

IN THE HIGH COURT OF SINDH KARACHI

Present:

Mr. Justice Muhammad Ali Mazhar

Mr. Justice Adnan Iqbal Chaudhry.

Constitution Petition No. D-2102 of 2017

[Textilers (Pvt.) Ltd and others versus Meezan Bank Ltd. and others]

- Petitioners : Textilers (Pvt.) Ltd. and two others through Mr. Raja Qasit Nawaz Advocate.
- Respondent 1 : Meezan Bank Ltd., through Mr. Abdul Ahad Advocate of M/s Mohsin Tayebaly & Co.
- Respondents 2-3 : Nemo.

Constitution Petition No. D-2304 of 2018

[M/s Textilers (Pvt) Ltd and others versus Meezan Bank Limited and others]

- Petitioner : Meezan Bank Ltd. through Mr. Abdul Ahad Advocate of M/s Mohsin Tayebaly & Co.
- Respondents 1-3 : Textilers (Pvt.) Ltd. and two others through Mr. Raja Qasit Nawaz Advocate.
- Respondents 4-5 : Nemo.
- For Interveners : Abdul Ghaffar and Abdul Rehman through Mr. Khawaja Shams-ul-Islam Advocate.
- Dates of hearing : 25-09-2018 and 28-09-2018
- Date of decision : 24-12-2018

JUDGMENT

Adnan Iqbal Chaudhry J. -

1. The Petitioners in C.P. No.D-2102/2017 are defendants /customers in Banking Suit No.B-42/2014 [said Suit], and the Petitioner in C.P. No.D-2304/2018 is the plaintiff [the Bank] in the said Suit which is pending before the original side of this High Court as the Banking Court under the Financial Institutions

(Recovery of Finances) Ordinance, 2001 [FIO 2001]. The Petitioners are aggrieved of separate orders passed in the said Suit by a learned Single Judge of this Court acting as the Banking Court, whereby certain measures were ordered for shifting and securing the hypothecated assets pending final adjudication in the said Suit.

2. The facts, in brief, leading to these petitions are as follows. In order to secure the hypothecated assets, the Bank, from time to time, sought various orders from the Court under Section 16 of the FIO 2001 during which time the leave to defend application of the defendants remained pending. Pursuant to orders dated 06-08-2014 and 11-08-2014, the Nazir of the Court sealed two of the premises where the hypothecated assets were situated, and deployed security guards thereat after making an inventory of the hypothecated assets. Subsequently, it transpired that the defendants were only tenants/licensees of the said premises when joinder applications were moved in the said Suit by owners of said premises complaining that orders passed in the said Suit prevented them from accessing their properties. By an order dated 17-03-2016 passed in the said Suit with the consent of the plaintiff and the defendants, the Official Assignee was appointed by the Court to auction those hypothecated assets the inventory of which had been prepared by the Nazir.

3. By order dated 07-03-2017 passed in the said Suit, the Court shifted the task of auction of the hypothecated assets from the Nazir of the Court to the Official Assignee. The shifting of such task was being opposed by the defendants on the ground that some of the hypothecated assets had went missing on the Nazir's watch. It is the said order dated 07-03-2017 that is challenged by the defendants of the said Suit in C.P. No.D-2102/2017.

4. While C.P. No.D-2102/2017 was pending before this Court, the said Suit continued before the learned Single Judge. The owners

of the premises where the hypothecated assets were situated moved applications for joining the said Suit on the ground that due to the delay in the auction of the hypothecated assets, they continue to be deprived of rent and of the use of their premises. By order dated 06-03-2018 the learned Single Judge dismissed the joinder applications of the owners of the premises on the ground that since they were not 'customers' within the meaning of the FIO 2001, they could not be made parties to the said Suit. However, on noticing that the earlier orders passed in the said Suit did not take in account the property rights of the owners of the premises where the hypothecated assets were situated, and that the earlier orders of sale of the hypothecated assets under Section 16 of the FIO 2001 were now hit by the recent pronouncement of the Honourable Supreme Court of Pakistan in the case of *Gulistan Textile Mills Ltd. v. Soneri Bank* (PLD 2018 SC 322 decided on 02.01.2018), the learned Single Judge took up the pending applications of the Bank under Section 16 of the FIO *albeit* not listed on that date, and decided the same by ordering measures for the shifting and securing of the hypothecated assets (as opposed to sale) under the supervision of the Official Assignee. This order dated 06-03-2018 is impugned by the Bank in C.P. No. D-2304/2018. The grievance of the Bank is primarily that the shifting of the hypothecated plant and machinery would entail their dismantling and consequently their damage.

5. The owners of one of the premises where part of the hypothecated assets are situated, have made an application for joining C.P. No.D-2304/2018 on the ground that they are interested in the outcome of the petition. They of course support the impugned order dated 06-03-2018.

Vide Reference No.01/2018 dated 12-04-2018 filed in C.P. No.D-2304/2018 the Official Assignee has reported that the hypothecated assets lying at one of the premises have already been shifted and secured in partial compliance of the impugned order dated 06-03-2018.

6. Admittedly, the orders impugned by way of these constitution petitions are interlocutory orders passed under the FIO 2001 from which an appeal is barred by Section 22(6) of the FIO 2001, and therefore it is contended by the Petitioners that having no remedy available at law against the impugned orders, constitution petitions under Article 199 of the Constitution of Pakistan are maintainable. Since these petitions prayed essentially for the issue of a writ to the High Court acting as the Banking Court, the maintainability of these petitions was questioned at the outset. By an order dated 29-05-2018 learned counsel for the Petitioners were again put on notice to satisfy this Court whether a writ can issue to a High Court even if it passed the impugned orders acting as the Banking Court ?

7. Mr. Raja Qasit Nawaz, learned counsel for the Petitioners in C.P. No.D-2102/2017 and Mr. Abdullah Ahad, learned counsel for the Petitioners in C.P. No.D-2304/2018, both submitted that by the time judgment and decree is passed in the said Suit and the remedy of an appeal against interlocutory orders becomes available to the Petitioners, the such orders would have been implemented and therefore in such exceptional circumstances a constitution petition under Article 199 of the Constitution of Pakistan is maintainable. Mr. Raja Qasit Nawaz further submitted that an order passed by the High Court under the FIO 2001 is to be treated as an order of the Banking Court, and that there was plethora of case law to show that constitutional jurisdiction can be invoked to correct errors of law committed by a Banking Court. Making the same argument Mr. Abdullah Ahad submitted that when the Single Bench of the High Court acts in a special jurisdiction as the Banking Court under the FIO 2001, a writ can issue to it as such jurisdiction was distinguishable from the ordinary jurisdiction of the High Court. The case-law cited by learned counsel for the Petitioners is discussed *infra*.

On the other hand, Mr. Khawaja Shams-ul-Islam, learned counsel for the intervenors submitted that the impugned interlocutory orders do not create any exceptional circumstances. He cited the cases of *Muhammad Shafi v. Attaullah* (1984 SCMR 1124) and *Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan* (PLD 2010 SC 61) to submit that under Article 199 of the Constitution of Pakistan, a writ cannot be issued to the High Court under any circumstances.

8. Having heard the learned counsel, and having gone through the case-law cited by them at the Bar, the matter put simply is as follows. Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 does not envisage a writ against the High Court as sub-Article (5) of Article 199 of the Constitution reads as follows:

“(5) In this Article unless the context otherwise requires –
“person” includes any body politic or corporate, any authority of or under the control of the Federal Government or of a Provincial Government, and any Court or tribunal, other than the Supreme Court, a High Court or a Court or tribunal established under a law relating to the Armed Forces of Pakistan; and
.....”

In the case of *Muhammad Shafi v. Attaullah* (1984 SCMR 1124), the Supreme Court of Pakistan had held that a constitution petition questioning the legality of an earlier order passed by the same High Court on a Settlement Revision, was barred by reason of Article 199(5) of the Constitution. In the case *Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan* (PLD 2010 SC 61) it was held by the Supreme Court of Pakistan that “What emerges from the provisions of clause (5) of Article 199 of the Constitution as also from some precedent cases is that writs should not issue from one High Court to another High Court or from one Bench of a High Court to another Bench of the same because that could seriously undermine and prejudice the smooth and harmonious working of Superior Courts. But this should never be understood to mean that

no writ can ever issue to a Judge in his personal capacity or where a Judge was working as persona designata.”

Therefore the only question that needs to be answered is whether the High Court is not to be treated as a High Court for the purposes of Article 199(5) of the Constitution of Pakistan when it acts as a Banking Court under Section 2(b) of the FIO 2001 ?

9. Mr. Raja Qasit Nawaz, learned counsel for the Petitioners in C.P. No.D-2102/2017 submitted that a writ can issue to the Banking Court as was done in the following cases: *Agriculture Development Bank of Pakistan v. Yar Muhammad* (2004 CLD 1084); *Sheikh Abdul Sattar Lasi v. Judge Banking Court* (2007 CLD 69); *Habib Bank Ltd. v. Victor Electronics Appliances Industries (Pvt.) Ltd.* (2011 CLD 1571); *United Bank Ltd. v. Presiding Officer Banking Court No.2* (2011 CLD 931); *United Bank Ltd. v. Banking Court No.II* (2012 CLD 1556); *Asif Kudia v. KASB Bank Ltd.* (2014 CLD 1548); and *Balochistan Glass Ltd. v. Bank Al-Falah Ltd.* (2015 CLD 52). However, in all of the said cases the order impugned by way of a constitutional petition was of the Banking Court not being the High Court, and it was a writ of *certiorari* that was issued to correct jurisdictional errors committed by an inferior Court ie., the Banking Court not being the High Court.

Regards the case of *Balochistan Trading Company v. National Bank of Pakistan* (1998 SCMR 1899), also cited by Mr. Raja Qasit Nawaz, there again the order in question was of the Banking Court not being the High Court, and this much was observed by the Honourable Supreme Court when it distinguished the case from its earlier judgment in the case of *Tank Steel & Re-rolling Mills* (discussed *infra*) for not being one for a writ to the High Court.

Of the cases cited before us by Mr. Raja Qasit Nawaz, it was only the case *Bank of Punjab v. International Ceramics Ltd.* (PLD 2013 Lah 487) where the impugned order brought before the High Court in constitutional jurisdiction was that of the High Court as Banking Court. Though in that case the petition was dismissed, but in doing so the Division Bench of the Lahore High Court observed that a

constitution petition against the order of a 'Banking Court' can be maintained where the order is blatantly illegal or without jurisdiction. But in making such observation the learned Division Bench did not clarify whether that would also be the case where the Banking Court was the High Court, nor did the learned Division Bench discuss the provision of Article 199(5) of the Constitution of Pakistan. Be that as it may, that judgment being of another High Court is not binding on this High Court.

10. Learned counsel for the Petitioners in both petitions had relied on the case of *Pakistan Industrial Credit and Investment Corporation Limited v. Government of Pakistan* (2002 SCMR 496), and Mr. Abdullah Ahad had also relied on the cases of *Tri-Star Polyester Ltd. v. Citi Bank* (2001 SCMR 410) and *Pakistan Fisheries Ltd. v. United Bank Ltd.* (PLD 1993 SC 109) for the proposition that the High Court when acting as the Banking Court does not exercise ordinary jurisdiction of the High Court. But that is a statement of the nature of jurisdiction that the High Court exercises as the Banking Court, and while there can be no cavil with that proposition, that is different from saying that the High Court while exercising special jurisdiction is susceptible to a writ of *certiorari* issued by the same High Court.

In *PICIC's* case, the observation that the High Court acting as the Banking Court does not exercise the ordinary jurisdiction of the High Court, was made by the Honourable Supreme Court to state that the High Court acting as the Banking Court could not have treated objections under Section 18(6) of the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997 as applications under Section 73 CPC.

In the case of *Tri-Star Polyester Ltd.*, the petitioners had approached the Supreme Court under Article 184(3) of the Constitution directly from an order passed by the High Court as the Banking Court whereby the leave-to-defend application of the bank was allowed while condoning the delay in filing the same. The Supreme Court dismissed the petition for leave to appeal, and in

that background observed that when the High Court passed an order as the Banking Court, it was not acting as a High Court in its ordinary jurisdiction so as to allow the petitioners to approach the Supreme Court directly under Article 184(3) of the Constitution.

In the case of *Pakistan Fisheries Ltd.* the question raised before the Supreme Court was whether an appeal under Section 15 of the Code of Civil Procedure (Amendment) Ordinance, 1980 was maintainable before a Division Bench of the High Court from an order passed by a Single Bench of the High Court as the Banking Court under the Banking Companies (Recovery of Loans) Ordinance, 1979 whereby leave to defend the suit was granted on the condition of security. It was held by the Supreme Court that “the jurisdiction conferred on the High Court under the Ordinance is special jurisdiction and while exercising such jurisdiction, the High Court bears the fictional character of a Special Court as defined in the Ordinance. It is a fundamental rule, that where an enactment creates a new jurisdiction and prescribes the manner in which that jurisdiction is to be exercised and further specifies the remedy, such remedy is exclusive and the party aggrieved of an order made in exercise of that jurisdiction must seek only such remedy and not others.”

The above discussion is to show that none of the cases of *PICIC*, *Tri-Star Polyester Ltd.* and *Pakistan Fisheries Ltd.* are of any help to the Petitioners. In fact, these cases advance the proposition that orders passed by the High Court as the Banking Court under special law should only be assailed in terms of the provisions of that special law. In fact, the said cases go against the Petitioners.

11. A complete answer to the Petitioners, that a writ cannot issue to a High Court even where it acts in a special jurisdiction (such as the Banking Court), is provided by the case of *Tank Steel & Re-rolling Mills (Pvt.) Ltd. v. Federation of Pakistan* (PLD 1996 SC 77). In that case the judgment and decree passed by the Banking Tribunal under the Banking Tribunals Ordinance, 1984, was appealed before the

Division Bench of the Peshawar High Court, who required the appellant to deposit the decretal amount as a condition precedent to the appeal as required by the said Ordinance. The appellants could not do so, leading to a dismissal of the appeal. The bank then initiated execution proceedings and the order passed therein was challenged by the appellant/judgment debtor by way of a constitution petition. One of the grounds for dismissing such petition was that the petitioners essentially sought a writ against a Bench of the High Court that had dismissed the appeal. While maintaining such finding, the Supreme Court held as follows:

“9. The learned counsel for the respondent No.3 has taken strong exception to the competency of the writ petition before the High Court as in effect, final orders passed by the Appellate Bench of the High Court were challenged in the Constitutional petition. We entirely agree with the learned counsel for respondent No.3 on the very maintainability of the writ petition. A bare reading of clause (5) of Article 199 of the Constitution of Pakistan would make it clear that the 'High Court' is not a 'person' to whom a writ of High Court can be directed. The obvious result is that the petition is barred by the provisions of the Constitution itself and the petitioners could not be granted any relief in writ jurisdiction of the High Court. It appears to us that the mere conferment of Constitutional jurisdiction on a Bench of the High Court does not have the effect of converting another Bench which exercises the appellate powers of the same High Court inferior to the former. This Court in *Malik Feroz Khan Noon v. The State* PLD 1958 SC (Pak.) 333 has approved the dictum laid down in the case of *Goonesinha v. O.L.de Kretser* (AIR 1945 PC 83) by the Privy Council that a writ of certiorari, which is in the nature of a revisional order and can only be issued to an inferior Court, cannot be issued by a Superior Court to bring up an order made by a Judge of that Court. In *Malik Feroz Khan Noon's* case, the principle deducible is that when the Judges of the High Court function in different capacities under different jurisdiction, they do not act as different Courts but exercise the powers of the same Court and that distribution of those powers is not more than an internal arrangement among the Judges of the same Court.”

Another case on the point is that of *Sajid Brothers & Co. v. Manager Allied Bank Ltd.* (2012 CLD 1858) where an order passed by a Single Judge of the High Court of Sindh under Section 10 FIO 2001 i.e., as a Banking Court, was assailed by way of a constitution

petition before a Division Bench of the same Court on the ground that while deciding the application for leave to defend, the Single Judge struck off some of the defendants. The Division Bench held that where an appeal against such order was expressly barred, allowing a constitution petition would amount to circumventing the statute. The other ground cited for dismissing the petition was that the impugned order was passed by a Judge of the High Court, who was not a 'person' under Article 199 of the Constitution of Pakistan against whom a writ could issue.

12. It will be seen that Section 2(b) of the FIO 2001 only confers jurisdiction of a Banking Court on the High Court, and as held in the case of *Tank Steel & Re-rolling Mills supra*, the conferment of a special jurisdiction on the High Court does not open it to a writ under Article 199 of the Constitution of Pakistan.

13. Having concluded that a writ cannot be issued to the High Court even where the High Court acts as the Banking Court under the FIO 2001, these constitution petitions are not maintainable and are therefore dismissed along with pending applications.

JUDGE

JUDGE

Karachi
Dated: 24-12-2018