

Dr.A.D.Kumar and ors Vs. Gian Chand Kumar and ors

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Court : Delhi

Decided On : Jan-09-2012

Appellant : Dr.A.D.Kumar and ors

Respondent : Gian Chand Kumar and ors

Judgement :

\$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI % Judgment Reserved On: January 03, 2012 Judgment Delivered On: January 09, 2012 + RFA(OS) 19/1997 DR.A.D.KUMAR and ORS. Appellants Through: Mr.M.Dutta, Advocate. versus GIAN CHAND KUMAR and ORS.Respondents Through: Mr.I.C.Kumar, Advocate for self (R-2), R-1 and R-3 to R-7. Mr.Vinay Bhasin, Senior Advocate with Mr.H.L.Raina, Advocate for R-8, R-9, R-10 and R-12. Mr.Arvind Sharma, Advocate for R-11. None for R-13. CORAM: HON'BLE MR. JUSTICE PRADEEP NANDRAJOG HON'BLE MS. JUSTICE PRATIBHA RANI PRADEEP NANDRAJOG, J..

1. Late Ganesh Dass was blessed with six sons named Harivansh Lal Kumar, Fateh Chand Kumar, B.D.Kumar, M.L.Kumar, Kumar Lall and P.D.Kumar..

2. On 10.11.1961 three sons namely B.D.Kumar, Harivansh Lal Kumar and Fateh Chand Kumar, and one son of Harivansh Lal Kumar named Ashok Kumar and Shobha Kumari the wife of Ashok Kumar constituted a partnership to carry on business under the name and style M/s.Ashok Anil and Co. RFA(OS) No.19/1997
Page 1 of 16 (hereinafter referred to as the partnership firm). The object of the firm

was to carry on business of roller flour mills. (Be it noted here that three minor sons of B.D.Kumar were admitted to the benefits of the partnership firm.) The respective share of the partners in the profit and loss of the partnership firm was as follows:- (i) B.D. Kumar - 37%; (ii) Harivansh Lal Kumar - 22%; (iii) Fateh Chand Kumar - 4%; (iv) Ashok Kumar - 18%; and (v) Shobha Kumari - 19%..

3. In the year 1972, certain disputes arose between the partners of the firm. On 06.12.1972, B.D.Kumar and his three sons instituted a suit bearing No.515A/1972 under Section 20 of the Arbitration Act, 1940 impleading Harivansh Lal Kumar - defendant No.1, Ashok Kumar - defendant No.2, Shobha Kumari - defendant No.3 and Fateh Chand Kumar - defendant No.4, before a learned Single Judge of this Court, inter-alia, praying that the disputes which had arisen between the parties pertaining to the partnership firm be referred to an arbitrator for the reason the partnership deed contained an arbitration clause..

4. During the pendency of the said suit, B.D.Kumar and his sons settled the dispute with Harivansh Lal Kumar, Ashok Kumar and Shobha Kumari and received the consideration recorded in the settlement agreement and as per which B.D.Kumar and his sons expressly recorded that henceforth they would have no concern in the partnership firm. In terms of the settlement agreement and on receipt of the money payable to them under the settlement they filed an application in the suit which was registered as I.A.No.883/1973. The application was filed under Order XXIII Rule 1 and 2 CPC, inter-alia, stating therein that they had RFA(OS) No.19/1997 *Page 2 of 16* compromised the matter with the defendants Nos.1 to 3 in the suit i.e. Harivansh Lal Kumar, Ashok Kumar and Shobha Kumari; that the compromise arrived between the parties be recorded and that the suit filed by them be dismissed as withdrawn..

5. Being relevant for purpose of adjudication of the instant appeal, the under-noted portion of the said application needs to be reproduced:- "1. That the plaintiffs in the above suit have arrived a compromise through the intervention of family friends and well-wishers and have settled all their disputes and differences in respect of the partnership firm M/s Ashok, Anil and Co. (hereafter referred to as the firm), which are the subject matter of the above suit..

2. That the terms and conditions of the compromise are: That defendants Nos.1, 2 and 3 have paid by crossed payees A/c Bank Drafts and Pay orders drawn in favor of the plaintiffs the following amounts towards their credit balances standing in their names as closing on 31st December, 1971, in the books of accounts of the firm. The amount of Rs.1,61,932/- (Rupees one lakhs sixty one thousand and nine hundred thirty two) as debit balance of Dr.B.D. Kumar H.U.F. has been adjusted and stands realized.

3. In consideration of the said amounts mentioned in clause I to IV of paragraph 2, the Plaintiffs declare that they have retired from the firm with effect from date of signing and the shares of 37% held by the plaintiffs in the flooring manner that is (Dr. B.D. Kumar as Karta of said H.U.F. family - 10% Sri Anil Kumar, son of Dr.B.D. Kumar - 9% Rajiv Kumar and Sanjiv Kumar both minor sons of Dr. B.D. Kumar 9% each making together 18% shall stand transferred to and vested in favor of RFA(OS) No.19/1997 *Page 3 of 16* Defendants Nos.1, 2 and 3 and the Defendants Nos.1, 2 and 3 shall be entitled to allocate the same amongst themselves in such manner and shares as may be determined by them amongst themselves..

4. The Plaintiffs shall not be entitled to any profits or other benefits of the said partnership of Messers. Ashok Anil and Co., and shall not be responsible for any loss or liabilities in the said firm for the period after 1st January, 1972. The Defendants Nos.1,2 and 3 shall be responsible for all losses, if any and shall also be entitled to receive profits, if any, during the said period in between 1.1.1972 to the date of signing the compromise deed. xxx xxx.

11. xxxxxx In the aforesaid premises, the plaintiffs respectfully pray that this Honble Court will be pleased to record the compromise arrived at between the plaintiffs on the one hand and defendants Nos.1, 2 and 3 on the other and dismiss the suit as withdrawn without any order as to costs and their compromise be read as part of their order. The receipt about the payment made by drafts to plaintiffs by defendants Nos.1 to 3 is attached herewith." (Emphasis Supplied).

6. Fateh Chand Kumar, impleaded as defendant No.4 in the suit, opposed the suit to be withdrawn pleading that since dispute pertaining to the partnership firm was

not resolved qua him, the petition filed by B.D.Kumar and his three sons under Section 20 of the Arbitration Act 1940 cannot be withdrawn, and in the alternative he prayed to be transposed as a plaintiff..

7. Vide order dated 24.04.1973, the learned Single Judge disposed of the said suit as also I.A.No.883/1973. Opposition by Sh.Fateh Chand Kumar was negated and IA RFA(OS) No.19/1997 *Page 4 of 16* No.883/1973 was allowed and the suit was permitted to be withdrawn. The relevant portion of the order dated 24.04.1973 reads as under:- "On April, 1973, the plaintiffs moved two applications in this Court. One application was I.A.

883. of 1973 stating that the plaintiffs and defendants 1 to 3 have arrived at a compromise and this compromise be recorded and the plaintiffs suit be dismissed as withdrawn. The substance of the compromise as set out in this application is that the plaintiffs have received their share in partnership and that they have obtained an indemnity from defendants 1 to 3 in respect of any liability which may be found to have incurred by them or in respect of any amount which may be found due from them to other partners.....The counsel for the plaintiff has today made a statement in court stating that he does not press his application under Order 23 Rule 1 and 2 for having the compromise recorded. The only thing he wishes to do is that he wants permission to withdraw his main application made under S.20 of the Arbitration Act. Defendant No.4 who is admittedly a partner owning 4 per cent share in the partnership business opposes the prayer for withdrawal made by the plaintiffs. Defendant No.4 has filed his reply and it is submitted that I should not allow the plaintiffs to withdraw their application The only question now left for consideration is: Should I permit the plaintiffs to withdraw their Application under S.20 of the Arbitration Act? Mr.P.P.Rao appearing for defendant No.4 has strenuously opposed this application. He has submitted that in a partnership suit all the partners stand in the positions of plaintiffs and, therefore, his client, namely defendant No.4 may be transposed to the array of the plaintiffs in case the plaintiffs withdraw from the suit. He has submitted that the plaintiffs compromise should not be recorded since RFA(OS) No.19/1997 *Page 5 of 16* this will cause prejudice to the interest of defendant No.4. I do not agree with this submission. I am not dealing with a partnership suit. The only application before

me is an application under S.20 for reference of the disputes between the partners to arbitration. The plaintiffs do not wish to prosecute this application. It may be that they have no disputes. It may be that they do not want the matter to be referred to arbitration. It may be that they have entered into a compromise and do not wish to raise any dispute before the court. I am not concerned with the motives which have actuated the plaintiffs to make this application for withdrawal. The plaintiffs are the dominus litus of their suit. If they do not want their disputes to be referred to arbitrator, this Court will not compel them to do so. The second prayer made before me with regard to transposition of defendant No.4 to the array of the plaintiffs has little substance. There is no bar in the way of defendant No.4 to make his own separate independent application for reference of disputes to arbitration. In the result, application under S.20 of the Arbitration Act is dismissed as withdrawn..... Suit is disposed of accordingly." (Emphasis Supplied).

8. On 30.05.1975, Fateh Chand Kumar filed a suit on the Original Side of this Court, which was registered as Suit No.588/1975 seeking dissolution of the partnership firm. In the suit he impleaded the partnership firm, the legal heirs of Harivansh Lal Kumar (including Ashok Kumar who was also arrayed as a defendant in his individual capacity), Ashok Kumar, Shobha Kumari, B.D.Kumar and his three sons and RFA(OS) No.19/1997 *Page 6 of 16* Dr.Vijay Sheel Kumar, who was the fourth son of late Sh.M.L.Kumar..

9. It may be highlighted by us that Dr.Vijay Sheel Kumar was unnecessarily impleaded as a defendant in the said suit as no relief could be claimed against him for the reason he had no concern with the partnership firm. His father late Sh.M.L.Kumar the son of Ganesh Dass was also not a partner of the firm and it is not the case of any party that any ancestral funds were used by the firm..

10. During the pendency of the said suit, Fateh Chand Kumar expired and his legal heirs were brought on record to prosecute the suit..

11. The legal heirs of Fateh Chand Kumar settled the dispute with Ashok Kumar, Shobha Kumari and the other legal heirs of Harivansh Lal Kumar and recorded the same in writing. The settlement envisaged `15,000/- to be paid by the branch of Harivansh Lal Kumar to the eight legal heirs of Fateh Chand Kumar; the obligation

to pay being that of Ashok Kumar and Shobha Rani and upon receipt of the payment, in lieu of Fateh Chand Kumars 4% share in the partnership firm, the claim pertaining to the share being satisfied. Annexing the written settlement an application under Order XXIII Rule 3 CPC was filed which was registered as IA No.7074/1986. The prayer clause of the said application reads as under:- "A) The plaintiffs suit be decreed in terms of this compromise and the said decree be also ordered to have been fully satisfied in so far as the plaintiffs 1 to 8 are concerned, in terms of this compromise petition. B) It may also be recorded, that this compromise decree shall not affect the rights of Dr.B.D. Kumar, RFA(OS) No.19/1997 *Page 7 of 16* his three sons, and Dr.Vijay Sheel Kumar, the said Performa defendants as the same shall always be without prejudice to their claims and demands. Further the claims and demands of Dr.B.D. Kumar and Dr.Vijay Sheel Kumar will be fully determined in the two pending suits Nos.219 of 1973 and 609 of 1985 referred to above, so that all the contentions of the parties in those suits shall remain, and be deemed to remain in tact and unaffected. C) It may also be ordered that the court fee, if any, payable on this compromise decree shall be paid by defendants 2,3 and 4 only, and otherwise the parties be left to bear their own costs." (Emphasis Supplied).

12. B.D.Kumar and his sons filed an application registered as IA No.413/1987 under Section 151 CPC in the said suit, inter-alia praying that Suit No.588/1975 be not decreed in terms of compromise referred to in I.A. No.7074/1986 and that they be transposed as plaintiffs in the suit..

13. Before the aforesaid two applications could be finally adjudicated upon by the court, the legal heirs of Fateh Chand Kumar filed an application registered as IA No.8832/1989 under Section 151 CPC praying that they may be permitted to repudiate the compromise and withdraw IA No.7074/1986..

14. Ashok Kumar and Shobha Kumari opposed IA No.8832/1989 pleading that the heirs of Fateh Chand Kumar could not resile from the settlement and as regards the application filed by B.D.Kumar and his sons it was pleaded that they had already settled the dispute when B.D.Kumar and his sons withdrew the petition filed by them under Section 20 of the Arbitration Act 1940. RFA(OS) No.19/1997

15. Vide impugned judgment dated 07.05.1996 the learned Single Judge decided the aforesaid three applications i.e. I.A.Nos.7074/1986, 8832/1989 and 413/1987. After holding that the compromise referred to in I.A.No.7074/1986 is legal and valid it has been held that the legal heirs of late Fateh Chand Kumar cannot be permitted to resile from the said compromise. The learned Single Judge has allowed I.A. No.7074/1986 and has dismissed I.A.No.8832/1989 and has decreed the suit in terms of the compromise referred to in I.A.No.7074/1986. However, in view of the long interval of time between the filing and disposal of I.A.No.7074/1986, the learned Single has directed Ashok Kumar and Shobha Kumari to pay a sum `1,25,000/- to each of the eight legal heirs of late Fateh Chand Kumar instead of the sum of `15,000/- as per the compromise arrived at between the parties. I.A.No.413/1987 filed by B.D.Kumar and his sons has been dismissed by the learned Single Judge on the reasoning that B.D.Kumar and his sons have no concern with the partnership firm as the shares held by them in the partnership firm stood transferred in favor of Harivansh Lal Kumar, Ashok Kumar and Shobha Kumari in terms of the compromise arrived at between them and Harivansh Lal Kumar, Ashok Kumar and Shobha Kumari during the pendency of suit bearing No.515A/1972 and thus they cannot be transposed as plaintiffs in suit bearing No.588/1975 filed by Fateh Chand Kumar for dissolution of the partnership firm..

16. Aggrieved by the impugned judgment dated 07.05.1996 passed by the learned Single Judge insofar it dismissed I.A. No.413/1987 filed by them, the sons and wife of late Sh.B.D.Kumar have filed the present appeal under RFA(OS) No.19/1997 *Page 9 of 16* Section 96 of the Code of Civil Procedure. Respondents Nos.1, 2, 3, 4, 5, 6 and 7 are the sons and daughters of Fateh Chand Kumar, respondent No.10 is the partnership firm and respondent No.13 is Dr.Vijay Sheel Kumar. The contesting respondents are respondents Nos.8, 9, 11 and 12 who are the sons of Ashok Kumar and his wife Shobha Kumari and the daughters of Harivansh Lal Kumar..

17. Before we proceed to note the submissions advanced by the appellants in support of the present appeal, few more facts need to be noted by us as they have a material bearing on the present appeal..

18. Aggrieved by the impugned judgment dated 07.05.1996 passed by the learned Single Judge, insofar it has dismissed I.A. No.8832/1989 filed by them for repudiation of the compromise, the legal heirs of late Sh.Fateh Chand Kumar filed RFA(OS) No.10/1997 before a Division Bench of this Court. Similarly, Ashok Kumar and Shobha Kumari filed RFA(OS) No.11/1997 challenging the impugned judgment dated 07.05.1996 insofar it has modified the terms of the compromise..

19. During pendency of the aforesaid two Regular First Appeals, both warring groups recorded a settlement and in terms of the settlement, vide order dated 24.05.2005, the Division Bench of this Court disposed of both appeals recording that in full and final settlement of their dues pertaining to the share of late Sh.Fateh Chand Kumar in the partnership firm, the eight legal heirs of late Sh.Fateh Chand Kumar have received `1,25,000/-. Thus, even Fateh Chand Kumar, and hence his legal heirs, would have no stake or a claim in the partnership firm. RFA(OS) No.19/1997 Page 10 of 16.

20. In the year 1985, late Sh.B.D.Kumar had filed a suit registered as Suit No.609/1985 against Ashok Kumar and Shobha Kumari before a Civil Judge, Delhi, inter-alia praying that he be declared the exclusive owner and in possession of a plot which was the asset of the partnership firm. Since B.D.Kumar died during the pendency of the said suit his wife and three sons i.e. the appellants herein were substituted as the plaintiffs to prosecute the suit..

21. An application under Order 12 Rule 6 CPC was filed by Ashok Kumar and Shobha Kumari praying that the suit be dismissed on account of the reason, B.D.Kumar the plaintiff of Suit No.515A/1972, had with respect to his 37% share in the partnership firm received the necessary money as per the settlement arrived at between him and Harivansh Lal Kumar which was duly noted by a learned Single Judge of this Court when Suit No.515A/1972 was dismissed as withdrawn. It was thus prayed that neither B.D.Kumar nor his legal heirs could agitate on the same subject matter by bringing another suit under the garb of a declaration pertaining

to an asset of the partnership firm..

22. The learned Trial Judge dismissed the said application and aggrieved by the dismissal thereof, Ashok Kumar and Shobha Kumari filed a petition under Article 227 of the Constitution of India in this Court which was registered as CM(Main) No.881-883/2007..

23. Vide judgment dated 22.03.2010, a learned Single Judge of this Court allowed CM(Main) No.881-883/2007. The relevant reasoning portion reads as under:- "12. The above Release Deed was executed in 1972, about ten years after the period of receiving RFA(OS) No.19/1997 *Page 11 of 16* consideration by plaintiff and becoming partner of this firm. It is admitted by plaintiff that in 1973, disputes arose between the parties and an application under Section 20 of Arbitration Act was filed in which a compromise was arrived at. This application under Section 20 of Arbitration Act in view of compromise was withdrawn as not pressed. However, subsequently Suit No.

588. of 1975 was filed between the parties regarding effect of this compromise and this suit was decided by this Court on 7th May, 1996. The question considered by the Court in the above suit was if after filing of memorandum of compromise a party resiles from the same and withdrew the petition itself on the ground that it was no longer interested in the compromise and the petition filed by it, would the compromise have no value. The plaintiff Mr. B.D. Kumar was a party to this suit as respondent No..

5. This Court discussed the compromise arrived at between the parties and the different amounts received by the parties under compromise, the shares of the parties in the partnership deed and also discussed the effect of order dated 24th April, 1973 passed by this Court in the petition under Section 20 of the Arbitration Act and came to conclusion that the compromise recorded between the parties was not vitiated because an application filed before the Court to take it on record was not pressed. This Court also observed that the plaintiffs were trying to get out of the situation which they had voluntarily brought about and that the plaintiffs had not made out a case challenging the compromise. This Court further held that the compromise was a valid contract between the parties. Although looking into the

long interval between the date of filing of compromise and the matter being taken up for consideration by the Court, the Court directed the defendants in the suit to pay some more amount than what was agreed to in the compromise. It is to be noted that the matter went right up to the Supreme Court. The above judgment of this Court was assailed before the Supreme Court by way of an SLP and the SLP was dismissed by the Supreme Court and the judgment RFA(OS) No.19/1997 *Page 12 of 16* of this Court was upheld. The amount as ordered by this Court was received by the plaintiff. xxx xxx.

14. I, therefore, consider that the trial court did not exercise its jurisdiction of scrutinizing the pleadings and the documents on the very threshold and arrive at a conclusion on the basis of admissions made by the plaintiff. The learned trial court also did not bother to read the compromise which was upheld right up to Supreme Court and which categorically showed that the plaintiff herein Dr. B.D. Kumar and his family members had received the amount in terms of compromise and retired from the partnership firm leaving the assets of the partnership firm including these two plots and the building thereon. I accordingly hereby set aside the order of the trial court. The petition is allowed with costs of Rs. 50,000/- on respondents. The application of the petitioners/defendants is allowed. The suit filed by the plaintiff/respondent is liable to be dismissed and is hereby dismissed with costs. The petitioner shall file certificate of costs of suit before trial court."

24. Review sought by the appellants of the aforesaid order was dismissed vide order dated 26.04.2010 and Petition seeking Special Leave to Appeal filed before the Supreme Court to appeal against the judgment dated 22.03.2010 was declined..

25. It is apparent that at the first instance, B.D.Kumar, who had filed the petition under Section 20 of the Arbitration Act 1940 settled his claim towards the 37% share which he held in the partnership firm M/s.Anil Ashok and Co. and he received the settled monetary consideration and filed IA No.883/1973 seeking permission to withdraw Suit No.515A/1972. Ex-facie, we see no scope for B.D.Kumar or RFA(OS) No.19/1997 *Page 13 of 16* his legal heirs to litigate with respect to B.D.Kumars 37% share in the partnership firm and the reasoning of the

learned Single Judge of this Court while allowing CM(Main) No.881-883/2007 is fully applicable and we adopt the same. Similarly, in view of the compromise arrived at between Fateh Chand Kumar and the branch of Harivansh Lal Kumar in respect of Fateh Chand Kumars 4% share in the partnership firm, we see no scope for Fateh Chand Kumars branch agitating on the issue. But, we would be failing not to deal with the submission advanced by learned counsel for the appellants at the hearing of the appeal. The following two submissions were advanced at the hearing of the appeal:- A. That the reasoning of the learned Single Judge in refusing to transpose the appellants as the plaintiffs in suit bearing No.588/1975; that the appellants have no concern with the partnership firm as the share held by their father late Sh.B.D.Kumar in the partnership firm stood transferred in favor of Harivansh Lal Kumar, Ashok Kumar and Shobha Kumari in terms of the compromise arrived at between late Sh.B.D.Kumar, Harivansh Lal Kumar, Ashok Kumar and Shobha Kumari during the pendency of suit bearing No.515A/1972 is faulty. The fault stated was that the learned Single Judge failed to appreciate that the compromise in question was not recorded by the court and that the suit bearing No.515A/1972 was simply dismissed as withdrawn. B. Highlighting that in the prayer clause to IA No.7074/1986 it was expressly recorded: it may also be recorded, that this compromise decree shall not affect RFA(OS) No.19/1997 *Page 14 of 16* the rights of Dr.B.D.Kumar, his three sons, and Dr.Vijay Sheel Kumar, the said Performa defendants as the same shall always be without prejudice to their claims and demands, it was urged that the same recognizes the right of the appellants to stake a claim with respect to late Sh.B.D.Kumars 37% share in the partnership firm..

26. In order to deal with the first submission advanced by the learned counsel for the appellants, it is important to note the pleadings made in I.A.No.883/1973 filed by B.D.Kumar and his sons in suit bearing No.515A/1972. The said application records that a compromise was arrived at between B.D.Kumar and his sons on the one hand and Harivansh Lal Kumar, Ashok Kumar and Shobha Kumari on the other hand; that as per terms of the compromise, B.D.Kumar and his sons were to transfer 37% share held by them in the partnership firm in favor of Harivansh Lal Kumar, Ashok Kumar and Shobha Kumari on payment of the agreed amounts by Harivansh Lal Kumar, Ashok Kumar and Shobha Kumari; that the necessary

payments were received by B.D.Kumar and his sons from Harivansh Lal Kumar, Ashok Kumar and Shobha Kumari and that B.D.Kumar and his sons had declared that they have retired from the partnership firm and transferred the share held by them in favor of Harivansh Lal Kumar, Ashok Kumar and Shobha Kumari. The pleadings contained in I.A. No.883/1973 brings out that a compromise was arrived at between B.D.Kumar and his sons, Harivansh Lal Kumar, Ashok Kumar and Shobha Kumari during the pendency of the suit bearing No.515A/1972 and that the said compromise was acted upon by the parties to the compromise. It hardly matters whether, based upon the RFA(OS) No.19/1997 *Page 15 of 16* compromise, Suit No.515A/1972 was decreed or was permitted to be withdrawn. Being permitted to be withdrawn on the plea by B.D.Kumar and his sons that they had received the consideration as per the settlement, they abandoned the claim to have the dispute referred to an arbitrator and now cannot be permitted to re-agitate a settled claim which has resulted in they having no right, title or interest in the partnership firm..

27. As regards the second plea, nothing turns on the language of the prayer clause of IA No.7074/1986. It is a case of imperfect drafting and no more..

28. The appellants are litigating on a dead issue and are repeatedly choking the already overburdened judicial system. They have not learnt a lesson when CM(Main) No.881-883/2007 was allowed against them imposing costs in sum of `50,000/- against them..

29. We dismiss the appeal imposing costs in sum of `1,00,000/- (Rupees One Lakh only) against the appellants and in favour of Ashok Kumar and his wife Shobha Kumari. The impugned decree is affirmed. (PRADEEP NANDRAJOG) JUDGE (PRATIBHA RANI) JUDGE JANUARY 09, 2012 dk RFA(OS) No.19/1997
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