IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Omar Sial
Mr. Justice Muhammad Hasan (Akber)

Criminal Accountability Appeal No. 14 of 2013
[Shaikh Iqbal Azam Farooqui vs. The State]

Appellant	:	**Shaikh Iqbal Azam Farooqui** (since deceased) through his legal heirs represented by Mr. Amir Raza Naqvi, Advocate
The State	:	**NAB, through Chairman NAB** Represented by Syed Meeral Shah, Special Prosecutor, NAB.
Date of Hearing	:	21.05.2025
Date of Decision	:	04.07.2025

J U D G M E N T

Omar Sial, J.: Shaikh Iqbal Azam Farooqi was the managing director of Eurasia Manufacturers Importers and Exporters (Private) Limited. The company took a loan from the National Bank of Pakistan of Rs. 3.6 million. The company defaulted on its obligations to the Bank, and consequently, the Bank filed a suit seeking recovery of the finance facility. In 1993, the case was decreed against the company. Execution proceedings were initiated and pending finalization when the Bank decided on 09.03.2004 that the directors of Eurasia be issued a demand of Rs. 5.187 million to be paid within thirty days. The money was not paid; therefore, the Bank asked (as per section 31-D of the National Accountability Ordinance, 1999) the Governor, State Bank, to initiate proceedings for “wilful default” (as defined in section 5(r) of the NAO 1999. The Governor issued a seven-day show cause notice. The appellant replied to the show cause notice, recording the reasons that led to the default, and further requested that, as a pledge of the stocks securing the finance facility, the Bank could realise its outstandings by selling the pledged stocks. The Bank took the position that recovery

could not be made, as the mortgaged property had been sold to a third party and the pledged goods had perished.

2. The Governor, State Bank, was not happy with the director's response and opined that a case for “wilful default”, as defined in section 5(r) of the NAO 1999, had been committed. Thus, on 30.10.2004, the Governor requested the National Accountability Bureau to file a Reference against the Eurasia directors. This was done. Farooqi pleaded not guilty to the charge against him and demanded a trial. The prosecution examined three witnesses. Abdul Shahid (PW-1), Mohammad Aqib Malik (PW-2), and Mohammad Munaf (PW-3). The first two of these gentlemen were ostensibly (and I will clarify later in this opinion why I use the word “ostensibly”) witnesses representing the Bank who had initiated the criminal procedure against the directors. The third gentleman was the investigating officer of the case. In his defence, Farooqi denied any wrong done on his part.

3. The Accountability Court No. 4 at Karachi on 24.10.2013 convicted Farooqi for an offence of wilful default and sentenced him to seven years imprisonment and a fine of Rs. 5.187 million. It is this judgment that has been challenged in this appeal. Farooqi, on the other hand, most sadly passed away on 12.08.2017. His legal heirs, however, decided to continue these proceedings. The reason for this is twofold. To clear the name of the late Farooqi and to save themselves from paying the fine that the late Farooqi was sentenced to.

4. We have heard the learned counsel for the appellant and the learned Special Prosecutor, NAB. Their individual arguments are not reproduced for brevity but are reflected in our observations and findings below.

5. Mr. Naqvi, the learned counsel for the late Farooqi/legal heirs, has agreed that the process, at least in principle, to initiate action by NAB, as given in the law, was complied with.

6. In essence, Farooqi was tried for and held guilty for the offence of “wilful default”. What wilful default is in essence, and what situations it encapsulates, has remained an elusive concept. The term' willful default' was not defined in the NAB Ordinance, 1999, as it was first enacted. Section 5(r)[1], inserted via the NAB Amendment Ordinance (IV of 2000), provided for the definition of willful default. This section has now been re-categorised as section 5(u) according to the NAB Amendment Act, 2022.

7. In the case law reported as, **The State v. Muhammad Asif Saigol (2016 PLD 620 SC),** the definition of “willful default” as provided in section 5(r)[1] [now 5(u)] of the NAO, 1999) was relied upon by the prosecution to argue that the same as per the NAO, 1999 was a strict liability crime and thus mens rea was not essential. However, the court declined to apply the statutory definition on the ground that the same could not be applied retrospectively, as on the date of the commission of the offence involved in the case, the NAB Amendment Ordinance, 2000 had not been passed. As such, the Court relied upon the definition of “willful default” as developed through judicial precedent. More recently, the offence of “willful default” under the NAO 1999 was discussed in the case law reported at, **Junaid Asad Khan v. the State PLD 2021 Kar 152**. In this case, a Division Bench of this Court made a distinction between simple and willful default. It held that the offence of willful default requires a deliberate intent to default. It was observed in this case that a deliberate intent would not be met in cases where, "*...a person is trying his best to pay back his liabilities to*

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[1] *“willful default” a person or a holder of public office is said to commit an offence of willful default under this Ordinance if he does not pay, or continues not to pay, or return or repay the amount due from him to any bank, financial institution, cooperative society, Government department or a statutory body or an authority established or controlled by a Government on the date that it became due as per agreement containing the obligation to pay, return or repay or according to the laws, rules, regulations, instructions, issued or notified by the State Bank of Pakistan, or the bank, financial institution, 2 [cooperative] society, Government department statutory body or an authority established or controlled by a Government, as the case may be, and a thirty days notice has been given to such person or holder of public office:…”*

the bank but is simply unable to do so because his business is collapsing due to no fault of his own."

8. The default under consideration occurred in the year 2004. At that point in time, the only applicable provision penalizing wilful default was Section 9(a)(viii) read with Section 5(r) of the NAB Ordinance. The offence of wilful default was introduced in the Financial Institutions (Recovery of Finances) Ordinance, 2001, pursuant to the Financial Institutions (Recovery of Finances) Amendment Act, 2016. In the cases reported at, **Intikhab A. Syed v. Chairman, NAB 2019 MLD 127** and, **Junaid Asad Khan v. the State PLD 2021 Kar 152**, the learned Division Bench of this Court has categorically held that the amendments in the FIO, 2001 vis a vis wilful default would apply prospectively and will have no retrospective application. Therefore, so far as the instant case is concerned, it is squarely governed by the provisions of the NAO, 1999, and the offence of wilful default as introduced in FIO, 2001 has no bearing on the instant case.

9. Before proceeding with our analysis of whether the prosecution was successful in proving its case at trial, we would like to address the preliminary argument raised by the learned Special Prosecutor i.e. that wilful default was established as a Banking Court had decreed the recovery suit against Eurasia and the execution of the decree was not challenged. With great respect, we do not agree with the argument presented.

10. In criminal law, the term "willful" refers to actions that are deliberate, conscious, and voluntary. The mere fact of a financial default is insufficient to warrant criminal punishment. The default must be demonstrated to be intentional and not the consequence of incompetence, an accident, ambiguity, or a fundamental disagreement. The prosecution must do more than merely indicate that a debt remained unpaid to obtain a legal conviction for willful default under the NAO. Willfulness cannot be assumed from default alone but must be inferred from a combination of behavior, awareness, and absence of legal

justification. The problem that arises here is that while the legislature has used the term “wilful default” in NAO 1999, with “wilful” generally connoting deliberate, intentional, and voluntary, the definition of the word does not take into account the *mens rea* aspect of the offence. It simply states that the inability to repay money to a bank is an offence under the NAO. In this regard, it would be apt to cite a paragraph out of the 4th edition of Mr. S.M. Zafar’s book, Understanding Statutes: Canons of Construction. Mr. Zafar, while citing **Iftikhar Ahmed and others vs President National Bank of Pakistan and others (PLD 1988 SC 53)** and **Commissioner of Income Tax vs Islamic Bank of Bahrain (2001 PTD 682)**, writes:

> *If the Court finds that the definition of the word given in a statute does not fit in or is not in the context with the declared object, or the purpose of a particular section of a statute, then the Court can reject its definition and resort to the ordinary dictionary meaning.*

The preamble to the NAO, 1999, states that it is an Ordinance to provide for the establishment of a National Accountability Bureau to eradicate corruption and corrupt practices, and to hold accountable all persons accused of such practices and related matters. The purpose of the legislature makes it clear what mischief it seeks to address. In a case titled **S.R. Batra vs Smt. Taruna Batra (AIR 2007 SC 1118),** the Supreme Court of India, observed that if a literal reading of a definition leads to irrationality, then a restrictive meaning can be given to it to avoid absurdity. Surely, interpreting the term wilful default as a mere failure to pay back a loan without the element of intent taken into consideration would lead to absurdity.

11. We agree with Mr Naqvi’s argument that if a civil decree of the Banking Court judging default is the sole criterion to also hold a person guilty of a criminal offence under the accountability law, then why even bother to have the accountability court adjudicate on this? One might as well hold a person liable for a civil wrong and a criminal offence in the

same breath. In our humble opinion, this thought process overlooks the fundamental principles of civil and criminal liability. No authority needs to be cited in support of the conclusion that, under civil law, one succeeds in proving a case on the preponderance of evidence; however, to succeed in a criminal case, the benchmark is significantly higher. i.e., one of beyond a reasonable doubt. The burden of proof on the accuser is far greater in criminal law than in civil. It is a high standard in criminal law, and we want it to remain that way. We must be certain beyond a reasonable doubt before we interfere in a person's right to life and liberty. Yet another fundamental issue arises. If a default ruling by a banking court is the sole criterion for criminal culpability, then we will effectively be reading the evidence of one case into another. Plenty of precedent exists that cannot be done.

12. The loan was secured. The primary security was a pledge on the company stock, its receivables, and current assets. The trial court should have determined why the security was not enforced upon default. It did not do so. A review of the evidence shows that it was on 15.04.1991 that the Bank sent a legal notice to Eurasia informing them that the pledged goods would be sold to recover the outstanding. A decree was passed in the Bank’s favour on 14.01.1993. Although the exact date is unclear, it appears that the execution was filed in August 1993. It was 11 years later that the Bank wrote to the Governor of the State Bank asking him to file a Reference against Eurasia. The Bank did nothing for 11 years, despite having the right to sell Eurasia’s pledged goods and current assets. The investigating officer had to determine whether the default was wilful by identifying who was at fault. We reproduce certain extracts from the testimony of Muhammad Munaf (PW-3) to show the quality of the investigation:

> “It is correct that neither any record was seized by me, nor I examined any person from the State Bank of Pakistan.”

"It is correct to suggest that no seizure memo was prepared by me in this case."

"It is correct to suggest that investigation was not authorised by the Chairman."

"It is correct that in a pledged based facility custody of the pledged goods is given to the Bank."

"It is correct to suggest that it is not mentioned in my investigation report that the pledged goods were ever removed without the permission of the Bank."

"It is correct to suggest that no complaint was ever lodged by the Bank in this matter for misappropriation of the pledged goods."

"It is correct to suggest that no bank official is associated by me in this case as accused."

"It is correct to suggest that I have not investigated the case from this aspect."

"It is correct to suggest that I have not investigated where the pledged goods were kept. During investigation it was disclosed to me by officials of the NBP that the pledged goods had been destroyed by rain."

"It is correct that I believed the statements of the witnesses and that I have not investigated personally about the pledged goods."

"The statement of accounts was not seen or perused by me."

13. It is obvious that the investigating officer was told what to do, and he did just that. No investigation was conducted to uncover the actual facts. The investigating officer did not investigate whether the Bank was at fault for not promptly realising the security to recover its arrears, nor whether criminal law was initiated as a means of coercion.

14. Abdul Shahid (PW-1), the bank official who produced documents, categorically testified that he was not the author, witness, or signatory to any of the documents that were produced. Most remarkably, he also testified that the Bank had issued him no authority to appear on its behalf in the case in which he came to testify for the Bank. The investigating officer told the Court that he had not seized the documents that Abdul Shahid produced in Court under a memo. The exact position was taken by the only other Bank witness i.e. Mohammad Aqib Malik (PW-2). This witness also testified that the Bank had not authorized him to appear on its behalf and that he was not present for any of the finance facilities negotiations, the signing of documents, and thereafter. This witness further admitted that he had not even gone through the record before testifying.

15. If Abdul Shahid's (PW-1) testimony can be given any weight, he also said that the applicable security for the loan was a charge by way of pledge. He did not, in his cross-examination, say that the mortgage created was also security for the loan. He further confirmed that when the facility was granted, the Bank had adequately secured it and that it had also been insured, the premium for which was included in the company's repayment obligations.

16. Abdul Shahid (PW-1) further testified that the company was sent a letter stating that the pledged stock would be sold if the arrears were not paid. He confirmed that the pledged goods secured the facility and that the goods remained in the custody and control of the Bank, with the Bank appointing a watchman at the premises where they were kept. He categorically stated that no misappropriation of the pledged goods had taken place. Still, when the Bank attempted to execute the decree, the goods were not in the Bank's custody but with Rent Controller No. 2 in Karachi. He confirmed that the Bank itself had filed an intervenor application in the rent case pending before the Rent Controller and prayed that the pledged goods, which the Rent Controller had taken possession of, be given to the Bank. The

Rent Controller approved this application on 22 March 1994. The Bank itself valued the pledged goods at Rs. 5.25 million. The Bank took possession of the goods but did nothing to mitigate its loss.

17. All documents, either related to the facility or the State Bank, were produced as evidence by persons who had not been authorized to do so. The trial court did not give any finding on the admissibility of evidence presented by unauthorized persons who did not fall within the ambit of section 510 Cr.P.C. Speaking hypothetically, even if the documents produced by these witnesses were admissible, for the reason that the loan and its default were never challenged by Farooqi, at best they only prove the loan taken and the security furnished. The evidence did not reveal that the default was a wilful one. As mentioned above, this would also have entailed that the Bank did not contribute to the default.

18. The civil procedure, and its extension in the banking jurisdiction, provides a distinct and purposeful path to follow in cases of banking defaults. The Bank has followed that path, and it has also obtained success in those proceedings. That very civil procedure also provides a procedure to follow if a decree is not complied with. In cases of banking recovery, that procedure should have been adopted first. Holding a person guilty under the accountability law in such a situation was a harsh step to take. Harshness is magnified when one sees that the initial amount in dispute was Rs. 3.8 million. The State has spent far more money on this case than it would ultimately hope to recover. Criminal law will not recover the amount and the way the case was initiated and proceeded; all other theories of sentencing have also failed. Someone should also be held accountable for the wastage of State resources in such a manner. The provincial law enforcement agencies were well-equipped to investigate such cases rather than referring them to the NAB for prosecution.

19. Companies taking loans and, unfortunately, at times, defaulting on their obligations, is not a new phenomenon. A comprehensive and detailed process is outlined under banking laws for a bank to seek its remedy in the event of a customer default. The most common mode of recovery is to realise the security that the defaulting customer gave. It is pertinent to note that in this case, before the execution proceedings had completed, the Bank had asked the Governor, State Bank, to request the Chairman, NAB, to file a Reference against Eurasia's directors. Prosecution against a business that has a good track record should always be initiated with great caution. A misconceived prosecution or one that lacks a substantial legal foundation substantially increases distrust among the business community, which is the backbone of Pakistan's economy. The record in the current case shows that Eurasia had banking relationships with several banks and was referred to in complimentary terms by the Bank.

20. The Bank's witnesses at trial acknowledged that "thousands" of execution applications, filed by the Bank, were pending adjudication in banking courts and that they were unaware as to why this particular case, seeking recovery of Rs. 5 million, was singled out to be referred to the NAB. In essence, it was not explained why the fundamental right of equal protection under the law was not followed, and Eurasia was discriminated against. We have failed to see any reason why it was selected from the "thousands" of cases to make an example of. The outstanding amount at that date was not phenomenal. The record also reflects that if a loss was caused to the Bank, the Bank too was equally liable for the loss. Not one Bank employee was charged for the loss? We give no definite finding on it as mala fide was not argued, but we observe that it cannot be eliminated. It is clear from the contents of the reference

made by the Governor under section 31D that there is no great application of mind in making that reference. The legislature established safeguards for the business community in the NAO 1999, one such safeguard being that the initiation of prosecution for wilful default had to be approved by the State Bank. The Governor of that time, by acting arbitrarily and mechanically, in initiating prosecution, defeated the purpose of the legislation. Perhaps the changing political atmosphere of the time influenced the arbitrary manner in which prosecution was commenced.

21. It would have been more appropriate if the learned trial court had taken into consideration the admissibility of evidence, which was the basis to hold that Farooqi had committed fraud by selling the mortgaged property. The learned trial court made this finding based on a letter from the microfilming department, which the court had requested. Farooqi's counsel was not allowed to cross-examine any witness. Farooqi was not the owner, buyer, seller, or beneficiary, even if the property was sold. His connection to the alleged sale of the mortgaged property was not investigated. Due process and the rule of law must never be compromised in a democratic country.

22. The record shows that Eurasia was a reputable and reliable business concern operating internationally with a good and clean business record. It appears to have been not a fly-by-night operation. Indeed, in the Bank's office note 28.09.1986, the Bank says that "the directors of the company are reported to be respectable persons and are in the business since long". As early as 15.03.1988, Eurasia wrote to the Bank, indicating that the Bank's delay in finalizing the disbursement of the facility had caused the company significant loss and contributed to a decline in their export volume. In a letter dated 18.06.1989, once again the company wrote to the Bank reiterating its earlier complaints. The record reflects that the Bank had security it could have realised, but that it did not. It almost seems that to save its skin, the Bank of that time dumped a bad debt on its

books to the NAB, without reviewing its own negligence and apathy. Whether the default was wilful or not, it thus came under a shadow. One cannot lose sight of the proviso to the definition of wilful default that creates an exception if the default could also be attributed to a lending bank.

23. Criminal law circles around the benefit of "even one doubt" going in favor of the accused. Our observations above, in our minds, create much more than just one doubt regarding whether the default was deliberate. We allow the appeal and acquit the appellant.

JUDGE

JUDGE