

IN THE HIGH COURT OF SINDH AT KARACHI

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

CP D 2669 of 2019 : KASB Invest (Private) Limited
& Another vs.
The Registrar Modaraba
Companies & Modarabas
Securities & Exchange
Commission of Pakistan
& Others

For Petitioners : Mr. Zeeshan Abdullah
Advocate

For Respondent Nos.1 & 2 : Mr. Furqan Ali, Advocate

For Respondent No.3 : Mr. Saleem Mangrio, Advocate

Mr. Hussain Bohra
Assistant Attorney General

Dates of Hearing : 24.05.2019, 05.08.2019
& 25.10.2019

Date of Announcement : 05.12.2019

JUDGMENT

Agha Faisal, J: The present petition has been filed by a modaraba company, as defined under the Modaraba Companies and Modaraba (Floatation and Control) Ordinance, 1980 ('Ordinance'), and its chief executive, seeking to quash and set aside the order dated 03.04.2019 ("Impugned Order") rendered by the Registrar Modarabas ("Registrar"), whereby an administrator was appointed, under Section 20 of the Ordinance, with respect to three modarabas, then under management of the petitioner no.1. The key argument led before us was that since the petitioner no.2 had recently been appointed as the chief executive of the petitioner no.1, and had legitimate expectations to remain in the said position for at least a period of three years, therefore, displacing of the modaraba company from the management of the modarabas, earlier under management, was contrary to the law.

2. Mr. Zeeshan Abdullah, Advocate set forth with the case of the petitioners and submitted that the show cause notice dated 05.11.2018 ("Show Cause Notice") pertained to the alleged misfeasance by the petitioner no.1, however, the period under scrutiny was prior to the appointment of the petitioner no. 2 as the chief executive of the petitioner no.1. Learned counsel demonstrated that a detailed response was submitted with regard to the Show Cause Notice, however, instead of appreciating the same in its true perspective the Registrar rendered the Impugned Order instead. Per learned counsel, the Impugned Order amounted to a colorful exercise of power and was entirely disproportionate to the facts and circumstances of the case. Learned counsel submitted that the petitioner no. 2 had recently been appointed and it was his legitimate expectation to continue to hold office for a period of three years. It was submitted that while he remains chief executive of the petitioner no. 1, the modarabas, under management of the petitioner no. 1, have been removed from its management vide the Impugned Order. Learned counsel stressed on the credentials of the petitioner no. 2 and submitted that he was the proper candidate to manage the modarabas and that the administrator appointed, being the respondent no. 3 herein, does not have the appropriate qualifications and experience to exercise the role which has been vested therein. In view of the foregoing, it was argued that the Impugned Order was not sustainable, hence, ought to be set aside.

3. Mr. Furqan Ali, Advocate appearing on behalf of the Respondents Nos. 1 & 2 supported the Impugned Order in its entirety. Learned counsel submitted that the administrator, respondent no. 3 herein, has been appointed in accordance with the law. It was submitted that the action taken by the said respondent is on account of the three modarabas being mismanaged by their modaraba company, petitioner no.1, and that the said action has been taken in the greater interest of modaraba certificate holders. It was argued that not a single certificate holder of the three modarabas under consideration has even come before this Court to challenge the Impugned Order and the present petition is of a self-serving nature filed primarily by an individual seeking to perpetuate his private interests. It was thus argued that no grounds

have been invoked to merit exercise of the Constitutional jurisdiction of this Court, hence, this petition may be dismissed.

4. Mr. Saleem Mangrio, Advocate submitted the curriculum vitae of the respondent no. 3 and demonstrated that the said respondent had decades of banking experience and had also been on the board of NBP Modaraba since 2010. Learned counsel submitted that the appointment as administrator was undertaken pursuant to Section 20(1)(a)(i) of the Ordinance and that no infirmity in such regard has either been argued or demonstrated before the Court.

5. We have heard the respective learned counsel and have considered the law and documentation to which our surveillance was solicited. It is recorded at the very onset that this Court is not sitting in appeal over the Impugned Order and that our jurisdiction, pursuant to Article 199 of the Constitution, is to determine whether any fundamental rights have been infringed. Hence, the primary point for determination before us is whether the Impugned Order merits interference in view of the grounds urged there against by the learned counsel for the petitioners.

6. It is considered pertinent to advert to the structure of modarabas and their management prior to deliberating upon the *lis* before us. A modaraba is a business in which a person participates with his money and another with his efforts and / or skills¹. The modaraba fund refers to the fund raised through the floatation of a modaraba² and the said fund is contributed to by holders of modaraba certificates, being certificates of definite denomination issued to the subscribers of a modaraba acknowledging receipt of their investment³. The management of a modaraba vests in a modaraba company, and the remuneration in such regard is a fixed percentage of the net annual profits of a modaraba, provided that the same does not exceed ten percent of such annual profits⁴. It is imperative to note that even though a modaraba is

¹ Section 2(ab) Modaraba Companies and Modaraba (Floatation and Control) Ordinance, 1980.

² Section 2(d) Modaraba Companies and Modaraba (Floatation and Control) Ordinance, 1980.

³ Section 2(b) Modaraba Companies and Modaraba (Floatation and Control) Ordinance, 1980.

⁴ Section 18 Modaraba Companies and Modaraba (Floatation and Control) Ordinance, 1980.

managed by a modaraba company, it retains its own legal juristic identity, distinct from that of its management company⁵.

7. The petitioner no. 1 is a modaraba management company and prior to the Impugned Order was managing three modarabas, i.e. First Pak Modaraba, First Prudential Modaraba and KASB Modaraba. Upon a specific query having been raised by the Court, the learned counsel for the petitioners had submitted that the petitioner no. 1 had not floated two of the three modarabas referred to supra and that management thereof had been bestowed by the respondent no. 2 thereupon in 2014 on account of the said modarabas having been mismanaged by their previous management company/ies.

The petitioner no. 2 was appointed chief executive officer of the petitioner no. 1 and his status remains undisturbed by the Impugned Order. It is however contended on his behalf that the removal of the modarabas, under management of the petitioner no. 1, on account of allegations of mismanagement thereof by the petitioner no. 1, is unlawful *inter alia* as the alleged misfeasance / malfeasance took place prior to the appointment of the petitioner no. 2.

8. We endeavor to address the primary argument of the learned counsel that the petitioner no. 2 had been appointed chief executive officer of the petitioner no. 1 with the approval of the respondent no. 2 and consequently the petitioner no. 1 was entitled to manage the modarabas for at least the tenure of the petitioner no. 2. Respectfully, we are unable to concur with this argument as no cogent justification has been advanced before us in such regard.

It has been noted above that the management company, petitioner no. 1, and the modarabas under its management remained mutually exclusive and distinct legal entities. The petitioner no. 2 was appointed as chief executive of the petitioner no. 1, however, this status was not altered by the Impugned Order. This is manifest from the memorandum of petition wherein it is apparent that the said petitioner retains his position. Learned counsel has been unable to plead and / or demonstrate the existence of any fundamental right of the petitioner no.

⁵ Section 12 Modaraba Companies and Modaraba (Floatation and Control) Ordinance, 1980.

2, to merit retention of the petitioner no. 1 as the management company of the modarabas. While the retention of the management of the modarabas, by the petitioner no. 1, may have been financially advantageous for the petitioner no. 1, and / or by extension the petitioner no. 2, the same can neither be considered to be a vested right in the first instance nor can such expectation supersede the paramount interests of the certificate holders.

9. It is an admitted position that the regulatory authority retains the jurisdiction and capacity in law to remove a modaraba company from the management of a modaraba⁶, as it is the very same law that permitted the petitioner no. 1 to manage two of the three modarabas under scrutiny herein.

The allegations of mismanagement were levied by the respondent with respect to the petitioner no. 1, albeit prior to the assumption of office of the petitioner no. 2. The Show Cause Notice was served upon the petitioner no. 1 and its management cataloguing the instances of mismanagement alleged to have taken place, causing loss to the modarabas, hence, to their certificate holders. In consideration of the reply, dated 30.11.2018, submitted by the petitioner no. 1 and the result of an inquiry conducted into the affairs of the modarabas, under management of the petitioner no. 1, the respondent no. 2 served another show cause notice, dated 07.02.2019, upon the petitioner no. 1 highlighting the instances of gross financial misfeasance / malfeasance. This subsequent show cause notice recorded that modarabas were transferred to the management of the petitioner no. 1 on the premise that the petitioner no. 1 would turn them around and manage them in the best interests of the certificate holders, however, the petitioner no. 1 failed to exercise prudence in its dealings and funds of the modarabas were misused and mismanaged and deployed in prejudicial activities. The aforesaid notice concluded by providing an opportunity to the petitioner no. 1 to once again present its case and maintained that in the absence of any cogent defense the regulator would be constrained to appoint an administrator in order to safeguard the interests of the certificate holders. It is thus observed that the respondents provided ample opportunity of defense while consistently seeking resolution of

⁶ Section 20 Modaraba Companies and Modaraba (Floatation and Control) Ordinance, 1980.

issues adversely affecting the interests of the certificate holders, hence, no colorable exercise of jurisdiction is demonstrated before us.

10. The ancillary argument put forward by the learned counsel for the petitioners was that the regulator did not appreciate the reply, to the Show Cause Notice, in its proper perspective and took action disproportionate to the peril under consideration.

We have considered the narrative of the misfeasance / malfeasance contained in the show cause notices and also the reply filed by the petitioner no. 1. The record clearly demonstrates that the allegations were levelled against the petitioner no. 1 and ample opportunity was provided to the said entity to answer the said allegations. The show cause notices, reply and inquiry proceedings demonstrate that the requirements of natural justice were satisfied.

In so far as the nature of the allegations and response thereto are concerned and the weightage apportioned thereto respectively, it is observed that the issues are of a factual nature and delving therein is eschewed herein as the same is discouraged in the exercise of Constitutional jurisdiction.

11. In so far as the issue of proportionality is concerned, it is our considered view that protection of the interests of the certificate holders is the primary duty of the regulatory authorities and if such interests are being jeopardized by a management company then lawful action for removal of such management companies from helmsmanship of modarabas is not only the requirement of the law but also proportional, per the Wednesbury principles⁷ as enunciated recently by one of us, *Muhammad Ali Mazhar J.*, in *Saba vs. Sindh*⁸.

12. In this regard we are fortified by a decision of the honorable Supreme Court in the *Royal Management Case*⁹ wherein the august Court was pleased to observe as follows:

⁷ Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223.

⁸ Judgment dated 17.05.2019 in *Ms. Saba vs. The Province of Sindh & Others* (CP D 2650 of 2019).

⁹ *Royal Management Services (Private) Limited & Another vs. The Chairman SECP & Others* reported as 2015 SCMR 101.

“6. That the first question that arises is whether a particular management company has a right to manage a modaraba despite serious and well founded findings of wrong doing against it. Modarabas are managed for the benefit of investors and thus the companies managing them must act solely for the benefit of the investors. However, in this case, the said Modarabas were being misused/misappropriated by those who were managing them. In other words the interest of the investors was being compromised. In the cited case of Muhammad Ashraf Tiwana the SECP's role with regard to safeguarding the interest of the investors was also highlighted by one of us (Jawwad S. Khawaja, J.) as under:--

"(5) The SECP as such is amongst the most important regulatory authorities directly impacting the economic life of the citizens of Pakistan. It may also be noted that amongst the various functions and powers of SECP which have been mentioned in section 20 of the Act, there are a number of functions which relate directly to the economic well-being of the people of Pakistan. By way of illustration only, it may be mentioned that in section 20(6), the SECP has been specifically ordered and mandated inter alia, "to maintain the confidence of investors in the securities markets by ensuring adequate protection for such investors". The Securities and Exchange Ordinance, 1969 which, as noted above, is also administered by SECP deals in the capital markets in Pakistan. By virtue of that statute too, the SECP is required "to provide for the protection of investors" (Preamble);"

"It is a self evident fact that persons making investments in and through the capital markets of the country will either be attracted to the capital markets or shy away from such market depending upon the trust and confidence which they have in such markets and this in turn depends upon the rigour and quality of the regulator. Moreover, investments made by the people, being property, are required to be protected through enforcement of the fundamental rights"

7. That in view of the fact that it had been established that the said Modarabas were not being run properly and the interest of the investors had been jeopardized, the question of the composition of the Board fades away. In any event the SECP Amendment Act that contained the saving and validation was neither assailed before the High Court nor it has been assailed before us. Even if for the sake of argument we were to agree with the learned counsel that the Board was incomplete at the relevant date, it would not take away from the fact that the petitioners were not running the said Modarabas in accordance with law, therefore, they had no ground to object to their substitution by another modaraba management company."

13. It was also painstakingly sought to be argued before us that the petitioner no. 2 was the fit and proper candidate to be entrusted with the management of the modarabas instead of the respondent no. 3. Learned counsel for the petitioners had assailed the qualification of the respondent no. 3, whereas, the counsel for the respondent no. 3 had argued that his client had sterling credentials and the requisite experience to be entrusted with the administration of the modarabas.

Notwithstanding the elaborate display of resumes before us, we consider the entire argument redundant. Firstly, if the challenge is to the qualification of the administrator on account of his qualifications then it would follow that the petitioner no. 2 would remain aggrieved even if another person had been appointed administrator instead. To consider the contrary argument, that no person could administer the modarabas better than the respondent no. 2, would be rather irreverent.

Secondly, there is no cavil to the proposition that the regulatory authority is empowered under the Ordinance to remove a management company and appoint another or administrator instead. It is through this very mechanism that the petitioner no. 1 was granted the management of First Pak Modaraba and First Prudential Modaraba in the first place. So if the power to remove a management company has been exercised unexceptionally then it is solely for the regulatory authority to determine who is to be appointed instead.

14. The record before us demonstrates that the Impugned Order has been rendered to safeguard the interests of the modaraba certificate holders and it is manifest that not a single certificate holder, of the three modarabas, has come before the Court to challenge the Impugned Order.

15. In view of the reasoning and rationale herein contained, we are of the considered view that the petitioners have been unable to set forth a case for the exercise of extra ordinary Constitutional jurisdiction by this Court, hence, this petition, along with pending application/s, is hereby dismissed.

JUDGE

JUDGE