand Gupta & Co. from 01.01.2008 onwards as filed by the petitioner before the Court of the Senior Civil Judge, and filed before this Court by the respondent, it is evident that the only transaction in the said bank account maintained with Punjab & Sind Bank was in relation to the payment of the monthly instalments

for the car taken on lease finance by the petitioner. No other transaction relating to any business conducted in the name of Dal Chand Gupta & Co. took place from 01.01.2008 onwards. He submits that the said firm ceased to exist on 01.04.2008.

38. The respondent further contends that neither the proprietorship firm M/s D.C. Fashions nor the lessee D.C. Creations Pvt. Ltd. have used any asset of the erstwhile partnership firm Dal Chand Gupta & Co. He further submits that no licence was created by the co-owners of the shop in question in favour of Dal Chand Gupta & Co., merely because the partnership business was being run from the shop in question.

39. Mr. Singla relies on ***M/s Boda Narayana Murthy and Sons v. Valluri Venkata Suguna & Ors.*** AIR 1978 Andhra Pradesh 257 and ***Lachhman Das & Anr. v. Mt. Gulab Devi*** AIR 1936 Allahabad 270 to submit that the property in which the partnership firm business is carried on does not become the property of the partners, unless it is so intended by the partners.

40. In his rejoinder, Mr. Malhotra points out that the respondent is relying upon self-serving accounts prepared by the respondent in relation to the partnership firm Dal Chand Gupta & Co. He submits that M/s Ashok Kumar Gupta & Associates, Chartered Accountants had earlier been auditing the accounts of the partnership firm. This is

evident from the balance sheet of the firm Dal Chand Gupta & Co. prepared as on 31.03.2006. He submits that the same chartered accountant firm had been auditing the accounts of the firm from the beginning i.e. since 1997. However, the respondent had, after usurping the partnership business changed the chartered accountant and got self-serving accounts prepared by M/s Mittal Ajay & Associates, Chartered Accountants. He submits that the balance sheet of the firm drawn as at 31.03.2007, which was prepared on 29.10.2007 and saw the light of the day only when the income tax return for the assessment year 2007-08 was filed on 14.10.2008, and the accounts prepared as at 31.03.2008, which were prepared on 29.09.2008 and filed with the Income Tax on 14.10.2008 are bogus and wholly unreliable.

41. He further points out that the stand taken by the respondent that accounts were taken on 31.03.2008 and that the business was wound up after taking accounts as on 31.03.2008 is belied by the fact that the Chartered Accountant, even as per the respondent's own showing, has prepared the accounts on 29.09.2008. He submits that the question of the petitioner raising any dispute regarding these accounts earlier did not arise as these were not placed before him earlier by the respondent, and were only filed for the first time before this Court in these proceedings. Mr. Malhotra further submits that the stand of the respondent that the shop in question was let out to "D.C.

Creations Pvt. Ltd.” on 01.09.2009 is belied by the fact that as on 05.09.2009 the business being run at the shop in question was that of “D.C. Fashion” and not of “D.C. Creations Pvt. Ltd.”. The same furniture, fixtures, décor and interiors were continued to be used even after the execution of the so-called lease between the respondent and the sisters of the parties on the one hand, and D.C. Creations Pvt. Ltd. on the other hand. Mr. Malhotra submits that the parties were litigating during this period and the said lease was created as a covert act by the respondent. He submits that the respondent resorted to the subterfuge of creating a sham deed during the hearing of the application for appointment of the receiver by the learned Senior Civil Judge. The respondent had disclosed to the said Court, during the course of dictation of the order of appointment of receiver, that a fresh lease had been created in favour of D.C. Creations Pvt. Ltd. to oppose the passing of the order appointing receiver.

42. Mr. Malhotra submits that under Section 14 of the Partnership Act 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 purpose and in the course of business of the firm and also includes the goodwill of the business. He submits that though no formal rights were vested in the partnership firm in relation to the property in question by the co-owners, the partnership business was being conducted under an

implied licence by the said firm. The goodwill of the firm, which resided in the premises in question, was an asset of the firm and the respondent could not have usurped the same for his own personal benefit. Mr. Malhotra submits that the respondent has sought to overreach the Court by creating the said sham lease with D.C. Creations Pvt. Ltd. Mr. Malhotra has also placed reliance on the decisions reported as ***Shyam Sunder & Ors. v. Brij Lal Chaman Lal Purani & Ors.*** AIR 1968 Punjab 28.

43. Before I proceed further to examine the case of the respective parties, I may note that the scope of the present proceedings under Section 9 of the Act is only limited to the grant of orders as interim measures of protection. This Court is, therefore, not determining the inter se rights and obligations of the parties on merits and the petition has to be disposed of on the application of the principles upon which the Courts exercise jurisdiction under Order 39 Rules 1 & 2 CPC for grant of interlocutory orders. Therefore, I only have to examine whether the petitioner has a prima facie case in his favour; whether the balance of convenience is in favour of the petitioner for the grant of interim orders, and; whether the petitioner would suffer irreparable loss and injury if the orders granting interim measures are not passed by the Court. Since the observations made by me are only on the basis of a prima facie evaluation of the respective cases of the parties, these observations are tentative and are being made as they are

necessary to be made to consider the prayers made by the petitioner. These observations should not come in the way of either party at the time of adjudication of their inter se rights and obligations by the arbitral tribunal.

44. Section 9 of the Partnership Act mandates that *partners are bound to carry on business of the firm to the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner or his legal representative*. Section 12 of the Partnership Act stipulates as to how the business of the firm is to be conducted and provides that *subject to contract between the partners, every partner has a right to take part in the conduct of the business and every partner has a right to access and to inspect and copy any of the books of the firm*. Section 14 stipulates that *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. Unless the contrary intention appears, property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm*. Section 15 provides that *subject to contract between the partners, the*

property of the firm shall be held and used by the partners exclusively for the purposes of the business.

45. Section 16 is relevant for the present purpose and the same reads as follows:

“16. Personal Profits Earned by Partners.

- Subject to the contract between the partners,-

- (a) if a partner derives any profits for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay it to the firm;
- (b) if a partner carries on any business of the same nature as and competing with that of the firm, he shall account for and pay to the firm all profits made by him in that business.”

46. Section 27 states that *where a partner acting within his apparent authority receives money or property from a third party or misapplies it, or a firm in the course of its business receives money or property from a third party, and the money or property is misapplied by any of the partners while it is in the custody of the firm, the firm is liable to make good the loss.* Section 46 states that *on the dissolution of a firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners or their*

representatives according to their rights. Section 48 sets out the mode of taking accounts between the partners after dissolution of the firm. Section 53 states that 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. Section 55 states that in settling the accounts of a firm after dissolution, the goodwill shall, subject to contract between the partners, be included in the assets, and it may be sold either separately or along with other property of the firm.

47. The admitted position is that the partnership business was started by the petitioner, the respondent and their mother late Smt. Kamla Devi in property bearing No.2436, Ajmal Khan Road, Karol Bagh, New Delhi under the name and style of M/s Dal Chand Gupta & Co. vide partnership deed dated 12.08.1997. The said partnership conducted the business of carrying on retail business in textile, clothing and garments such as shirts, suits, dupattas, sarees, dress materials etc. The said partnership took over the business left by the father of the parties late Sh. Dal Chand Gupta. The business under the said partnership continued till the demise of the mother of the parties on 18.01.2004. Thereafter, a fresh partnership deed was entered into between the parties on 20.01.2004, wherein the parties had equal

share. The parties carried on the business under the name and style of “D.C. Fashion”, which was used as the brand name/trade name of the partnership firm. This is evident not only from the advertisements inserted by the partnership firm in newspapers, but also from the photographs of the showroom run by the partnership. It is also evident from the receipts issued in respect of sales made through the ICICI Bank credit card machine/terminal procured by the partners from ICICI Bank, Karol Bagh branch.

48. The petitioner lodged a police complaint on 01.08.2007 raising a grievance that the wife of the respondent, Smt. Kanta Gupta, had started interfering with the business of the partnership and creating nuisance in front of the customers. He also complained about the alleged threats issued by her and the respondent to the petitioner. On 07.01.2008 the petitioner lodged a further complaint to the SHO of police station Karol Bagh complaining that on the same day the respondent had called the shutter welding person to change the inside locks of the shutters in the shop without his permission in order to stop the petitioner from entering into the shop. It is a matter of record that the wife and son of the petitioner filed civil suit bearing CS(OS) No.1668/2007 before this Court against the respondent and his wife and son to seek a permanent injunction against them from dispossessing the plaintiffs from the property situated in the City

Square Mall in Rajouri Garden without due process of law or from entering the said property.

49. According to the respondent, in the month of October, 2006, the parties through their sisters and their husbands tried to resolve the disputes between them and tried to partition the joint properties. The respondent further claims that on 19.01.2007 it was agreed between the parties that till the culmination of partition of joint property between co-owners, the respondent would use the Karol Bagh premises for his independent business and the petitioner shall not interfere in the premises of Karol Bagh. However, this submission of the respondent does not find corroboration and does not gel with the complaint dated 01.08.2007 of the petitioner made to the police.

50. In the face of the aforesaid factual background the submission of the respondent that *"Finally in the month of December, 2007, it was decided between the Respondent and the Petitioner that the partnership business of Dal Chand Gupta & Co. would be closed w.e.f. 31.03.2008"* and *"On 28.02.2008, Sh. Amit Kumar Gupta along with his sister Smt. Suman Garg, approached Sh. Lalit Kumar Gupta and served him the notice of dissolution of the partnership firm M/s Dal Chand Gupta & Co..... Accordingly, on the directions of the Petitioner himself the said partnership firm was dissolved and stopped*

functioning w.e.f. 01.04.2008" does not appear to be prima facie believable.

51. Prima facie, had the parties arrived at any such alleged agreement as set up by the respondent, in the face of the petitioner, his wife and son having already initiated a civil suit against the respondent, his wife and son, and in the face of the police complaints made by the petitioner against the respondent and his wife, the same obviously would not have been left unrecorded and would have been duly recorded by the parties in writing, who were already litigating between themselves. The submission of the respondent that the petitioner had himself directed that the partnership firm be dissolved w.e.f. 01.04.2008, therefore, does not, prima facie, appear to be sustainable. The contemporaneous knowledge attributed to the petitioner that w.e.f. 01.04.2008 the respondent opened a new bank account in the name of M/s D.C. Fashion in Vijaya Bank, Karol Bagh, New Delhi and in HDFC Bank, and that the respondent obtained a business debit master card from HDFC bank does not appear to be borne out from the record. The further submission of the respondent that at the time of allegedly leaving the partnership firm, the petitioner had himself transferred large stock and assets of the partnership firm to the business at Rajouri Garden Mall has also not been supported with any documentation.

52. Pertinently, on the one hand the stand of the respondent is that the accounts of the partnership were settled and the partnership business was wound up on 31.03.2008 itself, and according to those accounts the petitioner is liable to pay to the respondent large amounts of money, while on the other hand it is claimed by the respondent that the petitioner had transferred large stocks and assets of the partnership firm to his own business at Rajouri Garden Mall. The respondent, however, does not appear to have made any contemporaneous grievance or complaint in this respect at the relevant time.

53. The notice of dissolution which the respondent allegedly claims to have issued does not bear the acknowledgment of receipt by the petitioner. According to the respondent, the said notice was served upon the petitioner in the presence of the sisters of the parties and their husbands. The respondent also alleges that the petitioner refused to accept the said notice. However, what other efforts were made to serve the said notice upon the petitioner is not disclosed. In the normal course one would have expected that the respondent would send the notice by registered post (acknowledgement due) or by some other mode of recorded delivery. A notice of dissolution of a partnership is a notice which has serious legal consequences. Consequently, the failure of the respondent to issue such a notice, particularly when the parties were already litigating between

themselves, leaves many questions unanswered and creates a serious doubt on the stand of the respondent. It was only in the proceedings initiated by the petitioner under Section 9 of the Act before the Court of the Senior Civil Judge, Tis Hazari, Delhi that the respondent for the first time came up with his version that the partnership firm had been dissolved w.e.f. 01.04.2008 and that he was running his proprietary concern under the name and style of "D.C. Fashion" from the shop in question.

54. While it is claimed by the respondent that the partnership had been dissolved w.e.f. 01.04.2008 and the affairs and accounts had been wound up on that date itself, the respondent does not explain as to how the process of winding up had been accomplished. Nothing has been placed on record to even, prima facie, suggest that the parties had indeed met; drawn up the accounts; agreed to the mode and manner of drawing up of the accounts; drawn up the inventory of the goods and of the stocks and other assets of the partnership firm; drawn up list of creditors of the partnership firm, and distributed the liabilities and thereafter the remaining assets of the firm between themselves. On the one hand the respondent claims that the partnership had been wound up on 31.03.2008, while on the other hand he claims that he alone had liquidated the liabilities of the partnership firm. Why did the occasion for him to do so arise when,

according to him, the business had been wound up and accounts taken on 31.03.2008 is not explained.

55. The respondent also does not explain as to how the affairs of the partnership firm were wound up on 31.03.2008, when the accounts were drawn up by the chartered accountant, apparently appointed by the respondent, for the period ending 31.03.2008 only on 29.09.2008, and filed with the income tax authorities on 14.10.2008. When the accounts had been audited by the same chartered accountant, M/s. Ashok Kumar Gupta & Associates from the inception of the partnership business in the year 1997 and upto 31.03.2006, what was the occasion for the respondent to get the accounts prepared as at 31.03.2007 onwards from M/s. Mittal Ajay and Associates has not been explained.

56. The accounts got drawn by the respondent for the year ending 31.03.2007 and thereafter have been disputed by the petitioner. The submission of learned counsel for the respondent that the petitioner did not contemporaneously raise a dispute about those accounts, does not appear to be justified inasmuch, as, the accounts for the year ending 31.03.2007 were prepared only on 29.10.2007, as evident from the copy of the said accounts placed on record. These accounts saw the light of the day on 14.10.2008. Similarly, the accounts for the year ending 31.03.2008 were, on the face of it, prepared on 29.09.2008 and filed with the income tax authorities on

14.10.2008. Learned counsel for the respondent has not been able to show as to how and when the petitioner was made aware of these accounts. The accounts prepared by the respondent for the years ending 31.03.2007 and 31.03.2008, therefore, cannot be said to be undisputed and would not bind the petitioner. Since they have been got prepared by the respondent, it would be for the respondent to establish their correctness before the arbitral tribunal, if the respondent chooses to rely thereupon.

57. The respondent has also not explained as to what happened to the stocks, furnitures, fixture and all other assets of the partnership firm which were lying in the shop no.2436, Ajmal Khan Road, Karol Bagh, where the partnership business was being run. Since, even according to the respondent, the respondent started his proprietary business in the shop w.e.f. 01.04.2008 under the name and style of D.C. Fashions it, prima facie, stands to reason that the entire existing stocks, furnitures, fixtures and all other assets of the partnership firm including the goodwill of the partnership business in the shop in question as on 31.03.2008 were taken over by the respondent. The respondent has not explained as to how he could have taken over all the aforesaid assets and exploited the goodwill of the partnership firm which resided in its trade name, namely, D.C. Fashions and in the shop premises in question. Prima facie, the conclusion appears to be inescapable that the respondent had usurped the partnership business

and its assets consisting of stocks, furnitures and fixtures, goodwill and all other assets on and from 01.04.2008 to run his own proprietary business under the name and style of D.C. Fashions. It is not explained as to what fresh investment did the respondent made to start the partnership business w.e.f. 01.04.2008.

58. The submission of Mr. Malhotra that the respondent appears to have taken over possession despite the shop in question being locked by the court receiver, prima facie, appears to be well founded. During his arguments, Mr. Singla has not even attempted to explain as to how and when the respondent had taken over possession when the court receiver had placed her lock and sealed the premises on 09.09.2009.

59. From the communication issued by the court receiver, it is evident that the court receiver appointed by the court vide order dated 08.09.2009 had put her seal on the shop in question on 09.09.2009. Eventually, the appeal preferred by the respondent before the Additional District Judge succeeded, and the order appointing the receiver passed by the learned Senior Civil Judge was set aside. However, it has not been explained by the respondent as to how and when the respondent took over possession from the court receiver, after the passing of the Appellate order on 08.01.2010. Pertinently, on 05.10.2009 itself, the petitioner had lodged a complaint with the SHO,

Karol Bagh police station that the seal put by the court receiver had been broken by the respondent. Merely because the order appointing the court receiver was subsequently set aside, that did not provide the respondent with a justification to breach the order appointing receiver even prior to the said order being set aside.

60. The stand of the respondent that the premises was let out by him and the other alleged co-owners namely, the sisters of the parties to M/s. D.C. Creations Pvt. Ltd. and that the respondent is no longer in possession of the shop in question, and that he is not running any business there, prima facie appears to be rather dubious.

61. Pertinently, the company D.C. Creations Pvt. Ltd. was incorporated initially with the efforts and blessings of the respondent. It is he, who took effective steps for incorporation of the said company. The said company was incorporated with its address as 2436, Ajmal Khan Road, Karol Bagh, New Delhi on 24.08.2009. Prior to that on 19.08.2009, the respondent had given a communication apparently to the Ministry of Corporate Affairs, wherein he had stated that he *"has proposed to be the promoter/subscriber of D.C. Creations Pvt. Ltd. I am no more interested in the formation of the company. I have no objection in formation of the company in case formed by some another person"*. Thereafter, this company was incorporated, wherein the wife and son of the respondent are the two directors. It is not even the

respondent's case that his interest is adverse to that of the company and its shareholders. Prima facie, the respondent has resorted to a legalistic trickery. The law is not at all weak and this Court is not helpless to deal with such situations. The corporate veil can and would be lifted in cases of established fraud.

62. According to the respondent, the shop in question was leased out to D.C. Creations Pvt. Ltd. on 01.09.2009. If that were the case, it is not explained as to how the registered office of the said company had been shown as the address of the shop in question even prior to the incorporation of the said company, i.e. 24.08.2009. Moreover, the exercise resorted to by the respondent prima facie appears to be a mere paper exercise inasmuch, as, the business being run by the respondent as the proprietor of D.C. Fashions continued unabated even after the so-called letting out of the premises on 01.09.2009 to D.C. Creations Pvt. Ltd.

63. The photographs of the showroom at 2436, Ajmal Khan Road, Karol Bagh, New Delhi filed on record by the petitioner clearly show that as on 05.09.2009, i.e. after the so-called leasing of the premises to D.C. Creations Pvt. Ltd., the business in the name and style of D.C. Fashions continued unabated in the said shop. The respondent has also not explained as to what had happened to all the stocks, assets, fixtures and furnitures which were being used in the proprietary

business being run by him under the name and style of D.C. Fashions when he suddenly stopped business as on 31.08.2009. It is also not explained as to how and why D.C. Creations Pvt. Ltd. continued to exploit the goodwill of the partnership firm in "D.C. Fashions". Prima facie, it therefore appears that the goodwill, stocks, assets, fixtures and furnitures of the erstwhile partnership firm continued to be used by the respondent firstly as a proprietor of D.C. Fashions, and thereafter by D.C. Creations Pvt. Ltd.

64. No doubt, the shop in question does not form part of the partnership asset as the shop had not been intended by the partners to be pooled in as a partnership resource. The shop in question was, however, in the occupation of the parties as partners of the partnership firm M/s. Dal Chand Gupta & Co. Prima facie, therefore, the respondent could not have appropriated to himself the said premises even though he is a co-owner thereof, particularly with a view to exploit the goodwill of the partnership firm which resided in the said premises. The exploitation of the goodwill of the firm by the respondent, prima facie, is established by the fact that the respondent continued to carry on the same business as that carried on by the partnership firm M/s. Dal Chand Gupta & Co.; with the same brand name i.e. D.C. Fashions; and by using the stock, fixtures and furnitures and other assets of the partnership firm.

65. I may now turn to the case laws cited before me by the learned counsels. Since the respondent has not questioned the maintainability of this petition on the ground that similar relief could be sought under Section 17 from the arbitral tribunal which has since been constituted, I do not need to elaborately deal with the judgments relied upon by Mr. Malhotra in **M/s China Coal** (supra), suffice it to say that **China Coal** (supra) has clearly held that pendency of an application under Section 17 before the arbitral tribunal does not denude the Court of its power to make order for interim injunction under Section 9 of the Act.

66. The decision in **Addanki Narayanapa** (supra) does not specifically assist the arguments of Mr. Malhotra in the facts of this case inasmuch, as, the shop in question did not become a partnership asset.

67. In **Rajinder Singh** (supra), upon the demise of a partner, the legal heirs of the deceased partner who had 31.66% share in the partnership firm sought the appointment of a receiver. After taking note of the decisions reported as **Vidya Devi Vs. Mani Ram & Ors**, 1974 RLR 346; **Nihalchand L.Jai Narain & ors. Vs. Ram Niwas Munna Lal & ors.**, AIR 1968 Punjab & Haryana 523 and **Sheonarain Jaiswal & ors. V. Shree Kirpa Shankar Jaiswal & anr.**, AIR 1972 Patna 75, the Court in paragraph 39, inter alia, held as follows:-

“.....In fact, where a partner excludes another partner from the management of the partnership affairs, there is a case made out for appointment of a receiver. In the present case, the estate of the deceased Kanhai Ram has been excluded from the management of the partnership affairs and the respondents are running the business of the dissolved firm without settling the accounts and affairs of the firm. As already held above, the petitioners have established a prima facie title to the share of the deceased and the fact that their interest is exposed to manifest peril and the property of the firm is in danger of being wasted and dissipated, if left under the management and control of the respondents. The petitioners have also established prima facie that the conduct of the petitioners had been fair and free from blame whereas conduct of the respondents had been unfair and detrimental to the petitioners' interest. Thus applying the well established principles, to the facts of this case, I am of the considered view that it would be just and convenient to appoint a Receiver.”

68. In **Ashok Kumar Mittal** (supra), this Court, after taking into account the earlier decisions cited before it, in paragraph 20 to 24 held as follows:-

“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' (AIR 1985 J&K 50) (supra), 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."

69. In **Ganpat Rai** (supra), the Jammu & Kashmir High Court examined the meaning of the "goodwill" of a firm. The Court in paragraphs 10 and 11 held as follows:-

"10. Another aspect of this case to be considered is that the property of the firm at the time of the dissolution includes the goodwill of the firm. The term 'goodwill' has not been defined in the Partnership Act but different Judicial pronouncements have tried to define it. An important decision in which an effort has been made to define the term 'goodwill' is the judgment of Lord Macnaghten in Inland Revenue Commrs. v. Muller and Co's Margarine, Ltd. (1901 AC 217 at p. 223). The learned Judge held that the term 'goodwill' is a thing very easy to describe but very difficult to define. Another leading case in which the term 'goodwill' has been defined in more detail is Trego v. Hunt (1896 AC 7). In this case goodwill was described as advantage which is acquired by business beyond the mere value of the capital stock, fund or property employed therein in consequence of general

public patronage and encouragement which it receives from constant or habitual customers. It was further held that it is composed of a variety of elements and is bound to differ in its composition in different trades and different businesses in the same trade. The goodwill can be an advantage connected with the premises in which the business was previously carried on. This aspect has been very nicely dealt with by Wood V. C. in Churton v. Douglas ((1859 John 174 at P. 188) also in Ginesi v. Cooper, 1880-14 Ch. D. 5961. Wood V. C. stated the proposition as under: -

"Goodwill I apprehend must mean every advantage, every positive advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business."

The benefit of tenancy rights may also form part of the goodwill. In the absence of any stipulation to the contrary or circumstances indicative of a different intention, the goodwill of the business would include the benefit of the tenancy rights of a business. One of the important elements which comprised a business is its reputation. Business reputation can be a complex of personal reputation, local reputation and objective reputation of the products of the business. Often it is the local reputation or the attribute of locality which forms the content of the goodwill. Specially is the attribute of locality the most important consideration in the business of an ordinary trader or dealer consisting of buying or selling goods. This point has been very clearly brought out in Dulaldas Mullick v. Ganesh Dass, AIR 1957 Cal 280. Dealing with the above point Hon'ble Justice P. B. Mukharji, (as His Lordship then was) has held as under:

"The law of goodwill is often misunderstood because I think Jurisprudence not infrequently treats it as an abstract notion, which in fact it is not. Goodwill must always be understood in relation to facts. Goodwill in jurisprudence is not the abstract quality which the grammarian

means by that ex-pression but a very concrete notion of great practical import. What the goodwill of a business is depends a good deal on the facts and circumstances of the particular business. Goodwill represents business reputation. Business reputation in my view is a complex of personal reputation, local reputation and objective reputation of the products of the business. Which one of these elements, will predominate will depend on the facts and circumstances of each case. Except where the reputation of a business and where the product of the business more than its proprietor have won widespread popularity and universal approval and except in the case of well-known patents and manufacturing processes in which even the personal and objective reputations predominate, it is the local reputation or the attribute of locality which forms the largest content of goodwill in almost every other business. Specially is the attribute of locality the most important consideration in the business of an ordinary trader or a dealer as in the present case. In my opinion there can be no hard and fast rule, no simple formula and no inflexible and rigid definition of the term "goodwill" but in each case it is necessary to see the entire nexus of facts connected with the business whose goodwill is to be determined."

11. The word "goodwill" has been defined in Black's Law Dictionary. Among others the meanings assigned are as under:

"It means every advantage every positive advantage that has been acquired by a proprietor in carrying on his business whether connected with the premises in which the business is conducted or with the name under which it is managed or with any other matter carrying with it, the benefit of the business. This part of the description of the word "goodwill" has been based on Glen and Hall Co. v. Hall, 61 NY 226.

Corpus Juris Secundum Volume 38 at page 953 defines the word "Goodwill" in connection with the property as under:

"Business corporations may have a goodwill connected with their property, business or other rights."

From the above discussion it is manifest that the tenancy rights of the shop in the instant case also form a part of the goodwill which is the property of the firm and is liable to be taken into account while settling the accounts."

70. The decision in ***Shyam Sunder*** (supra), in my view is of no avail inasmuch as that was a case where the partnership firm was the lessee of the premises in question and as already noticed above, that is not the situation in the case before me.

71. Considering the fact that the business carried on by the partnership firm was a retail business in different kinds of clothing and garments in a well-known commercial area, the goodwill of the partnership resided in the shop in question as well as in the trade name i.e "D.C. Fashion". The shop in question where the partnership business was carried on for years together under the name and style of "D.C. Fashion", came to be identified with the retail business of clothing and garments being carried out thereat. That advantage was exploited in full measure by the respondent by continuing the same business even after 31.03.2008, when, according to him, the partnership firm, stood dissolved. That goodwill continued to be exploited even when, according to the respondent, the premises was let out to D.C. Creations Private Ltd. The nature of the business carried

on in the said shop premises has remained unchanged. The same trade name has also been retained which had been adopted by the partnership firm over the years. Even the décor, furniture and fixtures have continued to be retained by the so-called lessee M/s D.C. Creations Pvt. Ltd which was used by the respondent for conduct of business under the name and style of D.C. Fashions. Even according to the respondent, he continued with the same business as retail and clothing and garments as a proprietor of D.C. Fashion after 31.03.2008.

72. The issue as to what is the consequence of the purported lease deed executed in favour of D.C. Creations Pvt. Ltd by the respondent and his sisters and as to whether the business being conducted under the banner of D.C. Creations Pvt. Ltd should also be taken into account for the purpose of determining the share of the petitioner in the dissolved partnership firm are issues which can appropriately be determined by the arbitral tribunal. Prima facie, however the materials produced before me do suggest that the assets, furniture, fixtures, stocks and goodwill of the erstwhile partnership firm D.C. Fashions were exploited not only by the proprietary firm of the respondent, but continues to be exploited also by D.C. Creations Pvt. Ltd. Prima facie, it also appears to me that the creation of D.C. Creations Pvt. Ltd and the so-called letting of the shop in question to it, as also the conduct of business by it are a mere façade created by the

respondent to get out of his liability owed to the petitioner as partner of the erstwhile partnership firm.

73. The decision in **M/s Boda Narayana Murthy** (supra) in my view is of no avail as it not even the contention of the petitioner that the shop in question was a partnership asset. For the same reason, the decision in **Lachhman Das** (supra) is of no avail to the respondent.

74. As the shop in question was not a partnership asset, it would not be proper for me to divest the respondent or D.C. Creations Pvt. Ltd from the use and occupation of the said shop. Since it is claimed by the respondent that the said shop premises stands let out to M/s D.C. Creations Pvt. Ltd., which is a separate legal entity, and the said company carrying on its business, at this stage it may not be appropriate to appoint a Receiver for the business being conducted at the said shop premises under the name and style of M/s D.C. Creations Pvt. Ltd. However, if the petitioner is able to establish before the arbitral tribunal that D.C. Creations Pvt. Ltd is nothing but the alter ego of the respondent and, conversely, if the respondent is not able to establish the complete disassociation of D.C. Creations Pvt. Ltd vis-à-vis the assets, stocks, fixtures, furniture and goodwill of the erstwhile partnership firm, the appointment of a Receiver would be called for considering the decisions of this Court in **Rajinder Singh** (supra) and **Ashok Kumar Mittal** (supra).

75. However, the petitioner cannot be left remediless at this stage and unless and until the aforesaid issues are determined it is necessary to keep a complete account of the business being carried on at the said shop premises under the name and style of M/s D.C. Creations Pvt. Ltd so that in case the petitioner eventually succeeds, a true and complete account can be taken by the learned Arbitrator while determining the share of the petitioner in relation to the business being carried on under the name and style of D.C. Creations Pvt. Ltd in the shop premises in question. As the petitioner is running his own business at the City Square Mall, Rajouri Garden under the name and style of D.C.G Fabs, I am not inclined to direct the petitioner to participate in the business being carried out under the name and style of M/s. D.C. Creations Pvt. Ltd. No doubt, neither the respondent nor D.C. Creations Pvt. Ltd are entitled to use either the name, trading style, assets, furniture, fixtures and stocks of the erstwhile partnership firm, but it needs to be established that the said assets, goodwill, fixtures, furniture etc being used by D.C. Creations Pvt. Ltd are indeed those of the erstwhile partnership firm.

76. Taking into account all the aforesaid circumstances, I direct as follows:-

A) I appoint Mr. A.P.S. Gambhir, Advocate as the Court Commissioner who shall forthwith proceed to make a complete

inventory of the stocks, furniture, fixtures and other assets found in the shop premises bearing no.2436, Ajmal Khan Road, Karol Bagh, New Delhi. The parties shall be entitled to remain present at the time of the preparation of the complete inventory and the Commissioner shall record the claims and counter claims in respect of any assets or item of stock, furniture, fixtures found in the said shop premises.

- B) Each and every transaction undertaken during conduct of the business in the said shop premises shall henceforth be strictly recorded by maintaining ledgers, books of account, stock registers, cash registers and all stocks brought into the shop and sold from the said shop shall be duly recorded in these books of account etc.
- C) The Local Commissioner shall endeavour to make a visit every day, preferably in the evening before the close of the business hours to take note of the stock register, ledgers and books of account and he shall affix the date with his signatures. The respondent and his transferees, assignees including DC Creation Pvt. Ltd., which is a company promoted by his wife, son and brother-in-law shall be bound to comply with this order and to cooperate with the Local Commissioner.

- D) All receipts, including those monies received in cash, by cheque or through credit/debit card transactions from the business transacted at the said shop premises shall be deposited in a separate bank account in the name of D.C. Creations Pvt. Ltd to be opened and operated by D.C. Creations Pvt. Ltd.
- E) All expenses and payments to be made by D.C. Creations Pvt. Ltd shall be withdrawn from the said account and in respect of payments made in cash, the receipts with complete details and particulars of the recipients and the purpose for which the payments are made shall be maintained.
- F) The Local Commissioner shall file a bimonthly reports on the 16th of each month and at the end of each calendar month before the learned Arbitrator.
- G) The arbitral tribunal shall endeavour to determine the issue with regard to the use and exploitation of the assets, stocks furniture, fixtures and goodwill of the partnership firm M/s Dal Chand Gupta & Co. by M/s D.C. Creations Pvt. Ltd as a preliminary issue. In case the tribunal renders the interim award on the said issue, it shall be open to the parties to seek appropriate interim measures either from the Tribunal or from the Court founded upon such an interim award.

H) The account books, ledgers and stock registers etc. signed by the Local commissioner shall be maintained by the respondent/D.C. Creations Private Ltd. and shall be produced before the arbitral tribunal as and when called for.

I) The fees of the learned Local commissioner is fixed at Rs.2,000/- per visit apart from all other incidental out of pocket expenses. The Local commissioner shall also be paid a sum of Rs.3,000/- for submission of the bimonthly reports. In the first instance, the fees shall be borne by the parties equally. However the arbitral tribunal shall, at the time of making its final award determine the liability towards payment of fees and expenses of the Local Commissioner. The petition stands disposed of in the aforesaid terms with costs quantified at Rs.25,000/- in favour of the petitioner, to be paid by the respondent.

VIPIN SANGHI, J.

SEPTEMBER 24, 2010
sr/rsk