

IN THE HIGH COURT OF SINDH AT KARACHI

HCA No. 213 of 2019

Before : **Mr. Justice Irfan Saadat Khan**
Mr. Justice Fahim Ahmed Siddiqui

Amir Hanif & others. Appellants.

Versus

Khawar Hanif & others. Respondents.

Date of hearing: **17.09.2019**

Date of judgment: _____

All the Appellants namely, Amir Hanif, Imran Hanif and Abdullah Nasir through Mr. Khadim Hussain Thahim, advocate.

Respondent No.1 Khawar Hanif through Mr. Sadaat Yar Khan, advocate.

Respondent No.8 Defence Housing Authority (DHA) through Mr. Asif Rasheed, advocate.

J U D G M E N T

FAHIM AHMED SIDDIQUI, J:- Through the impugned Order dated 13-05-2019, the learned Single Judge of this Court has appointed the Official Assignee as Receiver of the firm M/s. Japan Packages with powers envisaged under Order 40 of CPC as well as some additional powers. The appellants, considering themselves aggrieved, preferred the instant appeal against the impugned order.

2. The contextual facts of the case are that the appellants and respondent No. 1 are brothers inter-se and running an industrial unit under a registered partnership firm i.e. M/s. Japan Packages. In the said partnership business, the appellants are having shareholding of 75%, while the remaining 25% shareholding rests with the respondent No. 1. Subsequently, some disputes arose between the appellants and respondent No.1, which could not be settled between the partners. Hence, the respondent No. 1 invoked the original civil jurisdiction of this Court by filing Civil Suit No. 2022/2015 for declaration, rendition of accounts, recovery of misappropriated funds etc. along with a CMA under Order 40

Rule 1 of CPC. On such CMA, the learned Single Judge through order dated 16-06-2016 made an interim arrangement by directing the respondents to deposit the profit of respondent No. 1 with the Nazir of this Court. After hearing the parties, the said CMA was disposed of vide order dated 06-02-2017 with directions to appoint a Chartered Accountant as auditor to conduct an independent audit of the said partnership concern from 10-01-2015 to 31-12-2016. The auditor conducted the audit and furnished his report. Nevertheless, respondent No.1 again filed an application (CMA No. 18074/2018) under Order 40 Rule 1 of CPC for appointment of Receiver, which was disposed of by passing the impugned order.

3. Mr. Khadim Hussain Thahim, learned counsel for the appellants assails the impugned order in his extensive and all-encompassing submissions. The gist of his arguments is that after an interim arrangement, there was no need to appoint a Receiver especially when a previous similar application was disposed of by giving some directions. The directions were complied with and the auditor has given his report in which he could not say anything about the alleged fraud and only some managerial issues were observed. After disposal of previous application for appointment of Receiver, another similar application not maintainable under the dogma of *res judicata*. According to him, the Receiver cannot be appointed in view of clause 12 of the partnership agreement, which does not require consent of the parties and at the most, the respondent partner can seek dissolution of partnership or retirement but no other relief can be granted to him. He stated that the business of the firm is generating profit and the law does not permit to appoint a Receiver in a profiting business, as the appointment of a Receiver will cause harm to the business considering the unreasonable condition imposed by the learned Single Judge that any amount exceeding Rs.25,000/- need consent of all the partners and counter signature of the Receiver. In this way, according to him, the management of the firm has been handed over to the Receiver, which is beyond the scope of Order 40 of CPC. After putting his submissions, he relied upon the cases of **Assadullah Mirbahar vs Mst. Yesha Mazahir (PLD 2011 Karachi 151)** and **System Company vs MTU Middle East FZE (PLD 2019 Sindh 382)**.

4. Contrariwise, Mr. Sadaat Yar Khan, learned counsel for respondent No.1 supports the impugned order. Briefly, his contention being that there is no harm in moving another application for appointment of Receiver in

the changed scenario as at the time of disposal of the previous application, there was no ground available with the respondent No.1 for pressing his plea for appointment of the Receiver, however, since now the auditor's report is available, which itself warrants the appointment of a Receiver in the changed circumstances. According to him, appointment of the Receiver does not mean that the management of the business has been taken over by the Receiver as presently, all the managerial decisions are being taken by the partners in a meeting held on every Saturday and the Receiver is there in the meeting just to oversee and safeguard the interest of all the partners including the appellants. According to him, after the appointment of the Receiver, the profits of the partnership concern have increased manifold; therefore, it would not be appropriate to apprehend about any harm for the business of the firm.

5. Mr. Khalid Mehmood, learned counsel for the respondent No. 8 submits that the core dispute is between the appellants and the respondent No. 1 but he specifies that the impugned order was the best option in the existing circumstances.

6. We have heard the arguments advanced and scrutinised the available documents in the light of submissions made before us. In the instant matter, the Receiver was appointed on a subsequent application; as such the learned counsel for the appellants has taken the plea of *res judicata* regarding the maintainability of the subsequent application. It is the contention of the learned counsel for the appellants that after the disposal of the first application for appointment of Receiver, under the principle of *res judicata*, the second application is not maintainable. There is no cavil regarding the proposition that Section 11 of CPC is applicable to the interlocutory applications also, as principle of *res judicata* applies between the same parties at all the subsequent stages of litigation. Nevertheless, in case of changed scenario when the reasons are altogether different from the previous application, the subsequent application and order thereon are not hit by the doctrine of *res judicata*. It is now settled that the application of the doctrine of *res judicata* to a subsequent interlocutory order depends upon the facts and circumstances of each case and the nature of the order passed at the earlier stage of the proceedings. This issue has elaborately been explained by the Hon'ble Supreme Court in a recent judgment reported as **Gulistan Textile Mills Ltd and another vs Soneri Bank Ltd and another (PLD 2018 Supreme Court 322)**, wherein a full bench of the Apex Court speaks as under:

“We now consider whether the second application filed by the respondent was liable to be dismissed on the ground of res judicata. There are several aspects to this issue. First, whether the principle of res judicata applies to applications or not; and second, if the answer to the first question is in the affirmative, what is the scope of the application of such a principle? Res judicata is the Latin term for "a matter (already) judged" and entails the concept of claim preclusion; once a matter has been decided and adjudicated on merits by an adjudicatory body, the same cannot be raised again. The purpose of this principle is to create repose and to prevent multiple and possibly contradictory findings on the same issues and to curb unnecessary delays in proceedings. As regards civil proceedings, this concept is codified in Section 11 of the C.P.C. However, the said section specifically refers to 'suits' and therefore restricts the application of the principle thereto. Interlocutory applications cannot be regarded as 'suits'; hence, strictly speaking Section 11 of the C.P.C. would not be attracted to such applications. Nevertheless, the general legal principles of res judicata would most certainly apply. Therefore an order passed pursuant to any interlocutory application at one stage of the proceedings would operate as a bar upon similar interlocutory applications made at a subsequent stage of the proceedings based on the general principles of res judicata. However this general rule will not apply where the order on such interlocutory application does not involve any adjudication. Examples of such instances are:- where there is no decision on merits, but a mere expression of opinion not necessary for the disposal of the application; where a matter, though in issue has, as a fact, not been heard and decided, either actually or constructively; where a matter in issue has been expressly left open and undecided; where the suit is not pressed; or where the suit is withdrawn. A further exception is highlighted in the case of *Amanullah Khan and others v. Khurshid Ahmad* [PLD 1963 (W.P.) Lah. 566], which holds that where an application has been decided once, but subsequently a fresh application is made on facts and circumstances different from those which existed earlier, res judicata would not apply. In this context the case reported as *Mst. Sarkar Khano A. Molo v. Abdul Malik Rehmanahtullah Kasim Lakha through L.Rs. and others* (2016 YLR 1506) is germane which holds that the change of the status of a suit property, even during the pendency of a suit, could be pressed as a fresh ground to re-present an application, even in the event of the existence of an earlier order on an application of the same nature or title. We find it pertinent to make reference to the case of *Arjun Singh v. Mohindra Kumar and others* (AIR 1964 SC 993) wherein it was held that interlocutory orders such as orders of stay, injunction or Receiver which are designed to preserve the status quo during the pendency of the litigation and to ensure that the parties may not be prejudiced by the normal delay occasioned in the proceedings before the Court, do not decide in any manner the merits of the controversy in issue in the suit and are capable of being altered or varied by subsequent applications for the same relief, but only on proof of new facts or new situations which subsequently emerge.”

7. Now we have to see that what are the changed circumstances, which augmented by the learned Single Judge to pass the impugned order. It is pertinent to point out that the previous application for appointment of Receiver was disposed of with a direction to carry out the audit of the partnership firm by a chartered accountant. In the audit report, some serious observations were made regarding the managerial weakness and accounting deficiency, which certainly demands interference by the Court. Hence, in these changed scenarios, the respondent was quite justified in moving a fresh application for appointment of Receiver, which was accordingly dealt with by the learned Single Judge under the impugned order.

8. Another objection raised by the learned counsel for the appellants regarding the mandate of the Receiver. It is the contention of the learned counsel for the appellants that the management of the partnership firm was handed over to the Official Assigning as Receiver, which is beyond the scope of Order 40 CPC. According to the learned counsel for the appellants, the Receiver cannot be appointed in a thriving business and the impugned order would hinder the functioning of the partnership firm, which subsequently will face losses. The learned counsel also objects about the process of issuance of cheque exceeding Rs. 25,000/-. In this respect, our observation is that it will be misconceived to consider that the management of the firm was handed over to the Receiver. In fact, the business is required to be carried out by all the four partners with their mutual consent under the supervision of the Receiver, who is available and will facilitate all the partners and safeguard their interests. It is nowhere mentioned in the impugned order that the Receiver will take over the partnership business with full power to run the same, as per his whimsical wishes. The procedure as laid down in the impugned order itself indicates that the partnership firm will remain in the hands of the partners and in case of dispute or disagreement amongst the partners, the Receiver will report the same to the Court, where the issue will be settled under the directions of the Single Judge of this Court.

9. So far as clause 12 of the partnership agreement is concerned, the same pertains to the day to day business and affairs of the partnership firm. The contention of the learned counsel for the appellants is that through the appointment of the Receiver, routine matters regarding the business would be disturbed. In support of his contention he relied upon the case of **System Company (supra)**, in which the effect of a time-bond

contract was discussed. This case has no bearing whatsoever with the case in hand. Nevertheless, we are of the view that the said clause of the partnership agreement does not preclude the Single Judge to appoint a Receiver. As explained above, the day to day business and affairs are not required to be carried out with the consent of the Receiver but all the partners may do so as per routine practice and norms of the business. Receiver interference, however, is limited to safeguard the interest of all the partners including the appellants and there is only one embargo that the partners must seek consent of each other in respect of payment of an amount exceeding to Rs.25,000/-. In the impugned order, the situation of failure in getting such consent has also been exquisitely resolved by directing that in such eventuality, the matter will be referred to the Court where it will be resolved by considering the interest of the partnership firm and all the partners.

10. The learned counsel for the appellants has also relied upon the case of **Assadullah Mirbahar (supra)** but in our view the same will not be helpful to the appellants in the present scenario; rather it goes against the appellants. In the said case, the object and scope of preventive provisions have been discussed. In the said case, a Division Bench of this Court has observed as under:

“The effect of appointment of Receiver by the learned Single Judge was not to prejudice the case of any party but the only object was to maintain the situation intact during the pendency of the suit. The controversy between the parties and their rights to the land in question can only be decided or finally determined after leading evidence by the parties in support of their case. At this stage, we do not find any illegality or irregularity in the impugned order and keeping in view the bare bones of the matter and on the touchstone of the criterion as discussed hereinabove, the learned Single Judge rightly appointed Receiver of the property for proper supervision and to save the land from further encroachment and illegal construction.”

11. The ultimate outcome of the above discussion is that there is no illegality or irregularity in the impugned order; as such we do not find any room to intervene in the same. Resultantly, the instant appeal is dismissed along with all the listed and pending applications, with no order as to cost.

JUDGE

Dated: _____

JUDGE