

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Suit No. 2022 of 2015

DATE

ORDER WITH SIGNATURE OF JUDGE

Plaintiff: **Khawer Hanif Through
M/s. Khalid Mehmood Siddiqui, Saadat Yar
Khan and Ashraf Yar Khan, Advocates.**

Defendant No.1 to 3: **Imran Hanif & others Through
Mr. Khadim Hussain Thahim, Advocate.**

Defendant No.4: **Habib Bank Limited Through
Mr. Fayaz Ali Metlo, Advocate.**

For hearing of CMA No. 18074/2018.

Dates of Hearing: **14.02.2019, 26.02.2019 & 03.04.2019**

Date of Order: **13.05.2019**

ORDER

Muhammad Junaid Ghaffar J. Application at Serial No. 9 i.e. CMA No. 18074/2018, has been filed on behalf of the Plaintiff under order 40 (wrongly mentioned as 41 in title) Rule 1 read with Section 151 CPC for appointment of a Chartered Accountant as a Chief Financial Officer of the Partnership Firm **M/s. Japan Packages**.

2. Learned Counsel for the Plaintiff has contended that Plaintiff owns 25% share in the partnership concern and through this Suit for Rendition of Accounts, Mandatory Injunction and Recovery of misappropriated funds, the Plaintiff has filed various interlocutory applications and vide Order dated 06.02.2017, while disposing of various applications, a Chartered Accountant was appointed to carry out the audit of the Firm from 01.01.2015 to 31.12.2016, who has furnished his report and has in fact conducted audit from 2015 to 2017. Per learned Counsel from 06.02.2017 onwards, the Defendants No.1 & 2 deliberately avoided furnishing requisite documents and a considerable time has lapsed since that date and finally the report for audit up to 2016 has

been furnished on 03.01.2019. Per learned Counsel in the report various irregularities have been recorded, which clearly substantiates the case of the Plaintiff that the Firm in question is being run in an inappropriate manner by concealing sales and inflating the expenditures so as to deprive the Plaintiff from his legitimate share. Learned Counsel has read out various observations in the report including the cost of sales and has contended that the report clearly reflects malafides on the part of other partners, as they are making money from the partnership firm to the exclusion of the Plaintiff. According to him, the application at the relevant time was though filed for appointment of Chartered Accountant as a Chief Financial Officer; however, in the changed circumstances after the audit report it is a fit case now to appoint a Receiver as deemed appropriate by this Court. Per learned Counsel, the other partners are depriving the Plaintiff from his lawful share for the last 5/6 years and the facts and circumstances of this case now warrant that some orders be passed to redress the grievance of the Plaintiff as it appears that other partners are continuously siphoning off huge sums of money from the partnership business, and therefore, a Receiver be appointed. In support of his contention, learned Counsel has relied upon the case of ***Muhammad Irfan v. The State*** reported as **2006 YLR 1506**, ***Faizullah Khan and others v. Mst. Mirzago Begum*** reported as **2015 YLR 1489**, ***Syed Munawar Hussain Shah v. Syed Nusrat Hussain through L.Rs and others*** reported as **2014 CLC 945**, ***Abdul Ghani and others v. Abdul Rashid and others*** reported as **PLD 2008 Karachi 443**, ***Media Max (Pvt) Ltd. through Chief Executive v. ARY Communication Pvt. Ltd.*** reported as **PLD 2013 Sindh 555**, ***Sahibzada Ghulam Muhammad Khan v. Nawab Jahangir Khanji and 6 others*** reported as **PLD 2011 Karachi 602**, ***Nelofar Saqib v. Saiban Builders and Developers and others*** reported as **2011 CLD 341**, ***Asadullah Mirbahar and another v. Mrs. Ayesha Muzahir through Attorney and 9 others*** reported as **PLD 2011 Karachi 151**, ***Muhammad Ayub through L.Rs. v. Muhammad Shafique and others*** reported as **2010 CLC 551**, ***Anwer Hussain v. Afsar Hussain and 2 others*** reported as **2019 YLR 442**.

3. On the other hand, learned Counsel for the Defendants No.1, 2 & 3 has raised a preliminary objection on the maintainability of this

application, as according to him this is not an application for appointment of Receiver but seeks appointment of a Chief Financial Officer; hence this Court must dismiss this application and shall not appoint any Receiver. Per learned Counsel, earlier, a similar type of application was not granted as the Court was of the opinion that a running business ought not to be disturbed, whereas, the audit report is not as such supporting the contention of the Plaintiff as argued. According to him the report itself cannot be made basis for appointment of a Receiver as in terms of Article 48 of the Qanun-e-Shahadat Ordinance, 1984, evidence is required to be recorded to substantiate the allegations in the audit report. Per learned Counsel instant Suit is neither for dissolution of the partnership nor for winding up of the business, whereas, appointment of Receiver is not in the interest of any of the parties as the business is making profits and substantial amount of such profits have been deposited with the Nazir of this Court, which the Plaintiff is continuously receiving without recording any objection. Per learned Counsel there is no direct finding of any misappropriation in the audit report; whereas, the burden of fraud as alleged is on the Plaintiff for which he needs to lead his evidence and such burden is yet to be discharged. Per learned Counsel, the report has though given certain shortcomings; but has not alleged any fraud or allegation, whereas, the findings are for preventive measures, and it needs to be appreciated that this is a family business, which is being run without maintaining proper accounts since long due to the relationship between the partners and the trust in each other. Insofar as maintaining a Rupee Account in the name of one of the partners is concerned, learned Counsel has argued that the factory is situated in the Karachi Export Processing Zone, where a Rupee Account cannot be maintained, and therefore, to overcome this practical difficulty, with consent a separate account in rupees was opened in the name of one of the partners so that transactions with third party can be smoothly carried out. In these circumstances, he has prayed for dismissal of this application. In support he has relied upon ***Bhagawan Ram Kairi v. Radhika Ranjan Das and others*** reported as **AIR 1953 Assam 25**, ***Radha Kanta Pal v. Benode Behari Pal and others*** reported as **AIR 1934 Calcutta 444**, ***Muhammad Siddiq v. Muhammad Yaqoob and others*** **PLD 1965 West Pakistan 584**.

4. I have heard both the learned Counsel and perused the record. As noted hereinabove, this is a Suit for Rendition of Accounts and Recovery, whereas, the primary grievance of the Plaintiff is against Defendants No.1, 2 & 3, who along with the Plaintiff are partners to the extent of 25% each in the firm namely **M/s. Japan Packages**. Earlier also a similar type of application was filed and vide Order dated 06.02.2017, whilst observing that appointment of a Receiver in a running business is always regarded to be a very harsh action and for the reason that Plaintiff holds 25% share; whereas, the other three partners i.e. Defendants No.1, 2 & 3 jointly own 75%, the application for appointment of Receiver was though not granted; but at the same time an order was passed to conduct audit of the accounts in the following manner:-

“7. However, at the same time as prayed in the alternative by the plaintiff, it would not cause any inconvenience to any of the parties, and for the sake of justice, equity and fairness to appoint a Chartered Accountants firm to conduct an independent audit of the Accounts, Balance Sheets and Profit & Loss statements of the partnership concern for the period starting from 1.01.2015 to 31.12.2016. This shall not prejudice the case of any of the parties and will only be a tool for the Court to properly adjudicate the main issue in hand. In the circumstances M/s Haroon Zakaria & Company, Chartered Accountants, having office at Mezzanine Floor, Progressive Plaza, Beaumont Road, Karachi (+92-21-35674741-4) are appointed to carry out this exercise. The Nazir is directed to convey this order of the Court, whereas, the defendants are directed to furnish up to date details of the Accounts, Profit & Loss statements, Balance Sheets etc, to the Nazir who shall send the same to the above firm. The firm shall quote their fee after receiving the documents and the amount of work required to be performed to the Nazir and thereafter it shall be approved by the Court. The Nazir shall associate the parties in this exercise, whereas, all the parties to the Suit are directed to extend their fullest co-operation to the Nazir, and to the firm, as and when requested by them. Nazir’s fee for this exercise is fixed at Rs. 30,000/- which shall be paid by and from the account of the partnership concern by defendants.

8. In view of hereinabove facts and circumstances of the case, all these applications are disposed of with the above directions and by further directing the defendants to continue with the arrangement presently going on pursuant to earlier orders of the Court, whereby, they have been directed to pay the plaintiff’s share through Nazir of this Court”.

5. In compliance of the above order, though after much resistance by Defendants No.1, 2 & 3 in providing requisite documents, the appointed Chartered Accountants have finally filed their report on 03.01.2019 on the financial statements for the years ending 31st December, 2015 and 2016. In the report it has been stated that proper receipts to match the sales figures as well as the expenses have not been provided completely.

It has been further observed in the report at Page 4 of 26, 5 of 26 and 6 of 26 as under:-

S. No.	Description
	December 2016 (Refer Annexure)
7	We have identified bank accounts not in the name of Partnership, but there is movement in said accounts. Accordingly management has not been able to provide any detail relating to said accounts on grounds of being dormant accounts.
8	We have identified bank accounts not in the name of Partnership; however transactions are properly recorded in the ledgers.
12	Profit reported as per financial statements for the year ended December 31, 2015 and December 31, 2016 prepared by independent accountants is Rs.7,490,840 and Rs.10,890,671 as against financial statements submitted in the court where it was Rs.28,773,011 and Rs.6,476,686 (Refer Annexure-XI)
13	The Partnership does not have a practice of stock taking or physical count of stock therefore, we are not able to form an opinion on stock in trade amounting to Rs.24, 867,706 for the year ended December 2015 and Rs.20, 527,171 for the year ended December 2016 respectively.
14	The Partnership does not have a practice of reconciling of supplier accounts with the purchases of stock therefore we are not able to form an opinion on trade payables amounting to Rs.3,261,615 for the year ended December 2015 and Rs.1,280,278 for the year ended December 2016 respectively in the absence of confirmation from supplier. Refer Annexure-XII for status of confirmations.
15	The Partnership does not have a practice of reconciling of customer accounts with the sales therefore we are not able to form an opinion on trade receivables amounting to Rs.57,545,565 for the year ended December 2015 and Rs.53,812,102 for the year ended December 2016 respectively in the absence of confirmation from Trade debuts. Refer Annexure – XIII for status of confirmations.
16	Partnership does not have a practice of counting physical cash in hand therefore we are not able to form an opinion on cash in hand amount to Rs.8,967,771 for the year ended December 31, 2015 and Rs. 10,566,898 for the year ended December 31, 2016 respectively.
17	Deposit Slips amounting to Rs.3,414,570 and Rs.3,917,282 for the period ended December 31, 2015 and for the period ended December 31, 2016 provided by the defendant are in the form of photocopy and were not in original form which pertain to the partnership customers but were deposited in Imran Hanif's personal Bank Account (1131-0081-000864-01-0) same amounts are reflected under cash in hand (namely petty cash Imran Hanif) in the books of accounts Refer S.No.16 for cash in hand opinion (annexure-XIV)

Conclusion- Continued

Currently it is strongly needed that Partners sit together and approve proper accounting Manual to be developed by Professional firm. Thereby, such accounting Manual shall be properly implemented so that Separate Entity Rule can be properly followed.

Based on our findings above, we conclude that financial reporting process of the Entity is very weak since the establishment of the Entity and no efforts are visible for the establishment of proper Accounting Function.

We strongly recommend that proper accounting fiction shall be established in supervision of professional Chartered Accountant who may be part time depending on budget of the Organization.

6. Perusal of the relevant observations of the Chartered Accountants apparently reflects that the accounts are not being maintained in a manner in which they ought to have been. It is pertinent to note that a dispute has already arisen and is pending before the Court since 2015 when this Suit was filed and on 06.02.2017 an order was passed for conducting audit; hence the objection by the learned Counsel for the Defendants that no irregularity has been committed for not maintaining proper accounts is not justified. The business is being run under a partnership arrangement and it is the responsibility of the firm as well as the managing partners to maintain proper accounts with clarity so that none objects and the transactions entered into by the firm are reflected in a proper and transparent manner in the financial accounts. This admittedly is not the case here. At least, as reflected from the report of the Chartered Accountant. Earlier on a similar type of application filed on behalf of the Plaintiff, this Court, showing restraint and giving an opportunity to the Defendants to continue with the business (which at the relevant time was running in profits) had chosen not to appoint a Receiver, and instead as an abundant caution, audit was ordered to be conducted through a Chartered Accountant. Such audit has now been done, though belatedly; but the report has pointed out various discrepancies in the accounting system, which ultimately will lead to erosion of the profits and increased cost of sales, thereby, depriving the Plaintiff from his legitimate share as he is not being allowed access to the business premises and / or to interfere in the affairs of the business. Showing restraint in the appointment of a Receiver, does not necessarily mean that Court has been deprived from its powers to appoint a Receiver as and when needed. Though Courts usually do not appoint Receivers in respect of businesses which are making profits; but at the same time, if substantial issues are raised and there is a likelihood that the property is in danger or the partnership business, if continued in the same manner will deprive the excluded partner from his legitimate share, a Receiver can be appointed. If the Court comes to a conclusion that ultimately there will only be one answer at the trial stage, and that is a dissolution

of the partnership business, then Court will always be justified in appointing a Receiver. In the present circumstances and on perusal of the record including earlier orders i.e. 06.02.2017 and the subsequent report of the Chartered Accountant, to me, it appears that it will be just and convenient to appoint a Receiver as presently there appears to be no other way to protect the interest of the Plaintiff. The objection of the learned Counsel for Defendants to the effect that until evidence is recorded and the admissibility of the report of Chartered Accountant is decided in terms of Qanoon-e-Shahadat Order, 1984, is concerned, the same does not appear to just and fair, inasmuch as the Chartered Accountant was appointed by the Court for its assistance before passing of an extreme order of appointment of Receiver; and once the report is furnished the Court is fully competent and is not denuded of its powers to proceed further on the basis of such report. Admittedly, the assets of the partnership business are to be collected and preserved as the parties are in dispute with bitter feelings. It is also a matter of record that the Plaintiff has though been compensated from time to time; but such compensation does not commensurate with the accounting figures given by the Chartered Accountant, and in the given facts and circumstances, there is reasonable apprehension to the partnership property, assets as well as income, which are in danger of being misused and dissipated, and therefore, it would be just and convenient to appoint a Receiver. It is not in dispute that the Suit was filed in 2015, and since then the Plaintiff is agitating his grievance to the effect that after being excluded from the business which he claims to have established, the other three partners (at least 2 brothers) are manipulating with the accounts and are pocketing money privately, to the exclusion of the Firm and the Plaintiff. In that situation, if nothing else, at least it was incumbent upon the Defendants to manage the accounts properly and in a transparent and clear manner. This would have resulted in shutting down the doors to the Plaintiff to agitate any further, and he would not have any case to ask for appointment of a receiver any further. However, unfortunately, the Defendants have not learned from their mistakes and the events that have occurred during this period. The report of Chartered Accountant clearly states that no proper accounting manual is being followed; that the financial reporting process of the entity is very weak and no efforts are visible for establishment of proper accounting functions; and strongly

recommend establishing proper accounting fiction under supervision of a Chartered Accountant. The argument that since this was a family business concern amongst brothers; therefore no proper accounting system was in field, may be true till such time it is with consent and no one objects. However, when a partner to the extent of 25% has been excluded and is ousted from the management of business, and is only dependent on the accounting figures of the firm for his earnings; then it is obligatory upon other partners to maintain transparent and expressly clear and lawful accounts which unfortunately has not been done. Notwithstanding this, even the partnership deed in clause 8 requires the firm and partners to manage proper accounts of business. The purpose of appointing a receiver always is to safeguard the interests of the parties pending final decision of the Court and it seems to me that since all parties share equally in the profit and loss it is to their joint interest that the assets be in the meantime maintained and the profit earned so as to leave more for the parties at the end¹. In cases where the dispute is between partners for dissolution of partnership-deed and accounts the Court always as a matter of course appoints receiver². Danger to the property is always a ground for the appointment. Thus the Court will appoint a receiver, although the partnership is not dissolved, where a partner is guilty of such breaches of his duty as a partner as would entitle his partner to a dissolution, or of embezzling the assets, or of excluding his partner, or where a surviving partner insists on continuing the business with the assets of the deceased partner, or fails to get in the outstanding debts, or otherwise acts to the prejudice of the assets or where an acting partner denies the other partner's right to relief on the ground that the partnership is illegal and claims the whole property for himself, or where a new firm, being interested in giving long credit to the debtors of the old firm, forbears to press them³.

7. In view of hereinabove facts and circumstances of the case I am of the opinion that a case is made for appointment of a Receiver; therefore the listed application is allowed. The Official Assignee is appointed as Receiver of the Firm M/s Japan Packages with full powers as contemplated under Order 40 CPC. In addition he is further directed to;

¹ Asghar Ali v Abdul Hussain (PLD 1977 Karachi 280)

² Muhammad Yousuf Burney v S Muhammad Ali (1983 CLC 1498)

³ Halsbury's Laws of England, Volume 24, paragraph 923, at pages 484 and 485

- a. Immediately take over the affairs of the Partnership business which shall be managed by all four partners including the Plaintiff under his supervision.
 - b. No payments from the account(s) and or on behalf of the firm in any manner shall be made or paid without approval of the Receiver who is directed to convey this order of the Court to Defendants No.4 to 8 and so also to all other Banks, including the Banks as stated in the Auditors report wherein the accounts of the firm are being maintained.
 - c. All payments exceeding Rs.25,000/ or equivalent in Dollars shall be made through crossed cheque(s) which should be countersigned by him after consent of all four partners. If the partners have dispute in making any payment(s), then he shall refer the matter to the Court.
 - d. He should make efforts to engage and appoint a part time Chartered Accountant as observed by the Auditors in their report. He shall also take assistance from the Auditors if needed.
 - e. He shall inform Karachi Export Processing Zone not to transfer any assets of the firm. He shall also inform all other concerned regarding restriction on transfer of any property of the Firm. Such information be provided by the Plaintiff.
 - f. None of the Partners shall be paid any amount as against profits or on account by the Receiver until it is agreed by all four partners.
 - g. Receiver shall be paid immediately an amount of Rs.500,000/- tentatively by the firm against his services and future terms will be settled as and when needed.
 - h. As noted hereinabove, if there is any other issue, the Receiver shall exercise his powers as deemed fit, in consultation with partners, if need be arise, and if not, then refer the matter to Court for appropriate orders.
 - i. The Receiver shall file his first report within 30 days from the date of this order.
8. CMA No 187074/2018 is allowed in the above terms.

Dated: 13.05.2019

J U D G

E

Ayaz P.S.