

**Yusuf Vs. Hamidulla**

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**Court :** Rajasthan

**Decided On :** Jan-05-1982

**Reported in :** 1982WLN172

**Judge :** S.K. Mal Lodha, J.

**Appeal No. :** S.B. Civil Misc. Appeal No. 86 of 1980

**Appellant :** Yusuf

**Respondent :** Hamidulla

**Advocate for Def. :** Mr. I.C. Maloo

**Advocate for Pet/Ap. :** Mr. P.C. Mathur

**Disposition :** Appeal allowed

**Judgement :**

**S.K. Mal Lodha, J.**

1. By this appeal under Order XLIII, Rule I(s) C.P.C., the plaintiff questions the correctness of the order dated March 31, 1980 of the Additional District Judge ho. 2, Jodhpur by which his application under Order XL, Rule 1 C.P.C. was dismissed.
2. The plaintiff instituted a suit for rendition of accounts etc. against Hamidulla s/o Mohammed (defendant No. 1), Abdul Rahim s/o Mohammed (defendant No. 2),

Inayatulla s/o Mohammed (defendant No. 3), Abdul Hakim S/o Mahammed (defendant No. 4), Abdul Wahid Abdul Aziz (defendant No. 5) and Mohammed Rafiq s/o Yusuf (defendant No. 6) in the court of District Judge, Jodhpur on March 27, 1978. The plaintiff and defendants No, 1 to 4 are brothers and they are sons of Mohammed. It was alleged that Mohammed used to carry on business in Kaddi (gypsum) in the name of Mohammed & Sons at Jodhpur, Bhadwasia and other places. The said business was converted into a partnership business by Mahmmmed on March 1, 1949. The partnership consisted of Mohammed and his six sons. Out of six sons, Abdul Aziz has died. A deed of partnership was executed by the partners on August 10, 1951. It was duly registered. The conditions of the partnership have been set out in para 5 of the plaint. Mohammed died on February 2, 1964 and his widow also, died on August 27, 1975. It has been stated by the plaintiff that Mohammed during his life-time executed a Tehrir on July 7, 1961 bequeathing 1/7 share in the part nership business to his grandson Rafique s/o Abdul Aziz Abdul Aziz is said to have died on January 13, 1973 and in his place, the name of defendant No. 5 Abdul Wahid was entered as partner in the register maintained for the purpose by the Registrar of Firms. It was disclosed by the plaintiff in para 11 of the plaint that with consent of all the partners, each partner was paid salary as specified therein. According to the plaintiff, the work of the Head Office of the firm was looked after and managed by defendant No. 1, Hamidulla for about 25 years and that the other brothers who used to look after the work and accounts at other places used to send the accounts and money to defendant No. 1. Defendant No. 1 discontinued payment of Rs. 400/- per month to the plaintiff from November, 1976. He also discontinued payment of electricity charges etc. from October, 1975. The account books of the partnership and other documents are alleged to be in the possession of defendant No. 1 Hamidulla. A registered notice was sent by the plaintiff on October 11, 1977 stating that the account books pertaining to the partnership business may be shown to him. This notice was delivered on October 15, 1977 but neither the account books were shown nor the accounts were rendered. Hence, the suit was filed as aforesaid. The principal reliefs sought by the plaintiff in the plaint are contained in para 22 (ka) (kha) and (ga) of the plaint, which are as under:

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x QeZ dk dkjksckj vU; Hkkxhmkj dks lqiqnZ fd;k tkos tks lc Hkxhmkjku ds lkFk feydj dk;ns ls dke djs o fglkc j[[kks A ^^

Defendants No. 1, 3, 4 and 5 filed written statements contesting the suit on various grounds on January 27, 1979. It was pleaded that the firm was dissolved on December 31, 1975. Thereafter, defendants No. 1,3, 4 & 5 formed another partnership on January 1, 1976 and since then, they have been carrying on the business. An objection was also raised to the effect that the suit in its present form is not maintainable. On April 16, 1979, an application was moved under Order XL, Rule 1 CPC. for the appointment of a receiver stating there in that it will be just and convenient to appoint a receiver in respect of the business of Mohammed & Sons. This application was supported by the affidavit of the plaintiff Yusuf. A reply was filed on behalf of defendants No. 1, 3, 4 and 5 stating that the partnership between the plaintiff and the defendants had come to an end on December 31, 1975 and that as the partnership had come to an end, the question of appointing a receiver does not arise. In the reply, it was also stated that there is no working contract of the partnership except that according to the agreement, Gypsum is supplied to the A.C.C. Co. and that whenever the accounts will be settled and if any amount is found due to the plaintiff, it will be paid by the defendants to the plaintiff. In support of the reply, the affidavit of the defendant Hamidulla was filed. A rejoinder to the reply was filed on behalf of the plaintiff on August 7, 1979. The learned Additional District Judge No. 2, Jodhpur by his order dated March 31, 1980 dismissed the application for the appointment of the receiver. The learned Additional District Judge was of the opinion that having regard to the reliefs claimed by the plaintiff and in the absence of any allegation regarding destruction of the property of the firm, it will not be just and convenient to appoint a receiver. The plaintiff has filed this appeal as aforesaid.

3. Respondent No. 2 Abdul Rahim died during the pendency of the appeal and his legal representatives respondents No. 2(a) to 2(1) were brought on record. It was

ordered by this Court on March 10, 1981 that the record may be sent for and the appeal be listed for hearing as soon as the record is received. When the appeal came up for orders on the stay application, the arguments were also heard on appeal.

4. I have heard Mr. P.C. Mathur learned Counsel for the appellant, Mr. I.C. Maloo for respondents No. 1, 3, 4 and 5 and respondent No. 2(f) Mohammed Aslam, who is also an advocate.

5. Mr. P.C. Mathur appearing for the appellant has assailed the order of the learned Additional District Judge on the following grounds:

(1) that the partnership firm has not been dissolved as accounts between the parties were neither rendered nor gone into nor any amount payable by one partner to the other was arrived at and during the course of trial of the suit, the plaintiff can well show that the partnership has not been dissolved under the Indian Partnership Act (No. IX of 1932) (for short 'the Act' hereinafter). There are various modes of dissolution of the partnership firm and the partnership has not been dissolved by any of the modes.

(2) that the plaintiff has a strong prima facie case in his favour, for exclusion of one partner from the partnership entitles the excluded partner to the appointment of the receiver. It was also submitted that notice was issued to the defendants stating that he been has excluded and that the accounts be shown to him but that was not replied.

(3) that in defendants are misconducting the partnership business, on account of their misconduct, the case for the appointment of receiver is made out, and

(4) that in order to safeguard the interest of the plaintiff some arrangement should be made.

6. Mr. I.C. Maloo, learned Counsel for the respondents has supported the order under appeal.

7. Before I proceed to examine the arguments of Mr. Mathur, it will be proper to consider the principles laid down in various decisions for the appointment of receiver.

8. Their Lordships of the Privy Council had occasion to consider the question of appointment of receiver on an interim application in *Benoy Kirshna v. Satish Chandra* A.I.R. 1928 P.C. 49. It was observed there in as follows:

On an interim application for a receivership such as this, the Court has to consider whether special interference with the possession of a defendant is required, there being a well-founded fear that the property in question will be dissipated, or that other irreparable mischief may be done unless the Court gives its protection. Such an order is discretionary, and the discretion is, in the first instance, that of the Court in which the suit itself is pending. When, as in this case, the order of that Court is altered on appeal it becomes necessary to consider whether the Court below had before it the evidence required to support such an order and considered it in accordance with the principles on which judicial discretion must be exercised. If the Court of review rightly concludes that proper discretion was not used below, it is free to exercise its own discretion in the matter.

9. After considering the English and Indian decisions, Ramaswami, J, in *Krishnaswamy v. Thangavelu* : AIR1955 Mad430 has stated five principles, which are as under:

(1) The appointment of a receiver pending a suit is a matter resting in the discretion of the Court.

(2) The Court should not appoint a receiver except upon proof by the plaintiff that prima facie he has a very excellent chance of succeeding in the suit.

(3) Not only must the plaintiff show a case of adverse and conflicting claims to property, but he must show some emergency or danger or loss demanding immediate action and of his own right he must be reasonably clear and free from doubt. The element of danger is an important consideration.

(4) An order appointing a receiver will not be made where it has the effect of depriving a defendant of a 'de facto' possession since that might cause irreparable wrong. It would be different where the property is shown to be 'in medio', that is to say, in the enjoyment of no one, And

(5) The Court, on the application made for the appointment of a receiver, looks to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame.

These principles were adopted by a learned Single Judge of this Court in *Jugal Kishore v. Mangi Lal* 1976 W.L.N. (UC) 64. I had an occasion to consider the matter relating to appointment of receiver in *Parasmal v. Mohanlal* (S.B. Civil Misc. Appeal No. 15/81 decided on July 1, 1981) and *Vijay Kumar v. Hart Kishan and Ors.* (S.B. Civil Misc. 1st Appeal No. 32/81 decided on October 12, 1981). As a matter of fact, there is no dispute between the parties regarding the principles which guide the discretion of the court for the appointment of receiver. Keeping these principles in view, let me examine whether any interference with the discretion of the Additional District Judge refusing to appoint a receiver and dismissing the application under Order XL, Rule 1 C.P.C., is made out or not.

10. One of the most important question that will arise for determination in the suit would be whether the partnership is still continuing or that it had come to an end on December 31, 1975 and a new partnership had come into existence as alleged by the contesting defendants on January 1, 1976. The learned Additional District Judge was of the opinion that the questions that the plaintiff has been excluded from the management of the partnership business or that the firm has been dissolved, are disputed questions. The learned Additional District Judge has observed:

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The plaintiff, besides asking for the decree for Rs. 9000/- against defendant No. 1 Hamidulla has also prayed that the entire accounts of the dealings and transactions of the partnership business may be taken and whatever amount is found due to the plaintiff may be ordered to be paid to him. He has also claimed that the entire business of the firm may be entrusted to some other person who may manage and keep accounts. Paras No. 7 and 9 of the plaint have been admitted by the contesting defendants No. 1, 3, 4 and 5. It is, thus, clear that the partnership that came into existence by means of the partnership deed, dated August 10, 1951 continued even after the death of Mohammed, Smt Jainab and Abdul Aziz. After the death of Abdul Aziz the name of the defendant Abdul Wahid was entered as a partner in the Register of Firms. The case of the plaintiff is that it is a continuing partnership. The case of the contesting defendants No. 1,3,4 & 5 according to para 12 of the written statement, is that the partnership stood dissolved on December 31, 1975, that there after the plaintiff' has ceased to be a partner, that the accounts of the dealings and transactions of the partnership business were with the plaintiff who did not co-operate with the other partners and therefore, defendants No. 1, 3, 4 and 5 constituted a new partnership from January 1, 1976, which is within the knowledge of the plaintiff. In nut-shell the principal contention raised by the contesting defendants is that the partnership which came into existence by means of the partnership deed dated August 10, 1951 and which continued after the death of Mohammed, Smt. Jainab and Abdul Aziz came to an end on December 31, 1975. The partnership deed dated August 10, 1951 has been filed by the plaintiff, which has been denied by the learned Counsel for the defendants No. 1, 3, 4 and 5. According to clause 24 of the partnership deed, the partners had agreed that partnership relations would be governed by the provisions of the Act. Provisions as to the consequences ensuing from the dissolution of the firm have been provided in clause 27 of the partnership deed.

11. Here it will be relevant to note the provisions relating to dissolution of the firm in the Act. Section 39 deals with dissolution of a firm. Section 40 lays down when a firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners. Section 41 provides for compulsory dissolution. Section 42 lays down that subject to the contract between the partners, a firm is

dissolved on the happening of contingencies provided in Clauses (a) to (d) of Section 42. Section 43 deals with dissolution of firm at will by notice. It was not shown to me from the written statement as to how the partnership which came into existence by means of the partnership deed dated August 10, 1951 came to be dissolved. The position comes to this that the plaintiff who was a partner has been denied the rights of the partner, the partnership according to the contesting defendants was dissolved and a new partnership had come into existence. It is a case of exclusion of a partner. The learned Additional District Judge has, in the impugned order stated that the exclusion of the plaintiff from the partnership business and the dissolution of the firm are disputed questions. Having considered the averments made in the plaint and the written statements of the defendants No. 1, 3, 4 and 5 and the material available on record, I am of opinion that all these suggest, prima facie, that the partnership which had admittedly come into existence by means of the partnership deed dated August 10, 1951 cannot be said to have been dissolved in accordance with the provisions relating to the dissolution of firm contained in the Act. If that is so, it would not be unsafe to hold, prima facie, that the plaintiff is entitled to manage the affairs of the firm and to have access to the accounts. Defendants No. 1, 3, 4, and 5 on their own showing, which is apparent from the written statements had denied this right to the plaintiff and, at any rate, they had excluded the plaintiff from the partnership business from January 1, 1976, for according to them the partnership firm which came into existence by virtue of agreement dated August 10, 1951 stood dissolved. The question is whether the partnership firm stood dissolved as contended by defendants No. 1, 3, 4 and 5 or it is still continuing as has been alleged by the plaintiff and in respect of which the plaintiff has prayed for the rendition of the accounts and the amount of the share which may be found due. It is not the case of the defendants that any action after the dissolution of the firm under clause 27 of the partnership deed was taken at the time of the dissolution of the firm on December 31, 1975 and prior to the new partnership, which is alleged to have commenced from January 1, 1976. There are various modes of dissolution of partnership and the case of defendants No. 1, 3, 4 and 5 regarding dissolution has not been shown to be covered by any one of them. It needs to be mentioned here that the plaintiff served a notice on the defendants on October 11, 1977, which

was served on October 15, 1977 for showing the account books of the partnership and for rendition of accounts but no reply was given thereof stating that the said partnership stood dissolved on December 31, 1975 or that a new partnership had come into existence on January 1, 1976. All this has been stated to show that prima facie, it cannot be said that new partnership firm had come into existence between the defendants No. 1, 3, 4 and 5 from January 1, 1976 or that the old firm stood dissolved from December 31, 1975. According to what has been stated above, two facts are prima facie apparent : (1) that the plaintiff has been excluded from the management of the partnership business and (2) that the firm has not been dissolved on December 31, 1975 as alleged by the defendants No. 1, 3, 4 & 5 in accordance with any of the modes of dissolution of partnership. It is correct that the plaintiff has not come forward with a case of wastage or dissipation of the firm properties. It is also correct that the plaintiff has not sought the relief of the dissolution. In these circumstances. the question is whether it will be just and convenient to appoint a receiver under Order XL, Rule 1 C.P.C.

12. A learned Judge in *Ramchandrayya v. Iswarayya* AIR 1952 Hyd 139 was of the opinion that in suits relating to partnership concerns, even though no circumstances tending to jeopardise the partnership assets be shown, the Court would be justified in appointing a receiver if the defendant seeks to exclude a co-partner from management. The revision petition in *Ramchandrayya's* case AIR 1952 Hyd 139 did not arise out of a suit for dissolution of the partnership but it arose out of suit for a declaration that the plaintiff was entitled to run the shop as a partner jointly with the defendant and for an injunction restraining the defendant from interfering with the exercise of his right as a partner in the shop. It was, inter alia, prayed by the suit that accounts may be taken of the dealings and transactions of the shop during his absence and for payment of the amount that may be found due to him. Reliance was also placed by Mr. P.C. Mathur on *Issardas S Lulla v. Smt. Hari* : AIR1962 Mad458 , which is based on *Benoy Krishna's* (i) case. The question that arose in that case was whether a receiver can be appointed to be incharge of the business of Messr. Oceanic Agencies. In this connection, it was observed as under:

The object and purpose of the appointment of a receiver is to protect and preserve the subject matter of the lis for the benefit of the parties who may ultimately be found entitled to it in part or in whole.

After referring to Ramchandrayya's case AIR 1952 Hyd 139 and Krishnaswamy's case : AIR1955 Mad430 , it was observed in Nihalchand v. Ram Niwas as under:

Where a partner excludes another from the management of the partnership affairs, there a case is made out for appointment of a receiver and this doctrine has been acted on even where the defendant contends that the plaintiff is not a partner or that he has no interest in the partnership assets.

In that case the plaintiff had instituted a suit claiming several reliefs against the defendants including specific performance of an agreement compelling the defendants to execute a deed of partnership, dissolution of partnership and alternatively for a decree for a sum of Rs. 1,20,000/-.

13. In Prem Prakash v. Gobind Ram AIR 1976 J & K 37, there was partnership between the plaintiff and defendants (plaintiff's father and brothers) for manufacture and sale of woollen and silken cloth, it never came to an end and despite the existence of the partnership, the plaintiff was denied his right to manage the affairs of the firm and to have access to the accounts thereof, thus excluding him from the business of the firm. The defendants had taken over the stocks in trade and the business of the firm and dealt with it as their own after entering into a new partnership. The assets of the firm both capital and liquids were exposed to manifest peril and required to be preserved. In a suit for declaration, injunction and also for rendition of accounts the Court by an interim order directed that the existing account books of the firm were to be signed by the counsel for both the parties. So far as the question of appointment of an interim receiver was concerned, it was held that a case for appointment of receiver was made out. It was also held that in that case that as it was a case of running business, a stranger should not be appointed as receiver to take over the business and run it, particularly when there were no compelling circumstances. In that case the defendants had control of the business and its assets and so they were appointed as joint receivers and the plaintiffs nominee was associated as a co-

accountant with their accountant and the account of the firm was required to be maintained under the joint signatures of the two. Ramchandrayya's case AIR 1952 Hyd 139 and Nihal Chand's case were followed.

14. A learned Single Judge of this Court in Abani Kumar v. Nand Kishore 1981 RLW 43 noticed Ramchandrayya's case AIR 1952 Hyd 139, Krishnaswamy's case : AIR1955 Mad430 . Nihalchand's case and Prem Prakash's case AIR 1976 J & K 37 and ordered that the appointment of one of the partners as receiver of the partnership business to maintain it for a period of 9 months or till an order is passed in arbitration proceedings whichever earlier. The five principles laid down in Krishna Swamy' case : AIR1955 Mad430 were approved.

15. Now I may notice the authorities cited by Mr. I.C. Maloo, learned Counsel for the respondents

16. It was held, inter alia, in Ahmedhasan Munshi v. Mishrilal Bhanvar Lal AIR 1955 MB 48 that a party in possession should not ordinarily be deprived of the possession of a property particularly when it consisted of a business like a running hotel except where there are allegations of purposeful waste, malversation or fraudulent disposal. In that case, the plaintiff brought a suit for recovery of money due on the basis of a pledge of a hotel executed by defendant 1 & also impleaded in the suit defendant 2 who alleged to be a bonafide transferee of the hotel from defendant 1 without notice of the pledge. The Court appointed an interim receiver to manage the hotel which was in the possession and management of defendant 2 at the instance of the plaintiff. It was held by the High Court that the order appointing a receiver is not appropriate and should be set aside.

17. A Judicial Commissioner of Goa, Daman and Diu in Jagannath v. Uday AIR 1976 Goa 70 has stated that the appointment of a receiver should not cause the loss of possession of the suit land which a party to the suit has, prior to the suit, unless it is proved that the party in possession causes or is likely to cause damage to the subject matter of the suit. It was further held that the receiver, if appointed in a particular case, must be appointed on the principle that the property must be preserved pending the litigation which is to decide the right of the litigants.

18. A Division Bench of the Calcutta High Court in *Ganesh Chandra v. Gopal Chandra* : AIR1976 Cal459 while reiterating the principles laid down in *Krishna Swamy's case* : AIR1955 Mad430 , in the facts and circumstances of that case found that the appointment of receiver over the business of new firm was not warranted. In that case the plaintiff instituted a suit for dissolution of partnership and accounts of the partnership business and for appointment of a receiver. The partnership business stood dissolved and the defendants carried on the partnership business after constituting a new partnership amongst themselves and the plaintiff was not a partner of the new partnership business run on the basis of the partnership agreement made and, therefore, there was no question of dissolution or winding up of that partnership business. The learned Judges were also of the view that the appointment of a receiver over a running partnership business will tend to hamper the smooth running of the business and thus ultimately may destroy the business itself.

19. K.C. Agrawal, J. speaking for the Court in *S.B. Industries v. United Bank of India* AIR 1978 Allah 789 observed as follows:

Order 40, Rule 1 of the CPC lays down that whether it appears to the court to be just and convenient the court may by order appoint a receiver of any property, whether before or after a decree. In order to justify the appointment of receiver, the plaintiff must establish a reasonable possibility that the plaintiff will ultimately succeed in obtaining the relief claimed in the suit. The requirement thus is that he must establish a good prima facie case. It may further be remembered that the appointment of a receiver is, as a general rule, discretionary, and not a matter of right. A court will make an appointment of a receiver with great caution and circumspection. In a case where the remedy of the appointment of a receiver seems necessary to prevent fraud, to protect and preserve the property against an imminent danger of loss or diminution in value, destruction, squandering, wastage or removal from jurisdiction, the court may appoint a receiver. It may further be stated in this connection that a court in exercise of its discretion to appoint or refuse a receiver must take into account all the circumstances and facts of the case, the presence of conditions and grounds justifying the relief, ends of justice, the rights of all the parties interested in the subject matter and the adequacy of

other remedies.

The authorities relied on by Mr. I.C. Maloo cannot be of any assistance in the facts and circumstances of the case on hand Keeping in view the five principles laid down in Krishnaswamy's case : AIR1955 Mad430 , which were adopted by this Court in Jugal Kishore' case 1976 W.L.N. (UC) 64, Parasmal's case (supra), Vijay Kumar's case (supra) and Abani Kumar's case 1981 RLW 43 and respectfully following Ramchandrayya's case AIR 1952 Hyd 139, Nihalchada's case and Prem Prakash's case AIR 1976 J & K 37 and having regard to the nature of the suit and the facts and circumstances, I am of opinion that it is just and convenient to appoint an interim receiver. This has been so held after giving preliminary consideration to the facts of the case on hand. The learned Additional District Judge, in my opinion, misdirected himself when he declined the prayer of the plaintiff on the grounds that whether the plaintiff has been excluded and dissolution of the partnership are them selves disputable questions. From the pleadings, the documents and the preliminary facts, the plaintiff has a good prima facie case for the reasons mentioned here in above. Power to appoint a receiver is discretionary and the appellate court should be slow in interfering with that discretion until and unless it comes to a conclusion that discretion has been arbitrarily or capriciously exercised or it has been exercised on extraneous grounds. As I have shown here in above that the learned Additional District Judge has misdirected himself and a wrong approach was made by him. The order under appeal is unsustainable.

20. I, therefore, reverse the order dated March 31, 1980 of the learned Additional District Judge when he held that no case for the appointment of receiver by the plaintiff is made out & dismissed his application for the appointment of receiver under Order XL, Rule 1 C.P.C.

21. The next question is whether a stranger should be appointed a receiver in this case. The partnership is a running business. It is being looked after by the defendants. Learned Counsel appearing for the contesting defendants-respondents submitted before me that the partnership business is actively looked after by defendant No. 5 Abdul Wahid. In these circumstances, I consider it proper

that defendant-respondent No. 5 Abdul Wahid should be appointed as a receiver to manage the partnership business. I order accordingly. Defendant No. 5 Abdul Wahid who has been appointed as a receiver is directed to maintain proper accounts of the partnership business inclusive of its assets and to submit three monthly accounts to the court where the suit is pending. One copy of the three monthly accounts to be submitted by defendant No. 5 respondent will be delivered to the plaintiff before filing it in court. The trial court on objections being filed by the plaintiff, will from time to time decide them and, if necessary, give appropriate directions to defendant No. 5 respondent for the management of the proper accounts particularly with respect to the income and expenditure of the partnership business. In order to safeguard the interest of the plaintiff with respect to amount that may be found payable to the plaintiff at the time of the decision of the suit, a further direction is given to the effect that the contesting defendants will furnish a solvent security to the satisfaction of the Additional District Judge No. 2, Jodhpur for the payment of the amount regarding which their liability may be adjudged in the suit. The security will be accepted after notice to the plaintiff.

22. The result is that I allow this appeal, set aside the order dated March 31, 1980 of the Additional District Judge No. 2, Jodhpur, by which he refused to appoint an interim receiver on the application of the plaintiff and dismissed his application under Order XL, Rule 1 and order that defendant No. 5 Abdul Wahid be appointed as an interim receiver to manage the partnership business of the parties until the decision of the suit on the terms and conditions mentioned above. It is further directed that the contesting defendants will furnish a solvent security to the satisfaction of the Additional District Judge No. 2, Jodhpur for the payment of the amount that may be found due to him at the time of the decision of the suit. Defendant No. 5 will not be entitled to any remuneration as receiver as he is actively managing the partnership business as stated by his learned Counsel. In the circumstances of the case, there will be no order as to costs of this appeal.