

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1569 of 2000

Ali Muhammad & another----- Plaintiffs

Versus

Faizullah & another ----- Defendants

Dates of hearing: 29.09.2016 & 27.10.2016.

Date of judgment: 16.12.2016.

**Plaintiffs: Through Mr. Shehanshah Hussain
alongwith Mr. S. Arshad Ali, Advocate.**

**Defendants: Through Mr. H.A. Rehmani alongwith
Ms. Naheed Akhtar, Advocates.**

J U D G M E N T

Muhammad Junaid Ghaffar, J. This is a Suit for Dissolution of Partnership, Rendition of Accounts, Possession, Injunction and Damages and the plaintiffs have sought the following the relief(s):-

- i) Decree for dissolution of partnership.
- ii) Decree for Rs.1,28,000/-.
- iii) Decree for Rendition of Account from 1-7-2000 till the disposal of the Suit.
- iv) Possession of shop No.1 and 2, Kazi Court No.2, Bahadurabad No.5, Karachi.
- v) Damages for Rs.10 Lacs.
- vi) Permanent Injunction restraining the defendants from using the aforesaid shops for their own purposes or from letting them or dealing with them in any other manner.
- vii) Cost of the Suit.
- viii) Any other relief.

2. Briefly, the facts as stated are that the plaintiffs and defendants' father were partners in a Restaurant business, known as "New Persian Restaurant" in Shop Nos. 1 & 2, Qazi Court, Bahadurabad, Karachi. Both of them were equal partners by means of a written Partnership Deed dated 26.03.1984. Thereafter defendants' father died in the year 1993 and after his demise the aforesaid partnership came to an end. However, the defendants joined the firm and a fresh partnership was created with the plaintiffs father and the defendants as three equal partners, whereas, the other terms and conditions were same as mentioned in the Partnership Deed dated 26.03.1984. It is further stated that on 05.08.1995, the father of the plaintiffs also died and thereafter the Firm was reconstituted with the plaintiffs joining the firm on equal terms and thus the partnership firm was constituted of four equal partners to run the said business. It is further stated that the partnership business with the said understanding was looked after by the plaintiffs from 5:00 A.M. till 5:00 P.M and thereafter from 5:00 P.M. till 5:00 A.M. by the defendants. It is the case of the plaintiffs that on 12.11.2000 when they came to open the Restaurant in the morning, they found it closed and all the locks were changed, whereas, the furniture and other things were removed from the Restaurant and therefore instant Suit. It is their case that they have not been paid their share of profit in business from 01.09.1998 to 30.06.2000 amounting to Rs.1,28,000/- and further loss due to closure of business at the rate of Rs.4000/- per day.

3. After issuance of summons and notices, written statement was filed and on 18.01.2007, the following Issues were settled:-

- i. Whether the plaintiff was partner in the business of New Persian Restaurant?
- ii. Whether the defendant No.1 unlawfully closed the business of New Persian Restaurant?
- iii. What were the assets and properties and accounts of the business of New Persian Restaurant?
- iv. To what relief, if any, plaintiff is entitled to?
- v. What should the decree be?

4. Learned Counsel for the plaintiffs has contended that after the death of defendants' father, the Partnership Deed dated 26.03.1984 though came to an end, however, with mutual consent and implied conduct, the partnership business continued and in support he has relied upon Section 42 of the Partnership Act, 1932. Learned Counsel has referred to Ex.P/4/1, which is a Survey Form issued by the then Government and has contended that in the Survey Form, the plaintiffs and defendants have been shown as partners of the business. Learned Counsel has also referred to Ex.P/5/5, which are notices addressed to the plaintiffs from one Fareeda Abbas widow of Late Abbas Ali, confirming the possession of the Suit Property and business as tenants. Learned Counsel has also referred to Ex.P/5/10, which is a certified copy of Memo of Petition bearing No.1237/1999 and has contended that such petition was filed by the plaintiff No.1 in the capacity of a Partner and owner of the business against some notices issued by Government Authorities. Learned Counsel has further referred to Article 125 of the Qanun-e-Shahadat Order, 1984 and has contended that the burden is on the defendants to show that the business was being run to the exclusion of the plaintiffs as partners. In view of hereinabove submissions learned Counsel has prayed that a Preliminary Decree be passed for Rendition of Accounts and the assets of the business. Learned Counsel has further submitted that since two versions are before the Court, therefore, the Court has to decide the matter on the basis of preponderance of evidence and probability, whereas, the defendants have not been able to prove that the business was in their exclusive ownership and since original partnership is admitted, the plaintiffs have proved their case and are entitled for judgment and decree. In response to the objections regarding admissibility of certain documents, learned Counsel has referred to Order 6 Rule 2 CPC and Order 13 Rule 1 CPC and has submitted that it is not necessary that all the documents relied upon in the evidence should also be part of plaint, whereas, the same were mentioned in the list of documents filed in Court. In support of his contention he has relied upon the cases reported as **AIR 1935**

Lahore 350 (Punjab & Sind Bank, Ltd. v. Kishen Singh Ghulab Singh and others), AIR 1963 ORISSA 11 (Tulsiram Sanganeria and another v. Smt. Anni Bai and others), AIR 1917 Calcutta 52 (Raghumull v. Lunchmondas), PLD 2007 Supreme Court 302 (Mian Pir Muhammad and another v. Faqir Muhammad through L.Rs and others), 1993 SCMR 1073 (Fazle Ghaffor v. Chairman Tribunal Land Disputers, DIR, Swat at Chitral at mardan and 6 others), 1991 SCMR 2126 (Zakaullah Khan v. Muhammad Aslam and another).

5. On the other hand, learned Counsel for defendants has contended that after expiry of defendants' father, the partnership came to an end as there was no clause in the said Partnership Deed to continue the business, whereas, even otherwise, there were only two partners in the business. Per Learned Counsel, the entire onus in this matter is on the plaintiffs as they have come to Court seeking Declaration and Rendition of Accounts and therefore, it is to be strictly construed against them. Learned Counsel has further submitted that no evidence has been brought on record to prove that the business continued after the death of defendants' father. Per Learned Counsel no independent witness has been examined by the plaintiffs to either substantiate their claim that they used to run the Restaurant from 5:00 A.M. in the morning till 5:00 P.M. in the evening, whereas, even otherwise, nothing has been placed on record to prove any participation by them in the said business. Per learned Counsel the documents relied upon by the defendants at the time of Examination-in-Chief were objected on behalf of defendants on the ground of their admissibility in evidence, in view of Article 78 of the Qanun-e-Shahadat Order, 1984, and has contended that no list of documents was filed by them and such documents were only annexed with the affidavit-in-evidence, therefore, in view of dicta laid down in **PLD 2005 Karachi 1 (Javed Rafat Khan v. Messrs Shabbir Tiles and Ceramics Limited through Representative)**, the plaintiffs cannot rely upon such documents as they are not admissible in evidence. Per learned Counsel the Survey Form relied upon by the plaintiffs is only a photo copy and not admissible in evidence, whereas, it is not an official record or document and in

view of Articles 76 and 77 of Qanun-e-Shahadat Order, the same cannot be relied upon. Insofar as reliance on filing of Constitution Petition is concerned, learned Counsel has contended that the same was not disclosed in the plaint and it has only been relied in the evidence. In response to the Legal Notices relied upon by the plaintiffs' counsel, he has submitted that the Author of such Legal Notices has not been examined and therefore these documents are also not proved. He has further submitted that the plaintiffs have not come to lead their evidence and have appointed another person through a Power of Attorney and since in this matter the factual position as well as sequence of events was required to be proved by them, therefore, evidence led by their attorney is not credible. Learned Counsel has prayed that Suit be dismissed with costs.

6. I have heard both the learned Counsel and perused the record with their able assistance and my Issue-wise findings are as under:-

7. **ISSUE No.1**

This is the main and crucial issue in this matter and all the other issues are dependent on the findings given on this issue. Insofar as the facts of this case are concerned the Partnership Deed dated 26.03.1984 has not been denied and is an admitted document by virtue of which the plaintiffs and defendants' fathers were partners in the said business. The father of defendants died in the year 1993 and since there were only two partners, the partnership business came to an end and partnership was dissolved. The plaintiffs' case is that thereafter their father continued the business with the present defendants till 1995 when he also expired, and thereafter two plaintiffs and two defendants continued to run the business as equal partners with 50% sharing on both the sides. It has not been denied that there is no instrument in writing after the year 1993 when the defendants' father had expired. It is only word against word, which is before the Court so as to assert that the partnership business continued thereafter since 1993 and once again after 1995 on the same terms

and conditions as recorded in the then Partnership Deed dated 26.03.1984. Section 42 of the Partnership Act, 1932, deals with Dissolution of a Partnership Firm on happening of certain contingencies and as per Section 42(c), the partnership business is dissolved by the death of a partner. It would be advantageous to refer to the said provision, which reads as under:-

“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 aforesaid provision provides that subject to **contract between the partners**, the firm is dissolved, if it is constituted for a fixed term, by the expiry of that term, and if constituted to carry out one or more adventures or undertakings, by the completion thereof; or *by the death of a partner* and finally by the adjudication of a partner as an insolvent. Clause “c” which is relevant in this matter has to be read with the words **“Subject to contract between the partners”** and though on the death of a partner, the firm stands dissolved, however, if there is an Agreement between the partners to the contrary, then the business would continue. In this matter there is no clause / provision in the Partnership Deed 26.3.1984 that upon expiry of any of the partner(s), the business would continue. In fact it could not have continued for the simple reason that there were only two partners in the firm. Therefore, insofar as the Partnership Deed is concerned (an admitted document) it does not cater to a situation that if any of the partners expires, the business would continue. It is very important to note that the contract for continuing the business even after death of one of the partners is to be made by the partners themselves and not by the subsequent parties, who may be inducted as partners later on. This clearly means that it must be provided in the original Partnership Deed, (which could be termed as **“a contract by the partners”**) that upon death of any of the partners, the business of partnership would continue. This is definitely not the case here. The plaintiffs’ assert their claim on the basis of implied conduct and series of happening(s), which

according to them has continued in the shape of a partnership business, wherein, they were equal partners of 50%. This means the onus to establish that they were partners in the firm is on them. However, from perusal of the evidence so led by them, I have come to the conclusion that they have not been able to establish with any corroborative and admissible evidence that they were working as partners. It was required to be proved by them with some independent evidence that they used to run the business from 5:00 A.M. in the morning till 5:00 P.M. in the evening, which continued according to them for more than five years. They have not brought in any independent evidence to substantiate this claim. They could have brought in their customers, their neighbors or anybody else to support their claim to that extent. Insofar as their reliance on the Survey Form i.e. Ex.P-4/1 is concerned, at the very outset, I may observe that it is only a document which used to be filled in by the citizens to complete with the survey requirement of the government. The document placed on record is not an official document, nor any signatures of the officials are endorsed. The plaintiffs' claim and assert that in the Survey documents they have been shown as partners, which fact has been denied by the defendants. Therefore, the document does not seem to be a piece of evidence on which any definite finding can be given. If the claim of the plaintiff was that they were partners in the firm then they were required to file Income Tax Return(s) which perhaps could have been admitted as evidence. They have miserably failed to bring on record any Income Tax Return filed by them showing the business as a partnership concern in which they were also taxpayers. Moreover, perusal of the *Exh P/1/4* (Survey Form) reflects that it has the same NTN of the firm i.e. "New Persian Restaurant", as well as that of plaintiffs and defendants, which is not conceivable. In the circumstances this document ceases to have any evidentiary value being contradictory and ambiguous in nature. In a partnership business, the firm is required to file its own return, whereas, the partners file their independent returns as well. However, the plaintiffs have failed to bring on record any of such return(s) filed by them. The Plaintiffs have also failed to bring on record any material to show that the business continued with defendants in

the form of partnership including any details of Bank Accounts, Balance Sheet, Profit and Loss Account or even settlement of Accounts prior to 1.9.1998 from which date onwards they are claiming dues from the said partnership business.

The Indian Supreme Court in the case of ***Commissioner of Income Tax, Madhya Pradesh, Nagpur and Bhandara v. Seth Govindram Sugar Mills*** (**AIR 1966 SC 24**), had the occasion to examine a partnership deed in which there were two partners and there was a clause in the said deed to the effect that “*the death of any of the parties shall not dissolve the partnership and either the legal heir or the nominee of the deceased partner shall take his place in the provisions of the partnership*”. However, the Indian Supreme Court after taking into consideration the provisions of Section 31 and 42(c) of the Partnership Act, 1932, came to the following conclusion. (It must be kept in mind that in the instant case there is even no such clause in the original partnership deed of 26.3.1984).

10. There is a fallacy in this argument. Partnership, under section 4 of the partnership Act, is the relation between persons who have regard to share the profits of a business carried on by all of them acting for all. Section 5 of the said Act says that the relation of partnership arises from contract and not from status. The fundamental principle of partnership, therefore, is that the relation of partnership arises out of contract and not out of status. To accept the argument of the learned counsel is to negate the basic principle of the law of partnership. Section 42 can be interpreted without doing violence either to the language used or to the said basic principle. Section 42(c) of the partnership Act can appropriately be applied to a partnership where there are more than two partners. If one of them dies, the firm is dissolved; but if there is a contract to the contrary, the surviving partners will continue the firm. On the other hand, if one of the two partners of the firm dies, the firm automatically comes to an end and, there-after there is no partnership for a third party to be introduced therein and, therefore, there is no scope for applying Clause (c) of S. 42 to such a situation. It may be that pursuant to the wishes or the directions of the deceased partner the surviving partner may enter into a new partnership with the heir of the deceased partner, but that would constitute a new partnership. In this light S. 31 of the Partnership Act falls in line with S. 42 thereof. That section only recognizes the validity of a contract between the partners to introduce a third party without the consent of all the existing partners; it presupposes the subsistence of a partnership; it does not apply to a partnership of two partners which is dissolved by the death of one of them, for in that event there is no partnership at all for any new partner to be inducted into it without the consent of others.(emphasis supplied)

In the case of ***Mt. Sughra v. Babu*** (**AIR 1952 All 506**), the Allahabad High Court has been pleased to hold as under;

8. It appears to us that the view taken by the Court below cannot be supported. The general rule is that a partnership is dissolved after the death of a party. This rule is, however, subject to a contract to the contrary. When it is said that a partnership will not be dissolved by the death of one party, what is meant is that the partnership will continue between the surviving partners even after the death of a partner. It follows that in order that the exception to the general rule may apply the original partnership must consist of more than two partners. In the case of a partnership consisting of only two partners, no partnership remains on the death of one of them and, therefore, it is a contradiction in terms to say that there can be a contract between two partners to the effect that on the death of one of them the partnership will not be dissolved but will continue. Nor is the position affected by bringing in the heirs of a deceased partner on the scene. One partner cannot, by his own contract, impose a partnership upon his heirs or legal representatives. Partnership is not a matter of status; it is a matter of contract. No heir can be said to become a partner with another person without his own consent, express or implied.

Similar view has been expressed by the Madras High Court in the case of *Narayanan Chettiar v. M.S.M. Umayal Achi* (MANU/TN/0189/1959) in the following terms;

....If the intention of the partners was that the death of one of them was not to result in the dissolution of the firm, such an agreement could be given effect to. In such cases the partnership as between the surviving partners will continue. There may also be cases where under the agreement of the deceased partner between the original partners the legal representatives of the deceased partner may be entitled to join in the firm in the shoes of the deceased partner. But the application of this rule will be difficult in the case of a firm composed only of two partners.

In that case if one of the partners died, there will not be any partnership existing to which the legal representatives of the deceased partner could be taken in. In such a case the partnership would come to an end by the death of one of the two partners, and if the legal representatives of the deceased partner joins in the business later, it should be referable to a new partnership between them.

Insofar as precedents relied upon in support of the contention that the plaintiffs were partners by the implied conduct of the parties is concerned, I may observe that the facts in all these cases were on different footing, wherein, there were either claims against the partnership business or disputes in respect of contract with other parties, but in none of the cases, the facts were to the effect that the partners themselves were standing against each other and denying the claim of one against the other, insofar as the partnership business is concerned. Therefore, they are of no help

to the case of the plaintiffs. In view of such position, Issue No.1 is answered in negative.

8. **ISSUE NOS. 2,3 & 4.**

In view of findings in respect of Issue No.1, all these issues are answered against the plaintiffs.

9. **ISSUE No.5.**

In view of hereinabove facts and circumstances of the case, instant Suit is dismissed, however, with no order as to cost(s).

Dated: 16.12.2016

J U D G E

Ayaz