

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
High Court Appeal No.149 of 2020

Date	Order with signature of Judge
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FRESH CASE:

1. For order on CMA No.1470/2020 (Exemption)
2. For hearing of main case
3. For order on CMA No.1471/2020 (Stay)

31.08.2020.

Mr. Rafiq Ahmed Kalwar, Advocate for the appellant.

This High Court Appeal (**HCA**) has been filed impugning the order dated 16.07.2020 passed by the learned Single Judge on an application bearing CMA No.5673 of 2020 filed under Order XXXIX Rule 7 read with Order XVIII Rule 18 read with Sections 94 and 151 of the Code of Civil Procedure, 1908, in Suit No.803 of 2020.

Mr. Rafiq Ahmed Kalwar Advocate has appeared on behalf of the appellant and stated that the learned Single Judge was not justified in deputing the Nazir to undertake the inspection without notice and to furnish his report, which order, according to him, is prejudicial to the present appellant since before inspection no opportunity of hearing was provided to the appellant, hence such action of the Nazir is not in accordance with law and needs to be vacated. In support thereof, the learned counsel has placed reliance on the decisions given in the cases of Syed Ali Gohar Shah Vs. Province of Sindh and others (2004 CLC 1875) and Barkat Ali and another Vs. Mst. Fatima Bai and 2 other (1995 CLC 1012).

We have heard the learned counsel at some length and have also perused the record.

It is noted from the record that Suit bearing No.88 of 2020 was filed by the present appellant for declaration, mandatory and permanent injunction against the present respondents No.1 and 2, seeking declaration that the present appellant be declared as the absolute and real owner of the 50% share held by the present respondent No.1 and that the respondent No.1 is a mere Benami owner of the 50% share in the suit property, which is plot bearing No.111 (industrial /commercial), measuring 603 square yards situated in Defence Housing Authority, Karachi. The record further reveals that a suit bearing No.803 of 2020 was also filed by the present respondent No.1 against the appellant and the respondents No.2 to 4 for declaration, dissolution of partnership, rendition of accounts, partition, mesne profits and injunction. In suit No.803 of 2020, the present respondent No.1 moved an application bearing CMA No.5673 of 2020 under Order XXXIX Rule 7 read with Order XVIII Rule 18 read with Sections 94 and 151 of the CPC, 1908 with the prayer to direct the Nazir to inspect and preserve the entire record including but not limited to books of accounts, ledgers of receivables, correspondence files etc. by making inventory and copies thereof without notice to the appellant, since she was apprehending that if notice is issued to the present appellant he might either shift or manipulate the record lying with him. The matter proceeded before the learned Single Judge, who allowed the Nazir to conduct the inspection without notice with directions to the Nazir to submit his

report to the Court. The Nazir in compliance to the order dated 16.07.2020, the impugned order, nominated his representative for doing the needful. However, it is noted from the report of the Nazir dated 18.07.2020 that the present appellant, who is the defendant No.1 in Suit No.803 of 2020, did not allow the staff members of the High Court to comply with the High Court's order. The staff, however, was able to obtain some photographs from the spot.

We have noted that the application bearing No.5673 of 2020 was filed with the main objective to inspect and preserve the record so that the same may not be either removed, misplaced or manipulated by the present appellant and that is why application was given by the defendant No.1 in the suit that the inspection may be conducted without notice to the other party, otherwise the purpose of filing the application would be frustrated. From the Nazir's report dated 18.07.2020 it is evident that the present appellant created hindrance while inspection and the staff only managed to obtain some photographs. Since a contempt application is pending before the learned Single Judge hence we, at this juncture, do not consider it necessary to give any opinion on this aspect as that application will be decided by the learned Single Judge on its own merits, in accordance with law.

We specifically asked a question from Mr. Kalwar that whether any record was impounded by the nominee of the Nazir, to which he candidly replied that no record was impounded but only some photographs were taken.

So far as allowing the application bearing CMA No.5673 of 2020 in Suit No.803 of 2020 is concerned, we see no illegality in the order of the learned Single Judge since an apprehension was shown by the present respondent No.1 about misappropriation and preservation of the record so that the same may not be manipulated, which order appears to have been passed in the interest of justice and looking to the facts and circumstances of the matter and we see no illegality in the said order and thus, in our view, the order of the learned Single Judge, by no stretch of imagination, could be considered either perverse or damaging to the present appellant.

The decision given in the case of Syed Ali Gohar Shah in fact supports the view taken by the learned Single Judge as the issuance of notice would frustrate the very purpose of inspection, hence is of no help to the learned counsel for the appellant, whereas the second decision given in the case of Barkat Ali talks about the powers of the Commissioner making the inspection, which are general proposition of law.

We, therefore, in view of the facts and circumstances noted above, find no illegality or irregularity in the order passed by the learned Single Judge. This HCA, thus, is found to be misconceived and not maintainable, hence, the same stands dismissed in limine alongwith the listed applications.

JUDGE

JUDGE