

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Shafi Siddiqui
& Jawad Akbar Sarwana JJ

High Court Appeal No.128 of 2017

Rifat Saeed and Another

v.

Zahid Saeed and Eleven (11) Others

Appellant No.1:	Rifat Saeed s/o Ahmed Saeed;
Appellant No.2:	Jawed Akhtar s/o Ahmed Saeed Through Obaid-ur-Rahman, Advocate
Respondent No.1:	Zahid Saeed s/o Ahmed Saeed;
Respondent No.2:	Farida Saeed w/o Zahid Saeed;
Respondent No.3:	Zehra Saeed d/o Zahid Saeed;
Respondent No.4:	Sarah Saeed d/o Zahid Saeed;
Respondent No.5:	Amna Saeed d/o Zahid Saeed;
Respondent No.6:	Mohammad Saeed s/o Zahid Saeed;
Respondent No.7:	Alliance Commercial Corporation (a sole proprietorship of Late Ahmed Saeed);
Respondent No.8:	H.A. Rauf & Co. (Pvt.) Ltd.; and,
Respondent No.9:	Saeed Industries (a sole proprietorship of Late Ahmed Saeed) through Haider Waheed and Sufiyan Zaman, Advocates
Respondent No.10:	The Sindh Industrial Trading Estate Limited. Nemo.
Respondent No.11:	Defence Officers Housing Authority. Nemo.
Respondent No.12:	Mrs. Akhtar Sultana through her Legal Heirs, 12(a) Zahid Saeed, 12(b) Javed Akhtar, and Rifat Saeed 12(c). Nemo
Date of hearing:	08.11.2023
Date of judgment:	01.02.2024

J U D G M E N T

Jawad A. Sarwana, J.: Two brothers, namely, Appellant No.1/Plaintiff No.1 (“Rifat Saeed”) and Appellant No.2/Plaintiff No.2 (“Jawed Akhtar”) have challenged the Order dated 17.01.2017 of the High Court of Sindh at Karachi passed in two Interlocutory Applications in Civil Suit No.1647/2012 filed by them against Respondent Nos.1 to 6 comprising their brother, Zahid Saeed and his family members, and the businesses operated by them (Respondent Nos.7 to 9) which the Appellants allege to be a part of the estate of their deceased father. The learned Single Judge dismissed the Appellant brothers Application under Section 94 read with Order 39 Rules 1 and 2 read with Section 151 CPC (CMA No.12833/2012) seeking orders from the Court to restrain the Respondents from disposing of, encumbering, alienating, or parting with possession and/or creating any third party rights or interests in the properties and businesses described in paragraph 2 of this Appeal (same as Paragraph 13 of the Plaint and Paragraph 15 of the affidavit in support of CMA No.12833/2012), and, an Application under Order 40 Rule 1 read with Section 151 CPC (CMA No.128834/2012) for appointment of a receiver. Aggrieved by the Impugned Order dated 17.01.2017 passed by the learned Single Judge, the Appellants have preferred this appeal.

2. The brief facts of Suit No.1647/2012, which the learned Single Judge has discussed in detail in the impugned Order dated 17.01.2017, are that the Appellant brothers filed this suit for administration, declaration, partition, accounts, cancellation of documents, permanent injunction and mesne profits against their brother, Zahid Saeed, his family members and businesses of the brother and their family’s businesses, which the Appellant brothers claimed belonged to their deceased father, Mr Ahmed Saeed, who died on 09.03.1984 (“the deceased”). The interests of the legal heirs of the deceased are set out in paragraph 2 of this Appeal (the same as Paragraph 13 of the Plaint and Paragraph 15 of the affidavit in support of CMA No.12833/2012 thereof). The learned Single Judge has summarised the details of the

properties and businesses of the deceased in Paragraph 2 of the impugned Order dated 17.01.2017 as follows:

- (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 Ahmed Rashid, located at E-43, SITE Karachi;
- (c.) 50% share in Sindh Industries (Pvt.) Ltd. (“SI”/“SIPL”), situated on Plot No.43/A, SITE, Mangohpir 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, Karachi (‘the DHA plot’)

3. The legal heirs of the deceased, for reasons alleged in the Plaint, could not agree on the distribution of the deceased’s property and businesses; hence, the Appellant brothers filed Suit No.1647/2012.

4. The learned Counsel for the Appellants claims that the learned Single Judge has decided the interlocutory applications filed by the Appellants based on assumptions set out in the impugned Order, which the learned Single Judge has attributed to consent/admission made by the Appellant brothers when there was no such consent/admission; and at times, the learned Single Judge has overlooked material available on

record. The Appellants' Counsel's concerns regarding such matters were as follows:

- ACC (Paragraph 11 of the Impugned Order): Contrary to the observations made by the learned Single Judge the Appellants never admitted that Respondent No.1 established ACC and registered it in 1999 as a sole proprietor. The Appellant brothers contend that ACC was assigned to Respondent No.1 by the deceased prior to his death. Thus, the learned Single Judge's observations regarding ACC are contrary to the record.
- AI and SI/SIPL (Paragraph 12 of the Impugned Order): AI was a partnership between the deceased and his brother, Ahmed Rashid, which ended upon the deceased's death. The partnership was reconstituted with the entry of Respondent No.1, who stepped into the deceased's shoes as per his admission in paragraph 3 of the Plaint. Respondent No.1 filed in a separate suit, namely, Suit No.504/1994. This suit culminated in a Consent Decree which safeguarded the interests of the legal heirs of the deceased. The third property of AI, which was the dyeing and processing of textile fabrics unit, was handed over by Ahmed Rashid to his nephew, Respondent No.1, who renamed it SI/SIPL. However, the assets of SI/SIPL were those of the deceased; hence, the Appellant brothers have claimed their share in the suit.

The Appellants never admitted that SI was established by Respondent No.1 in the year 1995 as the sole proprietor thereof. Counsel for the Appellants asserted that Respondent No.1 had taken over the same on behalf of the legal heirs of the deceased, which included the Appellant brothers, Respondent No.1 and their mother.

The Appellants and their mother were specifically mentioned in the Consent Decree dated 07.05.1999 in Suit No.504/1994 involving Respondent No.1 and his Uncle, Ahmed Rashid. Thus, based on the Compromise Agreement and the Consent Decree, even though the Appellants (brothers) and mother were not impleaded as a party in the said suit, they had acquired a valuable right. The interests/shares of all the legal heirs of the deceased were safeguarded by their Uncle, Ahmed Rashid, so that he did not have to face another round of litigation from the rest of the legal heirs of the deceased.

- HARCPL (Paragraph 13 of the Impugned Order): Respondent No.1 acquired shares of HARCPL on behalf of his mother and real brother and daughters as recorded in the Consent Decree dated 07.05.1999 in Suit No.504/1994. There was no need for the Appellant brothers and mother to file an Application under Section 12(2) CPC when the Consent Decree had recorded their rights in the deceased properties and business, which the Appellant brothers were claiming from Respondent No.1 in Suit No.1647/2017. The Appellant brothers were sufficiently protected, and the learned Single Judge erred in holding that the legal heirs should have filed an Application under Section 12(2) CPC.
- DHA Plot (Paragraph 14 of the Impugned Order): The Counsel for the Appellant brothers submitted that contrary to what was observed by the learned Single Judge, the legal heirs of the deceased never admitted that the DHA plot was not in the name of the deceased. He contended that Respondent No.1 himself admitted in another Suit filed by him and the Appellant brothers, namely Suit No.336/1998 for declaration, injunction and possession, that the DHA Plot belonged to the deceased. The onus was on Respondent No.1 to show on what basis he could now contradict the

judicial record of Suit No.336/1998 which was available in Suit No.1647/2012.

5. The learned Counsel for the Appellant brothers prayed that Suit No.1647/2012 was a suit for administration and accounts, etc. and the Appellants had established a prima facie case, the balance of convenience was in their favor and irreparable loss would be caused to them if the property and business were not protected during the trial and the Respondents were not restrained from creating of third-party interest over the subject properties and businesses of the deceased.

6. The learned Counsel for the Respondent's brother, Zahid Saeed and his family and businesses pleaded that there was nothing perverse in the impugned Order dated 17.01.2017, and the same was liable to be upheld.

7. We have heard the learned Counsels, reviewed the record as available in the Appeal and read the Impugned Order.

8. It is apparent on the face of the record that the learned Single Judge has made several assumptions in the impugned Order to assist him in determining whether the Appellants have met the ingredients of granting a discretionary relief. It also appears that these assumptions were based on oral submissions, as the Respondent's Counsel could not point out the specific documents either filed with the Appeal or filed along with the Counter-Affidavit/Written Comments filed by the Respondents in the Suit/Appeal which could confirm these assumptions made by the learned Single Judge. Yet throughout the Impugned Order, the learned Single Judge has made assumptions indicating that either "[i]t is a matter of record. . .", or "[i]t is an admitted position . . .", or "[i]t is not disputed. . .", etc. regarding the deceased's properties and businesses on the part of either the Appellants or both the parties. The assumptions/positions that the learned Single Judge has mentioned/recorded in the impugned Order are denied by the Appellant brothers both in the appeal and by their Counsel during his submissions.

It would have assisted us if the paragraph number, page number, and the documents that formed the basis of the learned Single Judge's assumptions were identified in the Impugned Order, but this is/was not the case. For example, in paragraph 10 of the Impugned Order, and we will discuss this aspect again later para-wise, the learned Judge has observed that "it is a matter of record that the plaintiffs are not claiming or asserting any right or share in AI and SPIL as a statement to this effect was made categorically made in the written synopsis of arguments filed on their behalf." The Respondent Counsel could not, when we sought assistance from him, identify the said Statement. Meanwhile, the Appellants' Counsel continued to urge that the learned Judges' assumptions as recorded are either not available in the suit file or the Plaintiffs' contentions regarding the deceased's properties and business have been overlooked and ignored by the learned Single Judge or, on other occasions, are contrary to the position stated in the Written Statement filed by the Respondents which was available on record.

9. Given the above predicament, we have re-examined paragraphs 10, 11, 12, 13, and 14 of the Impugned Order after removing the assumptions made by the learned Single Judge from the said paragraphs. Apart from the assumptions, the learned Single Judge has carried out an independent and detailed analysis of each disputed property and business identified in the Plaint. These paragraphs, even without the assumptions, do not necessarily become redundant. They can still manage to stand on their own. Accordingly, the following revised conclusions emerged when we carried out the above-mentioned exercise:

- Paragraph 10. Plaintiffs claim and assert their rights and shares in AI, SI/SIPL, ACC, HARCPL and the DHA Plot. There are/were no giveaways by the Plaintiffs of deceased properties and businesses, such as AI and SI/SIPL.

- Paragraph 11. The learned Single Judge overlooked the Plaintiffs assertions that: (i) Plaintiff No.2/Appellant No.2 was involved in the business of ACC prior to the death of his father (Appellant's Statement dated 28.11.2013); (ii) Respondent Nos.3 and 6 have stated in their Written Statement that ACC was assigned to Respondent No.1 by the deceased before his death; and (iii) ACC received a sum of Rs.12,140,800 from Saudi Pak Commercial Bank Ltd. to relocate from its premises which was recorded in an Application under Order 23 Rule 3 CPC filed before the Vith Rent Controller South at Karachi signed by Respondent No.1 (as per CMA No.5849/2013 to amend the Plaint which was allowed by the Court's Order dated 18.08.2016).
- Paragraph 12: The assets of AI and SIPL, in particular the dyeing processing unit, were absorbed into a new entity, SI. Even if SI was established after the death of the deceased, the plant and machinery and equipment transferred belonged to the deceased. The deceased business assets were taken over by Respondent No.1 and documented in the Consent Decree by Respondent No.1, who was acting on behalf of all the legal heirs of the deceased, i.e. the Appellants and their mother. As sole proprietor of SI, he has to give accounts to the legal heirs of the deceased including, his now-deceased mother.
- Paragraph 13: Respondent No.1 took over HARPCL for self and on behalf of other legal heirs of the deceased. He could not simply walk away from his liability as per the Consent Decree wherein his uncle/chacha had recorded this in the same terms.
- Paragraph 14: The Counsel for the Respondents could not show where the learned Single Judge had observed that DHA plot was never in the deceased's name. To the contrary, Plaintiffs/Appellants and Respondent No.1 had admitted in several pleadings that were available on record that the deceased was the owner of the DHA plot.

10. Suit No.1647/2012 is the Appellants/Plaintiffs claim to prove, and they will have to lead evidence to succeed. They have prayed for a restraining order, which is a form of equitable and discretionary relief that is to be invoked in the aid of justice and not to aid injustice and favor one party over another. If we do not grant relief, then the subject matter of the suit, which is essentially a suit for administration, may likely become complicated as the properties and business of the deceased will be subject to third-party interests during the course of the trial and potentially frustrate the decree, if any. We are constrained to accept the proposition advanced by the learned Single Judge that the threshold of a prima facie case is that the material available on record “speaks loudly and clearly in favor of the applicant. . . .” In the present case, crucial documents available on record have been overlooked. All the assumptions made by the learned Single Judge are negative; instead of enabling Plaintiffs to prove their claim and providing an opportunity to rely on the documents and subject them to cross-examination, the learned Single Judge raised assumptions, raising walls against Plaintiffs' arguable case set up in his Plaint.

11. Based on the above discussion, the Appellants have established a prima facie case as disclosed in the Plaint, affidavits and the documents filed in the suit. The Appellants/Plaintiffs, as legal heirs of the deceased, would not be able to recover their share in the properties and businesses if the injunction application is disallowed. The balance of convenience is in favor of the Appellants/Plaintiffs. The inconvenience caused to the Appellants/Plaintiffs would be greater than that which may be caused to the Respondents, who are running and operating the business and/or have possession of the properties or have funds in pocket generated from the sale of the properties owned by the various businesses. There is no remedy available to the Appellants/Plaintiffs to safeguard their interests during the trial other than a restraining order to maintain the status quo, which would be fair to all parties. Irreparable loss will be caused to the legal heirs of the deceased if equitable relief is not granted.

12. In view of the above, we set aside the impugned Order dated 07.01.2017 to the extent of CMA No.12383/2012 (stay) and uphold the Impugned Order dismissing CMA No.12384/2012 (appointment of a receiver). We concur with the learned Single Judge's decision to dismiss the Receiver's appointment because receivership is the harshest remedy in civil law. Be that as it may, with regard to the impugned Order dated 17.01.2017 dealing with CMA No.12383/2012, the parties, their representatives, assigns, attorneys, benamidars, agents, employees and/or anyone acting on their behalf either directly or indirectly are restrained from disposing of, encumbering, alienating or parting with possession and/or creating any third party rights or interests in the properties and business described in paragraph 2 of this Appeal. Further, the parties are also restrained from taking any action that may adversely affect the Appellants' rights and interests and that of the deceased's legal heirs. Further, the parties in the suit and all the legal heirs of the deceased are directed to maintain status quo till the final disposal of Suit No.1647/2012. Accordingly, the appeal is allowed in the above terms.

13. It may be noted that our observations should not influence the trial of the Appellants/Plaintiffs Suit, which shall be decided solely after the recording of evidence and hearing of final arguments in accordance with law.

14. The parties are left to bear their own costs.

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Announced by us on 01.02.2024.

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