IN THE HIGH COURT OF SINDH AT KARACHI

C P D – 8542 of 2018

Present: **Muhammad Ali Mazhar** and **Agha Faisal**, **JJ**.

Sukkur Beverages (Private) Limited
vs.
Federation of Pakistan and Others

For the Petitioner:	Barrister Owais Ali Shah Mr. Amir Khosa, Advocate
For the Respondents:	Mr. Manzoorul Haq Advocate for Respondent No.2.
	Mr. Asad Rizvi Advocate for Respondent No.3. Mr. Muhammad Saad CFO of the Respondent No.3.
	Mr. Ishrat Alvi Assistant Attorney General.
Date of Hearing:	11.01.2019
Date of Announcement:	12.02.2019

JUDGMENT

Agha Faisal, **J**: The crux of this judgment is the determination whether the placement of the petitioner on the defaulter list of the Electronic Credit Information Bureau of the State Bank of Pakistan ("**eCIB**") was just and proper in the present facts and circumstances, when admittedly the nature of the arrangement / understanding / agreement between the petitioner and financial institution was yet to be determined by the Court of competent jurisdiction seized of the lis.

2. Barrister Owais Ali Shah set forth case of the petitioner, being a limited liability company engaged in the bottling, manufacturing, selling and distribution of world-renowned multinational brand soft drinks, and submitted that the nature of the relationship between the petitioner and

financial institution, being Allied Rental Modaraba ("**ARM**") the respondent No.3 herein, was pending adjudication and during such pendency the placement of the petitioner on the defaulter list / eCIB was unconscionable, unmerited and in abject violation of the law. The submissions made by the learned counsel in such regard are encapsulated and presented herein below:

i. It was submitted that the petitioner and ARM had entered into an agreement for the acquisition of two new generator sets on BOT / hire purchase basis and the said relationship was amicably concluded in the past after settlement of all dues. Thereafter, the petitioner obtained a used generator from ARM on the same basis, however, such an agreement was oral and not reduced to any finance and security documentation. It was submitted that seventeen months into the relationship ARM sought to unilaterally alter the terms of the oral agreement and decided to treat all payments made thereto as rental for the generator set.

ii. Per learned counsel the aforesaid action led to a dispute between the parties and the same led to the filing of Suit No. 440 of 2018 by ARM ("**ARM Suit**") against the petitioner before the learned Banking Court No. I at Karachi wherein an amount of Rs.8,522,500/- was claimed. The petitioner filed its leave to defend application in the ARM Suit and also instituted Suit No. 553 of 2018 ("**SBPL Suit**") before the Banking Court No. I at Karachi against ARM seeking, inter alia, specific performance of the oral agreement reached inter se.

iii. It was submitted that the two suits, referred to supra, remain pending adjudication before the Court of competent jurisdiction, however, the petitioner was served with a notice by the State Bank of Pakistan ("**SBP**"), the respondent No.2 herein, dated 2nd July, 2018 ("**Impugned Notice**") wherein it was stated as follows:

"It has been reported to us that you have overdue amounts on the loans contracted by the Bank/Financial Institutions. Detail Statement provided by them is appended below for your information.

NAME OF THE REPORTING FINANCIAL INSTITUTION	TOTAL LIABILITIES	OVERDUE PAST 90 DAYS < 365 DAYS	OVERDUE PAST 365 DAYS
ALLIED RENTAL MODARBA	47,975,029		47,975,029

We propose to reflect this information in the CIB database within 30 days from the issue of this notice. If the statement is in agreement with your record, you are requested to settle thee dues with the Bank/Financial Institution within this period and your name will no longer be included in the CIB database. If the statement is not in agreement with your record, kindly provide us details and take up the matter with the concerned institutions. In case a satisfactory settlement of overdue amount does not take place within one month from the issue of this notice the information will be included in the CIB database."

iv. The petitioner responded to the Impugned Notice vide its detailed reply dated 30.07.2018 stipulating that the alleged default reported to the eCIB by ARM was contrary to the facts and even otherwise the quantum thereof was almost six times more than the amount which had been claimed by ARM in the ARM Suit. It was, however, demonstrated from the record that instead of considering the reply submitted by the petitioner, its name was placed on the defaulter list of eCIB against all enshrined principles of the law.

v. Learned counsel submitted that the present petition was preferred to remedy the grievance of the petitioner and in respect thereof

sought to place reliance upon the judgments of the superior courts in the cases of *A & A Services through Proprietor vs. Federation of Pakistan through Secretary Ministry of Finance and Others reported as 2014 CLD 809* ("***A&A Services***"), *New Jubilee Insurance Company Ltd., Karachi vs. National Bank of Pakistan Karachi* reported as *PLD 1999 SC 1126* ("***New Jubilee***") and *Messrs Yousaf Sugar Mills vs. Trust Leasing Corporation and Others* reported as *2006 CLD 1191* ("***Yousaf Sugar Mills***") in order to bulwark his contentions.

3. Mr. Asad Rizvi, learned counsel for ARM, controverted the arguments advanced on behalf of the petitioner. It was stated that while claim of ARM was yet to be determined by the Court of competent jurisdiction, ARM had rightfully reported the default of the petitioner to the SBP as the same was a requirement of the law. It was demonstrated from the paragraph wise comments filed on behalf of ARM that the amount that remained in default was 17,508,357/-, as ARM had already taken possession of the generator set from the petitioner and hence was no longer accruing any rent in such regard. It was argued that while ARM was bound to report any default to the SBP, it had no nexus with the reporting of such information by the SBP on the eCIB or through any other medium. Learned counsel submitted that they would have no cavil if the amount in default reflected on the eCIB is changed to reflect that which is presently shown as outstanding from the petitioner in the books of ARM. In addition hereto the learned counsel also assailed the maintainability of the present petition and sought the dismissal thereof forthwith.

4. Mr. Manzoor ul Haq, learned counsel for the SBP, vehemently defended the placement of the petitioner on the defaulter list / eCIB and submitted that the same was in due consonance with the law. It was submitted that the SBP was mandated to collect such information under Section 25-A of the Banking Companies Ordinance, 1962 ("**Ordinance**") and further that the provisions of section 93(C) of the Ordinance permitted such information to be shared in the manner prescribed. It was submitted that the default is an issue between a financial institution and its customer and that upon such occurrence being reported to the SBP the same is reflected in the eCIB. Learned counsel further argued that the SBP does not determine the veracity of any default reported as such determination is the domain of the Courts. It was conceded that the amount presently stated by ARM to be in default was less than one third of the amount reflected in the eCIB, however, it was added that the figure will be modified once the same is reported thereto by ARM in the prescribed format. Learned counsel relied upon the case of *Messrs Abdul Aziz Nawab Khan & Company vs. Federation of Pakistan, Ministry of Finance and Others* reported as *2006 CLD 55* ("***Abdul Aziz***"), *Sahibzada Faisal Ali Khan vs. Federation of Pakistan and Others* reported as *2007 CLD 463* ("***Sahibzada Faisal***") and *Syed Wajahat Hussain Zaidi vs. State Bank of Pakistan through Governor and 14 Others* reported as *2015 CLD 1897* ("***Syed Wajahat***") to support his contentions and sought the dismissal of the present petition.

5. We have heard the respective learned counsel and have also reviewed the record arrayed before us. It is an admitted fact that both the petitioner and ARM claim an oral agreement inter se, however, differ with regard to their interpretation of such an agreement. It is also apparent that each of the two parties have filed a suit before the Court of

competent jurisdiction, inter alia, to establish the authenticity of their version of the oral contract. Therefore, the primary question for this Court to determine is whether prior to the determination of the nature of arrangement / agreement, between the parties by the Court of competent jurisdiction, could a party have been deemed to be in default thereof.

6. The honorable Supreme Court was seized of a similar situation in *New Jubilee Insurance* wherein it was required to deliberate upon whether the delisting of an insurance company, from a bank's list of approved insurance companies, was merited prior to the cause for such delisting having been adjudicated upon by a competent forum. The judgment was rendered deprecating the act of premature blacklisting and it was observed as follows:

> "16. It may be pointed out thus the fall-out of the blacklisting of the appellant is to prevent it from the privilege and advantage of entering into lawful relationship with the respondent for the purpose of gains which is violative of Article 18 of the Constitution, which lays down that subject to such I qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business. The blacklisting of a company/firm/person, also tarnishes the reputation of it/has, as to its/his credibility to honour its/his commitments which may dissuade other parties from entering into contracts with, the former. Thus the consequences of blacklisting a company/firm/person are of great magnitude, which warrant that before taking such an action, there should be material on record prima facie to indicate that the delinquent Insurance Company's refusal to pay claim was not warranted in the circumstances of the case.
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> 17. We are, therefore, inclined to hold that the impugned order/action of the respondent cannot be maintained in law."

7. The honorable Lahore High Court applied the ratio of *New Jubilee Insurance* to the issue of placement of a person on the defaulter list of the SBP and maintained that such an action was unmerited prior to determination of the genuineness of the information received. The

operative portion of the said judgment, in *Yousaf Sugar Mills*, reads as follows:

> “10. The act of a blacklisting or preventing a company from the privilege and advantages of entering into a lawful relationship with the bank for the purpose of gain, is violative of Article 18 of the Constitution. The consequences of blacklisting a person, are of great magnitude and warrant that before taking such action there should be a fair and proper trial, through an impartial Court or Tribunal by providing such person reasonable opportunity to defend the allegations made against him. The effect of placement of a person's name on the list that facility of finance is extended to such person, only after recording the reasons, according to para.2(a)(ii) of the Prudential Regulations. It has the effect of negating the facility to a borrower in the ordinary course. If the name of a person is brought on the list without any verification, it will adversely effect the reputation as well as the business of such borrower. The Honourable Supreme Court of Pakistan in the case of "New Jubilee Insurance Corporation v. National Bank of Pakistan Karachi" PLD 1999 SC 1126 held that when an act or order inflicts civil consequences on a person in respect of his reputation or property which is harmful to his interest, he is entitled to be heard before such an action or order is taken or passed……..
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> 11. The placement of a person on CIB List of defaulters places a restraint on his business to enter freely into a contract with banks etc., therefore, before such placement, the concerned individual is entitled to a notice. State Bank of Pakistan which regulates the affairs of banks etc. has the responsibility at least to see the genuineness and truthfulness of claim of a Banking Company or NBFI qua the default of a borrower. The stance taken by the State Bank of Pakistan in the reply that it places the name of a defaulter on the list without any verification or notice to such person is not in accord with the law laid down by the Honourable Supreme Court of Pakistan in the case of New Jubilee Insurance Corporation (supra). The petitioners as per award dated (sic) have paid off their liabilities while respondents No.l has conveyed its acceptance of the award which is further affirmed by encashment of the cheques presented by the petitioners to the arbitrator. Respondent No.3 is under an obligation as per award to release the security documents. Prima facie there is justification for placement of the petitioners on CIB List. The action of respondent No.3 regarding placement of the petitioners on the CIB List without notice and without ascertaining the genuineness of the information is, therefore, violative of Articles 4, 18 and 25 of the Constitution of Islamic Republic of Pakistan. Impugned placement of the petitioners, or CIB List, is declared without lawful authority and with no legal effect. The impugned order is thus set aside.”

8. It was shown by the learned counsel for the petitioner that a Division Bench of this High Court had deliberated upon the issue of

placement of persons on the defaulter list of the SBP in the case of *A&A Services* and deprecated the practice of financial institutions acting as judges in their own cause. The relevant observations of the learned Division Bench are highlighted herein below:

> “We have perused the above provisions and on a very careful examination of the same, it transpires that the respondent No 2 can ask for credit information in such manner as it deems fit, from a Banking Company and such information on its own motion or at the request of any Banking Company can be made available on payment of such fee as may be prescribed, while making such information available to a Banking Company, the respondent No 2 shall not disclose the name(s) of the Banking Company which has supplied such information. It further provides that when Banking Company proposes to enter into any financial arrangement which is in excess of the limits laid down, it must obtain the credit information of that borrower from the respondent No 2. Subsection (2) stipulates that such credit information shall be treated as confidential and shall not be published or otherwise disclosed without prior permission of the respondent No 2. In the instant matter, subsection (3) and explanation (a) is not relevant. However explanation (b) is relevant and important wherein "credit information", has been defined and it means any information relating to the amounts and the nature of loans or advances or other credit facilities, including bills purchased or discounted, letter of credit and guarantees, indemnities and other engagements extended to a borrower; the nature of security taken from any borrower for credit facilities granted and the guarantees, indemnities or other engagement furnished by any of its customers; and the operations of accounts in respect of loans and advances and other credit facilities referred to in this clause. When we examine the meanings assigned to "Credit Information" above, it seems to us that it only requires the Banking Company to provide to the respondent No 2 the details of advances and loans of all sorts and the security taken for grant of such advances and loans and the details of accounts. It has nowhere been provided that the Banking Company has been authorized or asked to mention or include the name of a customer or a borrower as "defaulter" on its own regarding the re-payments of such loans and advances. The Banking Company has not been vested with any such powers to issue a notice to the alleged defaulter and ask it to clear the dues within 90 days of the issuance of such notice; otherwise its name would be put or recommended to be put on the CIB list. If such exercise is being carried out by the banking companies under the directions of the respondent No. 2 on the basis of any circulars or instructions, we are afraid, such circulars or instructions are beyond the mandate of this provision and cannot be sustained under a well settled proposition that rules and circulars cannot go beyond the scope of the parent statute, hence cannot be reconciled. The words "in such manner as the State Bank may specify" in subsection (1) would not mean either, nor authorize the State Bank to collect information from Banking

> Companies regarding "credit Information" beyond the meaning assigned in explanation (b) in section 25A of the Ordinance 1962. In fact the respondent No. 2 ought to have taken more responsibility in managing the CIB list on its own, rather than resting its management on the Banking Companies, who have been authorized to put names of any customer or borrower on the CIB list before any proper adjudication of the case from a competent Court of law as provided under the Ordinance 2001. This in fact has allowed the Banking Companies to be judges of its own cause which has been deprecated by the Hon'ble Supreme Court in a number of cases. If any reference is needed one may refer to the case of New Jubliee Insurance Company Ltd., Karachi v. National Bank of Pakistan Karachi (PLD 1999 SC 1126), and Agricultural Development Bank of Pakistan and another v. Abid Akhtar and others (2003 SCMR 1547).
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> 9. The petitioner, as well as all the citizens of this country have been granted various fundamental rights under the Constitution of the Islamic Republic of Pakistan 1973, namely under Articles 4, 10A, 18 and 25 and so on, and if any such fundamental right is violated the respondent No. 2 is obligated to see that the conduct of the Banking Companies working under the Ordinance, 1962 does not interfere or violates any such fundamental rights. Similarly it cannot be overlooked that every citizen has a right to a fair trial, be it civil or criminal. In this context reference to Article 10A of the Constitution of the Islamic Republic of Pakistan would be relevant which provides as follows:--
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> "Right to fair trial:-For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process."
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> It appears that the placement of the name of an alleged defaulter on the CIB list before any adjudication in the matter by the Court of first instance i.e. the Banking Court, would violate the fundamental right as guaranteed under Article 10A of the Constitution as now this is a salutary principle of law, that nobody should be condemned unheard and without any proper hearing and adjudication of the case."

9. It is observed that the judgments referred to supra, cited by the learned counsel for the petitioner, are squarely applicable to the facts and circumstances under consideration. However, it remains to be considered whether the case set forth on behalf of the petitioner is hampered by the authority relied upon by the learned counsel for the respondent No. 2. *Sahibzada Faisal* is a decision of a learned Single Bench of the Lahore High Court and *inter alia* uphold the provisions of section 25 A of the Ordinance, relating to the power of the SBP to collect

and furnish credit information. *Abdul Aziz*, a Division Bench Judgment of this High Court, considered SBP's BCD Circular No. 6 of 1990 and maintained that a financial institution informing the SBP about the financial status of its customer, in pursuance of the said directive, does not violate the law. The decision in *Syed Wajahat* also enunciates that the provisions of section 25 A and 93 and SBP's BCD Circular No. 6 of 1990 are not violative of the law. However, the focus of this petition is not a challenge to section 25 A of the Ordinance or the SBP's BCD Circular No. 6 of 1990. The only question before us is whether it was just and proper for the SBP to list the petitioner as a defaulter prior to there being a determination with respect to the very agreement upon which such a default could have been predicated. Therefore, in the present facts and circumstances the ratio of the judgments cited by the learned counsel for the respondent No. 2 are distinguishable.

10. It is also worthy to observe that in arriving at its decision in *A&A Services* the honorable Division Bench of this Court had duly considered the pronouncements *inter alia* in *New Jubilee* Insurance, Yousaf *Sugar Mills* and *Abdul Aziz*. The said decision, squarely applicable in the present facts and circumstances, is also binding upon this bench in due consonance with the prescriptions of *Multiline Associates vs. Ardeshir Cowasjee* reported as *1995 SCMR 362*, wherein it was maintained that a decision of an earlier Division Bench of the Court is binding on subsequent Division Benches, save for when circumstances existed necessitating reference of the matter to the honorable Chief Justice for the constitution of a larger bench.

11. It is an admitted fact that the petitioner and the respondent No. 3 have filed suits, being the ARM Suit and the SBPL Suit, seeking inter alia the judicial recognition of their interpretation of an oral agreement

inter se. The said suits remain pending and to this date and hence it can safely be stated that the terms of the oral agreement between the parties remain mired in controversy. It is inconceivable that prior to any determination having taken place as to the terms of an agreement, any default in respect thereof could be deemed to have occasioned.

12. In the present case there are no financial agreements recording the relationship between the parties as customer and financial institution, within meaning of the Financial Institutions (Recovery of Finances) Ordinance 2001, or otherwise. There is also no security documentation purporting to secure any obligation that may have accrued. We perused the plaint filed by the respondent No. 3 in the ARM Suit and confronted the learned counsel for the said respondent with the issue of the conspicuous absence of any mention of finance / security documentation therein. The learned counsel categorically submitted that there was no such documentation as the agreement *inter se* was oral and that ARM had approached the concerned Court for recognition of ARM's interpretation of the said oral agreement. In the absence of any crystallized terms of an agreement no default could be proliferated in respect thereof.

13. It is also noted that the ARM Suit *inter alia* claims recovery of Rs. 8,522,500/-; the paragraph wise comments of ARM delineate the recoverable amount as Rs. 17,508,357/-; and the eCIB lists the petitioner as being a defaulter to the tune of Rs. 47,975,029/-. The learned counsel for SBP, when confronted with this anomalous situation, submitted that the SBP merely proliferates that which is reported by the financial institutions from time to time. Such a mechanical approach to an issue effecting the financial viability of persons does not merit the appreciation of this Court.

14. It is also observed that while the Impugned Notice appraised the petitioner of its purported default, it also sought an explanation therefrom with regards to the accuracy / veracity thereof. The petitioner was also provided with a month's time to submit the requisite response. The record reflects that the petitioner did in fact submit its detailed response, within the stipulated timeframe, wherein it was clearly highlighted that the very agreement claimed to have been defaulted upon is yet to be determined and that the said determination has been sought before the Court of competent jurisdiction by each of the parties respectively. However, the SBP appears to have paid no heed to the response provided and placed the petitioner on its defaulter list.

15. In view of the reasons and rationale delineated supra, we are of the considered view that placement by the SBP of the petitioner on its defaulter list / eCIB, prior to the determination of very agreement in respect whereof a default is alleged, was unwarranted in the present facts and circumstances. In pursuance hereof we do hereby direct the respondent No. 2 to remove the name of the petitioner from its defaulter list / eCIB under advisement to all financial institutions concerned.

16. The present petition is hereby allowed in terms herein above.

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