

IN THE HIGH COURT OF SINDH AT KARACHI**Suit No. 1774 of 2012.****Raphael Furtado ----- Plaintiff****Versus****Mohsin Mirza and others ----- Defendants****Date of hearing: 28.01.2016****Date of judgment: 09.02.2016****Plaintiff: Through Mr. Muhammad Iqbal Khan,
Advocate.****Defendants: Nemo.****J U D G M E N T**

Muhammad Junaid Ghaffar, J. The plaintiff has filed instant Suit against the defendants for recovery of 5.5. Millions US \$ and has prayed as follows:-

- (i) Give direction to the defendants to pay profit of invested money and commission as per agreement to the plaintiff @ 1% on total sale of 50 million US \$ p.a. from September, 2003 to 2012 which comes 5.5. million US\$ and in future in the same rate.
- (ii) Cost of the Suit.
- (iii) Any other relief/relieves which this Hon'ble Court deem fit and proper to the circumstances of the case.

2. Notices/summons were issued to the defendants, however, no one affected appearance and thereafter the defendants were served through publication in daily "JANG" dated 18.09.2013 and vide Order dated

10.03.2014 the Suit was ordered to be proceeded ex-parte against the defendants.

3. Briefly the facts as stated are that the plaintiff and his father started business on partnership basis with defendant No.1 through a registered Partnership Deed in the name and style of defendant No.2 i.e. J.M. Clothing Company on 22.12.1997, which was registered before the Registrar of Firms on 21.04.1998. In the said partnership the plaintiff had 20% share, the father of the plaintiff had 40% share and defendant No.1 had 40% share. It is the case of the plaintiff that he alongwith his father invested 4 Million US dollars and set up a Company in the name of defendant No.4 in 1997 having registered Office at Karachi and various other Companies under the name of Joe's Fashion Export, Group of Companies. The plaintiff states that in fact the entire defendant Companies were established by the plaintiff and his father. It is further stated that thereafter on 01.12.1999 the plaintiffs father entered into another Deed of partnership with defendant No.1 on 60-40% share basis. Through this partnership it was agreed upon between the parties that defendant No.1 was bound to pay 2% of the Invoice value of total sales of the defendants No.2 to 12 (Companies) till the life of the father of the plaintiff. It was further agreed upon between them that after the death of father of the plaintiff, the plaintiff would receive 1% of the total annual sales of the defendants No.2 to 12 during life time of defendant No.1. It is further stated that from 28.01.1999 to 11.08.2003 though various payments were made by defendant No.1 to the plaintiff and his father, however, the said amount was much short of the 2% of the total sale of the defendant Companies. However, the same was accepted by the plaintiff's father on the promise of defendant No.1 to pay the balance payment. It is further stated in the plaint that after the death of the

plaintiff's father, the defendant No.1 took advantage of the situation and refused to make any payment after August, 2003 and in fact became Chief Executive Officer of defendants No.2 to 12, whereas, the entire business was set-up by plaintiff's father. After having failed to get any response from defendant No.1 on the Legal Notice dated 31.10.2011, the plaintiff has filed instant Suit for recovery of US\$ 5.5 Million. The plaintiff after ex-parte orders against the defendants has filed Affidavit in Evidence through his attorney Syed Tariq Shafiq, and has produced photocopy of special power of attorney as Ex.P/3, Affidavit in Ex-parte proof as Ex.P/4, original agreement dated 27.11.1999 entered into plaintiff and defendant No.1 as Ex.P/5, attested translated copy of death certificate along with original certificate in French as Ex.P/6 and P/7; attested translation of heir-ship certificate along with original heir-ship certificate in French as Ex.P/8 and P/9 and legal notice dated 31.10.2011 sent to the defendant No.1 along with reply thereto dated 21.11.2011 as Ex.P/10 and P/11 respectively, and original letter dated 19.09.2012 of SECP as Ex.P/12. He has also produced photocopy of letter dated 18.10.2011 of Habib Bank Limited along with statement of accounts as the original of these documents were not with him and these two documents were taken as X/1 and X/2, by the Court with the observation that the authenticity of the same will be considered at the time of hearing of the case. Since the defendants are Ex-parte in the matter, none has affected appearance even for Cross Examination of the Plaintiffs witness.

4. Counsel for the plaintiff submits that since the defendants have been declared ex-parte, whereas, the plaintiff has led his evidence through attorney and exhibited various documents, which have gone

unchallenged; therefore, plaintiff is entitled for passing of judgment and decree as prayed.

5. I have heard the Counsel for the plaintiff and perused the record including the evidence file. Admittedly the defendants have failed to lead any evidence in the instant matter and have neither cross examined the witness of the plaintiff, nor have led any arguments in the instant matter so as to defend their case. However, this Court in matters wherein Ex-parte proceedings are being carried on, has an additional burden and duty cast upon it, to ensure that the ends of justice are met and the interest of the party who has not been able to defend its case for any reason whatsoever, shall be protected and must be dealt with in accordance with law. The Court is required to examine the Affidavit in Evidence filed in such proceedings and to see that the contention so raised is supported by evidence and supporting material or not. It is the duty of the Court to see whether the Plaintiff is entitled to the relief being claimed and if yes, then to what extent. The Suit cannot be decreed as prayed in such matters, until and unless the Court is satisfied in this regard. Reliance in this regard may be placed on the case of ***Nisar Ahmed & another Vs. Habib Bank Limited (1980 CLC 981) and Messers Al-Pak Ghee Mills through Managing Partner Vs. Zeeshan Traders through Proprietor (2008 CLC 120)***. On perusal of the main document i.e. the Agreement dated 27.11.1999 (Ex.P/5) executed between the parties on the basis of which the entire case has been set-up by the plaintiff, it reflects that as per the covenants of the agreement the same was made at Paris, France on 27.11.1999, whereas, it has been written on Stamp Paper of 100 rupees issued by Stamp Vendor in Karachi. On a query of this Court that as to how an agreement purportedly entered into at Paris, France, can be made on a stamp paper

issued in Karachi, the Counsel for the plaintiff could not give any satisfactory response. Similarly, it is further reflected that though the agreement has been made on 27.11.1999, the same has been made on the stamp paper issued subsequently on 29.12.1999, whereas, nowhere it has been stated in the agreement that though it is being signed on or after 29.12.1999, (date of purchase of stamp paper) but shall be effective from 27.11.1999. It is further noticed that the agreement has been notarized on 27.09.2000, again by a Notary Public in Karachi. I am unable to understand as to how this agreement can be treated as a valid and enforceable agreement on the basis whereof instant Suit for recovery has been filed, whereas, Counsel for plaintiff has been unable to respond such discrepancy pointed out by the Court. Similarly, though the plaintiff has filed certain bank statement to justify that defendant No.1 was sending him the payments pursuant to the agreement till 2003, however, thereafter the same was discontinued, but even on perusal of such bank statement again it is not clear as to how this could be of any assistance to the plaintiff's case as it does not reflect details of any transaction nor it can be made basis for granting the relief sought through instant proceedings. Moreover, it further appears that according to the plaintiff's own averments the agreement was entered into somewhere in 1999 and the plaintiff and his father had received the commission up to August, 2003, whereas, instant Suit was filed before this Court on 07.12.2012 in respect of recovery of an amount being claimed on the basis of Agreement dated 27-11-1999. The plaintiff while filing the plaint in the instant matter has not mentioned / shown as to when the cause of action actually accrued and neither any detail(s) have been set out in the plaint regarding the sale invoices on which the plaintiff claims commission. The date for cause of action as mentioned in Para-14 is 31.10.2011 on which

the plaintiff had sent a Legal Notice through his lawyer. The plaintiff has failed to disclose that what happened and transpired from August, 2003 to October, 2011 when the cause of action had actually accrued to the plaintiff. The period of limitation in respect of the dispute in hand would either be governed by Article 64 or 65 of the Limitation Act, 1908, both of which provide a three years limitation, whereas, apparently the cause of action as stated on behalf of the Plaintiff appears to be time barred, hence in terms of Section 3 of the Limitation Act, any Suit instituted after the period of limitation prescribed thereof shall be dismissed although limitation has not been set up as a defence. In the circumstances, it appears that even otherwise the claim of the plaintiff is time barred.

6. In view of hereinabove circumstances of the instant case, I am of the view that plaintiff has failed to make out any case for grant of any judgment and decree as prayed. Accordingly, the Suit is dismissed, however with no order as to costs.

Dated: 09.02.2016

Judge