

Order Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1647 of 2012

Before :

Mr. Justice Nadeem Akhtar

- Plaintiffs 1 and 2 : Rifat Saeed and Jawed Akhtar, through
Mr. Obaid-ur-Rehman Khan, advocate.
- Defendants 1 to 6 : Zahid Saeed, Farida Saeed, Zahra Saeed, Sarah
Saeed, Amna Saeed and Mohammad Saeed,
through Mr. Haider Waheed advocate.
- Defendants 7 to 11 : Called absent.
- Defendant No.12 : Mrs. Akhtar Sultana (proforma defendant), through
her guardian / defendant No.1 Zahid Saeed.
- Dates of hearing : 28.11.2013, 10.12.2013, 12.12.2013, 23.12.2014,
22.12.2015, 30.05.2016, 18.08.2016 & 17.10.2016.

ORDER ON C.M.A. Nos. 12833/2013 & 12834/2013

NADEEM AKHTAR, J. – This is a Suit for administration, declaration, partition, accounts, cancellation of documents, permanent injunction and mesne profits, in respect of the properties claimed to have been left by late Mr. Ahmed Saeed (**'the deceased'**). Through CMA No.12833/2012, the plaintiffs have prayed that the defendants be restrained from disposing of, encumbering, alienating, etc. the properties and businesses described in paragraph 13 of the plaint, and CMA No.12834/2012 has been filed by them seeking appointment of a receiver in respect thereof.

2. The plaintiffs, defendant No.1 and defendant No.12 are the legal heirs of the deceased, who passed away on 09.03.1984. The plaintiffs and defendant No.1 are the real sons and defendant No.12 is the widow of the deceased. Defendant No.2 is the wife, defendants 3, 4 and 5 are the real daughters and defendant No.6 is the real son of defendant No.1. It is claimed by the plaintiffs that the following properties and businesses were left by the deceased at the time of his death :

- a. Alliance Commercial Corporation (**'ACC'**), a sole proprietorship concern in the name of the deceased with offices owned by him and located on the second floor of Emirates Bank International Building, I. I. Chundrigar Road, Karachi.

- b. 50% share in Abid Industries ('AI'), a partnership concern of the deceased with his younger brother late Mr. Ahmed Rishad, located at E-43, SITE, Karachi.
- c. 50% shares in Sindh Industries (Pvt.) Ltd. ('SIPL'), situated on Plot No.43/A, SITE, Manghopir Road, Karachi.
- d. 50% share in H. A. Rauf & Company (Pvt.) Ltd. ('HARCPL'), a sales and marketing venture located in Latif Cloth Market.
- e. Plot measuring 1,000 sq. yds. in PMT Society, Korangi, Karachi (**the PMT plot**).
- f. Plot measuring 2,000 sq. yds. in Phase-VIII, DHA, Karachi (**the DHA plot**).

3. The case of the plaintiffs, as averred in the plaint, is that plaintiff No.1 settled in Dubai in the year 1974, while plaintiff No.2 was involved in developing a family owned chemical business during the lifetime of the deceased ; defendant No.1 became 50% partner / owner of AI in place of the deceased and gained complete control over the other three entities viz. SIPL, HARCPL and ACC to the exclusion of the plaintiffs ; a dispute arose between defendant No.1 and his uncle which culminated in the institution of civil Suit No.504/1994 before this Court, which was subsequently decreed on 07.05.1995 in terms of a compromise arrived at between them, whereby defendant No.1 took over assets mentioned in the said decree not only for himself but also on behalf of other legal heirs of the deceased ; after taking over full control of the assets of the deceased, defendant No.1 started creating third party interest therein and also started siphoning of the funds by purchasing valuable immovable properties in United Kingdom, Dubai, Islamabad, Lahore, Murree and Raiwind ; and, despite repeated demands by the plaintiffs, defendant No.1 not only failed to disclose or render the accounts of the assets and businesses left by the deceased, but also failed to pay the shares and profits therefrom to the other legal heirs. In view of the above allegations, this Suit for administration, declaration, partition, accounts, cancellation of documents, permanent injunction and mesne profits has been filed by the plaintiffs in respect of the above assets and businesses allegedly left by the deceased.

4. Mr. Obaid-ur-Rehman, learned counsel for the plaintiff, contended that ACC was originally a partnership firm consisting of only two partners viz. the deceased and his brother, and as the other partner retired from the firm by virtue of dissolution deed dated 28.03.1958, the deceased became the sole proprietor of ACC ; this fact is supported by ACC's letter dated 28.03.1958 filed by defendant No.1 along with his written statement which

is available at page 175 ; and, if it is assumed that defendant No.1 is the sole proprietor of ACC with effect from June 1999 as claimed by him, he would still be liable to render accounts in respect thereof from the date of death of the deceased till June 1999. Regarding AI, learned counsel contended that it was also a partnership between the deceased and his brother which ended upon the death of the deceased ; the said partnership was reconstituted when defendant No.1 became a partner in place of the deceased ; in Suit No.504/1994 between defendant No.1 and the other partner of AI, a consent decree was passed whereby properties of AI and SIPL were divided, defendant No.1 took over for self and on behalf of other legal heirs of the deceased business and share of HARCPL and the dyeing and processing unit which was renamed as SI ; in view of the above, all legal heirs of the deceased, including the plaintiffs, have their respective shares in the properties of SI and HARCPL ; despite this situation, the immovable property on which SI is situated has been illegally gifted by defendant No.1 to his daughter / defendant No.3 in order to deprive the other legal heirs, which gift is liable to be cancelled ; and, shares of HARCPL were never handed over by defendant No.1 to the plaintiffs and defendant No.12, and this company was wound up by defendant No.1 by showing that it had no assets although it had a godown and a rented shop. It was stated on behalf of the plaintiffs that they cannot claim any right in either SIPL or AI as the same are in the control of the sons of the late partner of defendant No.1 in view of the above compromise, and they are claiming their right and share only in SI and HARCPL.

5. Learned counsel for the plaintiffs further contended that the DHA plot was owned by the deceased ; defendant No.1 filed Suit No.336/1998 against DHA impleading all legal heirs of the deceased as plaintiffs and by claiming himself to be the attorney of all the legal heirs, he illegally obtained a consent order in the said Suit in respect of the DHA plot ; in pursuance of the said collusive and illegal order, defendant No.1 became the sole owner of the DHA plot in the record of DHA ; and, in view of the above, the DHA plot is liable to be administered, partitioned and sold, and its sale proceeds are liable to be distributed amongst all the legal heirs of the deceased. By submitting that the PMT plot was also owned by the deceased and as such all his legal heirs are entitled to their respective shares therein, he pointed out that defendant No.1 has admitted in his written statement that this plot forms part of the estate of the deceased.

6. After giving details of the assets and businesses left by the deceased as per the plaintiffs' version, it was argued by their learned counsel that sufficient material is available on record to show that defendant No.1 has illegally ousted other legal heirs of the deceased from the said assets and businesses and has usurped their shares to which they were / are entitled

according to *Shariah*. It was urged that defendant No.1 is liable not only to render accounts in respect of the said assets and businesses with effect from the date of the death of the deceased, but also to disclose details of all the benefits and profits derived, earned and received by him therefrom. It was further urged that the plaintiffs have successfully made out a case for grant of injunction and appointment of receiver in respect of the said assets and businesses, and in case the listed applications are not allowed, the plaintiffs and defendant No.12 will not be able to receive their legitimate share out of the estate left by the deceased. In support of his submissions, learned counsel relied upon (1) *Dr. M. B. Ankalsaria V/S Commissioner of Wealth Tax, Karachi, [(1992) 66 TAX 11 (S.C. Pak.)]*, (2) *Muhammad Zahid through legal heirs V/S Mst. Ghazala Zakir and 7 others, PLD 2011 Karachi 83*, (3) *Masireddi Suryanarayana V/S Akula Anasuyamma, AIR 1963 Andhra Pradesh 298*, (4) *Benode Behari Bose and others V/S Srimati Nistarini Dassi and others, ILR 33 Calcutta 180*, (5) *Mahomedally Adamji Masalawalla and others V/S Abdul Hussein Adamji Masalawalla and others, ILR 48 Bombay 331* and (6) *Mst. Ayesha Bai and another V/S Mst. Shahida and 4 others, PLD 1981 Karachi 177*.

7. At the very outset, Mr. Haider Waheed, learned counsel for defendants 1 to 6, raised an objection that this Suit for administration, partition and accounts has been filed by the plaintiffs 27 years after the death of the deceased claiming that the subject assets and businesses were left by him. He submitted that discretionary relief of injunction and receiver cannot be granted to the plaintiffs as delay in such cases defats equity. He contended that the entire claim of the plaintiffs is based upon mere allegations and no document has been filed by them to substantiate such allegations. In response to the case set up by the plaintiffs in relation to ACC, it was submitted by him that ACC was admittedly a sole proprietorship concern of the deceased, which could not be inherited by any of his legal heirs as only its properties could be inherited ; defendant No.1 became the sole proprietor of the present ACC in the year 1999, which is a completely new, separate and distinct entity ; office No.1001 was acquired by defendant No.1 for ACC in the year 2000, the registered lease whereof is in his name ; from when the deceased passed away in 1984 till 1999, no objection or claim was raised by the plaintiffs ; and, the assets, business and goodwill of ACC are the result of the hard work, efforts and investments made exclusively by defendant No.1, therefore, no other legal heir of the deceased has any right, title or interest therein.

8. Regarding AI, learned counsel for defendants 1 to 6, pointed out that a statement has been made on behalf of the plaintiffs that they are not claiming any share in AI. Without prejudice to the above, he contended that it was a partnership between the deceased and his younger brother Mr.

Ahmed Rishad ; as per the partnership agreement dated 01.12.1958 of AI, upon the death of any one of the two said partners, the legal representative(s) of the deceased partner had the option to be declared as sleeping partner(s) ; this option was exercised only by defendant No.1 who subsequently entered into a new partnership with the surviving partner vide partnership deed dated 14.03.1984 in order to become an effective and active partner of the said new firm ; the said new partnership also came to an end by way of a consent decree passed by this Court on 07.05.1995 in Suit No.504/1994, whereafter defendant No.1 started his own business on the land of AI in the name of SI ; the original partnership in which the deceased was a partner came to an end and admittedly no other legal heir was a partner in the new partnership between defendant No.1 and Mr. Ahmed Rishad ; the plaintiffs' assertion that defendant No.1 took over the share in AI for self and on behalf of other legal heirs, which in any event is misconceived as such reference could be made at best to the extent of HARCPL wherein other legal heirs were also shareholders, will not change the legal position that the new partnership created by defendant No.1 was not the successor-in-interest of the original partnership of the deceased ; and, in view of the above, no other legal heir of the deceased has any right, title or interest in AI.

9. In reply to the plaintiffs' claim in respect of SIPL, Mr. Haider Waheed pointed out that the plaintiffs have stated that they are not claiming any share in SIPL also. Without prejudice to the above, he contended that the deceased never had any share in SIPL, therefore, there is no question of inheriting his share therein by any of his legal heirs. Regarding the plaintiffs' claim in HARCPL, he submitted that the same is baseless as the deceased did not have any share therein at the time of his death. He further submitted that SI was established by defendant No.1 in the year 1995 with his sole efforts as the sole proprietor thereof after eleven years of the death of the deceased, therefore, the same was never a part of the estate left by the deceased. In relation to the DHA plot, he submitted that the same was never owned by the deceased nor was he the owner thereof in the record of DHA which fact was confirmed by DHA before this Court in Suit No. 336/1988 ; and, mere joining of other legal heirs in the said Suit did not entitle them to claim share in the DHA plot nor did it change the above factual and legal position. As far as the PMT plot is concerned, learned counsel conceded that the same was in the name of the deceased and as such all his legal heirs are entitled to their respective shares therein. It was urged that the plaintiffs have failed to show any interest in the subject assets and businesses which clearly shows that they do not have a prima facie case or balance of convenience in their favour nor can they suffer irreparable loss in case of dismissal of their applications. In view of his

above submissions, he submitted that both the listed applications are liable to be dismissed.

10. I have heard the learned counsel for the parties at length and have also examined the material available on record with their able assistance. It is a matter of record that the plaintiffs are not claiming or asserting any right or share in AI and SIPL as a statement to this effect has been categorically made in the written synopsis of arguments filed on their behalf. As far as the PMT plot is concerned, it is not disputed that the same was owned by the deceased and all his legal heirs are entitled to receive their respective shares therefrom. In view of the above, the relief sought in these applications by the plaintiffs will be considered only to the extent of ACC, SI, HARCPL and the DHA plot.

11. It is an admitted position that the deceased was the sole proprietor of ACC till 1984 when he passed away, therefore, the legal status, entity and business of ACC established by the deceased came to an end immediately upon his demise. It is also an admitted position that defendant No.1 established the present ACC and got it registered in the year 1999 as the sole proprietor thereof. Therefore, the burden is clearly upon the plaintiffs to show that defendant No.1 carried on the business of ACC from 1984 to 1999, and the present ACC established by him in 1999 after fifteen (15) years of the death of the deceased is the successor-in-interest of ACC established by the deceased.

12. In relation to SI, it is the case of the plaintiffs that AI was a partnership between the deceased and Mr. Ahmed Rishad which ended upon the death of the deceased, whereafter it was reconstituted with Mr. Ahmed Rishad and defendant No.1 as its partners ; and, in Suit No. 504/1994 between defendant No.1 and Mr. Ahmed Rishad, a consent decree was passed whereby properties of AI and SIPL were divided, defendant No.1 took over for self and on behalf of other legal heirs of the deceased business and share of HARCPL and the dyeing and processing unit which was renamed as SI. It is not disputed that SI was established by defendant No.1 in the year 1995 as the sole proprietor thereof. Thus it is an admitted position that a new partnership came into being after the death of the deceased wherein the plaintiffs were not partners ; the share of the deceased in AI was never claimed by any of his legal heirs till the time when SI was established by defendant No.1 or till the filing of this Suit ; even in the present Suit, the plaintiffs have categorically stated that they are not claiming any right or share in AI ; SI was not in existence at the time of death of the deceased ; and, it was established by defendant No.1 as the sole proprietor thereof after eleven (11) years of the death of the deceased. In view of the above, heavy burden is on the plaintiffs to prove that the share of the deceased in AI was carried forward by defendant No.1 in the

new partnership even after the death of the deceased ; it was the same share that was finally acquired by defendant No.1 by virtue of the above consent decree ; and, SI established by defendant No.1 after eleven (11) years of the death of the deceased was established with the same share. The effect of the plaintiffs' statement in the instant Suit that they are not claiming any right or share in AI, will also have to be examined at the proper stage. In addition to the above, it may be noted that the plaintiffs did not intervene in Suit No.504/1994 between defendant No.1 and Mr. Ahmed Rishad wherein AI was the subject matter nor did they file any application under Section 12(2) CPC in the said Suit for setting aside the above consent decree passed therein due to which their purported rights in AI were allegedly affected. It may also be noted that even according to the plaintiffs' own case, the said assets and business were acquired by defendant No.1 in pursuance of the said consent decree, which attained finality long ago.

13. The next claim of the plaintiffs is in respect of HARCPL, which was admittedly a private limited company. It is not their case that the deceased was a shareholder of the said company. Their case, as noted in the preceding paragraph, is that a consent decree was passed in Suit No. 504/1994 between defendant No.1 and Mr. Ahmed Rishad, whereby properties of AI and SIPL were divided inter alia resulting into the taking over of the business and share of HARCPL by defendant No.1 for self and on behalf of other legal heirs of the deceased. It may once again be noted that the plaintiffs did not file any application under Section 12(2) CPC in the said Suit for setting aside the above consent decree to the extent of HARCPL. In any event, they are not entitled to the relief prayed for in these applications to the extent of HARCPL as the deceased admittedly did not have any share therein.

14. As far as the DHA plot is concerned, the same was admittedly never in the name of the deceased, and the order passed in Suit No.336/1988 in respect of the said plot allegedly in view of the misrepresentation and fraud by defendant No.1, was never challenged by the plaintiffs. In respect of this property also, heavy burden is on the plaintiffs to prove that this plot was actually owned by the deceased despite the fact that it was never in his name, and defendant No.1 is merely a benami owner thereof.

15. The main question / issue in this Suit appears to be whether or not the assets and businesses of ACC, SI and HARCPL as well as the DHA plot were left by the deceased as part of his estate. The allegations and counter allegations by the parties clearly indicate that they are at variance on questions of fact which cannot be resolved without recording their respective evidence. For the time being, there is nothing on record to persuade this Court to grant discretionary relief of injunction and or receiver

in favour of the plaintiffs, especially when it is well-settled that the absence of any of the three ingredients viz. prima facie case, balance of convenience and or irreparable loss, disentitles the party seeking injunction from the grant thereof, and receiver is the harshest remedy in civil law. In my humble opinion, any of the above relief can be granted only when the material available on record speaks loudly and clearly in favour of the applicant, and not merely on the basis of allegations. The inaction on the part of the plaintiffs as noted above, also cannot be ignored while considering these applications. The plaintiffs will have ample opportunity to discharge the burden, which squarely lies upon them, by producing evidence in support of their claim at the relevant time in accordance with law. Needless to say that the observations made in this order are tentative in nature which shall not affect the merits or demerits of the case of any of the parties.

16. In view of the above discussion, both these applications are dismissed with no order as to costs.

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