THE HIGH COURT OF SINDH, KARACHI

Suit No. 1529 of 2018
[Mohammad Ahmad Ansari versus Interglobe Commerce Pakistan (Pvt.) Ltd., & others]

Plaintiff	:	Mohammad Ahmad Ansari through Mr. Qazi Umair Ali, Advocate.
Defendant 1	:	Interglobe Commerce Pakistan (Pvt.) Ltd., through M/s. Muhammad Zeeshan Abdullah and Adnan Abdullah, Advocates.
Defendant 2	:	Ahmed Jamil Ansari, through Mr. Abdul Qayyum Abbasi, Advocate.
Defendant 3	:	Ahmed Jamal Ansari, through Mr. Taimur Ali Mirza, Advocate.
Defendant 4	:	Nemo.
Dates of hearing	:	25-08-2021, 16-09-2021, 24-09-2021, 08-10-2021 & 03-06-2022

ORDER

Adnan Iqbal Chaudhry J. - The Plaintiff and the Defendants 2 to 4 of are real brothers. At the relevant time together they held majority shares in the Defendant No.1 [Company/Interglobe], a private limited company incorporated under the laws of Pakistan. However, as on the date of the suit, the Defendant No.2 had already divested his shareholding. At the time of the suit, the Plaintiff and the Defendants 3 and 4 were shareholders of 0.95% each (2892 shares each), and majority shares, 97.14%, were held by the two daughters of the Defendant No.2 who were Chief Executive and Director of the Company.

2. It is not disputed between the Plaintiff and the Defendants 2 to 4 ['the brothers'] that on or about 11-01-2002 they signed the following 'Undertaking' with regards to the assets of the Company:

"UNDERTAKING

We the four individuals whose names are stated at the end of this undertaking, state, affirm and make the following undertaking with regard to the beneficial ownership of the assets of Interglobe Commerce Ltd., whose registered office is at 99, CF-1/5, Clifton, Karachi, and in which each of us is a shareholder, hereinafter to be referred as the Company;

That regardless of the existing shareholding of the Company, and the shares that each of us may be holding in our respective names or the number of shares that each of us may come to hold in future, each of us shall remain entitled to the assets of the Company in absolutely equal proportion namely, twenty five percent for each of the signatories of the undertaking.

That regardless of the existing shareholding of the Company, and the shares that each of us may be holding in our respective names or number of shares that each of us may come to hold in future, in case of winding up or otherwise dissolution of the Company, after the settlement of all the liabilities of the Company, each of us shall share all the remaining assets of the Company in absolutely equal proportion. The list of assets is listed in Annexure I and will take place only after unanimous concurrence and agreement of all the signatories of this undertaking.

That each of us has executed this statement, affirmation and undertaking using our free will and without any coercion or undue influence and being fully aware of our legal rights and liabilities;

That this statement, affirmation and undertaking shall bind the legal heirs of each of us;

That the rights arising out of, or based on the statement, affirmation, and undertaking shall, in case of death of any one or more of the signatories, pass on to the legal heirs thereof.

Executed on this day 11th of January 2022 at Karachi.

s/d
Ahmed Jamil Ansari

s/d
Ahmed Jamal Ansari

s/d
Muhammad Ahmed Ansari

s/d
Muhammad Asad Ansari

Witnesses:

s/d
Muhammad Qamaruzzaman Faruqui

s/d
Muhammad Ajmal Ansari

ANNEXURE-I

1. *Interglobe Commerce Pakistan (Pvt) Limited,*
   99, CF-1/5, Clifton
   Karachi.

2. *72, West Benazir Plaza,*
1st Floor, Sector F-7/G-7,
Blue Area,
Islamabad.

3. *2 Shafiq Plaza*
Sarwar Shaheed Road,
Karachi -74200"

3. The Undertaking, it seems, was drafted by the Defendant No.2 and sent to Plaintiff and Defendants 3 and 4 under cover of the following on the letter-head of the Company:

"January 12, 2002

For the attention of Jamal, Tuna and Asad
From: Jamil Ansari

Enclosed are a set of documents which I require you to sign and retain one original copy with you.
I have had this Undertaking drafted with a view to ensure that no discord would exist either in my lifetime of thereafter regarding the assets of Interglobe Commerce Pakistan (Pvt.) Limited.

Further, this undertaking was all the more necessary as the shareholdings of Intergloble Commerce Pakistan (Pvt.) Limited was very lopsided and since the sharing of the assets, as you can see from the Undertaking is irrespective of the shareholding, I have taken one more step to equalize the shareholding of all of you to 550 shares each.
I offered Ajmal also 550 shares of Interglobe Commerce Pakistan (Pvt.) Limited but he declined and agreed to be a witness.

This new shareholding is notional and has no bearing after the signing of the Undertaking of the assets and each of the four signatories will draw their salaries till the dissolution of the Company or liquidation of the assets.

I have explained to Ajmal that these assets were required before his joining the Group and since I do not want any discord again about his participation, I will be taking care of his interest separately.

I also require you to sign the Gift Deeds transferring the excess shares to me and my family which I repeat will ensure equal shareholding of all of you at 550 shares each.

Nilofer and Zehra will continue to hold 5000 shares till I decide anything further.

I repeat that these transfer of shares to me are irrelevant as the issue of sharing the assets and drawing the salary has been settled through the Undertaking and through this memo.

Encs.

s/d"

4. It is pleaded by the Plaintiff that Interglobe is a family-owned company; that by virtue of the above Undertaking each of the brothers is entitled to a 25% share in the assets of the Company notwithstanding the share-holding reflected in the company returns; that given the assurance of said Undertaking and the letter dated 12-01-2002 written by the Defendant No.2, the brothers left the control of Interglobe to the Defendant No.2 and majority shares to his family; that the Undertaking was duly acted upon by the shareholders, as also in the year 2005 when the Islamabad property of the Company was sold and its sale proceeds were distributed amongst the brothers in equal proportion; that in the year 2010, the brothers agreed also to sell the Clifton property of the Company which was mortgaged to Bank Alfalah; that the vendee, SZABIST, agreed to advance payment for redeeming the mortgage, which amount was to be adjusted/deducted from the 25% share of the Defendant No.2; that due to delay in the performance of the sale agreement, SZABIST filed Suit No. 142/2011, which was eventually settled under a compromise decree dated 04-05-2018, where under the sale consideration was enhanced to Rs. 291,800,000/- and SZABIST deposited Rs. 186,524,638/- with the Nazir of this Court to be released to the Company in tranches upon fulfilment of certain conditions. It is averred by the Plaintiff that despite the Company receiving the first tranche from the Nazir, the Defendant No.2 did not give the Plaintiff his share as per the Undertaking; and therefore when the Plaintiff learnt that the Company had made an application to the Nazir for releasing the remaining tranche of Rs. 157,344,638/-, the Plaintiff filed this suit to stay the same, contending that out of the sale proceeds of the Clifton property he was entitled to a share of Rs. 72,950,000/- as specific performance of the abovementioned Undertaking.

5. By CMA No.10790/2018 the Plaintiff prayed "….. *to restrain the Defendants from encashing the payment of Rs. 157,344,638/- from the Nazir of this Hon'ble Court and direct the Nazir of this Hon'ble Court to release the payment of Rs. 72,950,000/- to the Plaintiff in terms of Undertaking*

dated 10-01-2002". By an interim order dated 01-08-2018 the Nazir was directed to hold the amount available with him in Suit No.142/2011. That order was modified on 28-08-2018 as follows:

> "In view of the above, the ad-interim order passed on 01.08.2018 is modified to the extent that Nazir of this Court will retain an amount of Rs. 72,950,000/- (Rupees Seventy Two Million Nine Hundred Fifty Thousand Only), which has been claimed by Plaintiff and will release the remaining amount to the duly authorized representative of Defendant No.1 and after due and proper verification in compliance of the compromise decree passed in Suit No. 142 of 2011.
>
> However, if the Defendants No. 3 and 4 make appearance in the matter and contest the claim of Defendant No.1 then either the Defendant No.1 will re-deposit the proportionate share of Defendants No.3 and 4 or in lieu thereof will furnish a solvent security of the equivalent amount valuation. It is further clarified that the above order of today is an ad-interim arrangement and is without prejudice to the rights, interest, and claims of any of the parties to the proceeding."

6. The Company/Interglobe (Defendant No.1) opposes any restraint on the release of the sale proceeds to it. As per its counter-affidavit the stance of the Company is that the Undertaking is not on the record of the Company; that if such Undertaking was executed it was at best an agreement only between the executing shareholders, not binding any other shareholder nor the Company which is a legal entity separate from its shareholders; and that in any case, the Undertaking itself states that it will be triggered only on the dissolution of the Company. The Defendants 2 and 4 have taken a similar stance in their counter-affidavits but do not dispute their signatures on the Undertaking. The Company has also filed Suit No. 1833/2019 for cancellation of the Undertaking.

7. The Defendant No.3 at first filed a counter-affidavit identical to the one filed by Defendant No.2, i.e. opposing the Plaintiff's case. Later on, he filed another counter-affidavit and then a written statement to support the Plaintiff's case while pleading that he too is entitled to receive his share of 25% in the sale proceeds of the Clifton property. On 25-09-2019, the Defendant No.3 too filed Suit No. 1511/2019 praying for specific performance of the Undertaking where

he has also pleaded that acting upon the Undertaking, the Chief Executive of the Company had paid to him Rs. 17,000,000/- by a cheque in July 2018 as part payment of his share in the sale proceeds of the Clifton property, but then did not pay the balance.

8. Mr. Umair Qazi, learned counsel for the Plaintiff submitted that the Undertaking had been executed by the Defendant No.2 also as Chief Executive of the Company as evident from his letter dated 12-01-2002 on the letter-head of the Company; and thus under the law of agency the Company too was bound by the Undertaking. He submitted that after the Undertaking had been duly acted upon, as in 2005 when sale proceeds of the Islamabad property were distributed amongst the bothers, the Defendants, including the Company, are now estopped from disputing the Plaintiff's share in the sale proceeds of the Clifton property. To advance his argument of estoppel, learned counsel relied upon *Theresa Henry v. Calixtus Henry* (2010 1 ALL ER 988). He then relied upon *U.I.G. (Pvt.) Ltd. v. Muhammad Imran Qureshi* (2011 CLC 758) and to submit that as a family-owned company, Interglobe had to be treated as a quasi-partnership. He submitted that the Plaintiff will suffer irreparable harm if the proceeds lying with the Nazir are released to Interglobe, for then the same would be consumed by it in the running of its affairs.

9. Mr. Zeeshan Abdullah Advocate representing the Company/Interglobe submitted that the Undertaking being an agreement between the shareholders cannot be enforced against the Company which is a separate legal entity; that at the time of the Undertaking there were in all 10 shareholders of the Company, whereas the Undertaking was signed only by 4 of them; that it is settled law that assets of a company are separate from the assets of its shareholders; that it is not the case of the Plaintiff that the Clifton property was purchased with the personal funds of the brothers; and that in any case, as per the second part of the Undertaking, it was triggered only on the dissolution of the Company; that the first part of the Undertaking with regards to distribution of the assets of the

Company was inconsistent with the Articles of the Company and cannot be enforced under law; and that as a going concern the Company was in need of the sale proceeds for its day-to-day affairs. In support of his submissions learned counsel relied upon *V. B. Rangaraj v. V. B. Gopalakrishnan* (AIR 1992 SC 201), *Commissioner of Income Tax, Calcutta v. Associated Clothiers Ltd.* (AIR 1963 Calcutta 629), *Calcutta Tramways Co. Ltd. v. Commissioner of Wealth Tax* (AIR 1972 SC 2600), *Anjum Rashid v. Shehzad* (2007 CLC 1414), and *Neelofar Shah v. Ofspace (Pvt.) Ltd.* (2013 CLD 114).

Mr. Abdul Qayyum Abbasi, learned counsel for the Defendant No.2 adopted the arguments of Mr. Zeeshan Abdullah while pointing out that the Defendant No.2 was no longer a shareholder of Interglobe.

10. Mr. Taimur Ali Mirza, learned counsel for the Defendant No.3 submitted that the Undertaking manifests that Interglobe was a partnership; that the Defendant No.3 had transferred his shares to the Defendant No.2 and his family on the basis of what was committed in the Undertaking, and therefore the family of the Defendant No.2 cannot now hide behind the veil of incorporation. He submitted that in such circumstances the Court can lift the veil of incorporation, and for that he cited *President v. Mr. Justice Shaukat Ali* (PLD 1971 SC 585), *Central Board of Revenue v. S.I.T.E.* (PLD 1985 SC 97), *Nagina Films Ltd. v. Usman Hussain* (1987 CLC 2263), and *Union Council Ali Wahan, Sukkur v. Associated Cement* (Pvt.) Ltd. (1993 SCMR 468).

11. Heard the learned counsel and perused the record with their assistance.

12. As already noted above, none of the brothers (Plaintiff and Defendants 2 to 4) dispute that they had signed the Undertaking. In para 1 thereof the brothers had agreed: *"That regardless of the existing shareholding of the Company, and the shares that each of us may be holding in our respective names or the number of shares that each of us may come to hold in future, each of us shall remain entitled to the assets of the Company*

in absolutely equal proportion namely, twenty five percent for each of the signatories of the undertaking". The assets referred to their included the immovable properties of the Company listed in Annexure I to the Undertaking, which included the Islamabad property and the Clifton property. Mr. Zeeshan Abdullah, learned counsel for the Company had submitted that in view of para 2 of the Undertaking, it could at best be invoked only on the dissolution of the Company. However, to me it appears that the arrangement contemplated in para 2 of the Undertaking on the dissolution of the Company was with regards to the "*remaining assets of the Company*", i.e. assets remaining at the time of dissolution, and if any asset of the Company was sold before dissolution, the agreement between the brothers was to share the proceeds equally as per para 1 of the Undertaking.

13. By letter dated 12-01-2002 the Defendant No.2 requested his brothers to transfer majority share to him and his family while assuring them that: "*This new shareholding is notional and has no bearing after the signing of the Undertaking of the assets and each of the four signatories will draw their salaries till the dissolution of the Company or liquidation of the assets.*" At that time the Defendant No.2 was the Chief Executive of the Company and the other brothers were Directors.

14. Mr. Zeeshan Abdullah, learned counsel for the Company, had pointed to Form-A of the Company as of 31-12-2002 to submit that at the time of the Undertaking there were 10 shares-holders of the Company, whereas the Undertaking was signed only by 4 of them (the brothers). However, that Form-A shows that the other shareholders were also family members, viz. the late father of the brothers, the spouses of the Defendants 2 and 3 and their children. From the company returns on the record it is apparent that shareholding in the Company remained within a family.

15. It is not disputed that the Islamabad property of the Company was sold in the year 2005, i.e after the Undertaking. With its counter-affidavit the Company has filed the agenda of the AGM of the

Company proposed for 06-01-2005. Agenda No.9 reproduced over the vote sheet (at page 283 of Part II) proposed the following resolutions:

"ANNUAL GENERAL MEETING OF 6TH JANUARY 2005

VOTE SHEET FOR:

(1) CONSIDERATION TO AUTHORIZE –
MR. AHMED JAMIL ANSARI OR, ANY PERSON TO DEAL WITH
THE SALE PROCEEDS OF THE FOLLOWING TWO (2) PROPERTIES
OF THE COMPANY:
(1) 99 C/F 1/5, CLIFTON, KARACHI
(2) 72, WEST BENAZIR PLAZA, 1ST FLOOR,
SECTOR F-7 G-7 BLUE AREA, ISLAMABAD.

(2) SALE PROCEEDS OF THE PROPERTY ARE TO BE EQUALLY DIVIDED AMONG THE FOLLOWING FOUR (4) DIRECTORS:
1- MR. AHMED JAMIL ANSARI
2- MR. AHMED JAMAL ANSARI
3- MR. MOHAMMAD AHMAD ANSARI
4- MR. MOHAMMAD ASAD ANSARI"

Mr. Zeeshan Abdullah pointed out that as per said vote sheet, all shareholders present had ticked *'NO'* to the proposed resolutions, and thus he submitted that the Undertaking had never been acted upon. On the other hand, the said vote sheet does not bear the signature of any shareholder and it was contended by Mr. Umair Qazi that it is a fabricated document as the distribution of the sale proceeds was never even part of the agenda. He submitted that the sale proceeds of the Islamabad property were in fact distributed subsequently amongst the brothers as per the Undertaking as evident from office memo dated 28-03-2005 along with the Plaintiff's rejoinder. That memo, which is on the Company's letter-head, is said to have been signed by the Plaintiff and Defendants 2 and 3, and stated with regards to the advance received on the sale of the Islamabad property that: "*As per understanding amongst us, the amount is to be distributed equally between the four of us*".

16. It was in 2010 that SZABIST first made an offer to purchase the Clifton property of the Company. By way of a letter dated 03-05-2010 on the Company's letter-head, the Defendant No.2 sought the approval of the Plaintiff and the Defendants 3 and 4 to such offer, and as an apparent reference to the Undertaking he further stated that

SZABIST had offered to pay an advance of Rs. 30 million "*to be deducted from my share*". The brothers then signed a memo dated 03-05-2010, again on the Company's letter-head, approving the offer received. Form-A of the Company made as of 31-10-2010 shows that at such time 97% shares in the Company were held by the daughter of the Defendant No.2, and still the sale of the Company's property was being decided by the four brothers.

17. The facts discussed above *prima facie* suggest that prior to the dispute leading to the suit, the Company and its shareholders acknowledged the Undertaking and acted upon it by treating the immovable assets of the Company as the joint assets of the brothers. This of course is not to say that by implication the Undertaking becomes an agreement enforceable at law against the Company. Learned counsel acknowledged that it is fundamental company law that the identity of a company as a juristic person and consequently its assets, are separate from the identity and assets of its shareholders. Therefore, the first submission of Mr. Umair Qazi Advocate that the Defendants are estopped from acting contrary to the Undertaking, does not address that basic principle of company law. However, his second submission, and one which requires consideration, was that the Company was in substance a partnership of the brothers. Advancing on that, Mr. Taimur Mirza Advocate submitted that in the circumstances of the case the Court can lift the veil of incorporation of the Company.

18. It had been settled by the Supreme Court in *Ladli Prasad Jaiswal v. Karnal Distillery Co. Ltd.* (PLD 1965 SC 221), and then reiterated by a learned Division Bench of this Court in *Nagina Films Ltd. v. Usman Hussain* (1987 CLC 2263) that in a particular case the principles of dissolution of partnership may be applied if the apparent structure of the private limited company is not the real structure and on piercing the veil of incorporation the Court finds that in reality it is a partnership. However, the case in hand is not for dissolution of the Company, nor is it the case of the Plaintiff that he has been ousted

from the affairs of the Company. Mr. Zeeshan Abdullah submitted that in such circumstances the Court cannot go behind the veil of incorporation. On the other hand, M/s. Taimur Mirza and Umair Qazi Advocates submitted that dissolution of a private limited company is not the only instance where the Court may lift the veil of incorporation.

19. Before discussing the relevant case-law, I may note here that instances of piercing or lifting the veil of incorporation are by way of an exception to the general rule that at law a company is a person separate and distinct from its shareholders, which rule had been settled by the House of Lords in the bedrock case of *Salomon v. A. Salomon and Co. Ltd.*, (1897) AC 22.

20. In *President v. Mr. Justice Shaukat Ali* (PLD 1971 SC 585), a determination by the Supreme Judicial Council on a reference against a judge of a superior court, one of the charges of misconduct against the judge was that even after his elevation he continued to have financial dealings with family-owned private limited companies. The defense entered on behalf of the judge was that the private limited companies were legal entities separate from its shareholders, and owning shares in such companies did not mean that the shareholder was involved in the affairs of said companies. Since the matter was one of public policy relating to the code of conduct of a superior court judge, the Supreme Judicial Council was inclined to go behind the veil of incorporation to determine the actual relationship between the shareholder/judge and the companies, and concluded that the transactions in question were in substance the act of a partner of a partnership firm. The relevant extract is as follows:

> "The trend of decisions since the above enunciation of the law in Solomon's case appears, however, to show that in a number of important respects both the Courts and the Legislatures have rent the veil which was recognized in the above-mentioned decision to be almost inviolable. The growing tendency appears to be rather to look at the substance and not to allow the vision to be clouded by the shadow of the corporate personality. Thus where the corporate

> personality is being used merely as a cloak for fraud or improper conduct or where it can be established that the corporate personality is merely acting as an agent or trustee for someone else, be he an individual or another subsidiary company, or where it is necessary to determine the true character of the corporate personality for other purposes, such as to determine its tax liability or its quasi-criminal liability or as to whether the corporate body is an enemy concern or not, or a mere trustee for certain purposes, the Courts have not hesitated to look behind the veil of incorporation (vide Gower's Modern Company Law, 2nd Edn., pp. 183—209).
>
> ……
>
> Whatever might be the position of third parties, vis-a-vis the company and the liabilities of its shareholders, it does appear that there is no bar to the Courts lifting the veil of incorporation to determine the true relationship of the shareholders with regard to their dealings with the company or to ascertain the true nature of the company itself in matters which are governed by other statutes or where other considerations necessitate the taking of such a step. In the present case too, we are not concerned with the liability of the respondent as a member of the companies but we are concerned, in terms of a Code of Conduct drawn up under the Constitution, with determining as a matter of public policy as to whether the association of a Judge of a Superior Court with such concerns constitutes involvement in activities of trade, business or industry. For this purpose we think we are entitled to go behind the shadow of incorporation in order to ascertain as to what the real nature of the association of the respondent was with these concerns."

21. In *Central Board of Revenue v. S.I.T.E.* (PLD 1985 SC 97), the judgment of the High Court that was appealed before the Supreme Court had lifted the veil of incorporation of SITE Ltd. to hold that SITE was essentially a department of the Provincial Government, and thus its profits were exempt from income tax under the provisions of the Constitution of Pakistan which provided an immunity to the Provincial Government from taxation by Central law. The Supreme Court upheld the judgment of the High Court.

22. In *Union Council Ali Wahan, Sukkur v. Associated Cement (Pvt.) Ltd.* (1993 SCMR 468), the Supreme Court declined to lift the veil of incorporation to save a Government-owned private company from taxation. As a departure from the case of *SITE supra*, the Supreme Court held that here the respondent company was not discharging a wholly sovereign function of the Government so as to justify lifting

the veil of incorporation, however it was reiterated that in certain circumstances the Courts can lift the veil of incorporation to ascertain the real state of affairs of a body corporate in relation to others. Some of those circumstances were summarized by Justice Saleem Akhtar in an additional note as follows:

> "In spite of this fluid and uncertain state of judicial opinions and lack of comprehensive definition of the principles, depending on the facts and circumstances of the case, the veil of incorporation can be drawn where a statute provides for it, in cases of agency where the arrangement between the company and the shareholders is such which makes the business, business of the shareholders (Smith, Stone & Knight Ltd. v. Birmingham Corporation (1939) 4 All ER 116), when company is a sham, pretense or a puppet, cases involving fraud, illegal trading, evasion of tax or liabilities imposed by law or enemy character of the corporation and many other instances which arise from the circumstances and peculiar facts of the case. As held by this Court in the President v. Mr. Justice Shaukat Ali (PLD 1971-SC 585) referred by learned brother that even where question of public policy is involved, the Courts have not hesitated to lift the veil of incorporation….."

23. As observed above in *Union Council Ali Wahan supra*, a number of circumstances are by now recognized as grounds for lifting the veil of incorporation, including the circumstance where the arrangement between the company and the shareholders is such which makes the business, the business of the shareholders. At the same time, actual instances of lifting the veil of incorporation are far and between. At the end, whether the Court lifts the veil of incorporation or not, eventually depends on the facts and circumstances of each case.

24. As already discussed in paras 12 to 17 above, the Plaintiff has been able to demonstrate *prima facie* that the Company and its shareholders had acted upon the Undertaking by treating the immovable assets of the Company as the joint assets of the brothers. But what still remains to be seen is whether that practice of the parties is sufficient justification for a Court of law to ignore the corporate personality of the Company so as to enforce the Undertaking against the Company, which otherwise, acting under the Companies Act, 2017, can only issue dividends to its shareholders on profits declared.

The answer to that question will in turn determine the ownership to the sale proceeds of the Clifton property lying with the Nazir of this Court in Suit No.142/2011. Till such time, the Plaintiff has made out an arguable case for preserving the sale proceeds, for if the same are released to the Company those are likely to be expended. Therefore, I am inclined to dispose of CMA No. 10790/2018 by restraining the Company (Defendant No.1) from obtaining release of said sale proceeds, and the Nazir is directed to invest the same in a government profitable scheme till further orders.

JUDGE

Karachi:
Dated: 13-06-2022