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**Judgment Sheet**

**IN THE LAHORE HIGH COURT,**  
**LAHORE**

**(JUDICIAL DEPARTMENT)**

**F.A.O. No.81002 of 2021**

**Adeel Khalid Bajwa Vs. Bashir Ahmad Tahir,etc.**

**JUDGMENT**

<b>Date of Hearing</b>	<b>04.05.2023</b>
<b>Appellant by:</b>	M/s. Tariq Kamal Qazi & Ms. Farah Malik, Advocates.
<b>Respondent No.1 by:</b> <b>Respondents No.2 &amp; 3</b>	Mr. Sarim Shahid, Advocate. M/s. Hamood-ur-Rehman Awan and Ch. Zulfiqar Ali Hargan, Advocates.
<b>Respondent No.4 by</b> <b>Respondent No.5 by:</b>	Mr. Moeed Ahmad, Advocate. Azam Jan Leghari and Shameer Ubaid, Advocates
<b>Respondents No.6 &amp; 7 by:</b>	Mr. Mudassar Nazar, Advocate.

**MUHAMMAD RAZA QURESHI, J.** Since the instant Appeal as well as connected Civil Revision bearing No.12886/2022 emanate from proceedings which remained pending determination before the learned Trial Court and the Appellate Court and call into question the same Order dated 03.12.2021, therefore, the instant Appeal as well as connected Civil Revision are decided together. As the facts relating to the controversy are admitted, therefore, for the purposes of convenience, the facts and grounds agitated in the instant Appeal are referred and determined.

2. The instant Appeal under Section 104 read with Order XLIII rule 1(u) of the Code of Civil Procedure, 1908 (the “CPC”) calls into question the legality, validity and propriety of Order dated 03.12.2021 passed by the Appellate Court pursuant whereto the Order dated 21.05.2021 passed by the Trial Court rejecting the

plaint in a suit filed by Bashir Ahmed Tahir (“**Respondent No.1**”) was set aside and the matter was remanded to the Trial Court with a direction to frame issue on the maintainability of the subject matter suit and proceed in accordance with law.

3. Learned counsel for the Appellant submits that the Impugned Order is not sustainable in the eyes of law as it suffers from serious jurisdictional defects. According to learned counsel, the suit filed by the Respondent No.1 was not only barred by law in terms of Order VII rule 11 (d) of the CPC but plaintiff also failed to disclose a cause of action against the Appellant impleaded in the suit as Defendant No.2, therefore, the plaintiff was liable to be rejected in terms of Order VII rule 11 (a) of the CPC. Contends that the Appellate Court erred in law by remanding the matter to the Trial Court with a direction to frame issue with respect to maintainability of the suit. According to learned counsel, the Appellate Court had ample powers under Order XLI rule 33 of the CPC to adjudicate upon the controversy as there was no factual controversy to be resolved. Adds that the Appellate Court failed to appreciate that suit for rendition of accounts was not maintainable as the Respondent No.1 was not even a member/shareholder of the Company. Submits that had the mandate of law been followed, the legal consequence thereof was that Appeal filed by the Respondent No.1 was liable to be dismissed by accepting the cross objections filed by the Appellant.

4. Learned counsel for Wincom (Pvt.) Ltd. (“Wincom”)/Respondent No.2 impleaded in the suit as Defendant No.1 has supported the contentions of learned counsel for the Appellant and submits that Wincom being owner of subject matter property supports its transfer in favour of the Appellant and the Respondent No.1 being not a member/shareholder of Wincom had no *locus standi* to question the transaction *inter se* Wincom and the Appellant.

5. Conversely, learned counsel representing the Respondent No.1 while supporting the Impugned Order passed by the learned Appellate Court submits that the same has been passed in lawful exercise of jurisdiction. Contends that this Court has very limited jurisdiction to interfere in a remand order as the issues of law as well as facts with respect to jurisdiction and maintainability were directed to be decided by the learned Trial Court. According to learned counsel, the instant Appeal merits dismissal and the Impugned Order is liable to be upheld by this Court.

6. The arguments of learned counsel for the parties have been heard and record has been perused with their able assistance.

7. The proceedings culminating into the Impugned Order has its genesis in a suit for declaration, rendition of accounts, cancellation of documents, recovery and injunction, *inter alia*, against Wincom and the Appellant seeking following reliefs:

“i. Restraining Defendant No. 2 from selling the Suit Property to any third party, until full and final settlement and recovery of the share proceeds of the

*Plaintiff including but not limited to his investment in the Company.*

- ii. Directing the Defendants, No. 1, 3 and 4 to render complete accounts of the Company, including documentation supporting (1) transfer of the Plaintiff's/company's assets/shares/capital/ dividends and write-offs if any. (i) alleged board resolution and partners authorization given to Defendant No. 1, 3 and 4 to sell the Suit Property to Defendant No. 2.*
- iii. Declaring that (i) the Suit Property has been illegally transferred to Defendant No. 2, without payment of any consideration to the Plaintiff company (ii) the resolution passed by directors of the Company (Wincom (Private) Limited) has been forged, in the absence of partners authorization in violation of the Contract of Establishment signed between the partners in 2006 (iii) the sale of Property to Defendant No. 2 was undertaken without authorization, illegal, unlawful and without jurisdiction hence void ab-initio, therefore sale deed to this effect be cancelled and declared as null and void.*
- iv. Direction may also be passed for taking punitive action against the culprits for making fraudulent transaction. It is further prayed that a decree may please be passed for cancellation of all forged documents, including the sale deed dated 9th February 2017 and any instruments perpetuating transfer of share/assets/capital/write-offs (if any) of the company resulting in the Plaintiff's loss."*

8. The contents of plaint and reliefs prayed therein reflect that the Respondent No.1 claimed that in year 2006, the Company with the name of Wincom Services Pakistan LLC (the "**Wincom LLC**") was incorporated in United Arab Emirates. The said Company was governed by its charter, namely, Contract of Establishment. The Respondent No.5 Pervaiz Ahmed Shahid (*impleaded in the suit as Defendant No.5*) and one resident of United Arab Emirates were promoters of Wincom LLC. The Defendant No.5 on 01.06.2006 got incorporated Wincom which was, *inter alia*, engaged in the business of manufacturing and

installation of towers and laying underground wiring. On 20.09.2008 Wincom through registered Sale Deed bearing No.3080 purchased the subject matter property bearing Plot No.14, H-Block, Gulberg II, admeasuring 06 Kanals 09 Marlas 85 sqf. As per paragraphs No.5 & 6 of the plaint, in year 2008 Pervaiz Ahmed Shahid transferred his shareholding in Wincom in the name of Wincom LLC, who became holding Company having 99.9971% of shareholding of Wincom. The Respondent No.1 who claimed to be shareholder of Wincom LLC to the extent of 10% shares claimed that he owned all the assets of Wincom in addition to the assets and liabilities of Wincom LLC to the extent of his shareholding.

9. According to the contents of plaint, the Respondent No.2 through its Board Resolution dated 22.12.2016 transferred its subject matter property in the name of the Appellant. Consequently, the Respondent No.1 through his suit challenged the Board Resolution dated 22.12.2016 passed by the Wincom through which the subject matter property was transferred in the name of the Appellant and sought restraining order against the Appellant from creating third party's interest in the suit property. The Respondent No.1 through his suit also sought rendition of accounts from the Wincom and lastly sought cancellation of the Sale Deed of the subject matter property in favour of the Appellant, the transfer whereof was made on the strength of Board Resolution of Wincom.

10. The suit was contested by the Appellant as well as other Respondents who filed their contesting written statements and

the Trial Court through Order dated 21.05.2021 declared that the suit was incompetent and jurisdiction of the learned Civil Court was barred in terms of Section 5 of the Companies Act, 2017. Consequently, the plaint in the suit was rejected under Order VII rule 11(d) of the CPC.

11. Against the Order passed by the Trial Court, the Respondent No.1 filed an Appeal whereas the Appellant simultaneously filed cross objections seeking rejection of plaint on the ground that plaint had failed to disclose the cause of action against the contesting Respondents. The Appellate Court through the Impugned Order allowed the Appeal filed by the Respondent No.1 and remanded the matter to the Trial Court with the direction to frame an issue on the maintainability of the suit and decide the matter in accordance with law.

12. To encapsulate the above narrated facts emanating from the plaint, it is an admitted position that the Respondent No.1 is not shareholder of Wincom. The Wincom LLC is holding Company of Wincom having 99.9971% shareholding. The subject matter property was transferred in the name of the Appellant through Board Resolution dated 22.12.2016 by the Wincom and through his suit the Respondent No.1 sought cancellation of Sale Deed of Wincom in favour of the Appellant which transaction had its roots in the said Board Resolution.

13. For determination of pivotal questions necessitating resolution of controversy, *inter se*, parties, it is imperative to

evaluate, *firstly*, whether the suit was maintainable by a non-member against a Company challenging a Board Resolution dated 22.12.2016 transferring its property in favour of a third person, *secondly*, whether the suit filed by the Respondent No.1 for rendition of accounts against Wincom was maintainable and *thirdly*, whether the Respondent No.1 had entitlement to seek a relief of cancellation of the Sale Deed in favour of the Appellant with respect to subject matter property. The answers to these questions would assist in adjudicating whether the Appellate Court was justified in remanding the matter to the Trial Court after framing of issue.

14. The reliefs prayed for by the Respondent No.1 in his suit were on the strength of his purported shareholding in Wincom LLC, who is a holding Company of Wincom having 99.9971% shareholding. The Respondent No.1 in paragraph No.1 of his suit conceded that Wincom LLC was governed by its charter contained in Contract of Establishment. The said Contract of Establishment bears clause 11.4 pursuant whereto "*the Chairman shall be solely entitled to appoint, add and remove the members of Board of Directors from time to time by written notice to the Member of Directors and the relevant Directors without the need to amend the Contract of Establishment*". Pursuant to a notice/Resolution dated 31.01.2012 the Chairman of Wincom LLC invoked clause 11.5 and removed the Respondent No.1 and Pervaiz Ahmed Shahid w.e.f. 31.01.2011 from the Board of Directors of Wincom LLC. This fact

has not been disputed by the Respondent No.1. According to learned counsel for the Respondent No.1 while determining the fate of the suit on the touchstone of provisions of Order VII rule 11 of the CPC, the Court can only look at the plaint and its contents and no other material can be referred or relied upon by the Court. I am afraid the objection raised by the Respondent No.1 is meritless in view of the High Court Amendment notified on 22.08.2018 substituting the provisions of Order VII rule 11 (d) of the CPC from “*whether the suit appears from the statement in the plaint to be barred by law*” to “*whether the suit appears from the record available with the Court to be barred by any law.*”

15. The afore-noted amendment has equipped the Court to seek assistance from the available record, while determining the fate of the suit under Order VII rule 11 of the CPC. Even otherwise the Court, besides the averments made in the plaint and other material on record which on its own strength is legally sufficient to completely refute the claim of the Plaintiff, can also look into for the purposes of rejection of the plaint. It does not necessarily mean that the other material shall be taken as conclusive proof of the facts stated therein, but it actually moderates that other material on its own intrinsic value to be considered along with averments made in the plaint. Reliance in this regard is placed on the judgment reported as “S.M. Sham Ahmad Zaidi through Legal Heirs vs. Malik Hassan Ali Khan (Moin) through Legal Heirs (2002 SCMR 338).

Even otherwise, if the Respondent No.1 has any cause of action

against the Board Resolution issued under Contract of Establishment, that has to be agitated before the court of competent jurisdiction in United Arab Emirates and the Respondent No.1 cannot contend before this Court that said Resolution is illegal and unlawful. Most interestingly, the resolution dated 22.12.2016 passed by the Board of Wincom has never been questioned by Wincom LLC before any *fora*. The said Resolution has been acknowledged and supported by Wincom before this Court. The Respondent No.1 who is not even a member/shareholder of Wincom does not have legal capacity, entitlement and/or *locus standi* to question the validity and legality of Board Resolution dated 22.12.2016. The only authority to question the said Board Resolution vests with the members or Directors of Wincom.

16. Even if the Respondent No.1 would have been member of Wincom, his remedy to challenge the subject matter Board Resolution dated 22.12.2016 was not before the learned Civil Court as the Civil Court had no jurisdiction to entertain the suit as the incorporated entities and all matters pertaining thereto are tried and adjudicated upon under the provisions of special law i.e. the Companies Act, 2017. The only remedy available to the Respondent No.1 was to file a Petition under Section 136 of the Companies Act, 2017, that too on the strength of passing the threshold test i.e. having 10% shareholding. As per the mandate of law, the said Petition was to be filed within a period of thirty days before the Court having jurisdiction i.e. the High Court under

Section 5 of the Companies Act, 2017, which provides that the Court having jurisdiction under the Act shall be the High Court. Under sub-section 2 of Section 5 of the said Act, there is a bar against jurisdiction of the Civil Court which provides that “notwithstanding anything contained in any other law, no Civil Court as provided in the Code of Civil Procedure, 1908 or any other Court shall have jurisdiction to entertain any suit or proceedings in respect of any matter which the Court is empowered to determine by or under this Act.” Under Section 4 of the Companies Act, 2017, it being special statute, has overriding effect. The Section 5 of the said Act expressly bars the jurisdiction of Civil Court in the matters falling within the purview of the Companies Act, 2017 and the word ‘shall’ has been used in the Act, which makes it mandatory, especially, when there appears to be no *mala fide* or ill-will of the Court. The Companies Act, 2017 being a special law in such circumstances is to override the provisions of general law to the extent of any conflict or inconsistency between the two. The reliance in this regard is placed upon the judgment reported as “*State Life Insurance Corporation of Pakistan through Chairman and others vs. Mst. Sardar Begum and others (2017 CLD 1080)*”. Therefore, any remedy to question the validity of meeting or Board Resolution lies before the High Court and in this respect the jurisdiction of Civil Court is barred.

17. The challenge through the suit filed by the Respondent No.1 is otherwise inherently flawed against the transfer

of property of the Company i.e. Wincom in favour of the Appellant.

A company is a separate entity distinct from its directors or shareholder and no shareholder or director of a company can be said to be the owner of any particular piece of a property in which such company has an interest. Such distinction has to be clearly observed between the company as a legal entity and its rights on one hand and individual shareholders and their rights on the other hand. Therefore, even if the Respondent No.1 claims to be a shareholder of Wincom LLC, he had no entitlement to question the transfer of its assets by Wincom to any third person. The said transfer of property in which Company has an interest can only be questioned by the Company or its Board. Reliance in this regard is placed on the judgments reports as Rai Bahadur Mohan Singh Oberot vs. Rai Bahadur Jodha Mal Kuthalia,etc. (PLD 1961 SC 6) and Anjum Rashid and others vs. Shehzad and others and others (2007 CLD 1210). Therefore, the plaint actually failed to disclose a cause of action against the Company as well as the Appellant to maintain the suit.

18. Now adverting to the prayer with respect to seeking rendition of accounts from Wincom, it must be borne in mind that the suit for rendition of accounts does not lie merely because that some accounts are maintained somewhere. Such suit lies only when one party is accountable to the other in some fiduciary capacity, e.g. as in the case of trustee and beneficiary, principal and agent, guardian and ward, person entrusted with control over some

property for benefit of the other, etc. Therefore, for the purpose of seeking rendition of accounts, it is essential that the defendant must be an '*accounting party*' and on account of their legal relationship, the defendant is obliged to render the accounts. The Respondent No.1 who is not even the member/shareholder of Wincom cannot assert even any relationship and from the entire facts mentioned in the plaint, the Respondent No.1 had failed to show that Wincom was in any way accountable to him. Reliance in this regard is placed on the judgments reported as Messrs Friend Engineering Corporation, The Mall, Lahore vs. Government of Punjab and 4 others (1991 SCMR 2324), M. Khurram Muggo vs. Mst. Perveen Hameed Muggo and 3 others (PLD 2007 Lahore 518), Abdul Karim vs. Iqbal-ur-Rehman and 5 others (1980 CLC 1283), Muhammad Azam Khan vs. Askari Leasing Limited through Branch Manager (2014 CLD 462) and Messrs Irfan Industries (Pvt.) Limited through Chief Executive vs. Standard Chartered Bank through Chief Executive Officer and another (2017 CLD 223).

19. Since it has been held above that the Respondent No.1 was neither a member/shareholder of Wincom nor had capacity or competence to question the transfer of interests in the property of the Company, therefore, in terms of Section 42 of the Specific Relief Act, 1877, he also lacked his entitlement to any legal character arising out of the law to seek declaration or cancellation of the subject matter property, which was only within the competence and powers of Wincom LLC or Wincom to question

the legality and validity of the subject matter transaction in favour of the Appellant.

20. Now advertng to the Impugned Order passed by the learned Appellate Court, I think that the learned Appellate Court despite having clear position of law with respect to maintainability of suit and powers contained therein granted an undue premium to the Respondent No.1 by directing the Trial Court to frame an issue on the maintainability of the suit. It is floating on surface that plaint was not only barred by law but it also failed to disclose a cause of action. Obviously the Respondent No.1 could not have proved his case beyond the scope of his pleadings. Therefore, even if the averments or bundle of facts made in the plaint are accepted in their mode and form, the same do not entitle the Respondent No.1 to relief prayed for and for such reason too the provisions of Order VII rule 11 of the CPC could be invoked as there was no room for any other possible approach to the case. Moreover, as no triable issue was made out in the case, therefore, the suit was clearly hit by mandatory provisions of law. For the purposes of determination whether the plaint discloses a cause of action or not, Court has to presume that every averment made in the plaint is true, therefore, power to reject the plaint under Order VII rule 11 of the CPC must be exercised only if the Court comes to the conclusion that even if all the allegations are proved, the plaintiff would still not be entitled to any relief whatsoever. Reliance in this regard is placed upon the

judgment reported as Abdul Waheed vs. Mst. Ramzanu and others (2006 SCMR 489).

21. The learned Appellate Court committed material irregularity by remanding the matter to the learned Trial Court for framing of issue with respect to maintainability of the suit. Whereas in terms of law continuing with such suit would be a futile exercise and it is clearly established that the suit filed by the Respondent No.1 was with manifest purposes and oblique object, to retain or claim the benefit of such gain which the Respondent No.1 was not entitled to and it was aimed to simply cause prejudice and harassment to the Appellant as well as other contesting defendants. The reliance in this regard is placed upon the judgment reported as M. Khurram Muggo vs. Mst. Perveen Hameed Muggo and 3 others (**PLD 2007 Lahore 518**).

22. Pursuant to law laid down by the Supreme Court of Pakistan in the judgment reported as Haji Abdul Karim and others vs. Messrs Florida Builders (Pvt.) Limited (**PLD 2012 SC 247**), if it “appears” to the Court from the statements in the plaint that suit was barred then it should be terminated forthwith. The great advantage of this would be twofold: on the one hand, *firstly*, the defendant would be saved from the harassment of being subjected to a prolonged and costly trial proceedings including the leading of evidence, which could be extended over a considerable period of time; *secondly*, a great deal of valuable Court time would also be saved from being wasted. “The second consideration is of special

*importance considering the extent to which the Courts are at present clogged within an enormous amount of cases. Thus, the idea, in brief, would be to bury the suit at its inception.* Therefore, it appears to be the rationale for the use of word ‘appear’ as against more strong words ‘established’ or ‘proved’.

23. After examining the position of law, this Court is convinced that the Impugned Order passed by the learned Appellate Court is not sustainable and it is held that the suit filed by the Respondent No.1 with respect to prayers No.(ii) and (iii), was barred by law, whereas, with respect to prayers No.(i) and (iv), the plaintiff miserably failed to disclose a cause of action. Therefore, it was liable to be rejected in terms of Order VII rule 11 (a) and (d) of the CPC.

24. As a consequence of the above stated position of law, the Impugned Order passed by the learned Appellate Court is declared to be illegal, unlawful and having been passed in illegal exercise of jurisdiction and is set aside and the instant Appeal as well as connected Civil Revision No.12886 of 2022 are **allowed**.

**(MUHAMMAD RAZA QURESHI)  
JUDGE**

**Approved for reporting.**

**Judge**