

**ORDER SHEET
THE HIGH COURT OF SINDH, KARACHI**

C.P.No.D-5688 of 2019

Date	Order with signature of Judge
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Present

Mr. Justice Muhammad Ali Mazhar

Mr. Justice Agha Faisal

ASG Metals Ltd.....Petitioner

Versus

Security & Exchange Commission of Pakistan.....Respondent

Date of hearing: 12.11.2019

Mr. Mansoorul Arfin, Advocate for the Petitioner.

Mr. Usman Tufail Shaikh, Advocate for Respondent.

Mr. Akram Javed, DPG NAB on court notice.

Mr. Ishrat Zahid Alavi, Assistant Attorney General.

Mr. Hussain Bohra, Assistant Attorney General.

Muhammad Ali Mazhar, J: This constitution petition has been brought to challenge repudiation of Security & Exchange Commission of Pakistan (respondent) communicated to the petitioner for non-registering the charge created by the petitioner in favour of National Bank of Pakistan for availing some financial facilities. The petitioner has entreated for the directions against the respondent to immediately register the charge and issue certificate of registration in accordance with Companies Act 2017.

2. The short-lived specifics as recounted in the memo of petition are that M/s. Abbas Steel Industries (Pvt.) Ltd. has been merged into the petitioner's company which is one of the companies under investigation by the Joint Investigation Team constituted by the Supreme Court which is the main cause of concern for non-registering the charge. The petitioner also attached a copy of order dated 28.11.2018 passed in J.C.M. No.10/2018 by the learned single Judge of this court at original side allowing the merger of M/s. Abbas Steel Industries (Pvt.) Ltd. and two other companies with the petitioner. The petitioner acquired some financial facilities from National Bank of Pakistan and created a

mortgage by depositing the title documents of some properties. After satisfying all required formalities, the petitioner approached to the respondent for registration of charge but the respondent vide email dated 26.08.2019 declined to register the charge/mortgage on the ground that the affairs of M/s. Abbas Steel Industries (Pvt.) Ltd. are under investigation.

3. The learned counsel for the petitioner argued that the said company is not under investigation by the JIT or the National Accountability Bureau (NAB), however, a call up notice was issued to Malik Bashir Ahmad, Director of the said company and in response to that notice, Malik Bashir Ahmad, appeared before the Deputy Director, NAB and presented his statement. He also filed a constitution petition in this court for interim bail which was subsequently converted into transitory bail. He also filed writ petition No.1644/2019 in the learned Islamabad High Court which was disposed of vide order dated 12.06.2019 on the statement of NAB that arrest of Malik Bashir Ahmad is not required, therefore, the petition is premature. The learned counsel further argued that there is no provision under the Companies Act, 2017 to refuse the registration of charge which is an obligation of the respondent under Section 100 of the Companies Act, 2017. It was further avowed that no intimation was ever received to the petitioner from NAB prohibiting them from creating any charge. Due to inaction of the respondent, the petitioner is suffering huge losses as their mills cannot operate without utilization of financial facilities. No show cause notice or explanation was ever sought by the respondent from the petitioner before refusal.

4. The learned counsel for the respondent argued that though the petitioner submitted Form-10 for registration of charge/mortgage but further action was withheld due to ongoing investigation by the NAB in respect of M/s. Abbas Steel Industries (Pvt.) Ltd. The role of SECP is to maintain record of companies in compliance of regulatory regime. The NAB authorities had called information

from the respondent under Section 19 of National Accountability Ordinance, 1999 but in the similar notices issued for some other companies also issued directions to mark caution while alluding the consequences in the case of violation of Section 23 of National Accountability Ordinance, 1999. He also requested for elucidation and explication of Section 23 and Section 19 of National Accountability Ordinance, 1999 with regard to its implication on the SECP statutory obligations. He had also shown acute apprehension that in case registration is accorded, NAB will take action against SECP officials.

5. Seeing as brought on record by the SECP that there is some ongoing investigation by the JIT under the directions by the Supreme Court, therefore, on 31.10.2019, we issued notice to the Chairman NAB, Islamabad as well as the Director General NAB, Karachi so that their DPG may appear and assist this court on court notice. On 08.11.2019, Mr. Akram Javed, DPG NAB appeared and submitted the report duly signed by Muhammad Qasim, Assistant Director/Investigation Officer of NAB, Rawalpindi. The learned DPG NAB argued that D.G. NAB authorized the investigation No.05/2019 against the persons involved in fake bank accounts scam and for the purposes of obtaining fraudulent loan, M/s. Parthenon Pvt. Ltd. shown payment of Rs.200 Million to M/s. Abbas Steel Industries Private Limited as advance against steel. The Director of M/s. Abbas Steel Industries (Pvt.) Ltd. Malik Bashir Ahmad appeared before the Investigation Officer and stated that the payment was received but the same was returned in cash to Khawaja Abdul Ghani Majid on the very next day. He admitted that the Director Malik Bashir Ahmad filed a petition in the Islamabad High Court which was disposed of since NAB had not issued warrants of arrest to Malik Bashir Ahmad. He further affirmed that no notice under Section 23 of the National Accountability Ordinance, 1999 was issued by the NAB to SECP regarding M/s. Abbas Steel Mills (Pvt.) Ltd. and/or ASG Metals Ltd. He further confirmed that NAB has not

nominated M/s. Abbas Steel Mills (Pvt.) Ltd. and/or ASG Metals Ltd. as accused so far in the reference No.13/2019.

6. Heard the arguments. The bone of contention in this matter is whether on creation of charge by the petitioner, the respondent is obligated and duty-bound to register the charge or they may refuse or decline its registration. Part-VI of the Companies Act, 2017 germane to the registration of mortgages and charges. According to Section 100 of the Companies Act, 2017, a company which creates mortgage or charge has to file specified particulars of mortgage together with a copy of instrument with the Registrar for registration within a period of thirty days. The second proviso fastened to this section explicates that any subsequent registration of a mortgage or charge shall not prejudice any right acquired in respect of any property before the mortgage of charge is actually registered. The tenor and tone of Section 102 of the Companies Act, 2017 postulates that the Registrar shall keep a register containing particulars of the charges which shall be opened to inspection by a person on payment of such fees as may be prescribed, whereas under Section 105 it is the duty of every company to file with the Registrar for registration the specified particulars of every mortgage or charge created. Section 111 expands on that any violation of this Part shall be an offence liable to a penalty of level 1 on the standard scale. While under Section 112, every company is bound to maintain a register of mortgages and charges requiring registration under this Part and such register maintained under this section and the copies of instrument creating any mortgage and charge shall be opened to the inspection of any member or creditor of company without fee and for any other person on payment of such fee as may be fixed by the company for each inspection. Under Sub-Section (3) of the same section, the refusal of inspection of the copies or register is an offence and any person guilty of such offence shall be liable to a penalty of level 1 on the standard scale and every officer of the company who knowingly refuses shall incur the like penalty and in

addition to the penalty, the Registrar may by order for an immediate inspection of the copies or register. Considering that the issue predominantly interrelates the statutory obligation streaming from Section 100, therefore for the ease of reference, Section 100 of the Companies Act, 2017 is reproduced as under:

“100. Requirement to register a mortgage or charge.— (1) A company that creates a mortgage or charge to which this section applies must file the specified particulars of the mortgage or charge, together with a copy of the instrument, if any, verified in the specified manner, by which the mortgage or charge is created or evidenced, with the registrar for registration within a period of thirty days beginning with the day after the date of its creation:

Provided that-

- (a) in the case of a mortgage or charge created out of Pakistan comprising solely property situated outside Pakistan, thirty days after the date on which the instrument or copy could, in due course of post, and if dispatched with due diligence, have been received in Pakistan shall be substituted for thirty days after the date of the creation of the mortgage or charge as the time within which the particulars and instrument or copy are to be filed with the registrar; and**
- (b) in case the mortgage or charge is created in Pakistan but comprises property outside Pakistan, a copy of the instrument creating or purporting to create the mortgage or charge verified in the specified manner may be filed for registration notwithstanding that further proceedings may be necessary to make the mortgage or charge valid or effectual according to the law of the country in which the property is situate:**

Provided further that any subsequent registration of a mortgage or charge shall not prejudice any right acquired in respect of any property before the mortgage or charge is actually registered.

- (2) This section applies to the following charges-**
 - (a) a mortgage or charge on any immovable property wherever situate, or any interest therein; or**
 - (b) a mortgage or charge for the purposes of securing any issue of debentures;**
 - (c) a mortgage or charge on book debts of the company;**
 - (d) a floating charge on the undertaking or property of the company, including stock-in-trade; or**
 - (e) a charge on a ship or aircraft, or any share in a ship or aircraft;**
 - (f) a charge on goodwill or on any intellectual property;**
 - (g) a mortgage or charge or pledge, on any movable property of the company;**

- (h) a mortgage or charge or other interest, based on agreement for the issue of any instrument in the nature of redeemable capital; or
- (i) a mortgage or charge or other interest, based on conditional sale agreement, namely, lease financing, hire-purchase, sale and lease back, and retention of title, for acquisition of machinery, equipment or other goods:

Provided that where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company shall not for the purpose of this subsection be treated as a mortgage or charge on those book debts.”

7. According to the plea taken by the SECP, they were issued a notice on 25.02.2019 by the Deputy Director, NAB under the provisions of Section 19 of the National Accountability Ordinance, 1999 with regard to some investigation against the holders of public office involved in fake bank accounts scam regarding corruption and corrupt practices in extending of loan and its misappropriation by M/s. Parthenon Private Limited, M/s. Park Lane Estates Private Limited and others. In paragraph 2 of the said notice, involvement of 14 firms was alleged in the table and at Sr.No.9; the name of M/s. Abbas Steel Industries Pvt. Ltd. was also mentioned. The Joint Registrar of Companies, SECP in pursuance of this notice was called upon to provide original master file alongwith certified true copies of record of the said companies.

8.The learned counsel for the SECP argued that though in the notice in which name of Abbas Steel was mentioned, there was no direction to maintain some caution but in some other notices issued for some other companies, NAB forewarned the Registrar of Companies, SECP that once the inquiry is authorized, transfer of any right, title or interest or creation of charge of property shall be void, however, the inquiry does not restrict the routine affairs of the alleged accused/company. On this notion and perception, the learned counsel for SECP argued that if the charge is registered by the SECP, some adverse repercussions will take place for their

officers as in some other notices issued under Section 19 of National Accountability Ordinance, 1999 caution was marked for the transfer of any right or title and or creation of charge but after all he admitted that in the case of notice issued in relation to 14 companies including M/s. Abbas Steel Industries (Pvt.) Ltd., no such caution was marked creating any bar or embargo for the alleged creation of charge or transfer of title. The counsel for the SECP with the reply has also attached some notices issued under Section 23 of National Accountability Ordinance, 1999 in relation to some other companies (not the petitioner) whereby the caution was marked against the transfer of property which envisions and foresees that after initiation of inquiry or investigation, the accused person shall not transfer by any means whatsoever or create a charge on any property owned by him or in his possession, while the inquiry, investigation or proceedings are pending before the NAB or the court and any transfer of any right, title or interest or creation of a charge on such property shall be void and such transfer has been made punishable in clause (b) of Section 23 of National Accountability Ordinance, 1999 with rigorous imprisonment for a term which may extend to three years and shall also be liable to fine not exceeding the value of the property involved. In order to distinguish and characterize the rudiments and niceties of Sections 19 and 23 of the National Accountability Ordinance, 1999, it would be advantageous to reproduce both the sections in seriatim as under:

“19. Power to call for information:

The Chairman NAB or [an officer of the NAB duly authorized by him] may, during the course of an inquiry [or investigation] [of an office under this Ordinance]:-

(a) call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Ordinance or any rule or order made thereunder;

(b) require any person to produce or deliver any document or thing useful or relevant to the inquiry [or investigation];

(c) examine any person acquainted with the facts and circumstances of the case [omitted];

[(d) require any bank or financial institution, notwithstanding anything contained in any other law for the time being in force, to provide any information relating to any person whosoever, including copies of entries made in a bank's or a financial institution's books such as ledgers, day books, cash books and all other books including record of information and transactions saved in electronic or digital form, and the keepers of such books or records shall be obliged to certify the copies in accordance with law [; and]]

[(e) where there is a reasonable suspicion that any person is involved in or is privy to an offence under this Ordinance, the Chairman NAB may, with the prior approval in writing of the High Court concerned, directed the surveillance of that person may be carried out through such means as may be necessary in the facts and circumstances of the case and the Chairman NAB, may in this regard seek the aid and assistance of any [Government] agency and the information so collected may be used as evidence in the trial under this Ordinance.

Provided that the copies obtained or information received or evidence collected under clauses (d) and (e) shall be [kept] confidential and shall not be used for any purpose other than for legal proceedings under this Ordinance]

23. Transfer of property void:

(a) Notwithstanding anything contained in any other law for the time being in force after the Chairman NAB has initiated [an inquiry or] investigation into [any offence] under this Ordinance, alleged to have been committed by an accused person, such [accused] person or any relative or associate of such [accused] person or any other person on his behalf, shall not transfer by any means whatsoever [or], create a charge on any [Omitted] property owned by him or in his possession, while the inquiry, investigation or proceedings are pending before the NAB or the [Omitted] Court; and any transfer of any right, title or interest or creation of a charge on such property shall be void.

(b) Any person who transfers, or creates a charge on property in contravention of subsection (a) shall be punishable with rigorous imprisonment for a term, which may extend to three years and shall also be liable to fine not exceeding the value of the property involved [;]

[Provided that such transfer of any right, title or interest or creation of a charge on such property shall not be void if made with the approval of the Court, subject to such terms and conditions as the Court may deem fit.]”

9. An austere screening to Section 19 of the National Accountability Ordinance, 1999 makes it profusely vivid that it communicates and translates powers of NAB to call information from any person for the purpose of satisfying whether there has been any contravention of Ordinance; requiring any person to produce or deliver any document or thing useful or relevant to the inquiry or investigation; examining any person acquainted with the facts and circumstances of the case and requiring any bank or financial institution to provide information relating to any person etc. The vernacular and phraseology of Section 19 is somewhat uncomplicated to decipher that this provision has been created

only to call for information, therefore, the apprehensiveness and anxiety of the counsel for the SECP that since in some other similar notices (not issued to the petitioner or Abbas Steel), SECP marked some caution or caveat in terms of Section 23 that justification or excuse in our view is ill-founded and illogical. The raison d'être of Section 19 is not meant for giving any caution but it is serenely congregated for requiring information for the purposes of inquiry or investigation to investigate and unearth any offence.

10. Insofar as Section 23 of National Accountability Ordinance, 1999 is concerned, this wrecks and enforces a bar or embargo against the transfer or creation of charge on any property, while the inquiry or investigation or proceedings pending before the NAB or the court. The learned Deputy Prosecutor General, NAB has admitted that no notice has been issued under Section 23 of National Accountability Ordinance, 1999 to the SECP with regard to M/s. Abbas Steel Mills Pvt. Ltd. and or ASG Metals Ltd. The copy of reference filed under Section 18 of the National Accountability Ordinance, 1999 is also available on record in which 17 accused have been implicated but the present petitioner or Al-Abbas Steel Pvt. Ltd or Abbas Steel Industries Pvt. Ltd. are not nominated as accused. For the ease of reference, the report submitted by I.O through DPG NAB is reproduced as under:-

“Brief Report on Behalf of NAB:-

In pursuance to the Orders of Honorable Supreme Court of Pakistan dated 07-01-2019, DG NAB Rawalpindi authorized an Investigation No.05/2019 u/s 18(c) of NAO, 1999 against the holders of public office, legal persons and others involved in fake bank accounts scam regarding corruption and corrupt practices in extending of loan and its misappropriation by M/s Parthenon Private Limited, M/s. Park Lane Estates Private Limited and others vide letter dated 22-02-2019. It was alleged that M/s Park Lane Estate (Pvt) Ltd obtained fraudulent loan of Rs. 1.5 Billion through a front company M/s Parthenon (Pvt) Ltd from National Bank of Pakistan and Summit Bank and collusively restructured/serviced it to the tune of Rs. 2.8 Billion. After investigation Reference No. 13/2019 has been filed before the Honorable Accountability Court II, Islamabad.

For the purpose of obtaining the fraudulent loan the company M/s Parthenon Pvt Ltd showed payment of Rs. 200M to M/s Abbas Steel Industries Private Limited as advance against steel

however as per the record of Bank the amount was withdrawn as cash by M/s Abbas Steel on the very next day. Moreover, the Director of M/s Abbas Steel, namely Malik Bashir Ahmed, appeared before the Investigation Officer and stated that the payment was received from Khawaja Abdul Ghani Majid, however the same was returned as physical cash to Khawaja Abdul Ghani Majid on the very next day.

It is pertinent to mention here that in response to Call Up Notice to the Director Operations of M/s Abbas Steel Mills Pvt Ltd namely Malik Bashir Ahmad, he filed a Pre Arrest Bail petition in Islamabad High Court which was disposed off since NAB had not issued Warrants of Arrest of Malik Bashir Ahmad.

It is submitted that NAB has not issued any Letter u/s 23 of NAO, 1999 to SECP regarding M/s Abbas Steel Mills Pvt Ltd and / or ASG Metals Ltd. Moreover NAB has not nominated M/s Abbas Steel Mills Pvt Ltd and / or ASG Metals Ltd as an accused so far in the above mentioned Reference No. 13/2019.

Sd/-
Muhammad Qasim
AD/IO
Sd/-
Special Prosecutor
NAB”

11. There is a sizable differentiation at the heart of two terms for instance “*creation of charge/mortgage*” and “*registration of charge by SECP*”. The SECP under their statutory duties and obligations as enumerated under Section 100 of the Companies Act, 2017 is obliged to register the charge and in case of failure they can also impose penalty on the defaulting company. Statutory obligations are those obligations that do not arise out of a contract but are imposed by law. Obligation is the moral or legal duty that requires an individual to perform and an obligation is also a duty to do what is imposed by a contract or law. Have a loan of funds is an essential cradle and indeed routine tradition and feature for a company to increase capital for financing large-scale ventures and getting higher its business. Corporate borrowings encompass finances get hold of by a company after creating charge on its assets as security to the financial institutions. The Companies Act 2017 makes it mandatory for all the companies to get the charges registered by intimating the concerned Registrar of Companies. If the company fails to apply within the prescribed limit, then it will be liable for the fines and penalties. It is responsibility and onerous duty of every company so that on registration of charge, the Registrar of Companies may issue a

certificate of registration. The finer points of Section 23 of National Accountability Ordinance, 1999 predominantly transmits a bar against the creation of charges/mortgages by any person who is under inquiry/investigation or encountering court proceedings. The letters of the law makes this obvious that Section 23 only imposes restriction on a person from transferring any right, title or interest or creation of a charge while pending inquiry, investigation or proceedings before the NAB or the court but it does not debar or prohibits SECP from fulfilling their statutory obligations under Section 100 of the Companies Act, 2017 nor imposes any fine or penalty on registration of charge. In order to fulfill official responsibilities and obligations, the SECP is bound to register the charge and failure to do so will amount violation of their regulatory regime and the law in which it has been constituted and established.

12. Under Section 3 of the National Accountability Ordinance, 1999, an overriding effect has been given that the provisions of this Ordinance shall have effect notwithstanding anything contained in any other law for the time being in force. Whereas under Section 4 of the Companies Act, 2017 also, an overriding effect has been dealt with that save as otherwise expressly provided herein the provisions of this Act shall have effect notwithstanding anything contained in any other law. It is quite notable and conspicuous that both aforesaid laws are special laws having overriding provisions on other laws in field but we do not find any hindrance or inconsistency which may restrain or hold back SECP (regulatory authority) from performing their statutory responsibilities and obligations particularly under Section 100 of the Companies Act, 2017 in which the SECP is required to register the charge. As a matter of fact, essentially the charge is created by a company/borrower with some financial institutions and the role of SECP is triggered after creation of charge, so for all intent and purposes, it is in fact between company and the financial institutions and if despite creation of the charge, SECP is

failed to register the charge, this will tantamount violation of Section 100 in particular when no notice was ever issued by the NAB to the SECP to mark caution against the registration of the charge. The outcome of overriding effect cannot be construed or interpreted in a manner that one statutory body can restrict without caveat another statutory body from performing its statutory obligations emanating from its parent law. Quite the opposite in the instant case, NAB has submitted their reply with clear statement that they have not issued any letter/caution under Section 23 of National Accountability Ordinance, 1999 to SECP regarding M/s. Abbas Steel Industries Pvt. Ltd. and or ASG Metals Ltd. It is further stated that NAB has not nominated M/s. Abbas Steel Mills Pvt. Ltd. and or ASG Metals Ltd. as an accused so far in the reference No.13/2019.

13. It is recapped that the purpose of registration of charge is most importantly defined under Section 100 of the Companies Act, 2017 and the register of charges to be kept by the Registrar may be inspected by any person on payment of fees as may be prescribed. The Registrar issues a certificate of registration. In fact the registration of charge with SECP is meant for safeguarding the interest of public at large including the financial institutions but again SECP has no role in the creation of charge but they go on board for its registration only.

14. As a result of above discussion, the petition is allowed. The respondent is directed to register the charge and issue certificate of registration.

Karachi:-

Dated. 5.12.2019

Judge

Judge