

# Shri Govind Sarda vs M/S Sartaj Hotel & Ors on 17 December, 2007

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IN THE COURT OF SHRI D.C. ANAND:  
ADDL. DISTRICT JUDGE: DELHI.

Suit No.154/07

Shri Govind Sarda. ... Plaintiff

Versus

M/s Sartaj Hotel & Ors. ... Defendants.

Order reserved on : 08.12.2007  
Order delivered on : 17.12.07

## ORDER

1. This order shall dispose of misc. applications pending disposal in Suit No.154/2007 as well as in Suit No. 155/2007 under Order 39 Rules 1 and 2 CPC, Order 39 Rule 4 CPC, as well as application filed U/o 39 Rules 1 and 2 CPC in Suit No. 155/2007 seeking restrain orders against the defendant/plaintiff in the main suit from interfering in the construction of motel by the plaintiff company in suit No. 155/2007 over the suit property in accordance with sanction/permission given by D.D.A till disposal of the suit, application Order 40 Rule 1 and other ancillary applications placed on record by the parties.

2. Their Lordships while dealing with the matter on original side passed ad-interim orders in respect of possession and alienation of the property in question to be maintained in term of prayer made in the application as was filed initially along with the plaint along with application under Order 40 rule 1 CPC. Thereafter the plaintiff filed another two applications under Order 40 rule 1 CPC with the same prayer for appointment of Receiver and application under Order 39 Rule 2A CPC with application u/s 340 Cr.PC for not obeying the orders for maintenance of status quo order . The plaintiff also filed three more applications u/o 39 Rules 1 and 2 CPC seeking mandatory injunction directing the defendant to demolish structure built at the suit property and also restraining them from holding and issue and letting out of property for other purposes, from making any additions and alterations and construction and changing the nature and character of the suit property, opening and running any restaurant on the suit land and investigation by the Commissioner of Municipal Corporation of Delhi whereas the defendant also placed application u/o 39 rule 4 CPC for setting aside of ex-parte order dated 21.7.2000.

3. Firstly the plaintiff's case as made out from the amended plaint placed on record is that defendant no.1, a company incorporated under the Companies Act, 1956 having registered office at New Delhi is owner of 20 acres of land situated in Village Rangpuri, Delhi as described in the schedule filed

along with the plaintiff, drew/devised a sketch through defendants no. 2 to 4 as Directors to construct a hotel/motel and service apartment on the suit lands for which it needed a partner capable of supplying finance besides being resourceful and competent to obtain various permissions/approvals for the implementation of the said project from the various departments of the Government authorities. Defendants no.1 to 4 sketched to construct a hotel/motel and service apartment and being in financial difficulty and not in a position to continue with their project, approached the plaintiff for participation in their project of development and construction and represented that documentation relating to project is under process at the Ministry of Urban Development and Affairs Department. The defendants no. 2 to 4 needed a partner capable of supplying finance besides being resourceful approached the plaintiff and represented him that defendant no.1 owned and possessed 20 acres land having drawn/sketched the plan/project of which no objection is required and requested the plaintiff to agree to become a partner in the said joint venture/partnership and also to finance the project by giving/supplying finance as his contribution towards the capital of the partnership. Accordingly, defendant no.1 through defendants no. 2 to 4 entered into an agreement of partnership/MOU dated 25.6.1996 for construction of five star hotel/motel/resort and service apartment in term recorded therein. The plaintiff as such entered into a partnership. Subsequent to MOU/agreement dated 25.6.96, the plaintiff issued letter dated 29.6.96 and also came to learn that defendant no.1 through defendant no.2 has caused one letter to be written confirming the arrangement. Defendants no.1 and 2 and plaintiff approached one Union General Company Ltd for finance and becoming the partners in their said project.

4. MOU dated 25.6.1996 was finalized and confirmed and was recorded in an agreement dated 30.8.97 entered into by the plaintiff and defendants wherein suggestions were recorded in term of order dated 8.7.97. The partnership agreement dated 30.8.97 contained terms and conditions which was further supplemented by partnership/MOU of partnership dated 26.12.97 containing the terms and conditions. In terms of the said partnership supplementary agreement dated 26.12.97, the partnership Memorandum of Understanding dated 25.6.1996 and the partnership agreement dated 30.8.1997 stood further amended and the clauses contained in the said partnership agreement dated 26.12.97 forming a part of Memorandum of Understanding / partnership dated 25.6.1996 and the partnership agreement dated 30.8.1997.

5. Further it was pleaded by the plaintiff that DDA was not giving permission for construction of hotel/motel/apartment in the suit property and cause of delay in commencing the construction/project, the defendant no.5 herein cancelled the contract with defendant no.1 and asked for refund of amount advanced by the said defendant no.5 to defendant no.1. Sine defendant no.1 did not returned the advance amount they filed suit CS (OS) No. 303/1999 in the High Court at Calcutta wherein interim orders were passed against the defendant no.1 although the plaintiff was also impleaded as defendant no.2 in the said suit.

6. Ultimately the plaintiff procured approval of the DDA for construction of hotel at the suit property vide letter dated 2.2.2000 of the DDA. The defendants no. 1 to 4 however failed to give any necessary documents as was required by the plaintiff. The plaintiff also stated that under the terms and conditions of the last amended supplementary agreement / Memorandum of Understanding dated 26.12.97, the plaintiff's share in the aforesaid partnership/joint venture of development of the

said project of constructing a five star hotel/motel and service apartments, is 40% and the share of the defendant no.1 to 3 is 40% while the share of defendant no.4 is 20% in all the assets and properties including the aforesaid lands approximately measuring 20 acres situated in village Rangpuri belonging to the partnership/joint venture of the parties. The plaintiff further submits that the defendants are bound by the terms of the said agreement of partnership as finally amended on 26.12.97 vide supplementary Memorandum of Understanding of partnership of the said date.

7. Despite request by the plaintiff to the defendant to put its signatures on the building plan to be submitted alongwith documents, the defendant being partner of the aforesaid partnership of the joint venture of construction of hotel/motel, refused to sign the said building plan for ulterior motives fraudulently and maliciously to wriggle out of the contract of partnership of the said joint venture. Further, the defendant no.1 forcibly and illegally made attempt to transfer the suit property without prior permission and consent of the plaintiff who was put in joint possession by them of the land as partner immediately on signing the MOU dated 25.6.96 and since then the plaintiff continued to be in possession thereof. The plaintiff also wrote a letter/notice dated 10.5.2000 to defendant no.1 which was replied with the allegations that plaintiff has made a default in making payment of the amount which the plaintiff was required to pay and the amount of Rs.51 Lakhs paid by the plaintiff stood forfeited as was consented by the plaintiff vide its letter dated 28.12.1999. The plaintiff denied any letter written by them dated 28.12.1999. The plaintiff as such challenged the right of defendant no.1 and pleaded that they have no right/authority/jurisdiction to determine or cancel the said agreement of partnership unilaterally on false/non-est allegations and the partnership/joint venture continued to subsist between them and binding upon the parties as the plaintiff continued to be partners of land to be the assets and properties of the partnership firm as provided under Section 14 and 16 of the Partnership Act. The plaintiff also stated that he has been ready and willing to perform his part of the contract as partner whereas the defendant committed several breaches thereof who has no right to forfeit the amount of Rs.51 Lakhs and appropriate the same. On the pleas, as referred above, the plaintiff prayed for relief in applications filed under Order 39 Rules 1 & 2 CPC whereas defendant no.1 made a prayer to vacate the ad-interim injunction and contested the applications filed under Order 39 Rules 1 & 2 CPC as well as under Order 40 rule 1 CPC with the plea that the relief claimed is barred under Section 69 of the Partnership Act and relief of declaration of the plaintiff that partnership firm is competent is hit by Section 34 of the Specific Relief Act besides challenging the valuation of the suit for the purposes of court fee and jurisdiction. The defendant admitted MOU dated 25.6.96 pursuant to which five cheques were handed over by the plaintiff as the plaintiff was under an obligation to advance Rs. 2 Crores to the defendant no.1. Out of the five cheques, two cheques of Rs.30 Lakhs and Rs. 21 Lakhs were cleared. On being approached by the plaintiff, the defendant no.1 carried out amendment of MOU and executed MOU dated 8.7.97 where under Rs. 1 Crore as advance out of which Rs.51 Lakhs already stood paid was payable within 45 days of the signing of the said MOU and balance of Rs. 1 Crore were to be paid after getting the requisite permission from the concerned authorities. In the new MOU, the plaintiff left the space of company name as blank as plaintiff was not sure from which of his companies he shall be able to arrange the balance money. Once again the terms and conditions were changed as the defendant no.1 was not able to perform his part of obligation and accordingly agreement dated 30.8.1997 was executed and the balance money was paid by him in his individual capacity wherein address of the plaintiff was the same which was the address of defendant no.5 and also borne out

from the various documents on record. The parties also entered into an agreement dated 26.12.97 wherein terms and conditions were further modified. The plaintiff failed to perform his part of the obligation as he failed to make the balance payment of RS.41 Lakhs and as such defendant no.1 vide letter dated 5.7.98, 2.12.98 and 17.12.98 called upon the plaintiff to perform his part of the obligation which he failed to do.

8. The defendant no.1 vide letter dated 23.3.99 informed the plaintiff that they are going to terminate the agreement and the said MOUs and shall be charging damages whereas the amount of Rs.51 Lakhs was forfeited of which consent of forfeiture and termination of agreement was given by the plaintiff vide letter dated 28.12.1999.

9. Since defendant no.1 was able to get permission for construction of motel and accordingly transferred the land in favour of defendant no.2 whereas defendant no.5 filed a false case before the Hon'ble High Court of Calcutta which was defended by defendants no.1 to 4 wherein also interim orders were passed against defendants no. 1 to 4 in respect of the amount of RS. 51 Lakhs. In that case in Hon'ble High Court of Calcutta, defendant no.5 forged the signatures of defendant no.2 on a letter dated 19.6.96 purportedly signed by him on behalf of the defendant no.1 whereas cheques issued by defendant no.5 dated 27.6.96 though alleged in terms of letter dated 29.6.96. The defendant as such pleaded that defendant no.1 was paid Rs. 51 Lakhs by the plaintiff by two cheques drawn by defendant no.5 which amount was forfeited by defendant no.1 as the plaintiff was unable to perform his part of the obligation. The plaintiff is stated to be guilty of misleading and misrepresentation before this Court who suppressed and concealed the material facts that defendant no.5 has filed a suit in the Hon'ble High Court of Calcutta praying that it was the defendant no.5 who had paid the said amount of Rs.51 Lakhs to defendant no.1 whereas claiming in the present suit that he had paid the said amount of Rs. 51 Lakhs to defendant no.1 and has acquired right, title and interest in the suit property. The defendant no.5 supported the plaintiff whereas claiming that the payment of Rs.51 Lakhs was made by him to defendants no. 1 to 4 when the suit was filed before the Hon'ble High Court of Calcutta.

10. Ld. counsel for the plaintiff submitted in support of the prayer made in the applications that he has become entitled to jointly develop and to receive benefits in view of performance of the obligations of Memorandum of Understanding dated 25.6.1996, 30.8.1997 and 26.12.97 as also he has acquired title/interest in the suit property of defendant no.1 and has become joint beneficiary of the property of defendant no.1 whereas the forfeiture of amount of Rs. 51 lacs paid to the defendant by the plaintiff is against the provisions of law as also the sale deed dated 11.5.2000 by defendant no.1 in favour of defendant no.2 is liable to be cancelled and the plaintiff is entitled to the prayer as made in the application and to further extension of interim relief granted by this court vide order dated 21.7.2000 as also at this stage only prima facie of the case in favour of the plaintiff has to be seen by this court and not to conduct a mini trial on the basis of alleged forged letters of the plaintiff wherein plaintiff was alleged to have given consent for forfeiture of the amount and termination of contract/Memorandum of Understanding of the dates.

11. To counter the submissions, Ld. counsel for the defendant no.1 to 4 submitted that the plaintiff has not performed the obligation of the Memorandum of Understanding dated 25.6.1996, 30.8.1997

and 26.12.97 as nowhere in the plaint they pleaded that they paid balance amount of Rs. 49 lacs to the defendant whereas the so called Memorandum of Understandings are not concluded contract between the parties as as per Memorandum of Understanding dated 26.12.97 further agreement was to follow the same. Ld. counsel for the defendants further submitted that Memorandum of Understanding if at all considered to be a contract in term of the Contract Act, the remedy lies in favour of the plaintiff only by getting the said partnership based on Memorandum of Understanding dissolved and to get the account settled, if any, after dissolution of the pleaded partnership of the joint venture between the parties as per Memorandum of Understandings of the dates. Ld. counsel for the defendants also submitted that although suit for declaration, that there was a partnership between the plaintiff and defendant on account of Memorandum of Understanding, is held to be maintainable by this court vide order dated 11.10.2006, yet the relief claimed in the application is based on concept of partnership on the basis of Memorandum of Understandings of the dates referred to above and such relief is forbidden under Section 69 of the Partnership Act, 1932.

12. In support of the contentions raised by the Ld. counsel for the plaintiff heavy reliance has been placed on the case of Smt. Indira Kaur and others Vs. Sh. Sheo Lal Kapoor reported in AIR 1988 SC 074; M/s Hind Construction Contractors by its sole proprietor Bhikamchand Mulchand Jain (Dead) by L.R's Vs. State of Maharashtra reported in AIR 1979 SC 720; Hindustan Construction Company, Muzaffarpur Vs. The State of Bihar reported in AIR 1963 Patna 254; M/s Nanak Builders and Investors Private Limited Vs. Vinod Kumar Alag reported in AIR 1991 Delhi 315; Pakharsingh Vs. Kishansingh reported in AIR 1974 Rajasthan 112; Gomathinayagam Pillai and others Vs. Palaniswami Nadar reported in AIR 1967 SC 868; Amteshwar Anand Vs. Virender Mohan Singh and others reported in AIR 2006 SC 151; Dalpat Kumar and another Vs. Prahlad Singh and others reported in AIR 1993 SC 276; Anand Prasad Agarwalla Vs. Tarkeshwar Prasad and others reported in AIR 2001 SC 2367; Govind Prasad Chaturvedi Vs. Hari Dutt Shastri and another reported in AIR 1977 SC 1005.

13. The focus of the submissions by the Ld. counsel for the plaintiff in support of the cited authorities is that time is not the essence of Memorandum of Understanding which was admittedly extended by subsequent dates of Memorandum of Understandings and as such under Section 55 of the Contract Act, 1872 it does not come to an end by itself after expiry of the period. Further, the promisee has to terminate by proper notice, as provided in Section 66 of the Act, otherwise the option to avoid the contract will be deemed to have been waived and the contract stand subsisting.

14. To counter the submissions, Ld. counsel for the defendants relied upon the authorities in the case of Kashi Nath (Dead) Through legal heirs Vs. Jaganath reported in (2003) 8 SCC 740; Ishwar Dutt Vs. Land Acquisition Collector and another reported in (2005) 7 SCC 190; Union of India Vs. Surjit Singh Atwal reported in (1979) 1 SCC 520; Mrs. Om Prabha Jain Vs. Abnash Chand and another reported in AIR 1968 SC 1083; Vinod kumar Arora Vs. Surjit Kaur reported in (1987) 3 SCC 711; A.V.G.P. Chettiar & Sons and others Vs. T. Palanisamy Gounder reported in (2002) 5 SCC 337; Sh. N.K. Bhatia Vs. Smt. R.K. Sood reported in 1996 II A.D (Delhi) 260; Afsar Sheikh and another Vs. Soleman Bibi and others reported in (1976) 2 SCC 142; Mrs. Om Prabha Jain Vs. Abnash Chand and another reported in AIR 1968 SC 1083; Bhagat Singh and others Vs. Jaswant Singh reported in AIR 1966 SC 1861; Shanti Vs. Surta and others reported in AIR 1973 Punjab and Haryana 387;

Ramsurat Devi Vs. Smt. Satraji Kuer and others reported in AIR 1975 Patna 168; Janki Missir and another Vs. Dharamraj Missir and others reported in AIR 1974 Patna 254; Smt. Lalita James and others Vs. Ajit Kumar and others reported in AIR 1991 Madhya Pradesh 15; Kusum Chand and another Vs. Kanhaiyalal and another reported in AIR 1974 Rajasthan 73; H.G. Krishna Reddy and Co. Vs. M.M. Thimmiah and another reported in AIR 1983 Madras 169; M/s Urmila and Co. Private Limited Vs. M/s J.M. Baxi and Co. reported in AIR 1986 Delhi 336; Mahabir Prasad Jain Vs. Ganga Singh reported in (2003) 8 SCC(1999) 8 SCC 274; Gujarat Bottling Co. Limited and others Vs. Coca Cola Co. and others reported in (1995) 5 SCC 545; Virumal Praveen Kumar Vs. Gokal Chand Hari Chand reported in 2000 VII A.D (Delhi) 312; Seema Arshad Zaheer and others Vs. Municipal Corpn. Of Greater Mumbai and others reported in (2006) 5 SCC 282; Narotam Prasad Vs. Premalbai Chavan reported in 1996 IV A.D (Delhi) 334; Messrs K.C. Bishwas & Sons and others Vs. Central Alkusa Colliery Co. reported in AIR 1973 Patna 184; M. Gurudas and others Vs. Rasaranjan and others reported in (2006) 8 SCC 367; and submitted that plaintiff cannot be allowed to blow hot and cold as the plaintiff has not filed a suit for specific performance of the contract but has filed a suit pleading himself to be a partner on the basis of joint venture/Memorandum of Understandings and as such plaintiff cannot go outside the pleadings so as to submit the arguments as referred to above.

15. It is a matter of record that suit of the plaintiff is based on Memorandum of Understandings which are pleaded as partnership agreement between the parties. There could be no two opinion that in case of violation of terms and conditions of the partnership agreement which are Memorandum of Understandings in the present case, the appropriate remedy available to the plaintiff is under the Partnership Act itself i.e to proceed with dissolution of the partnership as is there in the present case under Section 42, 43, 44 clause (c) and (d) r/w section 7 of the Partnership Act, 1932. There is substance in the submissions by the Ld. counsel for the defendants that plaintiff cannot be allowed to submit the arguments not based on foundation of their case set out in the pleadings so as to propound a new and different case and seek relief that too without performance of the part of the agreement including payment of Rs. 49 lacs which payment the plaintiff never made to the defendant nor pleaded so in the plaint. On the face of Memorandum of Understanding 26.12.97, which provide further execution of formal agreement between the parties, the reference made to the case of AIR 1983 Madras 169; AIR 1986 Delhi 336 and 1996 II A.D (Delhi) 260 further comes to the help of the defendants as their Lordship in the cited authority observed that in case of constituted contract contemplates execution of further regular agreement between the parties, there cannot be any enforceable contract unless the condition is fulfilled and there could be no question of breach of contract. I also see substance in the submissions by the Ld. counsel for the defendants when he submitted that although appeal is pending against the order dated 11.10.2006 whereby the suit for declaration filed by the plaintiff was held to be maintainable and not barred under Section 69(1) of the Partnership Act by this court, yet the very base of the suit is that plaintiff is a partnership firm with the defendant in term of Memorandum of Understandings of the dates and the relief claimed in the applications is barred as is apparent from the provisions of section 69(1) and (2) of the Partnership Act as what the plaintiff is claiming is enforcement of their right, if any, arising from contract conferred by the Act "The Indian Partnership Act, 1932"

which partnership firm is admittedly not registered. This aspect was not at all discussed while passing order dated 11.10.2006 whereas in the case of Mukund

Balkrishna Kulkarni Vs. Kulkarni Powder Metallurgical Industries & Another reported in 2004 13 SCC 750, as was referred to in the order dated 11.10.2006, their Lordship was seized with different facts to the case in hand as in the cited authority declaration of existence of partnership and the share between the parties was sought to be enforced under a contract whereas in the present case enforcement of the contract so as to seek the relief as prayed for in the application and as was granted for interim period vide order dated 21.7.2000 has been sought further which goes against the spirit of provisions of section 69(1) and (2) of the Partnership Act, 1932.

16. As already observed, the plaintiff has to stand on their own feet and foundations as laid down in the pleadings in the plaint i.e that the plaintiff is a partnership firm with defendants and has to seek the relief under the Indian Partnership Act, 1932 and not under the Indian Contract Act, 1872, as sought to be argued by the Ld. counsel for the plaintiff.

17. There is another angle to say that plaintiff has not approached this court with clean hands as the defendant no.5 has already filed a suit before Calcutta High Court wherein defendant no.1 to 4 had been ordered to submit security amount of Rs. 51 lacs which was paid by the plaintiff to defendant no.1 to 4 from the account of defendant no.5 whereas defendant no.5 filed a suit on the premises that it was defendant no.5 who paid amount of Rs. 51 lacs to the plaintiff for himself and not on behalf of defendant no.1 to 4. It is not the case of the plaintiff that any other cheque which were encashed of the amount of Rs. 51 lacs, were issued by the plaintiff in favour of defendant no.1 to 4 except the cheque in question which are admittedly drawn from the account of defendant no.5 when defendant no.5 was not at all a party to the Memorandum of Understandings whose name was left blank in one of the Memorandum of Understandings although address of defendant no.5 and plaintiff is the same. No doubt this aspect is a matter of trial but prima facie plaintiff cannot be allowed to fight a proxy war through defendant no.5 against defendant no.1 to 4 as the same would amount to a case of double jeopardy as the defendant no.1 to 4 would suffer loss of security amount as deposited before High Court of Calcutta and yet to go with the plaintiff in the joint venture of partnership with them on the basis of Memorandum of Understandings relied upon by both the parties.

18. On the face of discussion as above, the plaintiff is not able to put forward a prima facie case in his favour as also till date the plaintiff has not placed on record all the particulars as were sought by the defendant in the amended plaint i.e details of the amount of Rs. 51 lacs and the name of the account holder and the bank with details of the cheques issued as per application placed on record bearing No. 51/29/02 under Order 6 R 5 CPC which was disposed of vide the order which also prima facie established on record that defendant no.5 is working in hands in glove of the plaintiff and the plaintiff is not approaching the court with clean hands, despite orders to that effect dated 3.2.2003.

19. Another aspect/ingredient for requirement of grant of interim injunction i.e irreparable loss and balance of convenience in the given facts, the plaintiff is not going to suffer irreparable loss, as discussed above, as the remedy lies somewhere else and not enforcement of the contract/ Memorandum of Understanding as sought to be enforced by filing a suit for declaration that plaintiff is a partnership firm with defendants. The balance of convenience also does not lie in favour of the plaintiff as project of crores cannot be jeopardized by the plaintiff by payment of Rs. 51 lacs and non payment of Rs. 49 lacs regarding which no plea has been made that plaintiff was or is ready to pay the same. The plea as raised in the miscellaneous applications as referred to above filed by the plaintiff is accordingly declined and the ad-interim order dated 21.7.2000 is vacated. Vide this order the application of the defendant, the plaintiff in; suit No. 155/07 is allowed and the plaintiffs herein are restrained not to interfere in the construction of the motel by the defendant, plaintiff in suit No. 155/07 over the suit property till decision in the suit. The expressions made herein above shall not tantamount to observations on merits of the case as prima facie view has been taken while passing the orders on miscellaneous applications as were placed on record by the parties in the respective suits. A copy of this order be placed in suit No. 155/07. Announced in open Court.

Dated: 17.12.07 (D.C. ANAND) ADDL. DISTRICT JUDGE:

DELHI.