

Judgment Sheet
IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

F.A.O. No. 73598 of 2021.

Rabeah Hussain and 3 others v. Nusrat Aftab and 6 others.

JUDGMENT

Dates of hearing: 10.02.2022 & 15.02.2022.

Appellants by: Mr. Hafeez ur Rehman Ch. Advocate assisted by Mr. Noor Dad Chaudhry Advocate.

Respondents by: Rana Shamshad Khan, Additional Advocate General with Ms. Rashida Batool, Registrar of Firm, Sialkot.
Malik Shahbaz Ahmad, Advocate for respondent No.1.
Barrister Osama Ahmad, Advocate for respondent No.6.

Shujaat Ali Khan, J: - Briefly put, the appellants have filed a suit for declaration, rendition of accounts, recovery, permanent and mandatory injunction against the respondents. Alongwith the said suit, they also filed an application under Order XXXIX rule 1 & 2 CPC for grant of temporary injunction. The learned Civil Judge, Sialkot (learned Trial Court) after hearing arguments of both sides dismissed the said application, *vide* order, dated 11.10.2021; hence this appeal.

2. Learned counsel for the appellants submits that learned trial Court failed to consider that clause 12 in the Partnership Deed was against injunctions of Islam as partnership could not continue in the event of death of a partner; that respondent No.1 never remained associated with affairs of the Firm rather he awoke up from long slumber as is evident from the email, available at Page No.121 of the file, wherein she admitted that she never remained associated with business of his deceased father; that due to non-issuance of injunctive orders by the courts below respondent No.1 has already misappropriated billions of rupees left by the deceased whereas the other legal heirs of the deceased have been deprived of their due share.

3. Conversely, learned counsel representing respondent No.1 submits that earlier the appellants filed an application for setting aside of decree, dated 13.10.2020 and subsequent order, dated 19.06.2021, which was dismissed by the learned Civil Judge, Sialkot through order, dated 19.07.2021 which renders the matter crystal clear, thus, the appellants cannot claim anything during subsistence of aforesaid decree; that since injunctive orders have already been issued in favour of the appellants in two other suits, no irreparable loss would be caused to them in case this appeal is dismissed; that till the time

clause 12 of the Partnership Deed is intact, the balance of inconvenience lies in favour of the respondents, instead of the appellants; that loss in the shape of money cannot be termed as irreparable loss, thus, no interference is called for by this Court in these proceedings; that in case this appeal is accepted, perhaps more than 400 persons working in the Firm would become jobless and in case interim relief is granted it would amount to grant of main relief sought in the suit. In support of his contentions, learned counsel has relied upon the cases reported as Islamic Republic of Pakistan through Secretary, Establishment Division, Islamabad and others v. Muhammad Zaman Khan and others (1997 SCMR 1508), Muhammad Ashraf Khan v. Abdul Qadar and 3 others (1995 SCMR 296), Khan Muhammad Niazi v. M/s Habib Bank Ltd. Assistant Vice-President and Incharge Vigilance Team, President's Secretariat, Habib Bank Annex, Head Office, Karachi and 3 others (1997 MLD 1304), Messrs United Bank Ltd. v. Messrs Iftikhar and Company and 6 others (PLD 1990 Lahore 111) and Iftikhar Siddiqui v. Clifton Cantonment Board and others (PLD 1998 Karachi 373).

4. While supporting respondent No.1, learned Additional Advocate General contends that in presence of clause 12 in the

Partnership Deed, no interference is called for by this Court in these proceedings as interim relief in suits for mandatory injunctions cannot be granted at initial stage. Adds that since matter has already been referred for ADR to eliminate apprehensions of the appellants, thus, it is in the fitness of things that the matter be left upto the learned Trial Court.

5. In exercise of his right of rebuttal, learned counsel for the appellants submits that since ADR court has already sent back the matter to learned Trial Court, upon failure of reconciliation proceedings, the agony of the appellants can only be eliminated by issuing interim relief; that since cause of action in the earlier two suits was entirely different, the same cannot be made a ground to oust the appellants; that interest of the workers can be protected by appointing a receiver for which the appellants have already filed an application. Relies on Atif Mehmood Kiyani and another v. Messrs Sukh Chayn Private Limited, Royal Plaza, Blue Area, Islamabad and another (2021 SCMR 1446) and M.S.V. Narayanan Chettiar v. M.S.M. Umayal Achi (AIR 1959 Madras 283).

6. I have heard learned counsel for the parties at considerable length and have also gone through the documents,

annexed with this appeal, as well as the case-law cited at the bar.

7. Admittedly, the appellants have filed suit seeking declaration, rendition of accounts, recovery, permanent and mandatory injunction against clause 12 of the Partnership Deed. Section 42 of the Partnership Act, 1932 deals with dissolution of partnership, which, for convenience of reference, is reproduced herein below: -

“42. Dissolution on the happening of certain contingencies. Subject to contract between the partners a firm is dissolved—

(a) if constituted for a fixed term, by the expiry of that term ;

(b) if constituted to carry out one or more adventures or undertakings, by the completion thereof ;

(c) by the death of a partner ; and

(d) by the adjudication of a partner as an insolvent.”

The afore-quoted provision renders it crystal clear that in the event of death of a partner, partnership stands dissolved, however, when a special clause has been incorporated in the Partnership Deed regarding continuation of the partnership in the event of death of a partner, the partnership would continue irrespective of section 42 *ibid*. The Hon’ble Supreme Court of Pakistan, in the case of Muhammad Ashraf Khan (Supra) has held that when it has been provided otherwise in the Partnership

Deed the partnership would not stand dissolved in the event of death of a partner in terms of section 42 *ibid*. Further, the said question has beautifully been dealt with in the case of Commissioner of Income-Tax v. Ganeshi Lal & Sons (2000 P.T.D. 677), in the following manner: -

“From the above reproduced observations, it is manifest that if there is an agreement to the contrary in the partnership deed, then the firm would not stand dissolved and in that case, section 42 of the Partnership Act will not be attracted. If there is no agreement to the contrary and a partner of a firm dies then the firm will stand dissolved in view of section 42 of the Partnership Act. The legal position that arises in the instant case in which an agreement to the contrary was made in the partnership deed that despite the death of one of the partners, the firm will not stand dissolved, is that despite death of Inder Mohan, the firm did not stand dissolved and the business was continued by the surviving partners and hence the instant case falls under section 187 of the Act, meaning thereby, that it is a case of change in constitution.....”

Likewise, this Court in the case of Messrs Eastern Medical Technology Services v. Province of Punjab and others (PLD 2019 Lahore 395) has *inter-alia* held as under: -

*“*****The conduct of the surviving partner and heirs of the deceased partner after his death may evidence an original contract that the partnership should not be dissolved on the death of a partner. An intention to continue business in partnership with legal heirs/representative of the deceased partner may be gathered from conduct of the parties.....”*

If prayer of the appellants for grant of interim relief on the ground that clause 12 of the Partnership Deed is against

injunctions of Islam is considered on the touchstone of the afore-referred judgments, there leaves no ambiguity that the appellants are not entitled for interim relief on the said ground alone as it is to be decided by learned Trial Court, after thrashing evidence of the parties, as to whether clause 12 *ibid* is valid or not, thus, no opinion can be rendered by this Court in that regard.

8. During the course of arguments, learned counsel for the appellants has put much emphasis on the fact that since all other properties have been divided amongst legal heirs of deceased, respondent No.1 cannot be held entitled to the Firm in question, to the exclusion of other legal heirs. In this regard, I am of the view that the same is only possible after final adjudication of the matter between the parties and if learned Trial Court comes to the conclusion that clause 12 of the Partnership Deed was ineffective upon rights of the appellants, as legal heirs of the deceased partner, it would not be feeling shy to hold so but no interference is called for by this Court in these proceedings.

9. During arguments, it surfaced that in case this appeal is not accepted the appellants would suffer irreparable loss. The Apex Court of the country in the case reported as *Bolan Beverages (Pvt.) Ltd. v. PEPSICO Inc. and 4 others* (2004 CLD

1530) while interpreting the term irreparable loss has *inter-alia* held as under: -

*“21.*****yet the calculation of such amount and the claim thereof would automatically give an impression that such loss or damage is reparable in terms of money. We agree with the learned counsel and believe that, in the circumstances of the present case, the loss cannot be irreparable in case the decree for compensation and damages etc. as claimed by the plaintiff is ultimately granted.” (emphasis provided)*

From the above, it is crystal clear that monetary loss does not constitute irreparable loss rather in case a party is found entitled to any fiscal benefit, at the time of final adjudication of the matter, the court would be empowered to order in that regard but no relief can be granted under Order XXXIX rule 1 & 2 CPC.

10. It is important to observe over here that three ingredients i.e. prima-facie case, balance of inconvenience in favour of the plaintiff and irreparable loss must exist for grant of temporary injunction as held in the cases reported *Irshad Hussain v. Province of Punjab and others* (PLD 2003 SC 344) and *Mrs. Khalida Azhar v. Rustam Ali Bakhshi and others* (2007 CLC 339) which in my humble opinion are missing in the case of the appellants, thus, learned Trial Court has committed no illegality while declining application of grant of temporary injunction.

11. Coming to the case-law, cited by learned counsel for the appellants, I am of the view that the same is inapplicable to the facts and circumstances of the present case inasmuch as the same pertains to the final adjudication of matter between the parties whereas question involved in this appeal revolves around grant of interim relief by learned Trial Court.

12. For what has been noted above, I see no force in this appeal which is accordingly **dismissed** with a direction to learned Trial Court to decide application for appointment of the receiver **within one month** positively and to decide the main suit **within three months** positively, without being influenced by any observation contained in this order, under intimation to this Court through the Deputy Registrar (Judicial).

13. Office is directed to transmit a copy of this judgment to the learned District & Sessions Judge, Sialkot, **through fax**, for its onwards information and compliance by the learned Trial Court concerned.

Judge

Approved for Reporting.

Judge