

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI.

Before:
Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Adnan-ul-Karim Memon

High Court Appeal No.337 of 2021

Raza Elahi & others

Vs.

Mrs. Marium Kamran & others

Date of hearings: - 02.02.2023 & 22.02.2023
Date of order:- 01.03.2023.

Mr. Haider Waheed, advocate for appellants
Mr. Ravi Pinjani, advocate for respondents No.1 to 4
Ms. Heer Memon, advocate for respondent No.5

ORDER

Muhammad Iqbal Kalhoro, J: - In this appeal has been impugned an order dated 14.12.2021 passed by a single bench of this court in a Civil Suit No.758/2020 (Re-Danish Elahi & others Vs. Marium Kamran & others), whereby appellants' application under Order 39 Rules 1 & 2 CPC (CMA No.5467/2020) has been dismissed.

2. As per brief facts in the plaint, appellants and respondents No.1 to 4 are related *inter se* and are proprietors of various businesses with the name and style as Elahi Family or Elahi Group. One of the proprietorship concerns, is Elahi Electronics and its proprietor was Kamran Elahi, brother of appellant No.2 and uncle of appellants No.1 to 3. He was husband of respondent No.1 and father of respondents No.2 to 4. He passed away in a road accident on 26.05.2016. Statedly, late Kamran Elahi had obtained several facilities from various financial institutions and was under liabilities at the time of his death. The issue which emerged, on his death, was the settlement of his liabilities, and upkeep of his immediate family-- wife and children – enabling them to lead a normal life with all the privileges without being burdened under any of the liabilities left by him. In order to meet the situation, the agreement,

reproduced as below, was reached between the appellants and respondents No.1 to 4.

“Family Agreement”

The ELAHI FAMILY lost our Mian Kamran Ilahi (Late) on 26th May, 2016 in a road accident while traveling from Lahore to Islamabad. This untimely death has put the entire family and the Business in a devastated condition.

That its time like this that we & our families all should support each other as there are certain liabilities of Kamran Ilahi (late) payable to the Banks, Contractors, vendors, Employees, Transporters etc. These payments need to be paid urgently and on its due dates. In addition there are family expenses including domestic, traveling, medical wedding etc. which are required to be paid.

Hence the family has decided to be resolved as under:-

- 1) That M/s. Elahi Group of Companies (EGC) through its own resources and borrowing from other family members shall pay Bank liabilities after reconciling and negotiating with the Banks. The Assets released by the Banks shall be handed over to EGC for liquidation. That EGC shall also pay monthly payments of Pocket Money, Domestic Servants, Utilities, POL, Mobile, Club Payments etc. as per monthly requirements to be ascertained by Mr. Sohail Ilahi. In addition to Travel & Family events.
- 2) That Usman Elahi to return from Melbourne, Australia after completion of his education of Bachelors;
- 3) On receipt of the Succession, the properties of Mian Kamran Ilahi (Late), these properties, receivable, shares and other current and fixed assets shall be liquidated and all such payments made as per Serial no.1 & 2 above and/loans of late Kamran Ilahi paid by M/s. Elahi Group of Companies shall be reimbursed to Elahi Group of Companies.
- 4) That Mr. Arif Elahi our family elder shall supervise the distribution of the proceeds of such liquidation amicably of Kamran Ilahi's assets as per the Shariah legal Share to the legal heirs after deduction of all payables. We all have full faith in Mr. Arif Elahi who always treated Late Kamran Ilahi as his son and looked after the entire family.

That all decision by our elder Mr. Arif Elahi shall be final and binding on all members of the family including the Legal heirs of Kamran Ilahi Late.

Signed this 30th May, 2016

Mr. Arif Elahi

Mst. Mariam Kamran

On behalf of all Legal Heirs on behalf of EGC

Mr. Danish Elahi

Mr. Raza Elahi

On behalf of SCL”

It was agreed that appellant No.3 would perform the role of a guarantor / surety, and after satisfying the debt of principal, would step in the shoes of and hold the same rights and entitlements as the original creditor, i.e. to recover the debt that late Kamran owed to the banks, etc. either amicably or through process of law. Allegedly after such agreement, a chain of other documents: agreement of settlement of liabilities dated 18.06.2016, a letter dated 30.03.2017 to Bank Alfalah Limited, a letter of instruction Bank Islami Pakistan Limited dated 07.09.2016 and letter dated 11.01.2019 issued to Meezan Bank -- ratifying the said family agreement was exchanged and

executed by the parties. It is further averred that late Kamran Elahi had obtained financial facilities worth Rs.2 Billion and therefore the Family Agreement, in essence was a guarantee contract. Appellant No.3 stood surety for the principal debtor i.e. respondents and creditors i.e. Bank. Appellant No.3 was required to pay the liabilities of late Kamran Elahi as surety, whereas, his properties pledged with the financial institutions were to be returned to him for liquidation and protection of the surety.

3. The cause of action to file the suit accrued to the appellants when they find out that respondents had clandestinely obtained a decree from a Civil Court Lahore to the effect that they were the only surviving legal heirs of late Kamran Elahi without disclosure of his liabilities towards financial institutions, etc. or existence of the Family Agreement. They also obtained a succession certificate without disclosing the said Agreement. By using the succession certificate and the decree of Civil Court, it is further averred, the respondents transferred properties in their name, whereas, appellant No.3 has been depositing his money in the bank on behalf of late Kamran Elahi. As respondents were not sticking to the Family Agreement, appellant No.3 could not fully pay off liabilities of late Kamran Elahi. Therefore, the banks started to serve notices of defaulter to him and as a result he disposed of mortgaged properties. It is, mostly, in this backdrop, the appellants have prayed in the suit as under:-

- A) To direct the Defendants to specifically perform the Family Agreement dated 30.05.2016 (attached as Annexure "C" to the Plaint) in letter and spirit;
- B) Direct recovery of Rs.328,564,000/- on account of the amount expended on the suit properties by the Plaintiffs;
- C) Declare that the Plaintiff No.1 has lien over the properties and securities / assets of the deceased and / or the Defendants to the extent of the liabilities paid off and the expenses incurred on the properties by the Plaintiff No.1 on behalf of the deceased and Defendants subject to discharge of mortgage by the Banks;
- D) Grant general damages to the tune of Rs.3,000,000,000/- (Rupees Three Billion Only) to the Plaintiff No.1 against the Defendants jointly and / or severally;
- E) Restrain the Defendants from disturbing the peaceful possession of the Plaintiffs from the Suit Properties and creating third party interest in any way, shape or form in properties/shares listed at Annexure "G" to the Plaint;
- F) Restrain the Defendants from revoking the mandate given to the Plaintiff No.1 in respect of bank accounts being used to discharge liabilities in respect of the Family Agreements;

- G) That this Honorable Court may be pleased to grant the Plaintiffs the cost of the instant proceedings and grant such other relief as this Honorable Court may deem fit and appropriate.

In the Alternative:-

- H) Grant recovery to the Plaintiff No.1 of the amounts paid by the Plaintiff No.1 on behalf of the deceased and/or the Defendants including the amount expended on this Suit Properties by the Plaintiff No.1; and direct the Defendants to pay off the remaining liabilities of the Banks and/or other creditors;
- I) Declare that the Plaintiffs have no obligation of surety / guarantee in respect of the liabilities of the deceased and/or the Defendants emanating the Family Agreement;”

4. Respondents filed written statement denying the claim of the appellants including the Family Agreement or communicating any correspondence with the appellants in the wake of such Family Agreement. It is stated that all the properties mentioned in the schedule are personal properties of respondent No.1 and they are not part of the Estate of the deceased. Therefore, appellants have nothing to do with them and have no right to subject them to litigation; that suit is basically the suit for recovery of money is barred by Articles 59 and 61 read with Section 3 of the Limitation Act, 1908; that the amounts paid by appellant No.3 were on account of letters of credit (LCs) against the goods imported, which he himself took possession of from the port and disposed them of, without knowledge and consent of the respondents, and pocketed all the profits. The purported agreement appears to have been executed at Karachi on 4th day of demise of Kamran Illahi, when respondent No.1 was at Lahore and observing Iddat which is sufficient to show its manipulation etc.; that at the back of respondents, from the Estate of deceased Kamran Elahi, appellants have been receiving millions of rupees, and further they have illegally kept immovable properties of the deceased and have been receiving rental income from them. Further, the respondents while denying contents of the plaint in toto have put the appellants to proof thereof.

5. Mr. Haider Waheed, advocate appearing on behalf of the appellants has contended that impugned order is not sustainable in law, learned Single Judge has not considered documents on record, has erred in holding that the appellants have produced no record, has erred in appreciating the terms of the agreement. That learned Single Judge has erred in denying

the injunctive relief to the appellants; that learned Single Judge did not appreciate that respondents by obtaining a succession certificate and a decree from the Civil Court have been acting in breach of the Family Agreement; learned Single Judge has not appreciated that appellant No.3 has been discharging the liabilities of late Kamran Elahi as surety by paying off amounts to the banks and therefore he is entitled to be put into his shoes in respect of the properties left by him as a guarantor in order to ensure recovery of amounts so paid by him; and that he is in fact entitled to recovery of such amount in terms of the Family Agreement. He has further referred to sections 126, 127, 140, 141 and 145 of the Contract Act, 1872 to bring home his case.

6. His arguments have been rebutted by learned counsel for the respondents No.1 to 4, he has reiterated the facts and grounds reproduced in para 4 above. He has further revealed that earlier appellants had filed a Suit No.567/2020 in which the same injunctive relief was sought by them but it was dismissed by this court and the High Court Appeal filed against the said order was ultimately withdrawn unconditionally by the appellants on 02.11.2020 as such present suit and application for injunctive relief are barred by principle of *res judicata*; and that since the suit is basically for money decree, there is no question of irreparable loss to the appellants.

7. We have heard the parties and perused the record. Appellants are basically asking for a relief under Order 39 Rule 1 & 2 CPC under which an injunction can be granted as a step in aid of or to restrain or prevent waste, damage, alienation, sale, removal or disposal of property. Jurisdiction under the said provision of law is of an equitable character. Although the issuance of injunction is discretionary with the court, yet the principles regulating such discretion are settled. Injunction cannot be granted where specific performance cannot be granted, or where damages afford adequate relief, or where perpetual injunction cannot be granted, or where its effect would be to virtually decide the suit. For such relief to be granted the plaintiff has to prove prima facie existence of the right claimed in the suit and also its infringement. The case of plaintiffs/appellants is founded mainly on the

Family Agreement, the other rights -- such as recovery of amounts paid to the banks by appellants for discharging liabilities of late Kamran Illahi -- claimed by them flow from such agreement only. Proof of its successful execution by the appellants could determine their rights positively as against responsibilities and liabilities of the respondents arising out of it. But the respondents have completely denied its execution by them and have, on the contrary, termed it a fake and manipulated document. They have *prima facie* given tenable reasons in favour of such assertion like it is executed at Karachi whereas respondent No.1, the widow who has purportedly signed it, was in Iddat at Lahore at the time, it does not bear signature of any other legal heirs of late Kamran Illahi, does not give a detail in respect of any liability or asset of the deceased, it has not been witnessed by any one, etc. These exceptions taken by the respondents to the agreement require both the parties to lead the evidence before any opinion could be formed about its genuineness or otherwise. The burden to do so is upon the appellants which they have yet to discharge in the trial. Till such time, we are convinced that on this ground – *prima facie* case – the appellants have no case for injunctive relief.

8. The other ground on which the injunctive relief can be granted is: irreparable damage or injury. This term however does not refer to damage which cannot be physically repaired but to such material injury as cannot be adequately compensated. When the loss is ascertainable in terms of money, it is not a case of irreparable loss. It means that when the pecuniary compensation is an adequate relief, injunction will not be granted. It is interesting to note in the present case the plaintiffs/appellants themselves have asked for, amongst others, recovery of a particular amount in their prayer clause (b), and a certain amount of damages in their prayer clause (e), and in clause (h) have prayed for recovery of money paid by appellant No.1 on behalf of the deceased besides the amounts expended by him over the suit properties. When the case is of ascertainable injury or loss, as is in the present case, it does not become the case of irreparable loss or injury. In addition, it is for the plaintiffs/appellants to prove, by leading evidence, as to how and under what

circumstances they are entitled to recovery of such amounts and damages. Admittedly, these questions cannot be summarily decided here while determining right of the appellants to injunctive relief. So even on this ground, we do not find the appellants entitled to the relief under Order 39 Rule 1 & 2 CPC.

9. The third and last ground to grant such relief is balance of inconvenience. But, we may remind, that inconvenience by itself is not sufficient ground for purpose of granting an injunction. Plaintiff has to indicate that irreparable injury will accrue to him in case the injunction is not granted and that there is no other remedy available to avoid the apprehended injury. Here the plaintiffs/appellants have not urged that their case is one of irreparable and irreconcilable injury which cannot be compensated except unless the subject matter is persevered, as it is, till final adjudication is made over the matter. The Family Agreement, they have to establish its execution in the face of strong denial from the other side, amounts of recovery on account of spending on the properties left by the deceased and on satisfaction of his liabilities have yet to be proved by them by leading proper evidence. Plus the damages — the circumstances under which they have suffered wrong at the hands of respondents -- they have to prove yet to the satisfaction of the court before any such decree is passed in their favour.

10. Apart from the Family Agreement, which has been made fountainhead of the case by the appellants, and the rights, if any, cascading out of it, the apprehension shown by the appellants and which appears to prompt them to file this suit, is the ability of the respondents to obtain a succession certificate and a decree from the civil courts in respect of the properties left by late Kamran Illahi, and their right obtaining in the wake of which to deal with those properties as they please in accordance with law. Now the question is whether a person can be restrained through an injunction from doing a lawful act. The answerer to this question would be a simple no. What we understand therefore is that pursuant to succession certification and the decree of the court in their favour, any action of the respondents to deal with

the properties of the deceased in the manner as they wish would be lawful and not prone to any exception provided succession certification and the decree of the court hold field. By filing a separate suit at Karachi, which is wholly irrelevant or independent of the proceedings taken up in succession certificate and the civil suit filed at Lahore, the plaintiffs cannot ask for the injunctive relief abrogating rights of the respondents arising out of those proceedings. We therefore find that balance of inconvenience does not lie in favour of the plaintiffs in this matter but rather if we grant injunction the respondents would be put in peril i.e. inconvenience in terms of their acquired right to manage the properties left by the deceased. Learned counsel's reliance, at this point in time when question of ad interim injunction is being seen, on the provisions of Contract Act like sections 126, 127, 140, 141 and 145 is immaterial or somehow irrelevant. These provisions' impact or effect could be considered at the time of final adjudication of the matter when the entire evidence is available on record firstly. And secondly these provisions – surety and his rights in a contract of guarantee, or payment of performance, etc. -- would have been relevant when the Family Agreement had been uncontroversial, and only its minutia in regard to performance of respective parts and rights of the parties arising out of it had been under a dispute, plus its mode and manner of execution for determination such performances and rights. When the Family Agreement by itself has been disputed in toto by respondents, and the trial court is not certain of its authenticity, as expressed by it in the impugned order, no sanctity *prima facie* could be attached to it by this court by putting it in contrast with above provisions of law in order to determine respective performances and rights of the parties under thereof. The foregoing discussion has persuaded us to believe that in this appeal the appellants, for the relief sought for by them, musts fail. Accordingly this appeal is dismissed and disposed of accordingly along with all applications without any order as to cost.

Judge

Judge