IN THE HIGH COURT OF GUJARAT AT AHMEDABAD.

APPEAL FROM ORDER No. 132 OF 1994
WITH
CIVIL APPLICATION No. 1562 OF 1994
AND
APPEAL FROM ORDER No. 331 OF 1994
WITH
CIVIL APPLICATION No. 4182 OF 1994
AND
APPEAL FROM ORDER No. 311 OF 1994
WITH
CIVIL APPLICATION No. 3927 OF 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.S. SHAH.

1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

Mr S.B. Vakil for the appellants.
Mr D.D. Vyas for the respondents.

CORAM : MR.JUSTICE M.S. SHAH
Date of decision: 30/09/97

CAV JUDGEMENT

All these appeals arise from the interlocutory orders passed by the learned Civil Judge (Senior Division), Surat in Special Civil Suit No. 167 of 1992.

Since the properties which are the subject matter of all the three appeals are the same and the parties are the same, with consent of the learned counsel for the parties, all the three appeals and the Civil Applications therein are heard together for final disposal and are accordingly being disposed of by this common judgment and order.

BASIC FACTS :

2. Plaintiff No. 1 (respondent No. 1 in A.O. No. 132 of 1994), who is the brother of defendants Nos. 2 to 5, has filed the present suit alleging that all the defendant firms (Nos. 1 and 6 to 11) are joint Hindu family firms, but for the purpose of income-tax they were constituted as partnership firms (except defendant No. 1 - a Private Limited Company) and that the plaintiff has filed the present suit for dissolution of these firms and for accounts and for getting his 20% share in the assets and profits thereof. Plaintiff No. 1 is one of the five brothers. Plaintiff No. 2 is the wife of plaintiff No. 1. Defendant no. 14 is the son of the plaintiffs. The defendant - firms including defendant No. 1 Company are engaged in the business of processing textiles and other connected business activities. The other defendants are the remaining four brothers of plaintiff No. 1 and various business firms. According to the plaintiffs, the defendant - firms were dissolved on September 6, 1990 and in any case, the plaintiffs were entitled to have the firms dissolved with effect from the date of filing of the suit.

3. Appeal From Order No. 132 of 1994 is filed by original defendant Nos. 1 to 13 and 15 to 22 for challenging the order dated March 5, 1994 below interim injunction application Exh. 5 in the present suit, by which the trial Court has restrained the defendants from using all the properties, machineries, trade name and goodwill as mentioned in the Schedules to the plaint. In the aforesaid Appeal From Order, the appellants have also filed Civil Application No. 1562 of 1994 wherein this Court, while issuing notice on the Appeal and the said stay application, passed an ad-interim order dated May 3, 1994 staying the order passed by the trial Court. The said ad-interim stay has been continued from time to time and is operative at present.

4. After the aforesaid stay order was passed by this Court, the said appellants, i.e. defendant Nos. 1 to 13

and 15 to 22, filed application Exh. 65 before the trial Court praying for an interim injunction against the plaintiffs and defendant No. 14 (plaintiffs' son) from entering into the business premises of the defendant - firms and also from obstructing the defendants in day to day routine working of defendant - firms and further praying that the plaintiffs and Defendant No. 14 be restrained from dispossessing the defendants.

5. The trial Court has allowed the said application (Exh. 65) by an order dated September 6, 1994 and restrained the plaintiffs and defendant No. 14 from entering into the business premises of the partnership firms and from obstructing the defendants in day to day routine work of defendant Nos. 1 company and defendant Nos. 6 to 11 firms and also from dispossessing the defendants without following due process of law. The said order is made to be operative till the disposal of Civil Application No. 1562 of 1994 pending before this Court. Although the said order is apparently in favour of original Defendant No. 1 to 13 and 15 to 22, Appeal From Order No. 332 of 1994 is filed by them with a prayer that the aforesaid order dated September 6, 1994 ought to have been made operative by the trial Court till disposal of the suit and not merely till disposal of Civil Application No. 1562 of 1994 presently pending before this Court.

6. Substantially aggrieved by the above order dated September 6, 1994, the original plaintiffs have filed Appeal From Order No. 311 of 1994 contending that since the plaintiffs have 20% share in the partnership firms, the trial Court ought not to have passed any order restraining the plaintiffs from entering into the business premises of the partnership firms and taking part in the management of the said firms. No ad-interim stay has been granted in Civil Application No. 3927 of 1994 in the aforesaid appeal filed by the plaintiffs and therefore, the said interim order passed by the trial Court on September 6, 1994 below application Exh. 65 continues to operate.

SUBMISSIONS ON BEHALF OF APPELLANT - DEFENDANTS :

7. Mr S.B. Vakil, learned counsel for the appellants (original defendant Nos. 1 to 13 and 15 to 22, i.e. all the defendants except defendant Nos. 14 who happens to be the son of the plaintiffs) has assailed the interim order dated March 5, 1994 passed by the trial

Court below interim injunction application Exh. 5 on various grounds. However, at the outset his grievance was that the trial Court had passed the order under appeal without hearing the defendants. If the defendants had been given such opportunity, they would have filed further affidavits and produced some documents on the controversy sought to be raised by the plaintiffs on merits. Mr Vakil has then urged the following grounds on merits of the order dated March 5, 1994 :-

(I) The plaintiffs' reliefs in the suit are based on the allegation that all the defendant firms are joint Hindu family firms, but for the purpose of income-tax they were made as partnership firms. However, the entire base of the suit is untenable in view of the following submissions :-

(a) Except their own bare word, the plaintiffs have not led any evidence to show that the defendant firms are joint Hindu family firms.

(b) The plaintiffs have not produced any partnership deed nor have they relied upon any terms and conditions of partnership for asserting their 20% share in the suit properties.

(c) The plaintiffs have merely alleged that the defendant - firms and defendant No. 1 Company are formal, not real, but they have not even alleged that even plaintiff No. 1 is a partner in any genuine partnership firm.

(II) Even the plaintiffs' own case is that the suit firms are joint Hindu family firms, but for the purpose of income-tax they are treated as partnership firms. The very base of the plaintiff's suit is thus founded on allegation of illegality and therefore, the doctrine of pari delicto would apply and on this ground also the plaintiff cannot get any relief from the Court.

(III) The plea that the defendant - firms are joint family firms is contradictory and inconsistent with the plea for enforcement of rights under the Partnership Act.

(IV) Without prejudice to the above, the plaintiffs cannot file one suit for dissolution of all the partnership firms.

(V) The order passed by the trial Court is a blanket order restraining the defendants from using all the properties whether business properties or residential properties. An injunction of such magnitude and sweep could not have been given even at the final hearing of the suit, much less at the interim stage.

(VI) Once the trial Court granted the interim injunction against user of the suit properties and did not grant interim injunction against transfer of the suit properties, although prayed for by the plaintiffs, it would not be open to this Court to grant any interim injunction against transfer of the suit properties while setting aside the order of injunction against user of the suit properties and that such order cannot be passed even under the provisions of Order 41, Rule 33 of the Code of Civil Procedure.

8. As far as Appeal From Order No. 331 of 1994 is concerned, Mr Vakil submitted that since the plaintiffs were acting contrary to the interest of the defendant firms, the trial Court had rightly passed the interim injunction order dated September 6, 1994 restraining the plaintiffs and defendant No. 14 (plaintiffs' son) from entering the properties of the defendant firms and from interfering with the defendants in running business of the said firms and from dispossessing the defendants except in accordance with law. However, the said interim injunction orders were required to be made operative till disposal of the suit and there was no need to restrict their operation till disposal of Civil Application No. 1562 of 1994 which is pending before this Court.

SUBMISSIONS ON BEHALF OF PLAINTIFFS :

9. On the other hand, Mr D.D. Vyas, learned counsel for original plaintiffs (the respondents in the aforesaid 2 appeals and appellants in Appeal From Order No. 311 of 1994) has submitted that both the sides were fully heard by the trial Court before passing the order below interim injunction application Exh. 5 and supported the order dated March 5, 1994 passed by the trial Court below the

interim injunction application. He has assailed the order of the trial Court dated September 6, 1994 below application Exh. 65. The submissions made by Mr Vyas are as under :-

(i) The document called Lavadnamu (document referring the disputes between the parties to arbitration herein after referred to as "reference to arbitration") signed by all the five brothers on November 8, 1990 shows that the disputes between the parties about the suit properties were referred to arbitration. In the said document, it was clearly mentioned that all the five brothers i.e. defendant Nos. 2, 3, 4, 5 and plaintiff No. 1 were partners in one firm or the other being defendant No. 1 Company and defendant Nos. 6, 7, 8 and 9 and that all these firms and the private limited Company are interconnected as the five brothers are partners in one or the other firm. The defendants had tried to procure a back dated award in the aforesaid proceedings after expiry of the time limit stipulated for making the award and after filing of the present suit. The fact, however, remains that the defendants have admitted as recently as on November 8, 1990 (before the filing of the present suit in 1992) that plaintiff No. 1 is a partner in the defendant firms. Plaintiff No. 2 is the wife of plaintiff No. 1 and defendant No. 14 is the son of the plaintiffs. Thus, the plaintiffs have share or interest in the joint family firms which are being treated as partnership firms and the trial Court has rightly proceeded on that basis. Even in respect of defendant no. 1 Company, it is open to the Court to lift its corporate veil as it is basically a family concern.

(ii) Under Section 53 of the Partnership Act, after a firm is dissolved, every partner may restrain any other partner from using any property of the firm for his own benefit, until the affairs of the firm have been completely wound up. In this view of the matter, the trial Court had rightly passed the order of interim injunction for restraining the defendants from using the suit properties of the defendant - firms. The plaintiffs however concede that during pendency of the suit the defendants may be permitted to make use of the residential premises on condition that they do not transfer the same.

(iii) This Court can, in exercise of powers under Order 41, Rule 33 of Code of Civil Procedure Code, grant further reliefs to the plaintiffs to restrain the defendants from transferring the suit properties.

(iv) Once plaintiff No. 1 is treated as a partner of the defendant - firms and as one of the five brothers, he is having 20% share in the assets as well as profits of the defendant - firms, the Court erred in passing the order dated September 6, 1994 restraining the plaintiffs from entering the properties of the defendant - firms and from participating in the management of the said firms and from enjoying the common possession of the suit properties.

(v) On the one hand, the interim injunction dated March 5, 1994 passed by the trial Court for restraining the defendants from using the suit properties is stayed by this Court by an ad-interim order and the defendants are merrily using the suit properties and getting all the profits of the defendant firms for their own personal benefits and on the other hand the plaintiffs are neither permitted to participate in the running of the business of the defendant firms nor are the plaintiffs being paid any amount by the defendants ever since September, 1990. The disposal of the suit is bound to take some time, but the plaintiffs cannot be deprived of their right to get the profits of the defendant firms and to participate in the management of business of the defendant - firms.

ALLEGATION OF ABSENCE OF HEARING BEFORE TRIAL COURT :

10. So far as the grievance made by the learned counsel for the defendants regarding absence of hearing before the trial Court is concerned, affidavits have been filed by the learned advocates who had argued the interim injunction application before the trial Court. While the learned advocates for the defendants have said that they were not heard, the learned advocate for the plaintiffs has filed an affidavit stating that the learned advocates for all the parties were heard. Rojkam of the suit proceedings has also been perused. The rojkam shows that on December 28, 1993 the advocates for the parties were present and the arguments of the learned advocate for the

defendants were heard on application Exh. 5 (interim injunction application) and the hearing was adjourned to January 4, 1994 for the arguments on behalf of the plaintiffs on application Exh. 5 and also certain other applications. It appears that the matter was posted on certain dates in January, 1994, but ultimately on March, 19, 1994, the trial Court heard the arguments of the learned advocate for the plaintiffs on application Exh. 5 and the matter was thereafter adjourned to March 22, 1994 for hearing the reply on behalf of the defendants on application Exh. 5 and also for hearing of certain other applications. On March 22 the matter was adjourned to March 25 and then to March 29. Finally, the rojkam for March 29, 1994 shows that the learned advocate for the parties were present and the trial Court heard the arguments on application Exh. 5 and the matter was adjourned to April 5, 1994 for pronouncement of order below application Exh. 5 and for hearing of certain other applications. The order was pronounced on April 5, 1994. It appears from the rojkam that the arguments of both the sides were heard on interim injunction application Exh. 5.

The version of the learned advocate for the plaintiffs before the trial Court is that the defendants were heard on application Exh. 5 (interim injunction application) first on December 28, 1993 as they insisted that the matter be heard, when the learned advocate for the plaintiffs was busy in other Courts. Thereafter, the arguments of the learned advocate for the plaintiffs were heard on March 19, 1994 and on March 29, 1994, the trial Court heard the learned advocates for both the sides on interim injunction application.

On the other hand, the version of the learned advocate for the defendants before the trial Court is that on December 28, 1994, the trial Court heard the arguments on behalf of the defendants on certain other applications and not on interim injunction application Exh. 5 and that the reply of the defendants came to be filed on January 27, 1994 and thereafter they were not heard.

Going by the rojkam, it prima facie appears that on March 25, 1994 the Court posted the matter for hearing the reply arguments on behalf of the defendants to March 29, 1994 and on that day the trial Court did hear the learned advocates for the parties. In view of the aforesaid controversy, however, this Court conveyed to the learned counsel appearing for the parties here that full opportunity will be given to both the learned

counsel to argue at length on merits of the question of interim relief which should operate during pendency of the suit. The learned counsel for the parties have availed of this opportunity by addressing this Court at length in different sittings spread over about 10 days. This Court, therefore, proceeds to deal with the contentions of the parties on merits.

CONTENTION I:

11. The defendants have contended that the plaintiffs have not made out any case for grant of any interim injunction, because the plaintiffs have not led any evidence to show that they have any share or interest in the defendant firms. In support of the said contention, they have also relied upon the decisions in the case of Kshetra Mohan V. E.P.T. Commr., AIR 1953 SC 516, Bacha F. Guzdar V. Commr. of I.T., Bombay and Champaran Cane Concern V. State of Bihar, AIR 1963 SC 1737. However, it is not necessary to refer to the said decisions in view of peculiar facts of this case in as much as the Lavadnamu (Reference to arbitration) dated November 8, 1990 signed by all the five brothers clearly states that all the five brothers are having share in one firm or another being defendant No. 1 Company and defendant Nos. 6 to 9 partnership firms and that the arbitrators were appointed to resolve disputes between the parties and that the arbitrators will take into account the books of accounts of defendant No. 1 Company and the other firms and will take decision about partition of assets/distribution of the profits. The defendants having relied upon the said reference to arbitration, no further evidence was required to be led by the plaintiffs in support of the foundation of the plaintiffs' case.

12. Of course, there are subsequent disputes about the award purported to have been signed by the arbitrators on December 31, 1991 which, according to the plaintiffs, was signed and given by the arbitrators not only after expiry of the time limit (31.12.1991) stipulated by the parties for giving the award, but also after filing of the present suit on March 25, 1992 and after service of the summons in the present suit on the defendants who, according to the plaintiffs, were in collusion with the arbitrators and procured the award on April 8, 1992, but the arbitrators antedated the award by putting the date as "31.12.1991" and, therefore, the award was never communicated to the plaintiffs or the defendants prior to April, 1992. These controversies are already subject matter of Civil Misc. Application No.

26 of 1992. Reference is made to the aforesaid arbitration proceedings merely for the limited purpose of referring to the reference to arbitration dated November 8, 1990 which shows that plaintiff No. 1 was admitted to be a partner/shareholder in the defendant - firms especially defendant No. 1 Company and defendants No. 6 to 9 firms.

CONTENTION II :-

13. The contention of Mr Vakil that the plaintiffs are not entitled to any relief as they have themselves made an illegality the foundation of their application is misconceived. The plaintiffs have alleged in the application that although the defendant firms are joint family firms, they are constituted as partnership firms for income-tax purpose. As is well known businessmen do resort to tax planning for the purpose of reducing their tax liabilities and such tax avoidance cannot be treated as illegal though tax evasion is certainly illegal. It may be that as regards tax avoidance, there are two schools of thought on the question whether such tax avoidance should be discouraged or not, but it is not necessary to enter into that controversy for the purpose of the present proceedings. The plaintiffs cannot be denied any interim relief on application of principle of pari delicto as contended by the learned counsel for the defendants, for there is no illegality in the first place.

CONTENTION III :

14. Mr Vakil also contended that on the one hand the plaintiffs have claimed that the defendant - firms are joint family firms and on the other hand the plaintiffs are claiming relief under the Partnership Act and that they are thus taking up inconsistent plea which is not permissible. For this purpose, Mr Vakil has relied on the decision in the case of Om Prakash Vs. Ram Kumar, AIR 1991 SC 409. The ratio of the said decision is not of any assistance to the defendants as the Supreme Court observed in that case that a party cannot be granted a relief which is not claimed, if the circumstances of the case are such that the granting of such relief would result in serious prejudice to the interested party and deprive him of the valuable rights under the statute. In an action by the landlord the tenant is expected to defend only the claim made against him and if a cause of action arises to the landlord on the basis of the plea set up by the tenant in such action, it is necessary that

the landlord seeks to enforce that cause of action in the same proceedings by suit by amendment or by separate proceedings to entitle the landlord to relief on the basis of such cause of action. The principle that the Court is to mould the relief taking into consideration subsequent events is not applicable in such cases.

In the instant case, obviously the plaintiffs are not claiming any interim relief on the basis of any plea being set up by the defendants which is more of denial than any positive plea. Mr Vyas has rightly relied on the decision of the Supreme Court in the case of Firm Srinivas Ram Vs. Mahabir Prasad, AIR 1951 SC 177 wherein it is held that the plaintiff is entitled to take up inconsistent pleas.

CONTENTION IV :

15. As far as the contention that the present suit is not maintainable as it is filed with a prayer for dissolution of firms for which different suits should have been filed against different firms, the provisions of Order 1, Rules 3, 4 and 5 CPC are required to be noted. Rule 3 provides that all persons may be joined in one suit as defendants where, if separate suits were brought against such persons, any common question of law or fact would arise. Rule 5 provides that it shall not be necessary that every defendant shall be interested as to all the reliefs claimed in any suit against him. Similarly, Rule 4 provides that judgment may be given without any amendment against such one or more of the defendants as may be found to be liable, according to their respective liabilities.

In view of the nature of the subject matter of the suit and the controversy between the parties, it is clear that common questions of law and fact have arisen between the parties and the contents of the aforesaid reference to arbitration also indicates that hearing of the suits in respect of all the partnership firms between the parties would not embarrass or delay the trial of the suit. Looking to the provisions of Rule 9 of Order 1 CPC also, it is clear that the suit cannot be said to be non-maintainable.

As far as defendant no. 1 Company is concerned, Mr Vyas conceded that for the purpose of winding up of the Company, the plaintiff will take appropriate proceedings, if necessary, but looking to the contents of

the reference to arbitration dated November 8, 1990, it is necessary that the properties standing in the name of defendant no. 1 - Company be also considered alongwith the properties of the partnership firms for their protection and preservation.

CONTENTIONS V & VI :

16. So far as the substantive merits of the interim injunction granted by the trial Court are concerned, the only ground/s on which the trial Court has granted the said interim injunction are that by operation of section 53 of the Indian Partnership Act, after a firm is dissolved, no partner can use the partnership property for his own benefit and also on the ground that if the factory premises and machineries, etc. are used, machineries will wear out and become useless after some time. Mr Vyas has vehemently supported the said order and has relied upon an unreported judgement delivered by this Court on July 16, 1979 in C.R.A. No. 671 of 1979.

17. However, so far as the aforesaid injunction order is concerned, it appears that the trial Court did not appreciate that while machineries would certainly depreciate with user, on account of nonuser they can be rusted and would merely become scrap after passage of some time. Hence, no useful purpose would be served by restraining the defendants from using the machineries and factory premises or trade name and goodwill of the defendant - firms. In fact, the trade name and goodwill of running business would deteriorate in value if the business of defendant - firms are not permitted to be run and the factory premises and machineries are not permitted to be used. The defendants would certainly be expected to maintain the factory premises and machineries in good running condition and since the defendants have, even according to the plaintiffs, 80% share in the various suit properties and suit firms, one can certainly proceed on the basis that as ordinary men of prudence they would look after and maintain the factory premises and machineries in good running condition since they want to run the business with the help thereof. Of course, whether the plaintiffs should be kept out of the management of the business of different defendant - firms or not or whether they should be paid any amount on account towards the profits of the defendant - firms are different questions and the same are more appropriately the subject matter of Appeal Nos. 311 and 331 of 1994 which are being dealt with hereinafter.

18. Similarly, so far as reliance placed on the provisions of section 53 of the Indian Partnership Act is concerned, it is true that the plaintiffs' case is that the partnership firms were dissolved on September 6, 1990 and that even otherwise the partnership firms be treated as dissolved under the provisions of Section 44 of the Partnership Act, but at the same time, the provisions of the Partnership Act do not contemplate that the machineries of the dissolved firms should be allowed to be rusted by non-user or that even the partners who are admittedly having 80% share in the assets and the profits of the partnership firm should not be allowed to use the properties and machineries of the firms for years together. Section 53 will apply in absence of a contract between the parties to the contrary. In the instant case, the plaintiffs have not brought to the notice of the Court any document in order to show whether any contract to the contrary can be inferred or not, but Mr Vyas has strongly relied upon the provisions Section 53 of the Act on the ground that it was for the defendants to show any contract to the contrary.

Section 53 reads as under :-

"After a firm is dissolved, every partner or his representative may, in the absence of a contract between the partners to the contrary, restrain any other partner or his representative from carrying on a similar business in the firm name or from using any of the property of the firm for his own benefit, until the affairs of the firm have been completed wound up :

Provided that where any partner or his representative has bought that goodwill of the firm, nothing in this section shall affect his right to use the firm name."

In the commentaries of Pollock & Mulla on the Indian Partnership Act (1987 Edition), the following passage explains the object underlying the provisions of Section 53 :-

"It would follow from the wordings of Sec. 53 that if a partner having control over any property of the firm or in respect of which he is liable to account to the firm, is likely to

> deliberately damage or dissipate it, or transfer it out of the jurisdiction of the Court the other partners can apply for what is known as a Minerva injunction in order to safeguard the property of the firm. Such relief would be equally appropriate to prevent a partner from dissipating the goodwill of a firm."

In view of the aforesaid object underlying the provisions of Section 53, it appears to the Court that since there is no allegation about deliberate damage being caused by the defendants to the properties of the partnership firms in question, it would be more appropriate to pass an interim order for restraining the defendants from transferring the suit properties rather than to pass the drastic order of restraining the defendants from using the suit properties.

19. Of course, Mr Vakil strongly opposed such an interim injunction against transfer being granted on the ground that the plaintiffs had prayed both for interim injunction against user of the suit properties by the defendants as well as transfer of such properties, but the trial Court had granted only injunction against user and not injunction against transfer, but the plaintiffs have not chosen to challenge the order in so far as the injunction against transfer is not granted. Further, Mr Vakil submitted that injunction against user and injunction against transfer are two mutually exclusive remedies and, therefore, merely because the Court finds that injunction against user is not justified, the Court cannot grant injunction against transfer as a lesser relief.

20. As already discussed above, while the Court refuses to grant injunction against user, at the same time the Court can instead grant an injunction against transfer in order to soften the rigour of the provisions of Section 53 of the Indian Partnership Act and in order to permit the partners having 80% shares to carry on the business so that ultimately even if the plaintiffs succeed, they would get 20% share in the assets and profits of the partnership - firms, but the assets must be preserved and injuncted from being transferred in order to protect the plaintiff's interest during pendency of the suit.

Moreover, the provisions of Order 41, Rule 33 of the Code of Civil Procedure can certainly be invoked

since the situation like the present one would certainly be one of the situations contemplated by the said rule which provides that the Appellate Court has the power to make any order which ought to have been made and to make such further or other order as the case may require and that such power may be exercised in favour of such respondents who may not have filed any appeal or objection. The power is thus wide enough to enable the Court to pass an order of injunction against transfer while vacating the injunction against user of the suit properties.

21. Reliance placed by Mr Vakil on the decision of the Supreme Court in the case of Rameshwar Prasad Vs. Shambehari Lal, AIR 1963 SC 1901 is misconceived. In that case, the Supreme had laid down that the discretionary power conferred by the provisions of Order 41, Rule 33 cannot be exercised to nullify the effect of the abatement of the appeal. Where in a case the legal representatives of the deceased appellant and the surviving appellants are negligent in not taking steps for substitution, the Court is not to exercise its discretion in favour of such a party, because if the Appellate Court passes any such order notwithstanding abatement of the appeal so far as the deceased appellant is concerned, it will lead to the existence of two contradictory decrees between the heirs of the deceased appellant and the respondent, one passed by the appellate Court and another to the contrary effect passed by the Court below which has attained finality consequent on the abatement of the appeal in so far as the heirs of the deceased appellant are concerned.

The facts of the present case are obviously quite different from those in the aforesaid decision where the Apex Court has explained that order 41, Rule 33 empowers the Appellate Court to make such further or other order as the interest of injustice demand and that such power is to be exercised in exceptional cases when its non-exercise will lead to the difficulties in the adjustment of the rights of the parties.

22. Similarly, reliance placed by Mr Vakil on the decision of this Court in the case of Rajmal Shamji vs. Patel Manrupji, 13 GLR 737 also does not carry his case any further. In the said decision, this Court has observed that while it is open to the Appellate Court in adjusting the rights of the appellant to modify or interfere with the lower Court decree even though that

portion of the lower Court decree has not been appealed against, but it is not open to the appellate Court to reopen the decrees which have become final merely because the appellate Court does not agree with the opinion of the trial Court. These observations are not at all applicable in the instant case as there is no question of any decree having become final as the suit is still at the interim stage and no previous decree is pressed into service by any party.

23. In the facts of the present case, exercise of the power under Order 41, Rule 33 is justified because the injunction against transfer is being substituted for injunction against user of the suit properties and thus the Court is granting lesser relief than the relief granted by the trial Court. The injunction against transfer will preserve the suit properties in which the plaintiffs are claiming 20% share. Non-exercise of this discretionary power would lead to the difficulties in the adjustment of the rights of the parties at the conclusion of the trial. As stated above, if the plaintiffs succeed in the suit, they will get 20% of the assets as well as profits of the firms. In fact Mr Vyas for the plaintiffs also prayed that since the Court is considering the defendants' request for vacating the interim injunction granted by the trial Court against user of the suit properties, the defendants should also pay the plaintiffs a reasonable amount on ad-hoc basis, as they have continued to use the suit properties in view of the ad-interim stay granted in the present appeal. This submission is considered alongwith the submissions in the other two appeals.

APPEALS NO. 311 AND 331 OF 1994 :

24. Next comes the question about validity or otherwise of the order dated September 6, 1994 passed by the trial Court restraining the plaintiffs and their son defendant No. 14 from entering the suit properties of the defendant - firms and from participating in the management of the said firms and from dispossessing the defendants from the suit properties. According to Mr Vakil for the defendants, the trial Court had rightly passed the said order as the plaintiffs and defendant No. 14 were acting contrary to the interest of the defendant firms and also because it was the plaintiffs' case that the partnership firms were dissolved with effect from September 6, 1990 and, therefore, according to the defendants, there was no reason why the plaintiffs and their son defendant No. 14 should be permitted to enter

the business premises of the defendant firms and to participate in the management of the business of those firms. According to the defendants, the plaintiffs have land in the GIDC Estate at Ankleshwar and an industrial shed at Surat and, therefore, the plaintiffs can very well carry on their business in those premises.

25. Mr Vyas vehemently challenged the said order and submitted that either the defendants must immediately give the plaintiffs the share in the assets and accumulated profits of the firms or the plaintiffs must be permitted to participate in the management of the business firms but the plaintiffs cannot be left in the lurch on both the counts. Mr Vyas submitted that as regards the so called industrial shed and the land in GIDC, the plaintiffs are not in a position to use the said land. The machineries lying therein are claimed to be of the ownership of the defendants and, therefore, the plaintiffs are not in a position to generate any income from those properties. So far there is no partition by metes and bounds nor is there any distribution of the suit properties according to the shares of the five brothers who were partners in different firms. Mr Vyas has submitted that the contentions of the defendants in this behalf are based on the alleged award procured by the defendants in collusion with the arbitrators by getting it prepared after filing of the present suit by the plaintiffs and getting it antedated and that the said award has been prepared in such a way that the properties proposed to be given to the plaintiffs are inflated in value and the properties proposed to be given to the defendants are deflated in value so as to create a show of equal distribution of assets amongst five brothers and that the properties which the defendants want to give to the plaintiffs are not such that they can be immediately utilised. The plaintiffs have not been given a single pie since September, 1990 and the plaintiffs and their son defendant No. 14 are not even permitted to withdraw any amount from the amounts due and payable to them from the defendant firms even on account. This prayer is made not merely on account of the order below Exh. 65, but also in view of the fact that the interim injunction granted by the trial Court restraining the defendants from using the suit properties is stayed by this Court.

26. Having heard the learned counsel for the parties, it appears to the Court that while the police action attributed to the plaintiffs by itself might not have been sufficient to grant injunction below application

Exh. 65, nevertheless in view of the serious differences between the parties, while the defendants may be permitted to use the suit properties subject to the restraint against transfer of the suit properties and even while confirming the interim injunction dated September 6, 1994 till disposal of the suit so as to retrain the plaintiffs and defendant No. 14 from participating in the management of business of the defendant firms, it would be just and proper to direct the defendants to pay the plaintiffs every month a reasonable amount on account which will be adjusted against the properties which may ultimately be allotted to the plaintiffs and/or against the final amount which may be found to be due and payable to the plaintiffs.

27. Unfortunately, the defendants have not produced any figures on the basis of which the Court can fix the said amount. The plaintiffs have, however, averred in the injunction application that defendant No. 1 Company is engaged in the business of processing textiles and is running the business with the help of the licence owned by defendant No. 6 firm and that defendants No. 2 to 5 have made an arrangement under which defendant No. 10 is getting monthly rent of Rs. 75,000/- and defendant No. 11 firm is also getting monthly rent of Rs. 75,000/-; the plaintiffs are also entitled to get Rs. 15,00,000/- per annum for the use of the suit properties and machineries by the defendants.

Having regard to the fact that the contesting defendants are running the business of defendant No. 1 company engaged in processing of textiles and defendants No. 6 to 11 firms are also engaged in the business of textiles and related business and that even the disputed award has valued the suit properties at about Rs. 5 Crores, it would be just and proper to fix the aforesaid amount at Rs. 25,000/- per month.

O R D E R S

28. Appeal From Order No. 132 of 1996 is partly allowed. The interim injunction dated March 5, 1994 passed by the trial Court below application Ex. 5 restraining the defendants from using the suit properties is substituted by a composite order of an interim injunction restraining the parties, that is defendants as well as plaintiffs from transferring, alienating or otherwise disposing of their share or interest in any of the suit properties and an interim direction that defendants Nos. 1 to 13 and 15 to 22 shall pay plaintiff

No. 1 an amount of Rs. 25,000/- per month with effect from September 6, 1994.

29. Appeal from orders No. 311 and 331 of 1994 are partly allowed. The order dated September 6, 1994 passed by the trial Court below application Exh. 65 is confirmed and shall continue till disposal of the suit on condition that the defendants shall pay plaintiff No. 1 every month the aforesaid amount of Rs. 25,000/- with effect from September 6, 1994.

30. The amount of Rs. 25,000/- specified in the above two paras is one and the same amount and is not to be paid twice over. The amount shall be paid directly to the plaintiffs by A/c. Payee Cheque or shall be deposited in the trial Court on or before 15th day of every month, with liberty to the plaintiffs to withdraw the same on filing an undertaking that the amount so withdrawn shall be adjusted against the final amount which may be found due and payable to the plaintiffs or against the properties which may be finally allotted to them. The amount of arrears from September 6, 1994 till the month of September, 1997 shall be deposited in the trial Court on or before October 24, 1997. If the defendants fail to comply with this condition, the interim injunction granted below application Exh. 65 shall automatically stand vacated, and so also the interim injunction against user of the suit properties shall revive and shall continue till disposal of the suit.

31. These orders in all the three appeals shall not come in the way of the trial Court deciding Civil Misc. Application No. 26 of 1992 in accordance with law. Thereafter, it will be open to the parties to approach the trial Court for modification of the interim orders operating by virtue of this judgement, in case such modification becomes necessary for the purpose of implementing the orders on the aforesaid Civil Misc. Application.

32. The appeals as well as Civil Applications are accordingly disposed of in terms of the aforesaid directions with no orders as to costs.

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At this stage, Mr S.B. Vakil, learned counsel for the appellants in A.O. Nos. 132 and 331 of 1994

prays that the operation of this order be stayed for six weeks to enable his clients to have further recourse in accordance with law. In the facts and circumstances of the case, operation of this order is stayed till Novermber 11, 1997 only in so far as the direction to pay the amounts stipulated in the order is concerned.

September 30, 1997 (M.S. Shah, J.)