

IN THE HIGH COURT OF SINDH KARACHI

Present:

Mr. Justice Muhammad Ali Mazhar

Mr. Justice Adnan Iqbal Chaudhry

Const. Petition No. D-4190 of 2016

[Askari Bank Limited versus President of Pakistan and Others]

Petitioner : Askari Bank Limited through
Mr. Khalid Mehmood Siddiqui,
Advocate.

Respondent 1 : President of Pakistan through Mr. Shoaib
Mirza, Assistant Attorney General.

Respondent 2 : Nemo

Respondent 3 : Dr. Mirza Ikhtiar Baig through
Mr. Muhammad Azhar Faridi, Advocate.

Date of hearing : 10-10-2018

J U D G M E N T

Adnan Iqbal Chaudhry J. - The Petitioner (Askari Bank) is aggrieved of orders dated 19-10-2015 and 27-06-2016 passed respectively by the Banking Mohtasib and the President of Pakistan whereby the complaint of the Respondent No.3 under section 82D of the Banking Companies Ordinance, 1962 [**the BCO**] was accepted by the Banking Mohtasib, the Petitioner's Representation to the President under section 14 of the Federal Ombudsmen Institutional Reforms Act, 2013 [**the FOIRA**] was dismissed, and Askari Bank was directed to refund a sum of Rs.8,024,831/- to the Respondent No.3.

This petition had been tagged for hearing and then reserved for judgment along with a number of other petitions which had challenged the *vires* of certain provisions of the BCO and the FOIRA. However, since this petition does not raise any such challenge, we decide this petition separately.

2. The facts in brief are that the Respondent No.3 carries on business under the name and style of 'Pak Denim Ltd.' [PDL], and his grievance was that his employees in connivance with Askari Bank's employees had embezzled money from the bank account of PDL at Habib Metropolitan Bank by diverting certain cheques. Though the said cheques of PDL were made payable to different suppliers of PDL and were crossed for payment "to payee account only", these were collected for payment by Askari Bank and then credited to a bank account titled 'Kamran Latif & Company' even though 'Kamran Latif & Company' was not the payee of said cheques. From there, the proceeds of the said cheques allegedly landed in the bank accounts of two individuals, one of whom was the employee of PDL.

3. The cheques in question were 21 in number and were drawn on the bank of PDL from time to time between April to October 2008. Per the Respondent No.3 he came to know of the fraud in 2012 when it was brought to his attention by the FIA. An FIR was lodged in 2012 and the accused employees of the Respondent No.3 and Askari Bank were arrested and challaned by the FIA before the Special Court Offences in Respect of Banks (hereinafter 'the Offences Court').

4. Some correspondence took place between the Respondent No.3 and Askari Bank when the Respondent No.3 had called upon Askari Bank to settle the misappropriated sum. However, by letter dated 11-02-2014, Askari Bank finally denied liability. A complaint was made by the Respondent No.3 to the State Bank which was not processed owing to the case pending before the Offences Court. Eventually, in 2015, the Respondent No. 3 made a complaint to the Banking Mohtasib.

5. Before the Banking Mohtasib, the explanation offered by Askari Bank for crediting the cheques to the account of Khalid Latif & Company was that since the payees of the cheques did not

maintain accounts with Askari Bank, the cheques were credited to the account of Khalid Latif & Company !. The paying bank, namely Habib Metropolitan Bank, was also summoned by the Banking Mohtasib to give its point of view. That bank informed the Mohtasib that when the collecting bank (Askari Bank) sends a cheque for collection to the paying bank (Habib Metropolitan Bank), the collecting bank discharges the paying bank by certifying on the reverse of the cheque that 'payee account credited'; and therefore the paying bank has neither the means nor the responsibility to verify whether the correct payee account had been credited by the collecting bank.

6. The Banking Mohtasib held that all other things apart, since the cheques in question were crossed for payment to 'payee account only', in terms of section 123-A of the Negotiable Instruments Act, 1881, such crossed cheques ceased to be negotiable and could not have been deposited and then credited by Askari Bank to the account titled 'Kamran Latif & Company' when admittedly none of the said cheques were made payable to 'Kamran Latif & Company'. The Banking Mohtasib noted that it was not the case of Askari Bank that the cheques were deposited in the account of Kamran Latif & Company for some consideration, or that such deposit was made with the mandate of the Respondent No.3, or that the proceeds of such cheques were eventually received by the intended payees; hence the order of the Banking Mohtasib to refund the amount of the cheques being Rs. 8,024,831/- to the Respondent No.3, which order was upheld by the President on a Representation under section 14 of the FOIRA.

7. Mr. Khalid Mehmood Siddiqui, learned counsel for Askari Bank submitted that the Banking Mohtasib had failed to appreciate that the Petitioner could not be saddled with the entire loss of the Respondent No.3 when his own employees were admittedly party to the fraud; that the Respondent No.3 had already recovered a sum of Rs. 2.250 million from one of his accused employees; that the

Banking Mohtasib did not have jurisdiction to entertain the complaint when the matter was *subjudice* before the Offences Court. Learned counsel further submitted that the Banking Mohtasib also failed to appreciate that notwithstanding that Askari Bank had formally rejected the claim of the Respondent No.3 on 11-02-2014, the period of 90 days envisaged under section 82D (2) of the BCO for making a complaint to the Banking Mohtasib had commenced from 18-02-2012 when the Respondent No.3 first made a complaint to Askari Bank; and therefore the complaint made to the Banking Mohtasib on or about 05-08-2015 was beyond the period of limitation.

8. On the other hand, Muhammad Azhar Faridi, learned counsel for the Respondent No.3 denied that the Respondent No.3 had recovered any part of the misappropriated money from his accused employee. He submitted that all such questions had been duly considered by the Banking Mohtasib and then again by the President in passing the impugned orders. He supported the impugned orders and submitted that these were concurrent findings of fact which did not call for any interference in writ jurisdiction by reason of the ouster of jurisdiction clause contained in section 18 of the FOIRA. He submitted that notwithstanding the case pending before the Offences Court, since the complaint was one against maladministration, the Banking Mohtasib had jurisdiction to decide the matter. As regards the ground of limitation, learned counsel replied that owing to the time consumed in negotiating and corresponding with the Bank, and then the pendency of a complaint with the State Bank, the Banking Mohtasib had condoned the delay in filing the complaint, which power he possessed under section 82D (2) of the BCO.

9. After hearing learned counsel, we are inclined to agree with learned counsel for the Respondent No.3 that this Court in its writ jurisdiction will not delve into concurrent findings of fact unless the Petitioner can show that the impugned orders suffer from a

jurisdictional defect, in which case section 18 of the FOIRA will not oust the jurisdiction of this Court under Article 199 of the Constitution of Pakistan to exercise judicial review. That much has been laid down in *Peshawar Electric Supply Company Ltd. v. Wafaqi Mohtasib (Ombudsmen)*, Islamabad (PLD 2016 SC 940). For a similar ouster of jurisdiction clause contained in the Establishment of the Office of the Wafaqi Mohtasib (Ombudsman) Order, 1983, a Division Bench of this Court in *State Life Insurance Corporation of Pakistan versus Wafaqi Mohtasib* (2000 CLC 1593) had also held that the ouster is only attracted where action was taken within the four corners of the said statute, and any action taken or order made beyond the scope of authority provided in such statute cannot be held to be immune from judicial review by a superior court.

10. Mr. Khalid Mehmood Siddiqui, learned counsel for the Petitioner was unable to convince us that by reason of the criminal case pending before the Offences Court, the Banking Mohtasib did not have jurisdiction to entertain the complaint. Sub-section (5)(c) of section 82B of the BCO only bars the Banking Mohtasib from entertaining those complaints which have “already been disposed of by the State Bank, or any court in Pakistan.” Firstly, the criminal case before the Offences Court was not a matter ‘disposed of’; and secondly, in any case, the pendency of a criminal proceeding would not oust the jurisdiction of the Banking Mohtasib under the BCO where the proceedings are civil in nature.

In our view, once Askari Bank accepted that the cheques in question were crossed for payment to ‘payee account only’, and that ‘Kamran Latif & Company’ in whose account the said cheques were credited, was not such payee, then notwithstanding any other matter or aspect of the case, the liability of Askari Bank under the BCO for maladministration was triggered, which included the violation of section 123-A of the Negotiable Instruments Act, 1881 which mandates as under:

“123-A. Cheque crossed ‘account payee’. – (1) where a cheque crossed generally bears across its face an addition of the words ‘account payee’ between the two parallel transverse lines

constituting the general crossing, the cheque, besides being crossed generally, is said to be crossed 'account payee'.

(2) When a cheque is crossed 'account payee'

(a) it shall cease to be negotiable;

(b) it shall be the duty of the banker collecting payment of the cheque to credit the proceeds thereof only to the account of the payee named in the cheque."

11. We now advert to Mr. Khalid Siddiqui's contention that the complaint before the Banking Mohtasib was beyond the period of limitation.

Section 82D (2) of the BCO states:

"82D (2) Prior to making a complaint the complainant shall intimate in writing to the concerned bank his intention of filing a complaint and if the bank either fails to respond, or makes a reply which is unsatisfactory to the complaint, within a period of forty-five days, the complainant may file a complaint at any time thereafter within a further period of forty-five days:

Provided that the Banking Mohtasib may, if satisfied that there were grounds for the delay in filing the complaint, condone the delay and entertain the complaints."

The impugned order passed by the Banking Mohtasib does not show that Petitioner had ever urged before the Mohtasib that the complaint was beyond the period prescribed under with Section 82D (2) of the BCO. In fact, what was urged was that the claim made by the Respondent No.3 to the Bank in the year 2012 was with delay when the alleged fraud had taken place in 2008. That period, ie., prior to making a complaint to the Bank, does not figure in section 82D (2) of the BCO while determining the period for making a complaint to the Banking Mohtasib.

12. It appears that the ground of section 82D (2) of the BCO was first taken by the Petitioner before the President in Representation, who then observed *inter alia* that the pendency of the complaint with the State Bank, which remained undecided, was satisfactory explanation for condoning the delay. In these circumstances, since the Banking Mohtasib had the discretion under the proviso to section 82D (2) of the BCO to condone the delay in filing the

complaint, it will be deemed that in deciding the complaint before him he had condoned the delay.

13. In view of the foregoing we do not see any ground to upset the findings of the Banking Mohtasib and the President in the impugned orders. Accordingly, this petition is dismissed along with pending applications.

JUDGE

JUDGE

Karachi
Dated: 05-04-2019