

**IN THE HIGH COURT OF SINDH AT
KARACHI**

SUIT NO.1599 OF 2015

Plaintiff : Lt Col (Retd) Shahid Hamid,
through Mr. Mohsin Shahwani,
Advocate.

Defendant No.2 : SAMBA Bank Limited, through
Mr. Muhammad Qayyum Abbasi,
Advocate.

Defendant No.4 : Saleha Hyat, through Mr. Hassan
Akbar and Mr. Muhammad Imtiaz
Khan, Advocates.

Date of hearing : 23.05.2019

ORDER

YOUSUF ALI SAYEED, J. – The genesis of the Suit can be traced to 30.10.2009, being the date on which a sum of Rs. 35 Million placed by the Plaintiff with the Defendant No.2, Samba Bank Limited (the “**Bank**”) in a Term Deposit under Account Number 6406502973 (the “**Account**”) maintained at the Saddar Branch at Rawalpindi was encashed and withdrawn by the Defendant No.4, who was the Plaintiff’s wife at the time (the “**Transaction**”).

2. Whilst the Bank’s stance is that the funds were in a joint-account, and the Transaction was processed in good faith and without any negligence on the basis of instructions received in conformity with the applicable terms governing operation of the Account, the Plaintiff alleges that the Transaction was a fraud perpetrated on him by the Defendant No.4 with the connivance of the Bank’s staff, contending that the Account was intended to have been his alone, as at the time of its opening he had signed and delivered a blank Account Opening Form to the Defendant No.5, an employee of the Bank, in good faith on the basis and assurance that the same would be used for opening an individual account solely in his name.

3. The Plaintiff claims that he came to have knowledge of the Transaction on 12.01.2010, following which he lodged complaints with functionaries of the Defendant No.2, and upon his grievance remaining unaddressed, then filed a complaint on 06.02.2010 before the Defendant No.3, the Banking Mohtasib (the “**Mohtasib**”), which was rejected vide an Order dated 26.004.2011, against which the Plaintiff preferred an Appeal to the Defendant No.1, the State Bank of Pakistan (the “**SBP**”), which in turn was also dismissed on 08.06.2015.

4. It is in this backdrop that the Plaintiff filed the present Suit, praying for Judgment and Decree against the Defendants as follows:
 - “a. Declare that the Order passed by the Defendant No. 1 dated 08.06.2015 in Plaintiff’s Appeal filed against Defendant No. 2’s Order dated 26.04.2011 is arbitrary, illegal and defective, void ab initio hence the same is liable to be set aside;
 - b. Set aside the Order dated 08.06.2015 passed by the Defendant No. 1 in Plaintiff’s Appeal filed against Defendant No. 2’s Order dated 26.04.2011;
 - c. Direct Defendant No. 1 to make and pass such appropriate orders and take such remedial steps against Defendant No. 2 as may be required in accordance with law including cancellation of license of Defendant No. 2 in accordance with Section 27 read with Section 40(A) and 41 of the 1962 Ordinance and in accordance with law;
 - d. Direct the Defendant No. 1 to cancel the license of the Defendant No. 2;
 - e. Declare that the transfer and withdrawal of Plaintiff’s funds of Rs.35 Million on 30th October, 2009 from his Single title account by the Defendant No. 2 & 5 in active and fraudulent connivance of Defendant No. 4 and thereafter depositing in the personal account of Defendant No. 4 is without lawful authority, illegal uncalled for, unlawful, fraudulent, criminal breach of trust and in violation of law;

- f. Declare that the transfer of Plaintiff's fund of Rs.35 Million on 30th October, 2009 from Plaintiff single titled account was pre-planned, engineered, illegal, and organized by the Defendant Nos. 2, 4 & 5 collectively or severally to fraudulently and malafidely deprive the Plaintiff of his lawful and hard earned money;
 - g. Money Decree for Rs.535 Million / - (Rupees five Hundred and thirty Five Million) against the Defendant No. 2, 4 & 5 jointly & severally;
 - h. Award Damages to the Plaintiff to the tune of Rs. **500 Million** as claimed in the statement of claim hereinabove in para 37;
 - i. Grant a mandatory injunction directing Defendant No. 1 to freeze the reserve fund/cash reserves of Defendant No. 2 lying with Defendant No. 1;
 - j. Attachment and sale of assets owned by the Defendants;
 - k. Costs of funds at the latest rate as determined by the State Bank of Pakistan on the decreed amount from the date of illegal and fraudulent transfer i.e 30th October, 2009 from Plaintiff's single titled account till realization;
 - l. Costs of the Suit and other proceedings pertaining to instant matter;
 - m. Any other additional, further, better and or alternative relief that this Honourable Court may deem fit to grant in the facts and circumstances of the case."
5. The Suit has been met by Applications filed on behalf of the Defendants Nos. 2 and 4 under Order 7, Rule 11 CPC, bearing CMA Numbers 2820/19 and 5259/18 respectively, seeking rejection of the Plaint on the ground that the matter in dispute has already been agitated before and decided the Mohtasib, hence has attained finality, and the further declarations sought and financial claim being advanced are even otherwise barred by limitation. It is these two applications which fall to be decided in terms of this Order.

6. Advancing their arguments in support of the Applications, it was firstly pointed out by learned counsel that the grievance espoused by the Plaintiff was in relation to the Account and proceeded on the basis of the Transaction, hence, the cause of action, if any, accrued within the jurisdiction of the Courts at Rawalpindi and not at Karachi. It was also pointed out with reference to the title of the Plaint that the Defendants Nos.4 and 5 also resided within the District of Rawalpindi, and that an earlier suit instituted by the Defendant No.4 against the Plaintiff was pending before the Civil Judge, Rawalpindi, which, per learned counsel, encompassed the subject of the Transaction. It was contended the present Suit was an abuse of process and had been framed deliberately so as to bring the Mohtasib and SBP within the framework thereof as they were based at Karachi, and that such parties had been joined as Defendants to the Suit in an attempt to create a semblance of jurisdiction, which clearly did not exist.

7. It was submitted that the entire corpus of allegations encapsulated in the Plaint had earlier formed the subject of the complaint lodged before the Mohtasib, who had proceeded thereon and exonerated the Bank from any wrongdoing, hence the Suit was barred by virtue of Section 18 of the Federal Ombudsmen Institutional Reforms Act, 2013 (“**FOIRA**”) and no relief could be granted as against the Bank. It was submitted that from the respective standpoints of the Defendants Nos. 2 and 4, the applicable provisions of the Limitation Act were Articles 48 and 60, which at best provided a period of 3 years, whereas the Plaintiff, of his own admission, came to know of the Transaction on 12.01.2010, with the Suit being filed on 27.08.2015. It was averred that the proceedings before the Mohtasib did not serve to suspend or extend such period against the Defendant No.2 and could not

conceivably have any effect in relation to the claim against the Defendants Nos. 4 and 5, and that the Suit was barred and Plaintiff was liable to be rejected accordingly.

8. Responding to such submissions, learned counsel for the Plaintiff alleged that a fraud had been perpetrated upon the Plaintiff by the Defendant No. 4 with the connivance of the Defendant No. 2, whose officers, including the Defendant No.5, had breached the duty of trust and care owed to the Plaintiff, and that the Mohtasib and Governor, SBP in turn, had failed to appreciate the irregularities and illegalities underpinning the opening of the Account and processing of the Transaction, and their decisions were contrary to the evidence presented by the Plaintiff. It was contended with reference to Section 82-E(7) of the Banking Companies Ordinance, 1962 (the “**BCO**”) that the same clearly envisaged that a suit was competent in the event of rejection of a complaint, and on that basis it was submitted that the Courts of civil judicature have ultimate jurisdiction under Section 9 CPC, and even in the case of a statutory ouster clause in respect of matters decided by a special forum, the Court would still have jurisdiction to examine the acts of such forum to see if it is in accordance with law, or illegal, or mala fide. Reliance was placed on the judgments in the cases reported as Mian Muhammad Latif v. Province of West Pakistan PLD 1970 SC 180 and PLD 1996 SC 827. Learned counsel also sought to contend that Article 60 of the Limitation Act would not apply as, according to him, no formal demand had been made. He contended that the aspect of limitation would be governed under Article 120 of the Limitation Act, which prescribed a period of six years, and that the Suit was therefore within time.

9. In reply, it was pointed out on behalf of the Defendant Nos, 2 and 4 that the assertion as to Article 60 of the Limitation Act being inapplicable due to the absence of a demand as against the Defendant No.4 was in itself destructive to the Plaintiff's assertion of a cause of action having arisen against the Defendant No.2, and it was pointed out with reference to a letter dated 20.01.2010 addressed by the Plaintiff to the President of the Bank, filed as Annexure "P" to the Plaint, that a demand had clearly been made in terms thereof, hence such a plea was even otherwise misconceived. Furthermore, it was contended that the Suit was also barred by limitation, as the claim was essentially one for recovery of the deposited amount of Rs. 35 Million and damages, as claimed in terms of Prayers "g" and "h", and the subject of limitation had to be examined accordingly and it was immaterial that certain declarations had otherwise been sought. Reliance was placed on a judgment of the Honourable Supreme Court in the case reported as Dr. Muhammad Javaid Shafi v. Syed Rashid Arshad PLD 2015 SC 212.

10. Turning firstly to the plea of ouster of jurisdiction, it is noteworthy that Section 9 CPC and Section 18 of the FOIRA state as follows:

Section-9 CPC

Courts to try all Civil Suits unless barred--- *The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.*

Section 18 FOIRA

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 authority shall assume jurisdiction in respect of any matter pending with or decided by an Ombudsman.*

11. As to the contention on behalf of the Plaintiff that a civil Court could nonetheless exercise jurisdiction in the face of such a provision, it merits consideration that the cited judgment in Mian Muhammad Latif's case (Supra) as well as other judgments pertaining to the application of statutory ouster clauses were considered in the recent landmark judgment of the Honourable Supreme Court in the case reported as Searle IV Solution (Pvt) Ltd and others v. Federation of Pakistan and others 2018 SCMR 1444, and it was held that where the jurisdiction of the Civil court is challenged on the ground of ouster of jurisdiction it must be shown that, (a) the authority or tribunal in the Statute creating such a bar is validly constituted (b) where the order passed or action taken by the authority is not tainted with mala fide; (c) where the order or action taken was such which could be passed or taken under the law which conferred exclusive jurisdiction on the authority or tribunal; or (d) where in passing the order or taking the action, the principles of natural justice were not violated, and if one or more of these four conditions are violated an exception is carved out for the Civil Court to assume jurisdiction.

12. Under the circumstances of the matter at hand, there is no dispute as to the competence of the Mohtasib or the Governor SBP to exercise jurisdiction in the matter, and it is apparent that the Plaintiff's professed grievance against the Bank in relation to the Transaction was a matter that admittedly fell squarely within the jurisdiction of the Mohtasib, which in terms of Sections 82A(3) and 82- B(5) of the BCO, includes enquiring into complaints of banking malpractices, as well as violations of banking laws, rules, regulations or guidelines; and in relation to all banks operating in Pakistan, also extends to entertaining complaints of fraudulent or unauthorized withdrawals or debit

entries in accounts. Indeed, it was the Plaintiff himself who invoked the jurisdiction of the Mohtasib, of his own accord, and it has not even been pleaded that the proceedings as ensued were tainted with mala fide on the part of the adjudicating authority or suffered from any violation of the principles of natural justice.

13. With reference to Section 82-E(7) of the BCO, on which reliance was placed on behalf of the Plaintiff, it is noteworthy that the section merely envisages that the rejection of a complaint shall not preclude the filing of a suit by a complainant, and is not inconsistent with Section 18 of the FOIRA in any way, neither derogating therefrom nor diluting the effect thereof. Section 18, as per its own terms, only operates to bar the jurisdiction of a Court to entertain matters that fall within the jurisdiction of the Mohtasib, or to assume jurisdiction in matters that are pending or have been decided. The distinction between 'rejection' and 'dismissal' is well settled, and it has to borne in mind that in the instant case the Plaintiff's complaint to the Mohtasib was not rejected summarily, but was admittedly proceeded on and decided on merits, albeit the dismissal being termed a rejection of the claim.

14. From a reading of the Plaint in juxtaposition with the Order on the Plaintiff's complaint (Annexure "Q" to the Plaint), it is apparent that the case set up against the Bank in terms of the Plaint is the same as the case that was advanced before the Mohtasib, which was decided against the Plaintiff with a finding being recorded in the following terms:

"The crux of the Complainant's accusation is that TDR of Rs.35.0 Million has been swindled by the Samba Bank in a criminal manner which the Complainant failed to prove as discussed here in above. Admittedly, the money was received by the complainant's wife (at that time) Ms. Saleha Hyat who was

also beneficiary of the TDR which was well within the knowledge of the Complainant. I am of the view that the Saddar Branch, Rawalpindi encashed the TDR in question in line with the rule by which the said TDR was governed without negligence and in good faith. As such I cannot fault the Bank of any wrong doing.

Therefore, under powers vested in me vide Section 82 D of the BCO, I hereby, reject the claim of the Complainant and consign the complaint to records”.

15. The cases cited on behalf of the Plaintiff are further distinguishable in as much as in the matter at hand the Plaintiff is not seeking to avail a direct remedy in the form of a suit as an alternative to engaging the mechanism of the statutory fora, but has in fact already availed his remedy before the Mohtasib and preferred an appeal against his decision, and is now seeking that this Court exercise jurisdiction so as to sit in appeal over the concurrent findings of the original and appellate forum (i.e. the Mohtasib and the Governor, SBP) albeit that their decisions were competently made in relation to a subject that fell within the scope of their jurisdiction and do not offend the principles of justice, the substance of the objection being that the findings recorded therein are erroneous, allegedly being opposed to the law and facts. Needless to say, this cannot be countenanced.

16. Whilst the legality of the Mohtasib’s findings may still be open to question in the Constitutional sphere notwithstanding Section 18 of the FOIRA, it being well-settled vide the judgments of the Honourable Supreme Court as well as a full bench of the Lahore High Court in the cases reported as Mrs. Shahida Zahir Abbasi and 4 others v. President of Pakistan and others PLD 1996 SC 632 and Arshad Mehmood v.

Commissioner/Delimitation Authority Gujrawala & Others PLD 2014 Lahore 221 respectively that a provision in a sub-constitutional enactment cannot bar the jurisdiction of a Constitutional Court, the present proceedings have been filed under the original civil jurisdiction of this Court and are therefore subject to the ouster envisaged thereunder, hence Prayers “A” to “D” in their entirety and further prayers to the extent of the Defendant No.2 are barred accordingly.

17. Moving on to the question of limitation, it merits consideration that in the case of Dr. Muhammad Javaid Shafi (Supra), it was held by the Honourable Supreme Court that in cases where several causes of action have been joined and multiple remedies sought, it is not an absolute rule that the remedy entailing the maximum period of limitation should be the yardstick for determining limitation for purpose of the entire suit; rather such aspect should be examined by taking into consideration the facts of each case and particularly the frame and the object of the suit; *“And thus it should be determined what main relief is being sought by the plaintiff and whether the other remedies asked for (may be carrying larger period of limitation) are ancillary, dependent and consequential to the main relief.The true test for determining the period of limitation is to see the true effect of the suit and not its formal or verbal description.”* In that case, the Apex Court concluded that where the main relief was one for cancellation of a document under section 39 of the Specific Relief Act, 1877, the relief for possession of the immovable property that was the subject of such document was merely ancillary, incidental and dependent upon the primary relief, and where the main relief for cancellation was time-barred, the incidental and consequential relief of possession, even if attracting a larger period of limitation, had to go away along with it.

18. Applying the aforesaid ratio to the facts of the present case, it is apparent that, as was contended on behalf of the Defendants Nos. 2 and 4, the Suit is indeed essentially one for recovery of the deposited amount of Rs. 35 Million and damages, as claimed in terms of Prayers “g” and “h”, and the subject of limitation is to be examined accordingly. Even otherwise, as the declarations sought as against the Defendant No.1 have already been determined as barred under Section 18 of the FOIRA, the same cannot even otherwise serve as a determinant for purpose of reckoning the period of limitation, whereas the declarations sought in terms of prayers “e” and “f” are merely ancillary and incidental to the main relief in terms of Prayers “g” and “h”.

19. As such, the relevant provision of the Limitation Act from the standpoint of the Defendant Nos.4 would be Articles 36 or 48 and from the standpoint of the Bank, Article 60, which provide as follows:

Description of Suit	Period of Limitation	Time from which period begins to run
36. For compensation for any malfeasance misfeasance or non-feasance independent of contract and not herein specially provided for.	Two years	When the malfeasance, misfeasance or nonfeasance takes place.
48. For specific movable property lost or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same.	Three years	When the person having the right to the possession of the property first learns in whose possession it is.
60. For money deposited under an agreement that it shall be payable on demand including money of a customer in the hands of his banker so payable.	Three years	When the demand is made.

20. The plea advanced on behalf of the Plaintiff that Article 60 was inapplicable due to a demand not having been made against the Defendant No.2 and that Article 120 would therefore apply is clearly fallacious, as without a demand having been made on the Bank, a cause of action could not even be claimed as having arisen in the matter. Furthermore, as was pointed out on behalf of the Defendant No.2, a demand had evidently been made by the Plaintiff in terms of his letter of 20.01.2010 addressed to the President of the Bank, wherein the Plaintiff aired his complaint and called for reimbursement. The said letter reads as follows:

“Mr. Tawfiq Husain
President and CEO
Samba Bank Limited
Head Office
6th Floor Sidco Avenue Centre
Maulana Deen Muhammad Wafai Road
Saddar, KARACHI

FRAUDULENT TRANSFER OF RUPEES 35 MILLION FROM
ACCOUNT NUMBER 6406502973 (TITLE: SHAHID HAMID)
MAINTAINED IN SAMBA BANK LIMITED, SADDAR
BRANCH, RAWALPINDI

Reference: Telephone Complaint 4-8638 at 2115 hours
dated 20 Jan 2010

Dear Mr. Tawfiq Husain,

I would like to draw your attention to a gross fraud committed recently in my subject account. I maintain this account in Samba Bank Limited.

Earlier, in Samba Bank (formerly Crescent Commercial Bank Limited), Blue Area Branch, Islamabad, I used to operate an account 142-80175 for Term Deposits for a significant time. The average value of my deposit was Rs. 43,000,000. I shifted my principal Banking Relationship (Rs. 43,073,563) to another bank in Oct 2008. During early August 2009, my previous Relationship Manager at Blue Area Branch of Samba Bank, Mr. Muddassar Hassan called me and informed me about opening of the bank's new branch in Saddar, Rawalpindi. He also apprised me of his appointment as its Branch Manager and some of the Samba Bank's latest products and investment plans.

I decided to switch back to Samba Bank and avail better profit rates for deposit placement of Rs. 35,000,000. Mr. Mudassar Hassan visited my residence (H. No. 11, Street 14, Sector E, Phase I, DHA, Islamabad) and got my signatures on certain documents on the pretext that a new account will be opened and informed me that all particulars shall be filled by the Branch's official and only my signatures would suffice. At that time it was made clear to me that the newly opened account will have me as "Single Signatory" and all instruments shall be honoured only upon my telephonic confirmation in addition to my signatures.

I received my monthly profits regularly and it was only upon receiving my 6 monthly statement (by hand on 12 Jan 2010), it revealed to me that I had been deprived of Rs. 35 Million. I immediately rushed to the Branch Administration and requested for copies of complete documentation of my account no. 6406502973 since September 2009 onwards. Upon receiving these documents, it revealed to me that massive irregularities had been committed in my account. Unauthorized deposits, withdrawals through Demand Draft / Pay Order and issuance of Cheque Book(s) without my authority were done. I was not even informed by the branch in any manner when I was being deprived of Rs. 35 Million. I have come to know that the money was transferred to another account in the same branch without my authorization and knowledge.

Foregoing in view, I would request you to thoroughly investigate the matter to its minute details and rectify this fraud by getting Rs. 35 Million back to me from which I have been divested without authorization and in connivance by certain bank officials. I am available to extend my fullest cooperation with such an inquiry team in the matter if an impartial inquiry is conducted by your bank. I would also like to share credible evidences and records that clearly point towards gross misconduct and financial irregularity.

Please note that I am formally reporting the matter to your office for amicable resolution. However, in case the matter is not settled at your end, I reserve the right to initiate civil as well as criminal proceedings against Samba Bank Limited, its concerned officials and all those involved in this fraudulent activity that has resulted in this tremendous financial loss to me.

I shall look forward to receiving a prompt response to this letter but not later than 28 Jan 2010. Thereafter; I will be constrained to initiate appropriate legal course of action."

21. Hence, as the plaint was presented on 27.08.2015, it is apparent that whether the matter is viewed from the prism of either Articles 36, 48 or 60, the Suit is also clearly barred by limitation in terms of the Limitation Act.

22. In view of the findings in relation to the aspect of limitation and Section 18 of the FOIRA, CMA Numbers 2820/19 and 5259/18 are allowed, with the result that the Plaint stands rejected accordingly.

JUDGE

Karachi
Dated _____