IN THE HIGH COURT OF SINDH KARACHI

Present:
Mr. Justice Muhammad Ali Mazhar
Mr. Justice Adnan Iqbal Chaudhry.

C.P. No. D-905 of 2017	M/s Muslim Commercial Bank Limited versus Federation of Pakistan and two others.
C.P. No. D-6672 of 2017	M/s Muslim Commercial Bank Limited versus Federation of Pakistan and two others.
C.P. No. D-6673 of 2017	M/s Muslim Commercial Bank Limited versus Federation of Pakistan and two others.
C.P. No. D-6674 of 2017	M/s Muslim Commercial Bank Limited versus Federation of Pakistan and two others.
C.P. No. D-6675 of 2017	M/s Muslim Commercial Bank Limited versus Federation of Pakistan and two others.
C.P. No. D-4572 of 2017	M/s Habib Bank Limited versus Federation of Pakistan and two others.
For the Petitioners:	Mr. Kashif Hanif, Advocate in C.P. Nos. D-905 of 2017, 4572 of 2017, 6672 of 2017, 6673 of 2017, 6674 of 2017 and 6675 of 2017.
For the Respondents:	M/s Muhammad Zahid Khan, Shaikh Liaquat Hussain and Muhammad Shoaib Mirza, Assistant Attorney Generals for Respondents No. 1 and 2 in all petitions.
	Mr. Ayaz Ali Hingoro, Advocate for Respondent No. 3, in C.P. No. D-905 of 2017.
	Mr. Shahid Ali Qureshi, Advocate for Respondent No. 3, in C.P. Nos. D-6672 to 6675 of 2017.
	Mr. Ammar Athar Saeed, Advocate for Respondent No. 3, in C.P. No. D-4572 of 2017.

Dates of hearing: 16-08-2018, 31-08-2018, 14-09-2018, 03-10-2018 and 10-10-2018.

J U D G M E N T

Adnan Iqbal Chaudhry J. – The Petitioners in all these petitions are Banks who have impugned decisions passed concurrently by the Banking Mohtasib and the President of Pakistan respectively under the Banking Companies Ordinance, 1962 **[the BCO]** and the Federal Ombudsmen Institutional Reforms Act, 2013 **[the FOIRA]**, whereby the complaints made against the Petitioner Banks were allowed. Since the impugned decisions have been challenged also on jurisdictional and constitutional grounds common to all petitions, we decide these petitions by a common judgment.

I. C.P. No. D-905/2017, *MCB Bank v. Federation of Pakistan*

2. The Respondent No.3, Kulsoom, made a complaint to the Banking Mohtasib under Section 82D of the BCO stating that she was a widow and illiterate; that her father-in-law, namely Rahim Bux (by then deceased), had on 02-03-2012 entrusted the Branch Manager, MCB Market Road Branch, Nawabshah, with Rs. 600,000/- (cheque) with instructions to create a fixed-deposit in the bank account of Kulsoom so that she would be able to get a monthly profit for her and her children's sustenance; that the said deposit was evidenced by a deposit slip issued by the Bank on which was also scribed a note of the Branch Manager stating *"As per instructions of Mr. Rahim Bux Rs.4000/- per month, fixed 7 years only profit"*; that for some time she received monthly profits, but when those stopped, she discovered that the deposit of Rs.600,000 was never made to her account; that the Bank informed her that she had been defrauded by the Branch Manager, but her complaint/claim (dated 11-05-2015) for the return of her money was rejected by the Bank vide letter dated 06-11-2015.

3. The Bank's internal investigation report had found that the Branch Manager was responsible for the fraud, and that there were previous investigation reports finding the same Branch Manager guilty of similar frauds against other account holders whilst he was posted at another Branch. However, by a final report dated 07-09-2015, the Bank concluded that the evidence was not sufficient to hold that the Bank was liable.

4. Before the Banking Mohtasib, the Bank acknowledged that the Branch Manager after misappropriating funds from other accounts had absconded and that an FIR had been lodged against him by the Bank. The case of the Bank before the Banking Mohtasib was that the original deposit slip produced by Kulsoom was no evidence of the alleged deposit as the writing thereon had vanished/become invisible with the passage of time except for the stamp of the Bank. Though a photocopy of the deposit slip, said to have been made at the time the original slip was issued, had been produced by Kulsoom to show the writing thereon, but the Bank contended that such photocopy was unreliable as it could have been fabricated later on. However, it was acknowledged by the Bank that the photocopy of the deposit slip did correctly mentioned Kulsoom's account number, the serial number of the slip and the deposit of Rs.600,000/-; and that the handwriting and the signature on the photocopy of the deposit slip was that of the same Branch Manager.

5. The Banking Mohtasib found the photocopy of the deposit slip to be reliable evidence of the fact that Rs. 600,000/- had been deposited with the Bank for the benefit of Kulsoom with the intent to create a Term Deposit. Therefore, vide decision dated 03-06-2016 the Banking Mohtasib directed the Bank to pay Rs. 600,000/- to Kulsoom with such profit as would be applicable on a Term Deposit.

Against the decision of the Banking Mohtasib, the Bank made a Representation to the President under Section 14 of the FOIRA which was dismissed vide order dated 17-11-2016; hence the subject petition.

II. C.P. No. D-6672 of 2017, *MCB Bank v. Federation of Pakistan*
III. C.P. No.D-6673/2017, *MCB Bank v. Federation of Pakistan*
IV. C.P. No.D-6674/2017, *MCB Bank v. Federation of Pakistan*
V. C.P. No.D-6675/2017, *MCB Bank v. Federation of Pakistan*

6. The Complainants, namely Ghulam Sarwar, Ghulam Mustafa, Ghulam Murtaza and Ali Gohar (Respondent No.3 respectively in the captioned petitions) made complaints to the Banking Mohtasib under Section 82D of the BCO stating that they worked in Jordan and used to deposit their savings in MCB Hub Chowki Branch, Balochistan, by entrusting the same to the Branch Manager; that in 2015 they were shocked to discover that their bank balance did not reflect the deposits made by them; that they were informed by the Bank that they had been defrauded by the Branch Manager; that they had claimed the misappropriated money from the Bank, but the Bank was delaying the process of their claims; hence the complaint to the Banking Mohtasib. In the meantime, the said Branch Manager had been apprehended and imprisoned.

7. The internal investigation report of the Bank did find that the Branch Manager had defrauded the complainants by pocketing their money instead of depositing it in their bank accounts, and by making unauthorized transfers from their bank accounts. However, the Bank did not agree with the quantum of the claims and accepted liability only as under:

Of Customer	*Claimed Amount*	*Claim against Deposit Slips*	*Claim against debit of funds*	*Total Amount Payable against Claim*	*Difference of claimed/payable amount to customer*
Mr. Ali Gohar	*15,259,132*			*15,522,000*	**(265,868)*
Mr. Ghulam Murtaza	*12,001,210*			*4,274,650*	
Mr. Ghulam Sarwar	*20,780,492*			*5,064,000*	
Mr. Ghulam Mustafa	*19,500,000*			*15,239,940*	

**Amount pertain to the profit credited in the customer a/c which was fraudulently debited by the culprit but not claimed by the customer consequently payable amount exceeded the claimed amount.*

Note:- since all customers have PLS accounts hence claims may be settled along with sum of profit amount."

8. As against the Bank's determination of Rs.5,064,000/-, the Banking Mohtasib found that Ghulam Sarwar's claim was valid and payable to the extent of Rs.5,964,000/-. The Banking Mohtasib found this further amount of Rs.900,000/- payable to Ghulam Sarwar for the reason that he was a photo-account holder which entailed that no transaction could have been made from his account without his personal presence, and on the date of the transfer of Rs.900,000/- from Ghulam Sarwar's account, his passport showed that he was abroad. As regards the claims of Ghulam Mustafa, Ghulam Murtaza and Ali Gohar, the Banking Mohtasib agreed with the Bank and accepted the Bank's determination of the amount payable to them (Rs. 15,239,940/-, Rs. 4,274,650/- and Rs. 15,522,000/-respectively).

Therefore, vide separate decisions dated 17-04-2017, the Banking Mohtasib directed the Bank to credit the account of the complainants with the amount determined, plus compensation under section 82E (1)(c) of the BCO by way of profit applicable/payable on a PLS account from the date of the transactions in question to the date the credit is actually made.

9. Surprisingly, even though the Banking Mohtasib had agreed with the Bank as regards the complaints of Ghulam Mustafa, Ghulam Murtaza and Ali Gohar, still the Bank made Representations to the President under Section 14 of the FOIRA. All four Representations were dismissed by the President vide separate orders dated 07-08-2017; hence the subject petitions.

VI. C.P. No. D-4752 of 2017, HBL v. Federation of Pakistan:

10. The Respondent No.3, Yousuf Adil, made a complaint to the Banking Mohtasib under Section 82D of the BCO stating that in July 2016 when he was in London, he received a call from the Bank informing that four transactions aggregating Rs.600,000/- had been

made *via* the internet from his bank account maintained at an HBL Branch at Karachi. Yousuf Adil denied to have made the transactions, however he acknowledged that he had received a phishing email and while replying to such email he had been duped into divulging some personal data. For this reason, that Yousuf Adil was himself to blame for disclosing his personal data on-line, the Bank denied liability.

The funds were transferred in quick succession around mid-night of 26-07-2016 from Yousuf's Adil's account and ultimately to an ABL account in Lahore maintained by one Khalid Waheed Bhatti (the culprit), who withdrew/transferred the funds in the morning of 27-07-2016 around 9:30 a.m. leaving behind a nominal balance and thereafter evaded contact by ABL. Per Yousuf Adil, he had informed the Bank of the fraud at 8:30 a.m. Per the Bank, it made its first contact with ABL (the culprit's bank) at 11:09 a.m.

11. The Banking Mohtasib held that the Bank was liable to make good Yousuf Adil's loss for the following reasons. Firstly, because the Bank was negligent when it delayed contacting ABL and by delaying action on the complaint of 8:30 a.m. until 11:09 a.m., by which time the culprit had withdrawn/transferred the amount. Secondly, the Bank had left its system vulnerable to unauthorized access by failing to implement the 'Two Factor Authentication' (2FA) by the effective date of 01-04-2016 as required by the Regulations for Security of Internet Banking issued by the State Bank vide PSD Circular No.3/2015 dated 21-10-2015, which measure was eventually implemented by the Bank in November 2016 after a delay of seven (07) months. The 2FA was a two-tier security measure that required authentication of an internet banking transaction both by way of a password and a time-token. Per the Banking Mohtasib, had such measure been in place, the complainant's account could not have been accessed by the culprit. Therefore, vide decision dated 20-02-2017, the Banking Mohtasib directed the Bank to credit Yousuf Adil's account with Rs.600,000/-.

Against the order of the Banking Mohtasib, the Bank made a Representation to the President under Section 14 of the FOIRA which was dismissed vide order dated 02-05-2017; hence the subject petition.

12. We have noticed that in all the subject cases, the Bank had, for all intents and purposes, accepted before the Banking Mohtasib that either the Bank it or its employee was at fault. In the case of Kulsoom (C.P. No.D-905/2017), the Bank's internal investigation report had found its Branch Manager to be guilty and had lodged an FIR against him. The Bank had accepted the fact that the photocopy of the deposit slip produced by Kulsoom did correctly mention her account number, the serial number of the slip and the deposit of Rs.600,000/-, and that the handwriting and the signature on the photocopy of the deposit slip was that of the Branch Manager. In the cases of Ghulam Sarwar, Ghulam Mustafa, Ghulam Murtaza and Ali Gohar (C.P. No.D-6672/2017 to C.P. No.D-6675/2017), the internal investigation report of the Bank had found the Branch Manager guilty as alleged. In fact, in the cases of Ghulam Mustafa, Ghulam Murtaza and Ali Gohar, the Banking Mohtasib had ordered payment only of that amount which had been determined by the Bank itself as being payable. In the case of Yousuf Adil (C.P. No. D-4752 of 2017) the Bank had accepted that it had acted with delay on the complaint of the unauthorized transaction; and that the Bank had failed to implement Regulations for Security of Internet Banking (PSD Circular No.3/2015) prescribed by the State Bank of Pakistan which would have been a check on the unauthorized electronic fund transfer.

It appears that for the reasons aforesaid, Mr. Kashif Hanif, learned counsel for the Petitioner Banks while arguing the matter had confined his attack on the impugned orders only on jurisdictional and constitutional grounds and he did not controvert the findings of fact therein.

13. In order to give context to some of the submissions made by learned counsel, it will be expedient to briefly state the law relevant to this discussion.

By the Banking Companies (Amendment) Act, 1997, Act XIV of 1997, a number of provisions of the Banking Companies Ordinance, 1962 were amended, and by Section 15 of the Amending Act, Part IVA i.e. sections 82A to 82G in respect of the Banking Mohtasib were inserted in the Banking Companies Ordinance, 1962 [the BCO]. By the Finance Act, 2007, a number of provisions of the Banking Companies Ordinance, 1962 were again amended, including certain provisions relating to the Banking Mohtasib.

The Federal Ombudsmen Institutional Reforms Act, 2013 [FOIRA] was enacted on 20-03-2013 ***"to make institutional reforms for standardizing and harmonizing the laws relating to institution of Federal Ombudsmen and the matters ancillary or akin thereto: to enhance the effectiveness of the Federal Ombudsmen to provide speedy and expeditious relief to citizens by redressing their grievances to promote good governance; to enable the Federal Ombudsmen to perform their functions efficiently, they should enjoy administrative and financial autonomy."***

The laws which the FOIRA intended to harmonize were Federal legislation in respect Ombudsmen, referred to in section 2(c) of the FOIRA as "relevant legislation", consisting of the Office of the Wafaqi Mohtasib (Ombudsman) Order, 1983; Establishment of the Office of Federal Tax Ombudsman Ordinance, 2000; the Insurance Ordinance, 2000; the Banking Companies Ordinance, 1962; and the Protection against Harassment of Women at the Workplace Act, 2010.

Per section 24 of the FOIRA:

> "24. Overriding effect.—(1) The provisions of this Act shall have effect notwithstanding anything contained in any other law for the time being in force.
> (2) In case there is a conflict between the provisions of this Act and the relevant legislation, the provisions of this Act to the extent of inconsistency, shall prevail."

Section 14 of the FOIRA provided for a Representation to the President from an order passed by an Ombudsman. This section 14, by reason of the *non-obstante* clause contained in the FOIRA, had an overriding effect on section 82E(4) of the BCO which had provided for an appeal to the Governor State Bank of Pakistan from an order passed by the Banking Mohtasib.

In contradistinction to section 82E (7) of the BCO, which had allowed a complainant, not being a bank, to file a suit against the bank even after the Banking Mohtasib rejected the complaint, section 18 of the FOIRA reads as follows:

> "18. Bar of jurisdiction.--- No court or authority shall have jurisdiction to entertain a matter which falls within the jurisdiction of an Ombudsman nor any court or authority shall assume jurisdiction in respect of any matter pending with or decided by an Ombudsman."

14. The submissions made by Mr. Kashif Hanif, learned counsel for the Petitioner Banks to challenge the impugned orders on jurisdictional grounds (as distinct from his submissions on constitutional grounds), the replies of learned counsel for the Respondents, and our finding/decision in seriatim on each of such submissions, follows below.

15. With regards the petitions where the complainants had been defrauded by the Bank's Branch Manager, Mr. Kashif Hanif learned counsel for the Petitioner Banks submitted that firstly the act of the Branch Manager to defraud the complainants was his personal act for which the Bank could not be held vicariously liable; and secondly, that the jurisdiction to determine vicarious liability vested in a civil court, not the Banking Mohtasib.

On the other hand, Mr. Ayaz Ali Hingoro and Mr. Shahid Ali, learned counsel for the Respondent No.3 (complainants before the Banking Mohtasib) respectively in C.P. No.D-905/2017 and C.P. No.D-6672/2017 to C.P. No.D-6675/2017 submitted that the internal investigation report of the Bank submitted before the Banking Mohtasib had clearly found the fraud to have been committed by the

Branch Manager, and thus the Bank's vicarious liability stood established.

16. The argument that the Bank was not vicariously liable for the fraud of its employee, and the argument that the Banking Mohtasib did not have jurisdiction to hold the bank vicariously liable, are both misconceived. Firstly, it is settled law that the employer's vicarious liability extends also for the fraudulent acts of the employee if the fraud was perpetuated in 'the course of employment', and then it does not matter whether the fraud was for the employer's benefit or for the employee's own[1]. Secondly, the very remedy provided to a complainant against a Bank before the Banking Mohtasib proceeds on the principle of vicarious liability. That intent of the legislature is manifest in the following provisions of the BCO:

> "82A (3) The jurisdiction of the Banking Mohtasib in relation to banking transactions shall be to—
> (a) enquire into complaints of banking malpractices;
> (b) perverse, arbitrary or discriminatory actions;
> (c) violations of banking laws, rules, regulations or guidelines;
> (d) inordinate delays or inefficiency and
> (e) corruption, nepotism or other forms of maladministration.
>
> 82B (5) The Banking Mohtasib shall exercise his powers and authority in the following manner:-
> (a) In relation to all banks operating in Pakistan.— The Banking Mohtasib shall be authorised to entertain complaints of the nature set out herein below:-
> (i) ……
> (ii) delays or fraud in relation to the payment or collection of cheques, drafts or other banking instruments or the transfer of funds;
> (iii) fraudulent or unauthorised withdrawals or debit entries in accounts;"

17. Mr. Kashif Hanif, learned counsel for the Petitioner Banks submitted that even if the Banking Mohtasib had the jurisdiction to decide the complaints, he could not have determined the same without recording evidence; that the recording of such evidence was mandatory under sub-section (4)(c) of Section 82B of the BCO; and

[1] See the House of Lords in *Llyod v. Grace Smith & Co.* [1912] AC 716; and the Privy Council in *United Africa Co. Ltd. v. Saka Owoade* [1955] AC 130.

since that was not done, the Bank was deprived of an opportunity to cross-examine the complainants.

On the other hand, Mr. Ayaz Ali Hingoro, learned counsel for the Respondent No.3 (Kulsoom) in C.P. No.D-905/2017 submitted that when the internal investigation report of the Bank submitted before the Banking Mohtasib had found the Branch Manager guilty of the fraud, the question of recording evidence did not arise. Similarly, Mr. Shahid Ali, learned counsel for the Respondent No.3 in C.P. No.D-6672/2017 to C.P. No.D-6675/2017 submitted that the amount ordered to be returned by the Banking Mohtasib to the complainants was the same that had been determined by the Bank itself in its internal investigation report, and therefore the question of recording evidence did not arise. Mr. Ammar Athar Saeed, learned counsel for the Respondent No.3 (Yousuf Adil) in C.P. No.D-4752/2017 too submitted that the question of recording evidence never arose because the Bank had admitted before the Banking Mohtasib that it had not implemented the directives of the State Bank within the stipulated date.

18. Section 82B of the BCO provides that:

> "82B (4) The Banking Mohtasib shall have the power and responsibility—
> (a) to entertain complaints from customers, borrowers, banks or from any concerned body or organization;
> (b) to facilitate the amicable resolution of complaints after giving hearings to the complainant and the concerned bank;
> (c) to receive evidence on affidavit;
> (d) to issue commission for the examination of witnesses; and
> (e) in the event that complaints cannot be resolved by consent, to give finding which shall be acted upon in the manner set out herein."

In our view the words "The Banking Mohtasib shall have the power and responsibility ……. to receive evidence on affidavit" in clause (c) of sub-section (4) of section 82B of the BCO is not to say that that the Banking Mohtasib shall decide all and every complaint after the formal recording of evidence. Rather, the intent is to enable the Banking Mohtasib, should he so deem expedient in the

circumstances of the case, to take evidence of any party or witness by way of an affidavit. Such intent is manifest when sub-section (4)(c) of section 82B is read with sub-section (3) of section 82D of the BCO which reads as under:

> "82D (3). The Banking Mohtasib may adopt any procedure as he considers appropriate for investigating a complaint:
> Provided that he shall not pass any order against a bank without first giving it a notice and an opportunity of a hearing."

Clause (c) was inserted in sub-section (4) of section 82B of the BCO by an amendment in 2007 when sub-section (3) of section 82D was already part of the BCO. Had the intent of the legislature been that complaints before the Banking Mohtasib could, in each and every case, only be decided after the formal recording of evidence, sub-section (3) of section 82D of the BCO would have been omitted. The interpretation of sub-section (4)(c) of section 82B of the BCO being made by learned counsel for the Petitioner Banks would convert the summary nature of proceedings before the Banking Mohtasib to a trial even in cases where the record produced before the Mohtasib is sufficient to hold maladministration.

As discussed in para 12 above, given the findings in the Bank's own internal investigation reports and the acknowledgments made before the Banking Mohtasib, the fraud/maladministration was accepted by the Bank, so also the fact that the Bank's employees were acting in 'the course of employment' when they committed the fraud/maladministration. Therefore, none of the cases required the formal recording of evidence to establish fraud and vicariously liability.

19. Referring to those decisions of the Banking Mohtasib where he ordered the Bank to pay profit to the complainants on their deposits, Mr. Kashif Hanif submitted (a) that the Banking Mohtasib did not have jurisdiction to award profit to a complainant, which jurisdiction vested only in a civil court; and (b) that as regards the complaint of Kulsoom (C.P. No.D-905/2017), the Banking Mohtasib

did not have the jurisdiction to order the Bank to convert the complainant's deposit into a TDR (term deposit).

Regards the first submission, that is negated by sub-section (1)(c) of Section 82E of the BCO which enables the Banking Mohtasib "to pay reasonable compensation to the complainant as fixed by the Banking Mohtasib". A similar provision empowering the Ombudsman to order payment of compensation also exists in sections 22 respectively of the Establishment of the Office of the Wafaqi Mohtasib (Ombudsman) Order, 1983 and the Establishment of the Office of Federal Tax Ombudsman Ordinance, 2000. Similarly, the Provincial Ombudsmen Laws also provide for the same power. In fact, in the cases of Ghulam Sarwar, Ghulam Mustafa, Ghulam Murtaza and Ali Gohar (C.P. No.D-6672/2017 to C.P. No.D-6675/2017), the internal investigation report of the Bank had itself recommended that profit on the misappropriated amount was payable to the complainants at the rate payable on a PLS account. In none of the cases before us did the Banking Mohtasib order payment of any abstract profit, but only that profit which was already prescribed for bank deposits.

Regards to the second submission, that is a result of a misreading of the Mohtasib's order, which order was *"to pay the Complainant the sum of PKR 600,000/- and for opportunity loss, profit at the prevalent rate as applicable on TDR of the same tenure as announced by the Bank from time to time."* Thus, it was not that the Mohtasib ordered to 'convert' the deposit to a TDR, but to pay profit on the deposit at the 'rate' applicable to a TDR, for which purpose the deposit was made.

20. Mr. Kashif Hanif, learned counsel for the Petitioner Banks submitted that sub-section (1) of section 82E of the BCO made it mandatory for the Banking Mohtasib to first mediate the dispute, and only on the failure of such mediation could he proceed to give a decision. He submitted that the failure of the Banking Mohtasib to resort to such mediation was a failure to exercise jurisdiction which vitiated the decision.

Sub-section (1) of section 82E of the BCO reads as under:

> "82E. Recommendations for implementation. (1) In the event the Banking Mohtasib comes to the conclusion that the complaint is justified, in part or in whole, he shall try and facilitate an amicable resolution or settlement by resort to mediation and failing that communicate his findings to the concerned bank with the direction – ……..."

The words in section 82E (1) of the BCO that the Banking Mohtasib "shall try" to mediate, as opposed to 'shall mediate', manifest that the intent is only to equip the Banking Mohtasib with a tool to resolve the dispute, and not to fetter his jurisdiction to decide the matter. The said provision also manifests that the resort to mediation, if any, is envisaged towards the end of the proceedings just before the Banking Mohtasib "*communicates his findings*". Thus, a resort to mediation is made dependent, as it should, on the circumstances of each case, and the best judge of such circumstances is the Banking Mohtasib himself. It is not the case of the Petitioner Banks that before the Banking Mohtasib the parties had a meeting of the minds which should have encouraged the Banking Mohtasib to resort to mediation. Therefore, the argument that it was mandatory for the Bank Mohtasib to mediate the dispute before giving a decision, is misconceived.

21. Regards the decision of the Banking Mohtasib in the case of Yousuf Adil (C.P. No.D-4752/2017), where he ordered the Bank to credit the complainant's account with the amount of the disputed electronic fund transfer, Mr. Kashif Hanif submitted that in view of sections 50, 55 and 67 of the Payment Systems and Electronic Fund Transfers Act, 2007 [the PSEFTA], the latter section being a *non-obstante* clause, the jurisdiction of the Banking Mohtasib to entertain the complaint was ousted and remedy of the complainant was a civil suit for damages under the PSEFTA.

On the other hand, Mr. Ammar Athar Saeed, learned counsel for Yousif Adil submitted that though the complainant had been duped by a phishing email into divulging his personal data on-line, even assuming that he was negligent, the fact of the matter remained that had the 'Two Factor Authentication' (2FA) been implemented

by the Bank as per the Regulations for Security of Internet Banking prescribed by the State Bank of Pakistan, no fraud could have been effected. He submitted that the grievance of the complainant before the Banking Mohtasib was against maladministration, viz. the failure of the Bank to implement banking regulations, which grievance squarely fell within the jurisdiction of the Banking Mohtasib under Section 82A(3) of the BCO. With regards to the *non-obstante* clause contained in Section 67 of the Payment Systems and Electronic Funds Transfer Act, 2007 [the PSEFTA], Mr. Amaar submitted that section 24 of the FOIRA was a subsequent *non-obstante* clause, and in view of the law laid down in *Syed Mushahid Shah v. Federation Investigation Agency* (2017 SCMR 1218), where there are two special laws with competing *non-obstante* clauses, the latter in time prevails.

22. The provisions of the PSEFTA relied upon by Mr. Kashif Hanif to challenge the jurisdiction of the Banking Mohtasib in cases of electronic fund transfers are as follows:

> "50. Damages.- Except as otherwise provided by this section or the provisions of this Act, any person who fails to comply with any provision of this Act with respect to any other person, except for an error resolved in accordance with the provisions of this Act, shall, upon an action brought before a court, be liable to such person for payment of an amount equal to the sum of any actual damage sustained by that person as a result of such failure.
>
> 55. Jurisdiction of Courts.- (1) With regard to the amount in controversy, any civil action under this Act may be brought in any court of competent jurisdiction.
> (2) ……
> (3) ……..
>
> 67. Overriding Effect.- This Act shall have effect notwithstanding anything to the contrary provided in any other law for the time being in force or any agreement, contract, memorandum or articles of association."

The other provisions of the PSEFTA that would be relevant are sections 25 and 71 thereof which read as follows:

> "25. Preservation of Rights, etc. - (1) Except to the extent expressly provided, this Act shall not operate to limit, restrict or otherwise affect -
> (i) any right, title, interest, privilege, obligation or liability of a person resulting from any transaction in respect of a transfer order which has been entered into a Designated Payment System; or
> (ii) any investigation, legal proceeding or remedy in respect of any such right, title, interest, privilege, obligation or liability.
> (2) ……
>
> 71. Complaint Resolution.- (1) A consumer, not satisfied with the outcome of a complaint made to a Financial Institution in relation to any Electronic Fund Transfer or disclosure made by a Financial Institution to a third party, without prejudice to any right to seek any other remedy under the law, may make a complaint to the State Bank.
> (2) The State Bank after hearing the parties may pass such order as it deems fit under the circumstances of the case."

On the other hand, the scope of jurisdiction of the Banking Mohtasib is set out in sections 82A (3) and 82B (5) of the BCO to cover a host of complaints in relation to banking transactions including banking malpractices, perverse actions, violation of banking laws and regulations, inefficiency, corruption, nepotism, other forms of maladministration, delays or frauds in payment or collection of instruments or transfer of funds, and fraudulent or unauthorized withdrawals or debit entries.

23. It will be seen that sections 50 and 55 of the PSEFTA envisage a remedy when there is failure to comply with a provision of the said Act. Therefore, in our view, sections 50 and 55 of the PSEFTA did not oust the jurisdiction of the Banking Mohtasib under the BCO. In fact, sections 25 and 71 of PSEFTA suggest that the remedy available before the Banking Mohtasib under the BCO was not prejudiced by the provisions of PSEFTA. The argument that the jurisdiction of the Banking Mohtasib under the BCO was ousted by the PSEFTA is premised on section 67 thereof, a *non-obstante* clause. It is settled law that a *non-obstante* clause is triggered only in the event of an inconsistency between provisions [see *Syed Mushahid Shah v. Federal Investigation Agency* (2017 SCMR 1218)]. But, the remedy of a suit for damages before a civil court provided under

sections 50 and 55 of the PSEFTA, and the remedy against banking malpractices, violation of banking laws/regulations, other maladministration etc. before the Banking Mohtasib provided under section 82A of the BCO, are not inconsistent with each other. Both operate in their respective fields and remain available to the aggrieved person envisaged there under. One does not exclude the other. Before the Banking Mohtasib the determination is one of maladministration etc., in which compensation if awarded is to address the maladministration. On the other hand, in a suit under the PSEFTA, the determination is whether there has been a failure to comply with a provision of the PSEFTA, and for resulting damages if so proved. Needless to state that the forum deciding the matter may well take into account compensation or damages awarded in the other proceeding.

24. While arguing that the PSEFTA ousts the jurisdiction of the Banking Mohtasib under the BCO, Mr. Kahisf Hanif did not address the effect of the bar of jurisdiction contained in section 18 of the FOIRA (reproduced in para 13 above), therefore we do not discuss that aspect of matter here. But the said argument also fails to notice that the *non-obstante* clause in section 24(1) of the FOIRA was enacted subsequent to the PSEFTA. Had the intent of the legislature been that in cases relating to electronic funds transfers the remedy against maladministration etc. before the Banking Mohtasib was ousted by the PSEFTA, section 18 of the FOIRA being a subsequent enactment, would have provided for that. Even taking the submission of the learned counsel to its logical end, then as laid down in *Syed Mushahid Shah v. Federal Investigation Agency* (*supra*), where two special laws contain competing *non-obstante* clauses [section 67 of the PSEFTA and section 24(1) of the FOIRA], then the general rule is that the latter in time prevails, which in this case would be that of the FOIRA. The upshot of this discussion is that the PSEFTA does not oust the jurisdiction of the Banking Mohtasib.

25. We clarify here that whatever may be the effect of the ouster of jurisdiction clause contained in section 18 of the FOIRA on another forum, which matter we leave for decision in an appropriate case, it does not oust the jurisdiction of a High Court under Article 199 of the Constitution of Pakistan to exercise judicial review over the order passed by the Banking Mohtasib or the President under the BCO and the FOIRA. That much has been laid down in *Peshawar Electric Supply Company Ltd. v. Wafaqi Mohtasib (Ombudsmen), Islamabad* (PLD 2016 SC 940). For a similar ouster of jurisdiction clause contained in the Establishment of the Office of the Wafaqi Mohtasib (Ombudsman) Order, 1983, a Division Bench of this Court in *State Life Insurance Corporation of Pakistan versus Wafaqi Mohtasib* (2000 CLC 1593) had also held that the ouster is only attracted where action was taken within the four corners of the said statute, and any action taken or order made beyond the scope of authority provided in such statute cannot be held to be immune from judicial review by a superior court.

26. The second set of submissions advanced by Mr. Kashif Hanif, learned counsel for the Petitioner Banks to challenge the impugned orders, asserted that certain provisions of the BCO relating to the Banking Mohtasib and certain provision of the FOIRA were *ultra vires* the Constitution of the Islamic Republic of Pakistan, 1973, and thus were to be struck down by this Court in the exercise of constitutional jurisdiction. These submissions, the counter submissions of learned counsel for the Respondents, and our finding/decision on each of said submissions follows below.

27. Mr. Kashif Hanif submitted that the power of the Banking Mohtasib "to receive evidence on affidavit" in clause (c) of sub-section (4) of Section 82B of the BCO was inserted by way of the Finance Act, 2007 which was a 'Money Bill'. He submitted that per Article 73 of the Constitution, legislation by way of a Money Bill was confined to matters listed under Article 73(2) of the Constitution; that clause (c) in sub-section (4) of section 82B of the BCO to give the Banking Mohtasib additional powers had nothing to do with the

matters enumerated in Article 73(2) of the Constitution; and therefore clause (c) of sub-section (4) of section 82B of the BCO was un-constitutional. To support such submission, learned counsel relied on *Workers' Welfare Funds v. East Pakistan Chrome Tannery* (PLD 2017 SC 28).

On the other hand, Mr. Shahid Ali Advocate submitted that the provisions in respect of the Banking Mohtasib were part and parcel of the BCO, and since the subject matter of the BCO was a matter relating to the "financial obligations" of the Government within the meaning of clause (b) of Article 73(2) of the Constitution of Pakistan, the amendments to the BCO by way of a Money Bill were lawful. He submitted that the Finance Act, 2007 was not the first time that the BCO had been amended by way of a Money Bill, and that earlier as well, a number of amendments were made to the BCO by the Finance Act, 1990. Mr. Ammar Athar Saeed Advocate submitted that nothing turns on the insertion of the power "to receive evidence on affidavit" by way of a Money Bill or otherwise, as even prior to such insertion, the Banking Mohtasib had the power to "adopt any procedure as he considers appropriate for investigating a complaint" as provided in sub-section (3) of section 82D of the BCO.

28. By the Finance Act, 2007, a number of amendments were made to the BCO (as a whole), some of which were in sections 82B, 82D and 82E of the BCO relating to the Banking Mohtasib. Of the provisions of the BCO so amended, Mr. Kashif Hanif took issue only to the insertion of clause (c) in sub-section (4) of Section 82B of the BCO.

We have in para 18 above already interpreted the intent and scope of the Mohtasib's power "to receive evidence on affidavit" in sub-section 4(c) of section 82B of the BCO to show that the said provision does not bestow any right in any party before the Banking Mohtasib. But it is indeed strange that one the one hand, as discussed in para 18 above, the grievance of the Petitioners was that the Banking Mohtasib had failed to exercise jurisdiction under

clause (c) of sub-section (4) of section 82B BCO to the detriment of the Petitioners, and on the other hand the Petitioners contend that that very provision is unconstitutional. That is blowing hot and cold at the same time. Nonetheless, the submission made by Mr. Shahid Ali Advocate that the provisions in respect of the Banking Mohtasib were part and parcel of a statute (the BCO) that dealt with "financial obligations" of the Government so as to qualify under Article 73(2) of the Constitution, would require some examination. But even assuming that the provisions of the BCO relating to the Banking Mohtasib cannot be classified under any of the matters listed in Article 73(2) of the Constitution, we fail to see how clause (c) of sub-section (4) of section 82B of the BCO prejudices the Petitioners when admittedly that provision was never invoked by the Banking Mohtasib in passing any of the impugned orders for the reason that in the facts of C.P. No.D-905/2017 and C.P. No.D-6672 to 6675/2017, the Banks' own internal investigation had found its Branch Manager to have committed the fraud, and in the facts of C.P. No.D-4752/2017 the Bank had conceded that it had not implemented the directives of the State Bank within the stipulated time. Since maladministration stood established by admitted facts, the need to record evidence never arose. In other words, the challenge to clause (c) of sub-section (4) of section 82B of the BCO is a challenge for the sake of a challenge which will have no bearing on the cases presently before us. In these circumstances, we are not inclined to embark on any analysis of the constitutionality of the said provision, leaving such matter for consideration in a case more appropriate.

29. Mr. Kashif Hanif, learned counsel for the Petitioner Banks had submitted, *albeit* only in the passing, that section 14 of the FOIRA (Representation to the President), which had overridden sub-section (4) of section 82E of the BCO (appeal to the Governor State Bank of Pakistan), infringes upon the Petitioners' Fundamental Right to due process as it replaces the right of an appeal by a Representation. However, we have seen that the Petitioners had accepted the President's jurisdiction and availed the remedy of a Representation

under section 14 FOIRA without ever disputing the same. Nonetheless, when the orders of the President were passed after providing the Petitioners with a hearing, after a reappraisal of the entire record/evidence, and by giving detailed reasons, practically proceeding with the matters before him as appeals, the cases before us do not present circumstances where the Petitioners can claim to be aggrieved of section 14 of the FOIRA.

30. We now advert to the thrust of the Petitioners' challenge which was to the constitutionality of the FOIRA. Mr. Kashif Hanif submitted that section 10 to 12 of the FOIRA were *ultra vires* Articles 175, 202 and 203 of the Constitution of Pakistan for the following reasons:

(a) that since the Banking Mohtasib was not a 'Court' established under Article 175 of the Constitution, nor an Administrative Court or Tribunal established under Article 212 of the Constitution, it cannot be conferred the powers of a 'Court' to grant a temporary injunction, to implement its orders and decisions, and to punish for contempt by way of sections 10 to 12 of the FOIRA;

(b) that while exercising powers under sections 10 to 12 of the FOIRA, the Banking Mohtasib acts as a Court beyond the administrative supervision of the High Court contrary to Articles 202 and 203 of the Constitution;

(c) that by creating a parallel judicial system beyond the administrative supervision of the superior courts, sections 10 to 12 of the FOIRA strike at the principle of separation of powers and independence of the judiciary.

31. The case-law relied upon by Mr. Kashif Hanif to distinguish between a Court and other fora were that of *Mir Rehman Khan v. Sardar Asadullah Khan* (PLD 1983 Quetta 52); and *Shafatullah Qureshi v. Federation of Pakistan* (PLD 2001 SC 142). To challenge the vires of the FOIRA, learned counsel relied on *Riaz-ul-Haq v. Federation of Pakistan* (PLD 2013 SC 501); *Khan Asfandyar Wali v. Federation of Pakistan* (PLD 2001 SC 607); *In the matter of: Reference No.02/2005 by*

the President of Pakistan (re the *Hisba Bill)* (PLD 2005 SC 873); *Mehram Ali v. Federation of Pakistan* (PLD 1998 SC 1445); and *Sharaf Faridi v. Federation of Pakistan* (PLD 1989 Karachi 404). Mr. Kashif Hanif placed specific reliance on *UBL V. Federation of Pakistan* (2018 CLD 587), wherein a learned Single Judge of Lahore High Court has declared unconstitutional sections 82-A, 82-B and 82-E of the BCO, and sections 10, 11, 12 and 15 of the FOIRA.

32. Mr. Amaar Athar Saeed, learned counsel for the Respondent No.3 in C.P. No.D-4752/2017 submitted that it had been laid down in *Federation of Pakistan v. Muhammad Tariq Pirzada* (1999 SCMR 2744) (*Tariq Pirzada-I*), and *Federation of Pakistan v. Muhammad Tariq Pirzada* (1999 SCMR 2189) (*Tariq Pirzada-II*), that an Ombudsman / Mohtasib is not a 'Court', but a quasi-judicial authority. He relied on *Dr. Zahid Javed v. Tahir Riaz Chaudhry* (PLD 2016 SC 637) to explain what is meant by a quasi-judicial authority. He submitted that even if the Banking Mohtasib were given certain powers of a civil court, such as to record evidence and to implement its decision, that by itself did not make it a Court, as such powers could also be exercised by a quasi-judicial authority. He submitted that the test for determining which forum is a 'Court' and which is not, has been laid down in *Shafatullah Qureshi v. Federation of Pakistan* (PLD 2001 SC 142).

Mr. Amaar Athar Saeed further submitted that even prior to the enactment of the FOIRA, section 10(5) of the Establishment of the Office of Wafaqi Mohtasib Order, 1983 empowered the Wafaqi Mohtasib to adopt such procedure as he considers appropriate for investigating a matter before him; section 16 thereof vested the Wafaqi Mohtasib with the power to punish for contempt; and section 25 thereof empowered the Wafaqi Mohtasib to require any party to submit evidence by affidavit. Therefore, he submitted, that nothing substantial has been brought about by the FOIRA, the primary intent of which was to stream-line the Federal legislation on Ombudsmen including the Banking Mohtasib under the BCO.

33. The learned Assistant Attorney General who was on notice under Order XXVII-A CPC, submitted that the impugned orders are speaking orders which have been passed after a proper appraisal of the record, by applying a judicious mind, and after due process, and therefore, in view of section 18 of the FOIRA, no case for exercising writ jurisdiction is made out. As regards the challenge to the provisions of the FOIRA, the learned Assistant Attorney General while reiterating the arguments made in support of the said provisions, added that it is manifest that the challenge has been brought by the Banks as an afterthought to frustrate the forum of the Banking Mohtasib. He also relied upon *Federation of Pakistan v. Muhammad Tariq Pirzada* (1999 SCMR 2189) to submit that the decisions of the Banking Mohtasib as affirmed by the President are binding on the Petitioner Banks and need to be implemented.

34. We note here that the aforesaid challenge to the *vires* of sections 10 to 12 of the FOIRA does not go to the creation of the forum of the Banking Mohtasib, but to the exercise of certain powers subsequently given to such forum by certain overriding provisions of the FOIRA.

35. Article 175 of the Constitution provides for the Supreme Court and the High Courts, and for "such other courts as may be established by law", and it also provides for the separation of the Judiciary from the Executive. Article 202 of the Constitution provides that "Subject to the Constitution and law, a High Court may make rules regulating the practice and procedure of the Court or of any court subordinate to it"; and Article 203 provides that "Each High Court shall supervise and control all courts subordinate to it." Thus, together, Articles 175, 202 and 203 embody the principle of separation of the Judiciary from the Executive and of the independence of the Judiciary.

Apart from those 'other courts' (i.e. other than the Supreme Court and the High Courts) that may be established by law pursuant to Article 175 of the Constitution, Article 212 of the Constitution also

provides for the establishment of Administrative Courts and Tribunals to exercise exclusive jurisdiction in respect of certain matters that are specified in the said Article. Further, Article 225 of the Constitution provides for the establishment of a tribunal to decide election disputes.

36. Sections 10 to 12 of the FOIRA read as under:-

> "10. Powers of Ombudsman. In addition to powers exercised by Ombudsman under the relevant legislation, he shall also have following powers of a civil court namely:-
> (i) granting temporary injunctions; and
> (ii) implementation of the recommendations orders or decisions.
>
> 11. Temporary Injunction--. The Ombudsman may stay operation of the impugned order or decision for a period not exceeding sixty days.
>
> 12. Power to punish for contempt.- An Ombudsman shall have power to punish for contempt as provided in the Contempt of Court Ordinance, 2003 (V of 2003)."

The challenge to the *vires* of the aforesaid provisions is essentially premised on the apprehension that the Banking Mohtasib may invoke sections 10(ii) and 12 of the FOIRA to implement the impugned orders. Therefore we will confine ourselves only to the constitutionality of these two provisions as these are the only ones that the Petitioners can claim to be presently confronted with. In other words, we are not inclined to embark upon an analysis of those provisions of the FOIRA that would have no bearing on the case of the Petitioners.

37. Before discussing the effect of sections 10(ii) and 12 of the FOIRA, it is necessary to highlight the legal status of an Ombudsman / Mohtasib and the nature of the proceedings before it. Since the said has already been dealt with by the Honourable Supreme Court of Pakistan, we need only to cite from those judgments as follows.

In the case of *Federation of Pakistan v. Muhammad Tariq Pirzada* (1999 SCMR 2744) (*Tariq Pirzada-I*, decided on 22-02-1999), the

question before the Supreme Court was whether the recommendation of the Mohtasib under the Establishment of the Office of the Wafaqi Mohtasib (Ombudsman) Order, 1983 could be set aside by the President without assigning reasons and whether such order of the President could then come under the judicial review of the High Court. Resultantly, the question arose whether the order of the Mohtasib was a judicial act. As to what constitutes a judicial act, the Supreme Court cited the Privy Council in *Nakkauda Al v. M.F. De S. Jayarane* (PLD 1950 PC 102) to state that the only relevant criteria as to whether an act is a judicial act is not the general status of the person or body of persons by whom the impugned decision is made, but the nature of the process by which he or they are empowered to arrive at their decision; that when it is a judicial process or a process analogous to the judicial, certiorari can be granted. The Supreme Court held that the functions performed by the Mohtasib were quasi-judicial in nature and therefore his findings and recommendations could not be arbitrarily set aside without assigning valid reasons, and that the High Court in its constitutional jurisdiction can interfere in the order passed by the President.

Tariq Pirzada-I came up in review in *Tariq Pirzada-II*, reported as *Federation of Pakistan v. Muhammad Tariq Pirzada* (1999 SCMR 2189) (decided on 01-07-1999). There, it was reiterated that functions performed by the Wafaqi Mohtasib were quasi-judicial. It was further held that the jurisdiction vested in the President under Article 32 of the Establishment of the Office of the Wafaqi Mohtasib (Ombudsman) Order, 1983 partakes of appellate jurisdiction and therefore application of judicial mind is a must for reaching a fair and just conclusion. The case of *Hafiz Muhammad Arif Dar v. Income Tax Officer* (PLD 1989 SC 109) also came under discussion, which in turn had observed, as regards to the Wafaqi Mohtasib, that:

> "That forum has several attributes of a Court in many aspects of its powers. It can also move in a matter promptly whenever so needed. At the same time it does not suffer from some of the handicaps, due to the technicalities of procedural nature, which operate as impediments or thwart such like action by the Courts."

While addressing the argument that the recommendations of the Wafaqi Mohtasib were recommendary in nature and not binding on the Government, the Supreme Court cited various directives of the President and the Prime Minister directing the agencies to implement the findings / recommendations of the Wafaqi Mohtasib and to desist from making unnecessary Representations. It was observed by the Supreme Court that it has been departmental interpretation of the Federal Government itself that recommendations of the Mohtasib ought to be implemented promptly. Regards the tendency of the agencies to file unnecessary Representations before the President, the Honourable Supreme Court observed as follows:

> "13. Needless to observe that the office of the Ombudsman has been created for redressal of grievances of the citizens who are not in a position to approach the Courts/officials and the Ministries concerned. We note with great concern that notwithstanding various directives issued by the President and the Prime Minister from time to time urging the Federal agencies to implement the orders of Wafaqi Mohtasib, a large number of representations are invariably filed and the same remain pending at that juncture. A general perception is that dilatory tactics are resorted to by the agencies/Government functionaries to see to it that the orders passed favouring the citizens are made the subject-matter of the Representation under Article 32 of the Order and thereby thwarting the further process/implementation thereof. We express our deep concern about the alarming situation with a view to alleviating the miseries of the citizens who run from pillar to post to obtain relief in terms of the orders of the Mohtasib."

38. The legal status of the Mohtasib under the Establishment of the Office of the Wafaqi Mohtasib (Ombudsman) Order, 1983 again came under discussion before the Supreme Court in *Shafaatullah Qureshi v. Federation of Pakistan* (PLD 2001 SC 142) and it was held that since the Wafaqi Mohtasib was not a Court nor a Judicial Tribunal therefore the period consumed in proceedings before it could not be excluded under section 14 of the Limitation Act, 1908. While discussing what is a 'Court', the Supreme Court referred to *Mir Rehman Khan v. Sardar Asadullah Khan* (PLD 1983 Quetta 52) which had held that the determination of the question which forum is a Court and which is not, is mainly dependant on the manner and

method in which proceedings are regulated before it; that forums which are not bound by any law with regard to procedure and evidence, and only settle disputes but do not administer justice according to law, are not Courts; that Courts are such organs of the State which follow legally prescribed scientific methodology as to procedure and evidence in arriving at just and fair conclusion. The Supreme Court observed that had the legislature intended for the Wafaqi Mohtasib to serve as a Court or Judicial Tribunal, it would have stated so in the Establishment of the Office of the Wafaqi Mohtasib (Ombudsman) Order, 1983; therefore the status of a Court cannot by implication be conferred on the Wafaqi Mohtasib when it cannot deliver a binding judgment; that though the office of the Mohtasib has been created for redressal of the grievance of the citizens but it is neither a Court nor a judicial tribunal within the scope of Article 175 of the Constitution. While approving *Tariq Pirzada-II*, i.e. the Wafaqi Mohtasib was a quasi-judicial authority, the Supreme Court further held that performance of quasi-judicial functions by itself does not convert an authority into a Court, and that whether an act is quasi-judicial or purely executive depends on the interpretation of rules/law under which the authority exercises its jurisdiction; that many authorities are not Court, although they have to decide questions and have to act judicially in the sense that the proceedings shall be conducted with fairness and impartiality; that in order to constitute a Court in the strict sense, it should have power to give a decision or a definitive judgment, which has finality and authoritativeness.

39. 'Quasi-judicial' power was eloquently described in *Dr. Zahid Javed v. Dr. Tahir Riaz Chaudhry* (PLD 2016 SC 637). There a larger Bench of the Supreme Court of Pakistan while discussing the question whether the Revisional powers of the Chancellor under the University of the Punjab Act, 1973 was an administrative power or quasi-judicial power, held (per majority) that:

> "A 'quasi judicial' power is one imposed on an officer or an authority involving the exercise of discretion, judicial in its nature, in connection with, and as incidental to, the administration of

> matters assigned or entrusted to such officer or authority. A 'quasi judicial act' is usually not one of a judicial tribunal, but of a public authority or officer, which is presumably the product or result of investigation, consideration, and human judgment, based on evidentiary facts of some sort in a matter within the discretionary power of such authority or officer. A quasi judicial power is not necessarily judicial, but one in the discharge of which there is an element of judgment and discretion; more specifically, a power conferred or imposed on an officer or an authority involving the exercise of discretion, and as incidental to the administration of matters assigned or entrusted to such officer or authority."

40. Deducing from the above discussed judicial pronouncements, the following can be said of the forum of the Banking Mohtasib with some certainty:

(i) the Banking Mohtasib under the BCO, so also the President acting upon a Representation under the FOIRA, are quasi-judicial authorities performing quasi-judicial functions (*Tariq Pirzada-I, Tariq Pirzada-II, and Shafaatullah Qureshi*);

(ii) the Representation made to the President under section 14 of the FOIRA partakes of appellate jurisdiction (*Tariq Pirzada-II*);

(iii) a 'quasi-judicial act' can be described as the product of investigation, consideration, and human judgment, based on some evidentiary facts in a matter in the discharge of which there is an element of judgment and discretion *(Dr. Zahid Javed)*;

(iv) the fact that a quasi-judicial authority has certain attributes of a Court and is required by law to act 'judicially' in the sense of acting fairly and impartially, does not make it a Court (*Shafaatullah Qureshi*);

(v) fora which are not bound by any law with regards to procedure and evidence, and only settle disputes but do not administer justice according to law, are not 'Courts' (*Shafaatullah Qureshi*);

(vi) the exercise of quasi-judicial functions by the Banking Mohtasib does not make it a Court or a judicial tribunal within the meaning of Article 175 of the Constitution of Pakistan (*Shafaatullah Qureshi*).

41. Further, and more significantly, under Part I of the Federal Legislative List (Fourth Schedule to the Constitution of Pakistan), 'Federal Ombudsman' is a separate and distinct legislative field (see Entry No.13) from the legislative fields of 'Administrative Courts and Tribunals for Federal subjects' (Entry No.14) and 'Jurisdiction and powers of all courts, except the Supreme Court, ……..'' (Entry No.55). Thus Federal legislation in respect of Federal Ombudsman is not legislation in respect of a 'Court' pursuant to Article 175 of the Constitution or Entry No.55 of the Federal Legislative List, nor is it legislation pursuant to Article 212 of the Constitution or Entry No.14 of the Federal Legislative List.

42. Having seen that the Banking Mohtasib is not a 'Court' within the meaning of Articles 175, 202 or 203 of the Constitution of Pakistan, nor is it intended to perform judicial functions like a Court, it cannot be said that the Banking Mohtasib *per se* is a parallel judicial system beyond the administrative supervision of the High Court which is exercised under Article 203 of the Constitution of Pakistan. Consequently, in our view, the performance of quasi-judicial functions by the Banking Mohtasib does not raise concerns with regards to the separation and independence of the judiciary.

43. We now advert to the question whether the conferring of "powers of a civil court" on the Banking Mohtasib for "implementation of the recommendations orders or decisions" by section 10(ii) of the FOIRA is strictly a judicial function exercisable only by a Court, and therefore making the said provision *ultra vires* Articles 175, 202 and 203 of the Constitution of Pakistan.

> Sub-sections (5) and (6) of sections 82E of the BCO state:
>
> (5) The findings of Banking Mohtasib shall be implemented by the concerned bank or financial institution within forty days and compliance thereof shall be submitted accordingly. In case an [appeal][2] against the decision of the Banking Mohtasib is preferred

[2] The word 'appeal' is overridden by section 14 of the FOIRA which provides instead for a Representation to the President.

> to the [Governor State Bank][3] the aforesaid period of forty days shall be reckoned from the date of decision of [appeal][4].
>
> (6) Any order passed by the Banking Mohtasib which has not been appealed against within a period of thirty days from the date of order, or any order passed by the [State Bank in appeal][5], as the case may be, shall become final and operative and if not implemented shall render the bank concerned to such action including the imposition of a fine or penalty as the State Bank may deem fit, and in relation to a bank officer, to the appropriate disciplinary or other proceedings."

Thus sub-section (5) of section 82E mandates that, subject to the order passed by the President on Representation, an order given by the Banking Mohtasib shall be implemented by the concerned bank. Under sub-section (6) of section 82E of the BCO, once the order of the Banking Mohtasib attains finality, then a failure to implement the same exposes the bank to action by the State Bank, which may include fine/penalty on the bank and disciplinary proceedings against its officers. But that did not mean to say that prior to section 10(ii) of the FOIRA the Banking Mohtasib was devoid of powers to take action for the implementation of his orders when sub-section (5) and (6) of section 82E of the BCO expressly commanded the implementation of his orders. It is settled law that a statutory forum conferred with the power to decide a dispute has the 'implied power' to implement its order. This principle of 'implied power' is explained in the case of *Justice Shaukat Aziz Siddiqui v. Federation of Pakistan* (PLD 2018 SC 538) as follows:

> "It is settled law that where a law (more so the Constitution) confers jurisdiction it impliedly also grants the power to do all such acts and employs all such means as are essential and necessary for the exercise of such jurisdiction. This principle of implied power' is based on the well known legal maxim *'Cui Jurisdictio Data Est, Ea Quoque Concessa Esse Videntur, Sine Quibus Jurisdictio Explicari Non Potuit'* i.e 'To whomsoever a jurisdiction is given, those things are also supposed to be granted, without which the jurisdiction cannot be exercised.' Reference, in this behalf, may be made to 'N S Bindra's Interpretation of Statutes', (Tenth Edition at page 642)."

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[3] Ibid. Read 'President' instead of 'Governor State Bank'.
[4] Ibid. Read 'Representation' instead of 'appeal'.
[5] Ibid. Read 'President in Representation' instead of 'State Bank in appeal'.

However, after section 10(ii) of the FOIRA, the implementation powers of the Banking Mohtasib are express. The intent of course is to bring public confidence to the forum of the Banking Mohtasib.

44. Mr. Kashif Hanif had argued that the 'powers of a civil court' in section 10(ii) of the FOIRA is a reference to the Code of Civil Procedure, 1908, and where the Banking Mohtasib exercises such powers, it performs strictly a judicial function and is, for all intents and purposes, a 'Court'. But that argument fails to notice that a number of quasi-judicial forums and Regulatory Authorities which are not 'Courts' are vested with powers of a civil court, with specific reference to the Code of Civil Procedure, 1908, not only for summoning witnesses, examining them, for discovery, to receive evidence on affidavit, to issue commissions for examination of witnesses etc., but also for the implementation their decisions. To illustrate, under section 40 of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997, the determination by the National Electric Power Regulatory Authority on the decision of the tribunal set-up under the said Act, is deemed to be a decree of a civil court under the Code of Civil Procedure, 1908. Under sections 138 and 138A of the Income Tax Ordinance, 2001, for the purpose of recovery of tax, the Commissioner and the District Officer (Revenue) respectively, have the same powers as a civil court under the Code of Civil Procedure, 1908 for recovery of any amount due under a decree. Under section 79 of the Copyright Ordinance, 1962, every order made by the Registrar of Copyrights or the Copyright Board for the payment of money, shall on a certificate issued by the said Registrar or Board, be deemed to be a decree of a civil court and shall be executable in the same manner as a decree of such court. Under section 22 of the Sindh Rented Premises Ordinance, 1979, the Rent Controller, which is not strictly a Court, is vested with the power to execute final orders passed under the said Ordinance. Thus, the conferring of the power of a civil court on the Banking Mohtasib is in the same vein. In fact, since the conferment

of such powers is by way of a legal fiction, it is an acknowledgment of the fact that the such forum is not a Court, but that as a quasi-judicial authority it must be conferred the power to enforce its orders.

In the case of *State of Karnatka v. Vishwabharti House Building Property Society* (AIR 2003 SC 1043), a challenge to the constitutionality of certain quasi-judicial fora (consumer courts under the Consumer Protection Act, 1986), one of the provisions questioned was one that provided that the order of the consumer court shall be deemed to be a decree or order made by a civil court in a suit. It was held by the Supreme Court of India that such provision was a legal fiction created for the specific purpose of execution of the order passed by that forum; that the such provision "*is akin to Order 39, Rule 2-A of the Code of Civil Procedure or the provisions of Contempt of Court Act or section 51 read with Order 21, Rule 37 of the Code of Civil Procedure*". It was further held that "*It is well settled that the cardinal principle of interpretation of statutes is that courts or tribunals must be held to possess power to execute their own order.*"

Therefore, in our view, the boundaries of a quasi-judicial forum such as the Banking Mohtasib that is permitted to act beyond the purview of Articles 175, 202 and 203 of the Constitution, are not breached merely by the fact that such forum is conferred with certain powers of a civil court to implement its orders. To reiterate from *Shafaatullah Qureshi (supra*), the fact that a quasi-judicial authority has certain attributes of a Court, does not make it a Court.

45. Mr. Kashif Hanif, learned counsel for the Petitioners had placed reliance on the case reported as *In the matter of: Reference No.02/2005 by the President of Pakistan (re the Hisba Bill)* (PLD 2005 SC 873) to show that there the forum of a Mohtasib proposed under the Hisba Bill was declared to be unconstitutional by the Supreme Court of Pakistan on the ground that it amounted to setting up a parallel justice system. That is a reading of that case out of context. The opinion of the Supreme Court was that a number of provisions of the Hisba Bill were "violative of Article 2-A, 4, 9, 14, 16, 17, 18, 19, 20

and 25 as well as Article 175 of the Constitution being vague, over-broad, unreasonable, based on excessive delegation of jurisdiction, denying the right to access to justice to the citizens and attempting to setup parallel judicial system." Such opinion was made after noticing *inter alia* that the Hisba Bill if enacted would have the following effect:

> "Likewise, an individual having different religious standards/values of understanding the Sharia, as, per his sect, is not bound to obey 'Hukam-nama' [order] of 'Mohtasib' but due to unbridled/ unfettered/arbitrary powers of 'Mohtasib' he would have no option but to obey it. Thus, such conduct of 'Mohtasib' is bound to create `Fasad' among different sects of Islam, particularly between Sunnis and Ahl-e-Tashees."
>
> "We are in quite agreement with the contention of learned Attorney General that private life, personal thoughts and the individual beliefs of citizens cannot be allowed to be interfered with. The above discussion persuades us to hold that powers of passing order of judicial nature have been conferred upon 'Mohtasib', being an Executive Officer, basically appointed under the Hisba Bill, to inquire/investigate into the cases of mal-administration of Government Agencies as well as in respect of the religious/personal affairs of the individuals and at the same time blocking the powers of judicial review by the civil/criminal courts, which are under the protection of the Constitutional law."

If anything, the case of Hisba Bill goes against the Petitioners inasmuch as, to arrive at its opinion, the Honourable Supreme Court had distinguished the Mohtasib under the Hisba Bill from the Wafaqi Mohtasib under Office of the Wafaqi Mohtasib (Ombudsman) Order, 1983.

As regards *UBL V. Federation of Pakistan* (2018 CLD 587), where a learned Single Judge of Lahore High Court has declared unconstitutional certain provisions of the BCO relating to the Banking Mohtasib and certain provision of the FOIRA, with great respect to the learned Judge, and as discussed herein, we do not entirely agree with that view and have formed our own opinion.

The cases of *Riaz-ul-Haq v. Federation of Pakistan* (PLD 2013 SC 501); *Khan Asfandyar Wali v. Federation of Pakistan* (PLD 2001 SC 607); *Mehram Ali v. Federation of Pakistan* (PLD 1998 SC 1445); and *Sharaf Faridi v. Federation of Pakistan* (PLD 1989 Karachi 404) relied upon by Mr. Kashif Hanif are not attracted inasmuch as the fora under

discussion in those cases were held to be performing strictly judicial functions of a Court and that is why it was held that to ensure the separation and independence of the judiciary under Article 175(3) of the Constitution, the appointments to such fora were required to made in consultation with the respective Chief Justice. Whereas in *Tariq Pirzada-I* (1999 SCMR 2744), *Tariq Pirzada-II* (1999 SCMR 2189), and *Shafaatullah Qureshi v. Federation of Pakistan* (PLD 2001 SC 142) the Honourable Supreme Court of Pakistan has already held that the Ombudsman /Mohtasib perform quasi-judicial functions and is not a Court within the meaning of Article 175 of the Constitution.

46. Section 12 of the FOIRA however presents an entirely different matter. It provides that all Federal Ombudsmen including the Banking Mohtasib shall have the power to punish for contempt as provided in the Contempt of Court Ordinance, 2003. Though such power did not previously vest in the Banking Mohtasib, but prior to the FOIRA, sections 16 respectively of the Establishment of the Office of the Wafaqi Mohtasib (Ombudsman) Order, 1983 and the Establishment of the Office of Federal Tax Ombudsman Ordinance, 2000 provided that the said Ombudsmen shall have the same powers as the Supreme Court to punish for contempt, and provided for an appeal to the Supreme Court from such an order. But after the FOIRA, all Federal Ombudsmen, including the Banking Mohtasib have been conferred powers "to punish for contempt as provided in the Contempt of Court Ordinance, 2003." The anomaly in that is (a) the Contempt of Court Ordinance, 2003 only contemplates contempt committed in relation to a 'Court', (including certain acts in relation to a 'Judge') which the Banking Mohtasib is not; (b) the Contempt of Court Ordinance, 2003 only deals with the power of a 'Superior Court' (the Supreme Court and the High Courts) to punish for contempt; and (c) the right of an appeal provided in section 19 of the Contempt of Court Ordinance, 2003 is only from an order passed by a superior court. Therefore, the argument that section 12 of the FOIRA equates the Ombudsman / Mohtasib to a Court established under Article 175 of the Constitution, does carry some weight, and it

then raises the question that if the Banking Mohtasib is not a Court, can it even be conferred the power to punish for contempt.

47. Article 204 of the Constitution of Pakistan reads:

> "204. (1) In this Article, "Court" means the Supreme Court or a High Court.
> (2) A Court shall have power to punish any person who—
> (a) abuses, interferes with or obstructs the process of the Court in any way or disobeys any order of the Court ;
> (b) scandalizes the Court or otherwise does anything which tends to bring the Court or a Judge of the Court into hatred, ridicule or contempt;
> (c) does anything which tends to prejudice the determination of a matter pending before the Court; or
> (d) does any other thing which, by law, constitutes contempt of the Court.
> (3) The exercise of the power conferred on a Court by this Article may be regulated by law and, subject to law, by rules made by the Court."

A careful reading of the Article 204 shows that while the legislature may under sub-Article (1)(d) add as to what constitutes contempt of Court, and it may under sub-Article (3) regulate the power to punish for contempt, but that power to punish remains vested by sub-Articles (1) and (2) only in the Supreme Court and the High Courts. While Article 203E (3) of the Constitution does confer on the Federal Shariat Court the same power as a High Court to punish for its contempt, nothing in Article 204 of the Constitution envisages any sub-constitutional legislation to confer power to punish for contempt on any other Court or authority apart from the Supreme Court and a High Court.

The aforesaid limitation on the legislation envisaged under Article 204 of the Constitution was highlighted in *Baz Muhammad Kakar v. Federation of Pakistan* (PLD 2012 SC 923), where the Supreme Court of Pakistan in declaring unconstitutional the Contempt of Court Act, 2012 (COCA 2012), held as follows:

> "38. Article 204(2)(d) and Article 204(3) confer two different types of power on the Parliament. Under the former, the Parliament is empowered to make law providing for more offences of contempt of the Court, which is clear from the wording used therein, i.e.

'does any other thing which, by law, constitutes contempt of the Court'. In other words, here the Parliament is empowered to add to the offences already described in Article 204(2)(a), (b) & (c). On the other hand, under Article 204(3) the Parliament is empowered to make law to regulate the exercise of power conferred on a Court under this Article. Thus, these are two distinct areas of legislation envisaged by Article 204. The Preamble to COCA 2012 explicitly provides that it is expedient to repeal and re-enact a law of contempt in exercise of the powers conferred by clause (3) of Article 204 of the Constitution of Islamic Republic of Pakistan. Thus, the legislation under scrutiny has been enacted under Article 204(3), which is restricted to providing for matters enumerated therein, namely, to regulate the exercise of power.

47. It is vehemently contended by Mr. A.K. Dogar, learned ASC that section 2(a) of COCA 2012 is against the scheme of Article 204(2) read with Entry 55 of the Fourth Schedule to the Constitution. Section 2(a) defines 'judge' as including all officers acting in a judicial capacity in the administration of justice. On the other hand, Article 204(1) defines 'Court' as the Supreme Court or a High Court. A plain reading of the two provisions in juxtaposition makes it clear that the Judges of the Supreme Court and High Courts having been appointed under Articles 175A and 193 of the Constitution are the holders of constitutional posts; therefore, they cannot be equated with the judicial officers presiding over courts at the level of the district judiciary. Section 2(a) of COCA 2012 gives impression as if it has been promulgated for District Courts as mentioned above. The definition of 'judge' as given in section 2(a) of COCA 2012 is patently unconstitutional. The same is, therefore, liable to be struck down on the touchstone of the Constitution."

Similarly, in *The State v. Khalid Masood* (PLD 1996 SC 42), while discussing Article 204 of the Constitution, the Supreme Court held as follows:

"Indeed in clause (3), it has been provided that the exercise of the powers conferred on a court by Article 204 may be regulated by law and subject to law by Rules made by the court, but, it does not mean that statue can control or curtail the power conferred on the Superior Courts by this Article, nor it means that in the absence of statue in the above subject, the article will be in operated. The law referred to in clause (3) of the Article relates to procedural matters or matters which have not been provided for therein."

"The plain reading of above Article indicates that word 'Courts' used in above Article has been defined in clause (1) has means the Supreme Court or the High Court."

Again, in *Justice Hasnat Ahmed Khan v. Registrar, Supreme Court of Pakistan* (PLD 2010 SC 806), it was held :-

> "12. We may add that the Supreme Court and the High Courts derive power to punish contemnors from Article 204 of the Constitution, and are not dependent upon sub-constitutional legislation. Clause 3 of the Article only provides that the exercise of power conferred upon the Court under the Article may be regulated by law and, subject to law, by rules made by the Court. All the foregoing statutes from the Contempt of Court Act, 1976, onwards have been enacted with reference to Clause (3) of Article 204."

48. We have not been shown that the power to punish for contempt emanates from any other law apart from Article 204 of the Constitution. Thus, having seen that the power to punish for contempt cannot be conferred by sub-constitutional legislation on any other Court or authority apart from the Supreme Court and the High Court, it needs to be stated why that is so. That too is explained lucidly in *Baz Muhammad Kakar* (*supra*) in the following words:

> "69. In the light of the above discussion, it can safely be concluded that the contempt of Court is a criminal offence, which is tried summarily by a judge alone, who may be the very judge who has been injured by the contempt as against a regular trial."

The reference to 'judge' in the above is referring to a Judge of a Superior Court. But that is not to say that there can be no contempt of a sub-ordinate court. Under section 4 of the Contempt of Court Ordinance, 2003 a High Court is empowered to punish a contempt committed in relation to any Court subordinate to it except that the High Court shall not proceed in cases in which an act alleged to be a contempt is punishable by a subordinate court under the PPC. Under the PPC certain acts affecting the administration of justice are made offences, such as the giving of false evidence in a judicial proceeding (section 193 PPC), and the intentional insult or interruption to any public servant who is sitting in a judicial proceeding (section 228 PPC). Under section 476 Cr.P.C. such offences can be tried by the Court in which the offence is committed. But these offences are not classified as contempt of court.

49. Thus, even though contempt proceedings are sui generis, partaking of both criminal and civil law, these are nonetheless strictly judicial proceedings which may result in conviction and punishment, the latter may even extend to imprisonment. It is for this reason that Article 204 of the Constitution does not contemplate the vesting of the power to punish for contempt in any other Court or authority apart from the superior courts. Given that to be the intent of the Constitution, the vesting of such power in a quasi-judicial authority such as the Banking Mohtasib is *ultra vires* Article 204 of the Constitution. In taking this view, we are also fortified by *Sh. Liaquat Hussain v. Federation of Pakistan* (PLD 1999 SC 504), where the vires of the Pakistan Armed Forces (Acting in Aid of the Civil Power) Ordinance, 1998 had been challenged as the said Ordinance had established Military Courts for the trial of civilians charged with certain civil offences. In declaring the establishment of such Military Courts as un-constitutional, the Supreme Court of Pakistan held as under:

> "Since admittedly the Military Courts were not courts established as contemplated by Article 175(1) of the Constitution, they cannot be conferred jurisdiction to try an accused which is the part of the function of the judiciary. To hold trial of a person accused of an offence is undoubtedly a judicial function, which cannot be performed, but by a court which is a part of the judicature."

50. In view of the foregoing discussion, we decide these petitions alongwith pending applications as follows:

(a) The challenge to the decisions/orders of the Banking Mohtasib and the President of Pakistan passed in the subject petitions is dismissed, and the Petitioners are directed to implement such orders within 30 days;

(b) Sections 50, 55 and 67 of the Payment Systems and Electronic Fund Transfers Act, 2007 do not oust or override the jurisdiction of the Banking Mohtasib under sections 82A (3) and 82B (5) of the Banking Companies Ordinance, 1962;

(c) Section 18 of the Federal Ombudsmen Institutional Reforms Act, 2013 does not oust the jurisdiction of a High Court under Article 199 of the Constitution of Pakistan;

(d) Section 10(ii) of the Federal Ombudsmen Institutional Reforms Act, 2013 is *intra vires* Articles 175, 202 and 203 of the Constitution of Pakistan;

(e) It is declared that section 12 of the Federal Ombudsmen Institutional Reforms Act, 2013 is *ultra vires* Article 204 of the Constitution of Pakistan.

JUDGE

JUDGE

Karachi
Dated: 05-04-2019