

IN THE HIGH COURT OF DELHI AT NEW DELHI
(Not reportable)
ARB.P. 201/2011

Reserved on: 27th March 2012
Pronounced on: 30th March 2012

NEERAJ KHULLAR & ANR Petitioners
Through: Mr. Rajat Aneja with Mr. S. Sethu
Mahendran, Advocates.

Versus

VIRENDER KUMAR KHULLAR Respondent
Through: Mr. Ramesh Kumar, Advocate.

AND

O.M.P. 313/2011

NEERAJ KHULLAR & ANR Petitioners
Through: Mr. Rajat Aneja with Mr. S. Sethu
Mahendran, Advocates.

Versus

VIRENDER KUMAR KHULLAR Respondent
Through: Mr. Ramesh Kumar, Advocate.

AND

O.M.P. 905/2011

NEERAJ KHULLAR & ANR Petitioners
Through: Mr. Rajat Aneja with Mr. S. Sethu
Mahendran, Advocates.

Versus

VIRENDER KUMAR KHULLAR Respondent
Through: Mr. Ramesh Kumar, Advocate.

CORAM: JUSTICE S. MURALIDHAR**JUDGMENT**
30.03.2012

1. These three petitions arise out of a common set of facts and are being disposed of by this common order.
2. Petitioner No.1, Neeraj Khullar and the Respondent, Virender Kumar Khullar, are the sons of late Shri Bansi Lal Khullar. Petitioner No.2, Smt. Vidyawanti Khullar, is their mother.
3. Petitioner No.1 and the Respondent along with their deceased father Shri Bansi Lal Khullar were carrying on the business of a partnership firm under the name and style of M/s Oriental Drapers and Tailors. Their business is stated to be over five decades old with Shri Bansi Lal Khullar, by the founder.
4. On 2nd May 1984, a Deed of Partnership was executed including late Shri Bansi Lal Khullar, the Respondent (who is the elder son) and Petitioner No.1. In terms of para 8 of the said Partnership Deed, the profits and losses of the firm were to be shared between the parties in the following proportion:

a. Party of the First Part (Shri Bansi Lal Khullar)	35%
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b. Party of the Second Part (Shri Virender Kumar Khullar) 35%

c. Party of the Third Part (Shri Neeraj Khullar) 30%

5. The business of the firm was being carried out from the leased premises at 13/30, Ajmal Khan Road, Karol Bagh, New Delhi. The workshop was at 2909/44, Beadon Pura, Karol Bagh, New Delhi.

6. Para 4 of the said Partnership Deed dated 2nd May 1984 reads as under:

“4. That the goodwill of the business and the tenancy rights of the business premises of the partnership including its shop at 13/30, Ajmal Khan Road, Karol Bagh, New Delhi and the workshop of the partnership situated at 2909/44, Beadon Pura, Karol Bagh, New Delhi will vest in all the partners in equal shares.”

7. Two years later, the Partnership Deed was amended. An agreement dated 11th July 1986 was executed between the parties with the following changes:

“(4) That the goodwill of the business and the tenancy rights of the business premises of the partnership including its shop at 13/30, Ajmal Khan Road, Karol Bagh, New Delhi and the workshop of the partnership is situated at 2909/44, Beadon Pura, Karol Bagh, New Delhi will vest in all the partners in their profit sharing ratio subject to the condition that in the event of death of the party of the first part, his share of goodwill or the business and tenancy rights of the business premises will devolve on the party of the second and third parts in equal shares and no other legal heir shall claim any right or interest whatsoever in the goodwill and tenancy rights of the business.

(8) That the profits and losses of the firm shall be divided

between and borne by the parties in the following proportion:

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|-----|--------------------------|-----|
| (a) | Party of the First Part | 30% |
| (b) | Party of the Second Part | 35% |
| (c) | Party of the Third Part | 35% |

(12) That in case of death or retirement of any partner the partnership shall not be dissolved but shall be carried only the remaining partners and the wife of the deceased, if the wife so desire, on the terms and conditions to be determined mutually subject to the condition of goodwill and tenancy rights of the business premises contained in clause (4) above.”

8. A further amendment was made to the said Partnership Deed dated 2nd May 1984 on 31st March 1992, when a subsequent agreement was entered into between the parties by virtue of which Clause 7(a) was inserted after Clause 7 and Clause 8 was substituted. Further, Clause 8(b) was also inserted and the profits sharing were brought to the same percentage as was in the principal agreement dated 2nd May 1984.

9. It is further stated that the firm, M/s Oriental Drapers and Tailors purchased immovable property at Basti Rehgar, Reharpura, Karol Bagh, New Delhi by a Sale Deed dated 1st August 1995. That property is being used as a godown for the partnership business.

10. The Partnership Agreement dated 2nd May 1984 contains an arbitration

clause (Clause 20) which reads as under:

“That all the disputes and/or differences arising between the parties whatsoever touching the affairs in a partnership or the intents of these presents or their construction or application or division of assets and all other matters connected with the same shall be referred to the arbitration in accordance with the provisions of the Arbitration Act, 1940 and any statutory modification therein for the time being in force.”

11. After the demise of late Shri Bansi Lal Khullar on 20th November 2010, disputes arose between the parties. It is the contention of the Petitioners, Neeraj Khullar and his mother Smt. Vidyawanti Khullar that Respondent, Virender Kumar Khullar started exercising absolute control over the entire business of the firm. Further, the Respondent remained indifferent to the requests of Petitioner No.2 for being inducted as a partner in the firm so that it may provide her with some recurring income. Petitioner Nos. 1 & 2 are residing together in Gurgaon in which house late Shri Bansi Lal Khullar was residing till his death. The Respondent resides at Prasad Nagar along with his family. It is stated that the firm is assessed to income tax and is regularly filing its income tax returns. The Petitioners have placed on record the copies of the income tax returns for the assessment years 2009-2010 and 2010-2011 along with Auditor's Report and balance sheets etc.

12. It is stated that the attempts at sorting out the difference between the

parties remained unsuccessful. Petitioner No.2 served a legal notice dated 6th February 2011 on the Respondent calling upon him to immediately pay a sum of Rs.30,000 towards drawings etc. and also take steps to redraft and execute a fresh Partnership Deed inducting her as a partner. Petitioner No.1 also sent a legal notice dated 6th February 2011. The attempts thereafter to hold meetings and settle the disputes did not prove to be successful.

13. In the circumstances, O.M.P. No.313 of 2011 was filed by the Petitioners under Section 9 of the Arbitration and Conciliation Act, 1996 ('Act'), on 26th April 2011 seeking the following reliefs:

“A. It is, therefore, most respectfully prayed that this Hon'ble Court may be pleased to pass appropriate directions pending the commencement of and during the proceedings of the arbitration, thereby restraining the Respondent from selling, alienating, transferring, creating third party interest, sub-letting or parting with possession in respect of the properties mentioned herein below:

- (i) Property No.3982 in Khasra No.2188, Block-I, Gali No.30, Regharpura, Karol Bagh, New Delhi-110005;
- (ii) 13/30, Ajmal Khan Road, Karol Bagh, New Delhi;
- (iii) 2909/44, Beadonpura, Karol Bagh, New Delhi.

B. It is further most respectfully prayed that this Hon'ble Court may be pleased to pass appropriate orders thereby directing the appointment of a Receiver to take over the entire assets and funds of the partnership business and to take charge of the day-to-day affairs of the partnership business conducted

in the name and style of M/s Oriental Drapers and Tailors and to direct the payment of Drawings every month to the Petitioners as per the Books of Accounts maintained by the firm.

C. It is also most respectfully prayed that this Hon'ble Court may also restrain the Respondent from causing any obstruction or creating any nuisance in the conduct of the business of partnership firm by the Petitioner No.1, being a partner, and also to restrain the Respondent from denying access to the Petitioner No.1 to the Books of Accounts and other day-to-day sales of the business."

14. When the above O.M.P. No.313 of 2011 came for hearing first on 27th April 2011, this Court while directing to issue notice, passed the following order:

"Issue notice to the Respondent, returnable on 4th August 2011.

The Respondent is restrained from dealing with the assets of the firm, including properties No.3982 in Khasra No.2188, Block-I, Gali No.30, Regharpura, Karol Bagh, New Delhi; 13/30, Ajmal Khan Road, Karol Bagh, New Delhi; 2909/44, Beadonpura, Karol Bagh, New Delhi, except in the normal course of business till the next date.
Dasti."

15. Thereafter attempts were made to have the parties settle their disputes through mediation before the Delhi High Court Mediation and Conciliation Centre. However, on 19th September 2011, this Court was informed that the mediation efforts had failed.

16. Meanwhile, on 1st July 2011, the Petitioners filed Arb. P. No.201 of
ARB.P. 201/2011 & O.M.P. Nos.313 & 905 of 2011

2011 seeking appointment of an Arbitrator to settle the disputes between the parties. Notice was issued in the said petition on 8th July 2011.

17. With the efforts at mediation having failed, the Respondent filed a reply in Arb. P. No.201 of 2011 on 3rd November 2011 and also in O.M.P. No.313 of 2011 on 8th November 2011. The stand taken in both replies is more or less the same. It is sought to be contended by the Respondent that the partnership firm was engaged in the business of tailoring which was largely dependent upon the personal skill of late Shri Bansi Lal Khullar and the Respondent. The Respondent stated that he learnt the skills of this business while working with his father since 1972 and ever since then has been engaged in the said profession only. According to the Respondent, Petitioner No.1 was only lending his name to the firm and was never actively involved in the partnership business nor did he learn tailoring skills. It is stated that the Petitioner No.1 had started a separate business as a property dealer and has been engaged in the said real estate business till date. It is stated that Petitioner No.1 has got the family properties transferred in his name by reporting to all sorts of deceptions and fraud. It is stated that Petitioner No.1 is running his business separately and earning enough to sustain himself and his family. According to the Respondent for all intents and purposes, it was

settled and decided within the family that the business and goodwill of the partnership firm shall always belong to the Respondent only. The tenancy in respect of the shop was already in the name of the Respondent in his individual tenancy.

18. The Respondent accuses the Petitioner No.1 of putting pressure upon him so that he may get the property at No.13/30, Ajmal Khan Road, Karol Bagh, New Delhi, which is in the personal tenancy of the Respondent. According to the Respondent, the name of the firm does not have any goodwill as there is no demand for tailoring clothes and further that whatever business and assets have been acquired by the firm are because of personal efforts of the Respondent. The Respondent states that the Petitioners have not made any contribution whatsoever to the firm and they have no *locus standi* to file these petitions.

19. The Respondent has also questioned the maintainability of the petitions filed by the Petitioners mainly on the ground that the firm is unregistered and therefore, there is a bar under Section 69 of the Indian Partnership Act, 1932 ('PA') to maintaining the petitions. It is also stated that Petitioner No.2 is not a partner and is therefore not entitled to invoke the arbitration clause to seek

reference of the disputes involving her to arbitration.

20. In the reply filed by the Respondent, it is also stated as under:

“Apart from the partnership business, the Respondent has also been running the separate business of his sole proprietorship firm M/s Oriental Collection from the said premises.”

21. In the light of the above statement in the reply of the Respondent, the Petitioners filed the third petition being O.M.P. No.905 of 2011, again under Section 9 of the Act, on 1st December 2011 seeking *inter alia* the following reliefs:

“A. It is, therefore, most respectfully prayed that this Hon’ble Court may be pleased to pass appropriate directions pending the commencement of and during the proceedings of the arbitration, thereby restraining the Respondent from carrying on business in the name of sole proprietorship firm M/s Oriental Collection and to further restrain him from using the said name on any of the products whatsoever etc.; from any of the following three properties of the partnership firm:

- (i) Property No.3982 in Khasra No.2188, Block-I, Gali No.30, Regharpura, Karol Bagh, New Delhi-110005;
- (ii) 13/30, Ajmal Khan Road, Karol Bagh, New Delhi;
- (iii) 2909/44, Beadonpura, Karol Bagh, New Delhi.

B. It is further most respectfully prayed that this Hon’ble Court may be pleased to pass appropriate orders directing the Respondent to render the entire accounts of business carried on by him, either in the name of sole proprietorship concern of M/s Oriental Collection or in the name of partnership firm M/s

Oriental Drapers and Tailors; or in the alternative, to appoint a Receiver to take over the entire accounts and to supervise the business activities of the said firms, until the disposal of the arbitration proceedings.”

22. On 14th December 2011, this Court passed the following order in O.M.P.

No.905 of 2011:

“1. Learned counsel for the Respondent prays for and is granted four weeks’ time to file a reply. Rejoinder thereto, if any, be filed within two weeks thereafter.

2. Mr. Rajat Aneja, learned counsel for the Petitioners expressed concern on behalf of the Petitioners that the photographs of the shop at Ajmal Khan Road showed that below the sign board the Respondent has also placed a board bearing, in smaller letters, the name “M/s. Oriental Collection”. According to Mr. Aneja, in the reply filed by the Respondent to the connected OMP No. 313 of 2011, for the first time he disclosed that he was running a sole proprietorship firm from the same premises in the name and style of ‘Oriental Collection’. Mr. Aneja submits that this will severely prejudice the rights of the Petitioners, who are the brother and mother respectively to the Respondent.

3. It is directed that the Respondent should, in his reply to the present petition, deal with the above submissions.

4. It is made clear that carrying of business, if any, by the Respondent in the name and style of M/s. Oriental Collection would be subject to the orders passed by this Court.

5. List on 27th March 2012.”

23. Mr. Rajat Aneja, learned counsel for the Petitioners submits that with there being no possibility of settlement of the disputes between the parties and there being a breakdown of trust, it is necessary to have the disputes

referred to arbitration. He submits that the partnership deed dated 2nd May 1984 signed by the parties, consists of Clause 20 which is an arbitration agreement under Section 7 of the Act and is sufficient, for the purposes of the appointment of an Arbitrator. As regards to the maintainability of the petition, he relies on the decisions in *Premlata v. M/s Ishar Dass Chaman Lal* (1995) 2 SCC 145, *Prabhu Shankar Jaiswal v. Sheo Narain Jaiswal* (1996) 11 SCC 225 and *V.H. Patel & Company v. Hirubhai Himabhai Patel* (2000) 4 SCC 368 to contend that even where the partnership firm is unregistered, and the deed contains an arbitration clause, one of the partners can seeking reference of the claim for dissolution of the firm to arbitration. He submits that on his own showing, the Respondent has not paid anything to the Petitioners since the death of the father. He has also been operating a separate business as a sole proprietary concern in the name and style of M/s Oriental Collections in the same premises using the goodwill of the firm. He urges that a Receiver be appointed to take over the entire assets and funds of the firm as well as its immovable properties. He submits that even if the Petitioner No.2 is yet to be inducted as a partner, it is necessary for her to be made a party to the arbitral proceedings since her rights in the firm have been crystallized by way of amendments to the Partnership Deed in 1986.

24. Mr. Ramesh Kumar, learned counsel for the Respondent, on the other hand, refers to para 15 of the Arb. P. No.201 of 2011 where the Petitioners have crystallized their claims and which does not include a claim for dissolution of the firm. It is submitted that the Petitioners have not sought to amend their petition and in the circumstances, cannot positively seek dissolution of the firm before the learned Arbitrator. Moreover, Clause 5 of the Partnership Deed dated 2nd May 1984 clearly states that the partnership shall be at will “determinable by any party by giving to the other parties of this deed three months notice in writing.” He submits that inasmuch as no notice of dissolution has been given by Petitioner No.1, he cannot possibly seek dissolution of the firm. Consequently, he also cannot seek reference of such dispute to arbitration. As regard to the prayers in O.M.P. No.313 of 2011 and O.M.P. No.905 of 2005, it is submitted by Mr. Ramesh Kumar that the Petitioner No.1 has been merely lending his name to the partnership firm and had never taken part in its business. According to the Respondent, the earnings of the partnership firm is not substantial and it is open to the Petitioners to inspect the accounts of the firm. According to the Respondent, there is hardly any goodwill attached to the firm and it will be unfair to require the Respondent to pay from the profits of the firm to the Petitioners. The Respondent stated that Petitioner No. 1 has instigated Petitioner No. 2 to

push the parties to litigation.

25. The first issue that required to be considered is whether there is any arbitration agreement between the parties under which reference of the disputes to the arbitration can be made.

26. The arbitration clause (Clause 20) in the Partnership Deed dated 2nd May 1984, as amended on 11th July 1986, and a further amended on 31st March 1992, has continued throughout. The signing of the said deeds have not been denied by any of the parties. It certainly contains an arbitration clause and therefore, satisfies the description of an arbitration agreement under Section 7 of the Act. The further question is whether Petitioner No. 2 who is the mother of the Petitioner No.1 and the Respondent, and the wife of late Shri Bansi Lal Khullar, can also be a party to the arbitration. The insertion of Clause 12 in the Partnership Deed by the amendment of 11th July 1986 was specifically done to ensure upon the death of a partner that the partnership shall be carried on by the remaining partners, and the wife of the deceased partner, if she so desires, could be inducted as a partner. This clause continued unchanged. The correspondence between the parties indicates that Petitioner No.2 expressed her desire to be inducted as a partner. The

Respondent does not appear to have acted on that request as yet. On the one hand, the Respondent has not taken further steps to ensure that the partnership deed is redrawn to induct Petitioner No.2 as a partner, and, on the other hand, according to the Petitioners, she has also not been paid her share of the profits of the partnership business. It is obvious that the rights and interests of Petitioner No. 2, would very much be involved, in the resolution of the disputes that have arisen between the parties. Any attempt at dissolution of the said disputes, without her participation, would not only be not justified but also incomplete in the facts and circumstances of the case.

27. It is also evident that over the past one year, the attempts at having the parties settle the disputes through mediation or otherwise have not proved successful. There seems to be a complete breakdown of trust. Therefore, although, at the stage of filing of O.M.P. No.313 of 2011, the dissolution of the partnership was not being contemplated by the Petitioner, the subsequent events have led to the Petitioners to realize that there is no option but to seek dissolution of the partnership. The Respondent has, by running another proprietorship concern, from the said business premises, made it appear that he too is not interested in the partnership continuing as such. It is, therefore,

understandable that the disputes between the parties are essentially about the dissolution of the partnership firm. Although Arb. P. No. 201 of 2011 has not been formally amended to seek reference of such dispute. It is plain that the main claim in the arbitration proceedings by the Petitioners will be to seek dissolution of the firm. Learned counsel for the Petitioners also made this explicit in his submissions.

28. In that view of the matter, the bar under Section 69 of the PA will not operate. The legal position was explained in *Premlata v. M/s Ishar Dass Chaman Lal* as under:

“8. It is seen that with the demise of the partners, *ipso facto*, the partnership stood dissolved. What the legal representatives of the deceased partner, is seeking to enforce is for accounts of a dissolved firm or any right or power to realise the property of the dissolved firm. The right 'to sue' for the dissolution of the firm must, of necessity, be interpreted to mean the right to enforce the arbitration clause for resolution of the disputes relating to dissolved firm or for rendition of accounts or any right or power to realise the property of the dissolved firm.

9. Indisputably the first appellant is the widow of Chaman Lal - one of the partners. Therefore, she steps into the shoes of the deceased partner who had a right to the dissolved partnership firm. Sub-section (3)(a) carves out three exceptions to Subsections (1) and (2) of Section 69 and also to the main part of Sub-section (3) of Section 69, namely, (1) the enforcement of any right to sue for the dissolution of firm; (2) for accounts of the dissolved firm; and (3) any right or power to realise the property of the dissolved firm. Having excluded from the embargo created by the main part of Sub-section (3) or Sub-

sections (1) and (2) of Section 69, the right to sue would not again be construed to engulf the exceptions carved out by Sub-section (3) or Sub-section (4) of Section 69 of the Act. Any construction otherwise would render the exceptions, legislature advisedly has carved out in Sub-sections (3) and (4) of Section 69, otiose. The object appears to be that the partnership having been dissolved or has come to a terminus, the rights of the parties are to be worked out in terms of the contract of the partnership entered by and between the partners and the rights engrafted therein. The exceptions carved out by Sub-section (3) are to enforce those rights including the rights to dissolution of the partnership despite the fact that the partnership firm was an unregistered one. Having kept that object in view, we are of the considered opinion that the alternative resolution forum agreed by the parties, namely, reference to a private arbitration is a mode of enforcing the rights given under Clause (a) of Sub-section (3) of Section 69 of the Act and gets excluded from the main part of Sub-section (3) and Sub-sections (1) and (2) of Section 69. The enforcement of the right to sue for dissolution includes a right for reference to an arbitration in terms of the agreement of the partnership by and between the parties. Therefore, there is no embargo for filing a suit under Section 20 of the Act.”

29. The above legal position was subsequently explained further in *Prabhu*

Shankar Jaiswal v. Sheo Narain Jaiswal as under:

“5. Under Section 69(1), a suit, inter alia, to enforce a right arising from a contract cannot be filed by a person suing as a partner in a firm against the other partners of the firm unless the firm is registered. Under Sub-section (3) any other proceeding to enforce a right arising from a contract by a person suing as a partner against the other partners of an unregistered firm is also barred. Since the right to resort to arbitration flows from the contract between the parties contained in the partnership deed, a suit or any other proceeding by a partner to enforce this term in the contract against the other partners would, therefore, normally be barred under the first part of Sub-section (3) of

Section 69. [Vide *Jagdish Chandra Gupta v. Kajaria Traders (India) Ltd.*] Sub-section (3), in its later part, however, carves out certain exceptions to the bar contained in Sub-sections (1), (2) and the first part of Sub-section (3).

6. Under Sub-section (3)(a) this bar will not affect the enforcement of any right to sue for the dissolutions of a firm or for accounts of a dissolved firm or any right or power to realise the property of a dissolved firm. Therefore, although the partnership firm may be unregistered, one partner can sue other partners for dissolution of the firm and for accounts. The words "to sue" used in Sub-section (3)(a) cannot be construed narrowly to refer only to suits for dissolution of partnership and accounts. The exception contained in Sub-section (3)(a) applies not merely to Sub-sections (1) and (2) but also to the first part of Sub-section (3) which deals with proceedings other than suits. Therefore, in order that Sub-section (3)(a) would apply to all these provisions, the words "to sue" in Sub-section (3)(a) must be understood as applying to any proceedings for dissolution of partnership or for accounts of a dissolved firm or to realise the property of a dissolved firm. This proceeding may be either by way of a suit or it can even be a proceeding under the Arbitration Act to secure these rights through arbitration. (Vide *Prem Lata v. Ishar Dass Chaman Lal* [1995]2 SCC 145, a judgment to which one of us was a party). Therefore, an arbitration clause in a partnership deed of an unregistered partnership can be enforced for the purpose of securing, inter alia, a dissolution and accounts of the partnership or for enforcing any right or power for obtaining the property of a dissolved firm."

30. The Supreme Court reiterated the above position in *V.H. Patel & Company v. Hirubhai Himabhai Patel* where it was emphasized that where there is no mutual trust remaining between the parties, and the idea is to settle all the disputes between them, it will be open to any of them to claim

dissolution of the partnership and seek reference of such dispute to arbitration.

31. In view of the settled legal position and in the facts and circumstances of the case, this Court directs as under:

(i) Arb. P. No.201 of 2011 is disposed of by directing that the disputes between the parties i.e. the claim of the Petitioners for dissolution of partnership of M/s. Oriental Drapers and Tailors, the rendition of accounts of the firm and the ascertaining of the respective, rights, liabilities and entitlements of the parties, i.e., Petitioners 1 and 2 and the Respondent, shall be referred to the sole Arbitrator, Mr. G.P. Thareja, retired Additional District Judge R/o B-201, Priyadarshni Apartments, Plot No.17, Patparganj, Delhi-92 (Mob.9899664642). Mr. Thareja will inform the parties of his terms.

(ii) The interim order dated 27th April 2011 passed by this Court in O.M.P. No.313 of 2011 will continue till such time any modification thereof is ordered by the learned Arbitrator in any application that may be filed by either of the parties under Section 17 of the Act.

(iii) As regards O.M.P. No.905 of 2011, it is directed that the

carrying on business by the Respondent in the name and style of M/s Oriental Collections would be, subject to any order that may be passed in that regard by the learned Arbitrator in any application that may be filed by either of the parties under Section 17 of the Act and the final Award in the arbitral proceedings;

(iv) It will be open to the parties to apply to the learned Arbitrator for appropriate interim reliefs including inspection/audit of the accounts of the partnership firm.

32. The petitions are disposed of in the above terms with no order as to costs.

33. Copy of this order be communicated to the learned Arbitrator forthwith.



S. MURALIDHAR, J.

MARCH 30, 2012

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