Judgment Sheet

IN THE HIGH COURT OF SINDH, KARACHI

Present:
Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Khalid Hussain Shahani

Cr. Acquittal Appeal No.147 of 2024
(The State /Assistant Attorney General for Pakistan ***vs.*** The learned Judge Banking Court No.II, Karachi & others)

Cr. Acquittal Appeal No.153 of 2024
(MCB Bank Ltd. ***vs***. Humayun Barkat & others)

Dates of hearing : 07.05.2026 & 14.05.2026
Date of Judgment : 20.07.2026

M/s. Khaliq Ahmed DAG and Irshad Ali, Assistant Attorney General for appellant in Cr. Acq. Appeal No.147 of 2024.

M/s. Syed Danish Ghazi and Muhammad Ali Mangrio, advocate for appellant in Cr. Acq. A.No.153 of 2024.

Mr. Abdul Shakoor advocate for respondent No.3 Asadullah Barkat in Cr. Acq.A.No.147 of 2024 and for respondent No.2 in Cr. Acq. Appeal No.153 of 2024 a/w Fahad Ali advocate.

Mr. Sajid Ali Lakho advocate for respondent No.2 Hamayun Barkat in Cr. Acq.A.No.147 of 2024 and for respondent No.1 in Cr. Acq.Appeal No.153 of 2024 a/w Sadam Hussain.

Mr. Abdul Majeed Khoso, advocate for respondent No.4 Goharullah in Cr. Acq.A.No. 147 of 2024 and for respondent No.3 in Cr. Acq.A.No. 153 of 2024. Respondent No.5 Muhammad Saleem in Cr. Acq.A.No.147 of 2024 and respondent No.4 in Cr. Acq.A.No.153 of 2024 present in person.

J U D G M E N T

Muhammad Iqbal Kalhoro, J:- In these two connected acquittal appeals filed by the State against the impugned order dated 14.12.2023 acquitting respondents u/s 265-K CrPC, essentially the issue of interpretation of an amendment introduced in the year 2016 in Financial Institutions (Recovery of Finances) Ordinance, 2001 has been raised. By this amendment, among others, willful default was made cognizable offence to be tried by the Banking Court. Before that willful default was there in law but was being dealt with on civil side in terms of recovery proceedings. The definition of 'willful default' provided in section 2(g) of the Ordinance 2001 reads as under:

> (i) deliberate or intentional failure to repay any finance, loan, advance or any financial assistance received by any person from a financial institution after such payment has become due under the terms of any law or an agreement, rules or regulations issued by the State Bank of Pakistan;
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> (ii) utilization of finance, loan, advance or financial assistance or a substantial part thereof, obtained by any person from a financial institution for a purpose other than that for which such finance,

loan, advance or financial assistance had been obtained and payment in part or full not made to the financial institution; or

(iii) removal, transfer, misappropriation or sale of any assets co lateralized to secure a finance, loan, advance or financial assistance obtained from a financial institution without permission of such institution.]

2. As per facts, M/s Fateh Textile Mills Limited, Latifabad, Hyderabad was granted financial facilities to the tune of Rs.44,000,000/- by NIB Bank (Now MCB Bank) on the basis of personal guarantees of respondents for a period of five years by way of approval letter dated 29.03.2005. The Fateh Mills ultimately defaulted and were given various chances to adjust the outstanding amount but in vain. Hence, the bank filed a recovery suit before the Banking Court, which was allowed vide judgment dated 10.02.2010 and decree dated 12.10.2010.

3. After that, an out-of-court settlement was realized between the parties, whereby respondents agreed to pay a sum of Rs.32.676 million to the bank in twenty-five monthly installments, commencing from 15.09.2012 till 15.09.2014. Pursuant to that, respondents issued twenty-five postdated cheques to the bank but when they were deposited for encashment were dishonored. The respondents, when despite several opportunities, failed to repay the outstanding amount, the bank served notices upon them claiming repayment but without any result.

4. Eventually, the bank filed a complaint upon which the Federal Investigation Agency, after holding an enquiry, registered FIR for offences u/s 20(7), (8) and (9) of FIO, 2001, against the respondents. FIR led to due investigation and submission of the Challan on the basis thereof. The respondents, when subpoenaed, appeared in the Court and filed an application u/s 265-K Cr.PC. This application has been allowed by the Banking Court by way of the impugned order holding that the amendment, brought about in year 2016 through which willful default was made a cognizable offence, has no retrospective effect. Therefore, the alleged default committed by the respondents before the said amendment cannot be treated as an offence.

5. Irrespective of the fact that such opinion was the ultimate below to the prosecution case, yet the Court further proceeded and held that the proceedings against a person accused of willful default could only be initiated when the complaint was lodged directly in the court, as specified in proviso to section 7 of the FIO, 2001. The FIA was not competent to receive

complaint directly, start inquiry, register FIR, conduct investigation and then submit the Challan against the accused. Induced by such findings, the Court has finally concluded that the complaint, born out of such untenable procedure, is not maintainable, and the accused/respondents are entitled to acquittal.

6. While dealing with the first issue, the Court has observed that the decree in the banking suit was passed in the year 2010, whereas offence of willful default was introduced through the Financial Institution (Recovery of Finances) (Amendment Act) of 2016, much after the date and time of the alleged offence. When the alleged default happened in the year 2010, it was not an offence. Therefore, subsequently, in the year 2022, an FIR for an action done in the year 2010 when it was not an offence cannot be lodged. To support its view, the Banking Court has cited Article 12 of the Constitution -- Protection against Retrospective Punishment – and has held that an FIR, for an action not an offence in the year 2010, cannot be lodged in the year 2022 when subsequently such action was made an offence.

7. Leaned DAG arguing on behalf of the State has pleaded that the Court has erred in appreciating the amendment and its consequences, the omission in payment of defaulted amount is a continuous wrong; unless and until such wrong is rectified, it will be considered to continue; when the law was amended and willful default made an offence, the situation on the ground was the same, the respondents were still defaulters.

8. Leaned counsel pleading on behalf of the respondents have supported the impugned order and have relied upon a case decided by the Supreme Court[1]. In addition, they have cited a number of judgments[2] to support the contention that FIO, 2001 has no retrospective effect.

9. We have considered their respective pleas, perused the record and taken guidance from the cited case law. In this case, certain facts are admitted, the Fateh Mills defaulted in making good of the outstanding amount in the year 2009, hence the recovery suit was filed that was decreed in the year 2010. The decree drove the respondents to enter into an out of court settlement, and issue 25 postdated cheques to the bank. The problem, however, arose when the bulk of cheques were dishonored, and despite

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[1] 2002 SCMR 1903,
[2] 2019 CLD 375, 2022 CLD 128, 2005 CLD 1794, PLD 2016 SC 620, PLD 2021 Sindh 152, 2018 CLD 1505 and 2025 CLD 1791

various attempts, the respondents failed to oblige. It was then (in the year 2022) when the bank called it a day and decided to take up the matter on criminal side to redress its grievance.

10. It is not disputed either that until the complaint was filed, the respondents had not paid the outstanding amount, which is exactly why the bank chose to seek such remedy. Hence, it is clear that when the willful default was made an offence in the year 2016, the default on the part of respondents was still alive. No doubt, the respondent defaulted first time in the year 2010, while it was not an offence, but their action did not culminate, nor it was terminated or novated by any new obligation, and continued even after the year 2016 when it was legislated to be an offence. It is not hard to understand that a case in which the willful defaulted was committed, but before the given date in 2016, the burden was discharged, the defaulter would stand protected under Article 12 of the Constitution. Later on, the fact that the default on his part persisted for a number of years would not be made a ground for prosecuting him under the amended law. However, the case in which the willful default commenced and it stayed on even after it was amended to be an offence, will not be covered by such protection, for the reason that the wrong it begot was not attended at any time by the defaulter ever after its nature was modified.

11. On the issue of willful default, the Supreme Court in one case[3] has held that the act of willful default is not an act or omission which was punishable by law at the time the same was committed but an act or omission committed 30-days after the promulgation of the Ordinance whereby it was created. The willful default is in the nature of continuous wrong which was converted into an offence prospectively – where such wrong continued even after the expiry of 30 days of the promulgation of the Ordinance – and not retrospectively. It is further held that in other words, it is a case where the punishment is prescribed in relation to the breach of a continuing duty which is not performed even within 30-days after the coming into force of the Ordinance. In such circumstances, the Supreme Court has finally concluded, by no stretch of imagination it could be termed retrospective in operation.

12. A full bench of the Peshawar High Court comprising five judges, while examining legality of the Khyber Pakhtunkhwa Ehtesab Commission Act,

[3] Khan Asfandyar Wali and others vs. Federation of Pakistan and others (PLD 2001 SC 607).

2014 in a case[4] has relied upon *Asfandyar Wali* case and has held that protection to a person provided under Article 12 is against retrospective punishment. But the legislatures are competent to give retrospective effect to an enactment which the legislature is competent to enact. Further, the said protection may be availed against those offences which were offences at the time of when they were sought to be punished but were not offences at the time when they were done. The Peshawar High Court in the end has rejected all the grounds including the one raised on retroactivity of the offences and their punishments and has declared the law under challenge as reasonable.

13. The Supreme Court in a different case[5] pertaining to an issue concerned with the Illegal Dispossession Act, 2005, has held that there is no cavil to the legal position that the said Act has no retrospective effect, but the expressions 'grab, control or occupy' used in section 3 of the Act cannot be restricted to the illegal occupants who entered in the premises subsequent to the promulgation of the Act, rather all illegal and unauthorized occupants would be subject to the Act, except the cases which were pending adjudication before the other forums. Ratio of *supra* case was again confirmed by the Supreme Court in the case of *Shahabuddin Vs. the State*[6] when it refused to accept the proposition that the Illegal Dispossession Act, 2005 will apply only to the illegal occupants who had entered into the premises subsequent to the promulgation of the Act, and held that rather all cases of illegal and unauthorized occupants would be subject to the Act.

14. From the guidance that we have received on a perusal of aforesaid case law, it has become clearer to us that protection provided under Article 12 of the Constitution is not absolute. Firstly, the legislature is competent to introduce retroactive punishment for an offence which the legislature is competent to enact, and secondly if the wrong continues and meanwhile it is made an offence by the legislature, the prospective action provided under the given law for such wrong would not be hit by the protection under Article 12 of the Constitution, for a simple reason that such wrong lingered on and existed on the book even beyond the period when it was converted into an offence. Therefore, based on such analogy, our view is that if the willful default committed before the year 2016 – when it was finally amended to

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[4] Noor Draz Khan Vs. Federation of Pakistan and 7 Others (PLD 2016 Peshawar 114).
[5] Rahim Tahir Vs. Amjad Jan and 2 Others (PLD 2007 SC 423).
[6] PLD 2010 SC 725.

be an offence – was not accounted for before that period and stayed on would then definitely be subject to the fallout set out in given amendment.

15. The crime of willful default is not like that species of crimes which as soon as is committed is concluded with all the concomitant implications getting effective immediately. The wrong stirred by the willful default on the other hand lingers on till the defaulted amount is paid accordingly. Protraction of the willful default beyond the given point in time when it is legislated to be an offence will unfold it into the realm of amended regime. Once that stage is reached, regardless of the fact that the willful default had commenced when it was amenable to only civil proceedings, it would be subject to criminal jurisdiction of the Court concerned as well, and dealt with accordingly. The protection under article 12 will not be then available to the cases like that for a reason that it did not become a past and closed transaction and stayed on incessantly without being compensated even after the time it was made an offence.

16. Hence, we find that the trial court's conclusion that the charge is groundless and there is no probability of conviction against the respondents as their action is protected under Article 12 of the Constitution is not sustainable in law and is set aside.

17. The other issue on the basis of which the Banking Court found the complaint bad in law and dismissed it is proviso to section 7 of FIO, 2001 setting out a condition that the Court shall not take cognizance of any offence except upon a complaint in writing made by a person authorized in this behalf by the financial institution in respect of which the offence is committed. The view of the Banking Court is that since the complaint was directly submitted to FIA, which filed the Challan in the Court, it is violation of the said proviso. In its opinion, the complaint should have been filed in the Court and the Court should have sent it to the FIA for an enquiry etc. to make the complaint competent and worthy of further proceedings.

18. What the Banking Court lost sight of in rendering such an opinion is the fact that in the given amendment in the year 2016, subsections (6) and (7) to section 20 [Provisions relating to certain offences] of the FIO, 2001 were also added. By subsection (6), the offence of willful default was made non-bailable, cognizable and non-compoundable, and as per regime under subsection (7), an investigation agency, to be nominated by the Federal Government, was authorized to take action in respect of an offence of willful

default on a complaint in writing by an authorized officer of a financial institution. Both these provisions are latter in time and more so subsection (7) starts with non-obstante clause, which essentially means regardless of anything else to the contrary, it is effective. This inalienable proposition ensures that what is provided in the given provision shall prevail even if some other law or section in the same document says otherwise. It means that it will have precedence over other conflicting laws or provisions contained either in the same law or in some other law.

19. In this case, the principal officer namely Muhammad Salman, who the facts show was duly authorized through a power of attorney by the bank, filed the complaint with the FIA. It may be noted that in terms of rule 5 of the Financial Institutions (Recovery of Finances) Rules, 2018, the FIA has been defined to be the agency to investigate all complaints filed by the financial institutions regarding willful default cases in terms of subsection (7) of section 20 of FIO, 2001. The FIA after a proper enquiry/investigation filed interim Challan inducing the Court to take cognizance of the offence on 30.3.2022 and proceed with the trial. In our view no perceptible illegality was committed and the due procedure in terms of subsections (6) and (7) to section 20 of FIO, 2001 was followed. The complaint was rightly filed with the FIA; it was thoroughly investigated, evidence was collected and the Challan with a reference to such evidence was submitted accordingly. Thereupon, the Court initially took cognizance and proceeded with the trial. The Court's succeeding approach declaring the complaint incompetent and bad in law for want of proper procedure, as explained above, in our view, is unsustainable in law too and is accordingly set aside.

20. In addition, it may be noted that the impugned order was passed on 14.12.2023 after more than one and half years of taking cognizance of the offences by the Court. The Court's finding, after such a long period, that the FIA had no jurisdiction to receive the complaint and investigate it unless it was forwarded to it by the Court where the complaint ought to have been filed directly, not only goes against the very provisions contained in subsections (6) and (7), as they stand out, but also means that the Court decided to sit over its own order of taking cognizance of the offences without referring to any specific provision of law under which the Court had such power. Such approach lacking legal support, as detailed above, we refuse to endorse, and set aside.

21. Nevertheless, we agree with the Banking Court and endorse its findings on the sole point that it is only when civil liability of default is established, the offence of willfulness in committing the default would be taken up and tried. This proposition is a trite law and the Banking Court's reliance in this regard on the judgment reported in 2019 CLD 375 is well oriented and its acquittal of the accused [Humayun Barkat (Resp.2) and Maqsood Ahmed Khan], against whom no decree of default stood as they were not even the party in the recovery suit, is hereby confirmed being in accordance with the law.

22. Consequently, we allow both the acquittal appeals in hand, set aside the impugned order with one modification detailed in preceding para (Para 21) and remand the matter to the Banking Court to proceed with the trial on merits and decide the case against the respondents [except Humayun Barkat (Resp.2) and Maqsood Ahmed Khan, whose acquittal has been confirmed] expeditiously.

Both the criminal acquittal appeals are disposed of accordingly in above terms.

JUDGE

JUDGE

Rafiq/PA.