

ORDER SHEET
IN THE HIGH COURT OF SINDH BENCH AT SUKKUR.
 C.P.No. D – 1071 of 2022.

1. For orders on office Objection at Flag. A.
2. For Hearing of main case.

30.04.2024.

Mehboob Ahmed Soomro, the Petitioner, present in person.
 Mr. Shoukat Ali Choudhary, Advocate for respondent No.4.
 Mr. Dareshani Ali Hyder 'Ada", Deputy Attorney General

O R D E R

MOHAMMAD ABDUR RAHMAN, J- The Petitioner maintains this Petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, seeking the following relief.

" ... a). *This Hon'able Court is thus requested to declare all impugned circulars drastically changing/dis-continuing the Pension and Post Retirement Benefits benefits/privileges of employees of NCBs as contravention of the statutory Order of November 1977 Government of Pakistan thus being illegal, discriminatory, unlawful violation of law of the land and void ab-initio.*

b). *that the respondent may kindly be directed to grant pension and Post Retirement benefits/privileges as per stipulation of law of Statutory Order of Government of Pakistan of 1977 in true prospective besides complying section No.13 of Banks Nationalization Act, 1974 and covenants and agreements executed with the Government of Pakistan."*

2. The Petitioner was an employee of Habib Bank Limited (hereinafter referred to as "HBL'). He contends that he started his career at HBL as a Grade-III Office in 1981 and retired from his employment with HBL in November, 2016. He maintains that at the time when his employment commenced, HBL was a Bank that was owned and controlled by the Government of Pakistan and which was inter alia regulated by the Pakistan Banking Council. Relying on a Notification of the Government of Pakistan Finance Ministry No.17(9) II-XI-77 dated 30 November 1977, he stated that the Federal Government of Pakistan had directed all Banks to maintain a Pension and Gratuity scheme and which was implemented by the Pakistan Banking Council and endorsed by HBL through its Circular No.GN/286 dated 22 February 1978.

3. Pursuant to a Share Purchase Agreement dated 26 February 2004, the Government of Pakistan privatized HBL by selling its shareholding in HBL to the Aga Khan Fund for Economic Development. Pursuant to Clauses 5.2 & 5.6 of that Agreement it was obligatory on the Aga Khan Fund for Economic Development to ensure that:

“ ... 5.2 Purchaser shall comply with the following conditions in relation to the existing employees and staff members of HBL:-

5.2.1 all existing benefits and facilities being enjoyed by the employees and staff members of HBL (whether executive, managerial, officers or workmen) shall not be changed, varied or discontinued to the detriment of the staff members and employees by Purchaser, for a minimum period of (1) one year from the Signing Date and thereafter, only in accordance with the provisions of applicable laws and contracts of such employees and staff members.

5.2.2 the existing employees and staff members of HBL, (whether executive, managerial, officers or workmen) shall not for a period of minimum (1) years from the Signing Date, be terminated, laid-off, retrenched or made to resign from the services of HBL except by way of dismissal on account of misconduct within the meaning of the service rules/regulations of HBL and/or applicable laws:

5.2.3 subject to sub-clause 5.2.1, the existing service rules/regulations of HBL will not be modified to the detriment of the existing staff members and employees for a period of at least one (1) year from the Signing Date;

5.2.4 nothing contained in sub-clauses 5.2.1, 5.2.2 or 5.2.3 shall restrict or be constructed as restricting the right of HBL or Purchaser to offer a scheme of voluntary retirement or golden handshake to the existing employees of HBL;

5.2.5 except and to the extent specified in this Clause 5.2 nothing contained in this Agreement including without limitation this Clause shall affect any other right or power of HBL with respect to its employees and staff members under the applicable law; and

5.2.6 it is clarified that nothing in this Clause 5.2 shall apply to (a) employees of independent contractors engaged by HBL or transfer of any HBL's employees from one management to another within HBL provided such transfer does not result in any reduction in his/her remuneration and other benefits.”

4. It seems that after the privatization of HBL, various pensionary benefits, as contained in the Notification dated 30 November 1977 were purportedly modified and which has caused the Petitioner much angst. The Petitioner hence claims a vested right as against HBL to be treated as in accordance with the Notification dated 30 November 1977 and has maintained this Petition seeking the enforcement of that notification s against HBL. He relied on the decision of the Supreme Court of Pakistan reported as **Bahadur Khan and others vs. Federation of Pakistan**

Secretary M/o Finance, Islamabad and others¹ wherein the same notification was enforced by the Supreme Court of Pakistan as against the National Bank of Pakistan as being statutory in nature and issued under Section 20 of the Banks Nationalization Act, 1974. He therefore pleads that as it has been held that the Said Notification has statutory force, it should equally be enforced as against HBL.

5. The petition is opposed by HBL who are represented by Mr. Shoukat Ali Choudhary. The sole ground that the post that had been advanced by him was that after the divestment of the Government of Pakistan in HBL, this Petition is not maintainable and is liable to be dismissed. He stated that as per the “Function Test” developed by the Supreme Court of Pakistan, the Petitioner not being either owned or controlled by the Government of Pakistan, is not subject to this Court’s jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. In this regard Mr. Choudhary relied on the judgment of the High Court of Baluchistan reported as **Abdul Malik vs. HBL and Others**² wherein when a similar objection was raised by HBL before the High Court of Baluchistan, the Petition was dismissed on the ground that HBL being a privately owned company, it was not subject to the jurisdiction of a High Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. He also relied on an unreported judgment of the Peshawar High Court, Peshawar entitled **Zulfiqar and others vs. Federation of Pakistan through Secretary Ministry of Finance and others** bearing Petition No.447/P of 2011 and an unreported judgment of the High Court of Azad Jammu and Kashmir bearing CP NO. 315 of 18 entitled **Muhammad Javed Khan vs. Habib Bank Limited and others** in both of which Petitions, HBL was a respondent and the courts dismissed the petitions on identical grounds. He also relied on 2 other judgments being an unreported decision in C.P. 1411 of 2019 of the High Court of Baluchistan Quetta entitled **Safdar Ali vs Federation of Pakistan and others** and Writ Petition No. 2250 of 2019 entitled **Parvaiz Akhtar Bhatti vs. Federation of Pakistan ad others** decided by the Islamabad High Court, Islamabad in which it is stated that even where a company was controlled by the Government of Pakistan, unless the company was regulated by statutory rules the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of

¹ 2017 SCMR 2066

² SBLR 2009 Baluchistan 98

Pakistan could not be invoked. Mr. Dareshani Ali Hyder ‘Ada’ the Learned Deputy Attorney General supported the contentions of Mr. Shoukat Ali Choudhary.

6. We have heard Mehboob Ahmed Soomro, Mr. Shoukat Ali Choudhary and Mr. Dareshani Ali Hyder ‘Ada’ and have perused the record.

7. The Supreme Court of Pakistan in the decision reported as **Salahuddin And 2 Others vs. Frontier Sugar Mills & Distillery Ltd., Tokht Bhai And 10 Others**³ had held that:

“ ... Clause (1) of Article 199 of the 1973 Constitution is in identical terms, and clause (5) of that Article also contains the same definition of the term "person". Both these Articles are in pari materia with Article 98 of the abrogated Constitution of 1962.

It will be seen that the power conferred on the High Court under sub-clauses (a)(i) and (a)(ii) of clause (2) of Article 201 of the interim Constitution can be exercised only in respect of a person performing, within the territorial jurisdiction of the Court, functions in connection with the affair of the Federation, a Province or a local authority. If the person whose acts, actions or proceedings are challenged before the High Court, does not fall within any of the specified categories, then he would clearly not be amenable to this extraordinary jurisdiction. ...

Now, what is meant by the phrase "performing functions in connection with the affairs of the Federation or a Province." It is clear that the reference is to governmental or state functions, involving, in one form or another, an element of exercise of public power. The functions may be the traditional police functions of the State, involving the maintenance of law and order and other regulatory activities; or they may comprise functions pertaining to economic development, social welfare, education, public utility services and other State enterprises of an industrial or commercial nature. Ordinarily, these functions would be performed by persons or agencies directly appointed, controlled and financed by the State, i.e., by the Federal Government or a Provincial Government. However, in recent years, there has been manifest a growing tendency on the part of Government to create statutory corporations for undertaking many such functions, particularly in the industrial and commercial spheres, in the belief that free from the inhibiting effect of red-tapism, these semi-autonomous bodies may prove more effective, flexible and also profitable. Inevitably, Government retains effective control over their functioning by appointing the heads and other senior officers of these corporations, by regulating their composition and procedures by appropriate statutes, and by finding funds for financing their activities.

Examples of such statutory corporations are the National Bank of Pakistan, the West Pakistan Water and Power Development Authority, the National Shipping Corporation, the Agricultural Development Bank of Pakistan, and the large number of Universities functioning under their respective statutes. On account of their common attributes, as mentioned in the preceding paragraph, they have all been regarded as

³ PLD 1975 SC 244

persons performing functions in connection with the affairs of the Federation or a Province.

(See *Deputy Managing Director, National Bank of Pakistan v. At-ul-Haq* (P L D 1965 S C 201), *Wall Muhammad v. General Manager, WAPDA, Lahore* (P L D 1964 Pesh. 167), *Chairman, East Pakistan Industrial Development Corporation v. Rustom Ali* (P L D 1966 S C 848), *Muhammad Ashraf Pervaiz v. Agricultural Development Bank of Pakistan* (P L D 1973 Lah. 425), *Abdur Razzaq v. WAPDA* (P L D 1973 Lah. 188) and *R. T. II. Janjua v. National Shipping Corporation* (P L D 1974 S C 146)

However private organizations or persons, as distinguished from government or semi-government agencies and functionaries cannot be regarded a persons performing functions in connection with the affairs of the Federation or a Province simply for the reason that their activities happen to be regulated by laws made by the State.

Accordingly, a joint-stock company, incorporated under the Companies Act, for the purpose of carrying on commercial or industrial activity for the benefit of its shareholders, cannot be regarded as a person performing State functions, just for the reason that its functioning is regulated by law or that the distribution of its manufactured products is subject to governmental control in the public interest. The primary test must always be whether the functions entrusted to the organization or person concerned are indeed functions of the State involving same exercise of sovereign or public power; whether the control of the organization vests in a substantial manner in the hands of Government; and whether the bulk of the funds is provided by the State. If these conditions are fulfilled, then the person, including a body politic or body corporate, may indeed be regarded as a person performing functions in connection with the affairs of the Federation or a Province; otherwise not."

8. The "Functions Test" as developed by the Supreme Court of Pakistan requires a determination as to whether any entity is directly or indirectly under the control of either the Government of Pakistan or of the Government of a Province. In the event that it is, the entity would be subject to the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. The test has since been followed in numerous decisions by the Supreme Court of Pakistan.⁴ The test was applied in the context of the relationship as between master and servant in the decision reported as **Pakistan International Airline Corporation and others vs. Tanweer-ur-Rehman and others**⁵ wherein it was held that:

⁴ See **Federal Government Employees Housing Foundation through Director General Islamabad and another vs. Muhammad Akram Alizai, Deputy Controller, PBC, Islamabad** 2002 PLC (C.S.) 1655, **Aitchison College, Lahore through Principal vs. Muhammad Zaubair and another** PLD 2002 SC 326; **Ziaullah Khan Niazi vs. Chairman, Pakistan Red Crescent Society** 2004 SCMR 189; **Pakistan Red Crescent Society vs. Syed Nazir Gillani** PLD 2005 SC 806; **Pakistan International Airline Corporation and others vs. Tanweer-ur-Rehman and others** PLD 2010 SC 676, **Pir Imran Sajid vs. Managing Director/General Manager (Manager Finance) Telephone Industries of Pakistan** 2015 SCMR 1257; **Pakistan Olympic Association vs. Nadeem Aftab Sindhu** 2019 SCMR 221

⁵ *Ibid*

“ ... 19. However, this question needs no further discussion in view of the fact that we are not of the opinion that if a corporation is discharging its functions in connection with the affairs of the Federation, the aggrieved persons can approach the High Court by invoking its constitutional jurisdiction, as observed hereinabove. But as far as the cases of the employees, regarding their individual grievances, are concerned, they are to be decided on their own merits namely that if any adverse action has been taken by the employer in violation of the statutory rules, only then such action should be amenable to the writ jurisdiction. However, if such action has no backing of the statutory rules, then the principle of Master and Servant would be applicable and such employees have to seek remedy permissible before the Court of competent jurisdiction.

As is apparent, the Supreme Court of Pakistan has stated that even in the event that a body is found to be owned or in a control of the federal or provincial government, unless the body is regulated by statutory rules, a Petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 cannot be maintained as against it. The test has been applied to banks which were previously owned by the Government of Pakistan but which have subsequently been privatized. In the decision reported as **Muhammad Ashraf vs. United Bank Limited**⁶ it was specifically clarified that a High Court could not entertain a petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 against a private bank having no statutory rules.

9. Applying the “Functions Test” to HBL we have no doubt that it is a Banking Company, albeit regulated by the State Bank of Pakistan, but owned and controlled by the Aga Khan Fund for Economic Development and hence, being a private entity, is not subject to the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

10. Regarding the status of the Notification of the Government of Pakistan Finance Ministry No.17(9) II-XI-77 dated 30 November 1977 and which was held by the Supreme Court of Pakistan in the decision reported as **Bahadur Khan and others vs. Federation of Pakistan Secretary M/o Finance, Islamabad and others**⁷ to have statutory force by virtue of Section 20 of the Banks Nationalization Act, 1974. We are clear that such statutory notification would be applicable to banks the control of which vested with the Government of Pakistan under the Banks Nationalization Act, 1974 but after HBL’s privatisation the provisions of Section 20 of the

⁶ 2015 SCMR 911

⁷ 2017 SCMR 2066

Banks Nationalization Act, 1974 would not be applicable to HBL and hence Notification of the Government of Pakistan Finance Ministry No.17(9) II-XI-77 dated 30 November 1977 would not be enforceable by the Petitioner as against HBL.

11. In respect of clause 5.2.1 of the Share Purchase Agreement dated 26 February 2004, we note that this agreement was executed as between Aga Khan Fund for Economic Development and the Government of Pakistan. Pursuant to this clause of the Share Purchase Agreement dated 26 February 2004 the Aga Khan Fund for Economic Development was obligated to the Government of Pakistan for a period of one year, not to change, vary or discontinue “all existing benefits and facilities being enjoyed by the employees and staff members of HBL (whether executive, managerial, officers or workmen).” We also note that HBL was not a party to the Share Purchase Agreement dated 26 February 2004 and it being a separate legal entity, it is disputable as to whether the terms of that agreement would bind HBL. Be that as it may, at best the Government of Pakistan could have compelled the Aga Khan Fund for Economic Development to keep any such policy in place for a period of one year and surely after that period not even the Government of Pakistan could have compelled the Aga Khan Fund For Economic Development to maintain any policy. To our mind at present the relationship as between any employee of HBL and HBL would be governed solely as per the laws of master and servant. We are therefore of the opinion that:

- (i) as HBL was never a party to the Share Purchase Agreement dated 26 February 2004, the terms of that contract would not be enforceable as against it; and
- (ii) the terms of the Share Purchase Agreement dated 26 February 2004 could have been enforced by the Government of Pakistan as against the Aga Khan Fund for Economic Development for a period of 1 year whereafter, the Aga Khan Fund for Economic Development would have been able to use its position as the majority shareholder of HBL to vary “all existing benefits and facilities being enjoyed by the employees and staff members of HBL (whether executive, managerial, officers or workmen).”

12. For the foregoing reasons we are of the opinion that the Petition is clear misconceived as:

- (i) applying the functions test, in terms of the decision reported as **Muhammad Ashraf vs. United Bank Limited**⁸ the provisions of Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 cannot be applied by a High Court against HBL as it not an entity owned or controlled by the Government of Pakistan or the Government of any Province of Pakistan;
- (ii) after the execution of the Share Purchase Agreement dated 26 February 2004, the provisions of Notification of the Government of Pakistan Finance Ministry No.17(9) II-XI-77 dated 30 November 1977 were no longer binding on HBL as it was no longer a nationalized bank and was not subject to any rules made under the provisions of Section 20 of the Banks Nationalization Act, 1974; and
- (iii) after the execution of the Share Purchase Agreement dated 26 February 2004 the Aga Khan Fund for Economic Development was obliged to the Government of Pakistan, for a period of one year, to not vary all existing benefits and facilities being enjoyed by the employees and staff members of HBL (whether executive, managerial, officers or workmen)” And which period has also lapsed; and
- (iv) the terms of employment as between HBL and its employees is regulated by the law of master and servant before the civil courts.

The petition is hence dismissed along with all listed applications, with no order as to costs.

JUDGE

⁸ 2015 SCMR 911

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JUDGE