

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

*Present: Ahmed Ali M. Shaikh, CJ and Omar Sial, J*

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**Constitution Petition No. D – 2441 of 2018**

Qamar Hussain ..... Petitioner

**Versus**

The Federation of Pakistan & Others ..... Respondents

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**Constitution Petition No. D – 3509 of 2018**

Asif Brohi ..... Petitioner

**Versus**

The Chairman, NAB & Others ..... Respondents

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**Constitution Petition No. D – 2575 of 2018**

Ahmed Humayun Shaikh ..... Petitioner

**Versus**

The Federation of Pakistan & another ..... Respondents

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**Constitution Petition No. D – 2635 of 2018**

Abid Amin ..... Petitioner

**Versus**

The NAB & Others ..... Respondents

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**Constitution Petition No. D – 2447 of 2018**

Nadeem Anwer Ilyas & another ..... Petitioners

**Versus**

The Federation of Pakistan & Others ..... Respondents

*Mr. Arshad M. Tayebaly, Advocate for petitioner in C.P. No.D-2441 of 2018.*

*M/s. Salim Salam Ansari & Zeshan Abdullah, Advocates for petitioner in C.P. No.D-2635 of 2018.*

*Ms. Ismat Mehdi, Advocate for petitioner in C.P. No.D-2575 of 2018.*

*Mr. Shoukat Hayat, Advocate for petitioner in C.P. No.D-3509 of 2018.*

*M/s. Saim Hashmi, Jam Asif & Behzad Haider, Advocates for petitioner in C.P. No.D-2447 of 2018.*

*Mr. Riaz Alam Khan, Special Prosecutor NAB.*

On Court Notice

*Mr. Kumail Shirazee, Advocate on behalf of the State Bank of Pakistan*

*Mr. Imran Shamsi, Law Officer of the SECP*

*Mr. Kailash Vaswani, Special Prosecutor NAB along with Nasir Shehzad, Investigating Officer*

**JUDGMENT**

**Omar Sial, J.:** The petitioners have all been nominated accused in Reference No. 21 of 2017 filed by NAB and pending adjudication in the Accountability Court No. II in Karachi. Earlier, on 13-2-2018 the learned trial court had dismissed the applications of all the petitioners seeking quashment of proceedings. We note that it was only petitioners Ahmed Humayun Sheikh and Abid Amin who had filed section 265-K Cr.P.C applications before the trial court whereas the remaining petitioners, in our view, filed applications for quashing proceedings under incorrect sections of the law. Be that as it may, as the learned Judge of the trial court has passed a similar order in all the petitions, we have heard the petitioners' counsel and intend to dispose of all the petitions with this common order.

2. The petitioners Qamar Hussain (in C.P. No. D-2441 of 2018), (ii) Nadeem Anwar Ilyas and Nausherwan Adil (in C.P. No. D-2447 of 2018) and Asif Brohi (in C.P. No. D-3509 of 2018) are all employees of National Bank of Pakistan whereas Ahmed Humayun Sheikh (in C.P. No. D-2575 of 2018) and Abid Amin (in C.P. No. D-2635 of 2018) are the shareholders/directors of Azgard Nine Limited.

3. A brief background of events which led to the filing the Reference is as follows:

Azgard Nine Limited, a public limited company incorporated under the laws of Pakistan, availed various finance facilities from 22 banks, which included National Bank of Pakistan, and as security for the finance facilities, inter alia, pledged the shares of one of its wholly owned subsidiary Agritech Limited. Azgard defaulted upon its obligations towards the banks and as a consequence the 22 banks restructured the finance facilities availed by it. One of the terms of restructuring was that National Bank of Pakistan would purchase the shares pledged to the consortium banks i.e. those of Agritech Limited, at a share price of Rs. 35. To document the restructuring, a Master Restructuring and Inter-creditor Agreement was executed between Azgard and the consortium banks. NAB's

case against the petitioners is that the shares were actually each of Rs. 13.47 value hence the restructuring caused a loss of Rs. 3.302 billion to the national exchequer.

4. We have heard the learned counsel for the petitioners as well as the learned Special Prosecutor, NAB. Although the State Bank of Pakistan and the Securities & Exchange Commission of Pakistan were not made parties, we felt it necessary to hear them in the circumstances of the case. Our observations are as follows.

5. The learned counsel for the petitioners have all primarily argued that the Reference filed against the petitioners is liable to be brushed aside in view of the fact that the conditions stipulated in section 31-C and 31-D of the National Accountability Ordinance, 1999 had not been complied with before the filing of the Reference.

#### **Petitioners who were employees of National Bank of Pakistan**

6. We will first address the case of those petitioners who were admittedly employees of National Bank of Pakistan at the relevant time and that they acted in their official capacities in connection with the restructuring of the finance facilities extended to Azgard.

7. Section 31-C of the National Accountability Ordinance, 1999 provides as follows:

***31-C** No Court established under this Ordinance shall take cognizance of an offence against an officer or an employee of a bank or financial institution for writing off, waiving, restructuring or refinancing any financial facility, interest or mark-up without prior approval of the State Bank of Pakistan.*

8. It is clear from the above section that the prior approval of the State Bank of Pakistan is mandatory before cognizance can be taken by a Court of an offence against an employee of a bank in connection with, inter alia, a restructuring of a finance facility.

9. Section 31-D of the Ordinance provides that: *“Notwithstanding anything contained in this Ordinance or any other law for the time being in force, no inquiry, investigation or proceedings in respect of imprudent loans, defaulted loans or rescheduled loans shall be initiated or conducted by the National Accountability Bureau against any person, company or financial institution without reference from Governor, State Bank of Pakistan.*

10. It follows from section 31-D that there is a bar on NAB to conduct an inquiry, investigation or proceedings in respect of, inter alia, rescheduled loans if the same is initiated without a reference from the Governor, State Bank of Pakistan. We observe though that the word *“restructuring”* appearing in section 31-C of the Ordinance does not find a mention in section 31-D wherein the word *“rescheduling”* is used. Keeping in

mind that the word “*restructuring*” and “*rescheduling*” would encapsulate different mechanisms for the treatment of a facility which has been defaulted upon, we give no definite finding on whether the bar contained in section 31-D would be applicable to the case of the petitioners who are employees of a bank. We are however satisfied that the condition stipulated in section 31-C of the NAO 1999 would come into play in the case of those petitioners who are bank employees. The learned counsel for the State Bank of Pakistan has categorically submitted that the approval of the State Bank of Pakistan was not sought before the Reference was filed. Similarly, that the requisite permission was not obtained by NAB before the filing of the Reference has also been admitted by the learned Special Prosecutor, NAB as well as the investigating officer of the case.

11. We are perturbed by the fact that out of a consortium of 22 banks, it is only National Bank of Pakistan and its employees who have been singled out as accused in the Reference. The learned Special Prosecutor, NAB was unable to satisfy us as to why the remaining 21 banks and their employees were not included in the Reference, inquired or investigated as they face exactly the same allegation which has been leveled against the petitioners (who are bank employees). It appears that a pick and choose, discriminatory and lop sided strategy without fulfilling the mandate of law has been deployed by NAB, which in itself does not reflect well on the country’s premier anti-graft agency.

12. In view of the fact that an approval mandatorily required to be obtained i.e. that of the State Bank of Pakistan was not obtained by NAB before the filing of the Reference, the learned trial Court erred in taking cognizance in the matter. We are of the view that the Reference No. 21 of 2017 initiated against the petitioners who were employees of the bank does not fulfill the mandatory condition contained in section 31-C of the NAO 1999 rendering the very initiation of proceedings and all subsequent acts illegal and void. We therefore quash the proceedings against the petitioners.

**Petitioners who were employees/shareholders/directors of Azgard Nine Limited**

13. The learned counsel appearing on behalf of Azgard Nine employees at the time of arguments, adopted the arguments of Mr. Arshad Tayebaly, learned counsel appearing on behalf of some of the National Bank of Pakistan employees. While dictating the order we had observed that the primary argument raised by Mr. Tayebaly was non-compliance of section 31-C of the NAO, 1999, which applies to banks and bankers. Azgard Nine employees are admittedly not bankers and the company is not a bank. In order to do justice, we gave an opportunity to the learned counsel for the petitioners to clarify their position. As during the initial hearing, learned counsel

appearing for Azgard had also argued that permission from the Securities and Exchange Commission was compulsory in terms of section 41-B of the Securities and Exchange Commission Act, 1997, we gave notice to the Joint Director (Law) of the SECP to file his statement as to whether the transaction of restructuring of the finance facility extended to Azgard fell within the definition of “regulated activity” or “regulated securities activity” as contained in section 41-B of the Securities and Exchange Commission Act, 1997.

14. Mr. Imran Shamsi, the Law Officer of SECP who assisted us, categorically stated that the line of business that Azgard followed was not a regulated activity as used in section 41-B of the Securities and Exchange Commission Act, 1997. He further stated that no permission was sought from SECP nor, according to him, one was required in the circumstances of the case. The learned counsel appearing on behalf of the Azgard employees, also finally submitted that they do not wish to rely on section 31-C of the NAO 1999 nor on section 41-B of the Securities and Exchange Commission Act, 1997 but that their case for quashing proceedings was based solely on section 31-D of the NAO 1999.

15. As mentioned above, section 31-D of the NAO 1999 provides that notwithstanding anything contained in the NAO 1999 or any other law for the time being in force, no inquiry, investigation or proceedings in respect of imprudent loans, defaulted loans or rescheduled loans can be initiated or conducted by the National Accountability Bureau against any person, company or financial institution without reference from Governor, State Bank of Pakistan.

16. We asked the learned counsel appearing on behalf of the Azgard employees as to how section 31-D of NAO 1999 was applicable in the present case as the parties had entered into a restructuring agreement and the SECP permission required by section 31-D is in connection with a rescheduling of a loan. Learned counsel argued that rescheduling and restructuring is basically the same thing and the terms are used interchangeably. He then argued that rescheduling of a loan fell within the ambit of restructuring. In order to support his argument, he made some un-authoritative references to definitions of “*rescheduling*” and “*restructuring*” wherein it was given that the two terms mean the same things. We are not satisfied with the references made as they seem to have been picked from the internet from amongst many others which show the contrary.

17. In our view there is a difference between a restructuring and rescheduling of a loan. Rescheduling is often implemented as a supplementary to already existing loan

agreement whereas restructuring requires a completely new set of documents; the security in a rescheduling is not usually discharged whereas in a restructuring the first security documents are discharged; in a restructuring arrears, capitalization of penalty, profit charges may fall within the ambit of a restructured loan whereas the same would not be the case in a rescheduling etc. It was recognition of this difference that the State Bank of Pakistan through BPRD Circular No. 13 of 2016 dated 7-10-2016 amended Rule 8 of the Prudential Regulations by introducing the following definitions:

***“Restructuring** means such concessions to the borrower, due to borrowers’ financial difficulty, which the bank/DFI would not otherwise consider. Restructuring normally involves modification in the terms & conditions of the financing / securities and generally includes, amongst others, alteration of repayment period, repayable amount, installment amount, mark-up rates (due to reasons other than competitive pricing) etc.*

***Rescheduling** means such concession in the grace period or modification in the repayment dates of principal loan amount (without changing overall loan tenor), due to borrowers’ financial difficulty, which the bank/DFI would not otherwise consider.”*

18. The learned Special Prosecutor, NAB’s argument that the transaction entered into was a debt-asset swap also appears to support the position that the transaction in issue was a restructuring of a loan.

19. Be that as it may, in these proceedings this Court cannot carry out a comprehensive analysis of the agreement to determine its actual effect. To us, prima facie, this appears to be a restructuring transaction. Further, the learned counsel was also not able to satisfy us why the legislature would use different words in two successive sections of the law, if its intent was the same. We are therefore not convinced that in the circumstances of the case, an SECP permission was a pre-requisite to file a Reference.

20. As the only ground raised, relied upon and argued by the learned counsel for the Azgard employees in support of quashing proceedings against them was their reliance on section 31-D of the NAO 1999, and we are of the view that section 31-D was not applicable, we are not inclined to quash proceedings against the petitioners who are Azgard employees/shareholders/directors.

21. In view of the above:

(a) The petitions filed by Qamar Hussain (C.P. No. D-2441 of 2018), Nadeem Anwar Ilyas and Nausherwan Adil (C.P. No. D-2447 of 2018) and Asif Brohi (C.P. No. D- 3509 of 2018) are allowed and the proceedings against them arising out of Reference No. 21 of 2017 stand quashed.

(b) The petitions filed by Ahmed Humayun Sheikh (C.P. No. D-2575 of 2018) and Abid Amin (C.P. No. D-2635 of 2018) stand dismissed.

JUDGE

CHIEF JUSTICE