

# IN THE HIGH COURT OF SINDH AT KARACHI

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

CP D 7222 of 2018 : Faysal Bank Ltd vs.  
Federation of Pakistan & Others

For Petitioner : Mr. Kashif Hanif, Advocate

For Respondent No.3 : Mr. Shayan Ahmed, Advocate

Date of Hearing : 29.05.2019

Date of Announcement : 26.06.2019

## JUDGMENT

**Agha Faisal, J:** The present petition has been filed by the petitioner bank assailing the order of Banking Mohtasib Pakistan, dated 04.06.2018 (“**Mohtasib’s Order**”), and the President’s Order affirming the same, dated 06.09.2018 (“**President’s Order**”). The petition is predicated on the premise that the orders referred to herein are without jurisdiction as the Banking Mohtasib is not the proper forum to hear and decide complaints.

2. Briefly stated the facts pertinent hereto are that the respondent No.3 had exported a consignment overseas against a Letter of Credit (“**LC**”). It was argued that the petitioner agreed to negotiate / discount the LC, after having verified the same. Thereafter, upon issuance of an E-form by the petitioner, the goods were shipped and the bill of lading was issued to the order of the petitioner. It was contended that after scrutiny the petitioner found documents per LC terms and forwarded them to the LC opening bank and thereafter a maturity date was also determined for payment. It was asserted by the respondent No.3 that upon being approached to discount the LC, the petitioner reneged from its earlier commitment and also took stance that the LC opening bank was not their correspondent bank. The grievance of the respondent No.3 originated at the said point primarily upon the contention that this stance was taken by the bank after the shipment of the goods. It was also stated before us that upon maturity date the export proceeds were not paid to the respondent No.3 and the petitioner bank took no steps to

remedy the said situation. The grievance of the respondent No.3 was escalated to the Banking Mohtasib and culminated in the Mohtasib's Order, the operative findings wherefrom are reproduced hereunder:

"All the follow up correspondence exchanged by Faysal Bank with Axios Bank reveals that Faysal Bank reiterated and put all pressure upon Axios Bank by writing to its President & CEO as well as Head of Compliance based in Kuala Lumpur, Malaysia for payment of bill amount under LC issued by it. As per UCP 600 the opening Bank was liable to honour their acceptance on maturity against DA LC issued by it. When it did not honour the same on one or the other reason, the FBL ought to have initiated action to file a case against Axios Bank for payment of Bill amount with ICC Pakistan and ICC Paris but this legal step seems not to have been initiated as yet. Besides, it also seems FBL has not raised the issue or taken any initiative against Axios Bank's Regulator in Gambia that Axios Bank is not fulfilling its contractual obligation as per undertaking under LC. The Axios Bank's latest message whereby it doubted the intentions of its client (applicant) does not affect its commitment given under LC for payment. Complying presentation was made in accordance with the terms and conditions of the credit and the applicable provisions of these rules and international standard banking practices. On receipt of shipping documents Axios Bank found the same in order and therefore did not report any discrepancy therein within 5 working days to beneficiary's Bank. Therefore, Axios Bank under Article 7 of UCP 600 is bound to make payment of the Bill amount.

Opening Bank (Axios Bank) in its last SWIFT message sent to FBL affirmed its pledge that even if applicant defaults it is bound to honour the claim and will make the payment. It further explained the plan that Axios Bank's legal team will meet the FBL's legal team to finalize the payment plan. Therefore, FBL must contact Axios Bank then take the necessary legal action. Further, FBL must initiate effective recovery measure as per law (applicable both domestically as well as internationally) within 30 days from the issue of these findings, against Axios Bank (Opening Bank) which has also in its latest message to FBL affirmed its commitment for payment of claim despite the default by the applicant. FBL has not clearly dealt with the L/C documents after confirming the authenticity of LC which was issued by Axios Bank falling nowhere in required rating category "A". The Opening Bank credit worthiness was not acceptable for FBL and thus it rightfully refused discounting of it but it was acceptable to it on the expense of its customer's interest shows handling of this transaction unprofessionally and without sagacity. I place the burden of the litigation and all its costs on FBL because it has clearly violated the mandatory provisions of part "f" of Article 9 of the UCP 600. Compliance of commencement of this litigation should be reported to this office and the Complainant is directed to cooperate with and assist the FBL in the legal proceedings.

This case is decided accordingly."

The petitioner bank challenged the findings by filing a representation before the President's Secretariat and the said proceedings culminated in the President's Order, the operative findings wherefrom are reproduced herein below:

"49. After perusal of record, examination of all documents and detailed hearing, it has been noted that as per covering Schedule FBL submitted shipping documents to Axios Bank quoting LC number and gave instructions to Axios Bank for acceptance and payment. This shows that FBL processed the documents against LC of Axios Bank and forwarded to it duly endorsed in its favour which was otherwise considered by it no reliable. If Faysal Bank was not comfortable with Axios Bank it should have warned the complainant of the risks in its exercise of banker's duty of care before forwarding shipping documents to the Axios Bank. FBL's responsibility and duty is clearly spelt out in para (f) of Article 9 of UCP 600 reproduced below:

"If a bank is requested to advise a credit or amendment but cannot satisfy itself as to apparent authenticity of the credit, the amendment or the advise, it must

so inform, without delay, the bank from which the instructions appear to have been received. If the advising bank or second advising bank elects nonetheless to advise or amendment, it must inform the beneficiary or second advising bank that it has not been able to satisfy itself as to the apparent authenticity of the credit, the amendment or the advise”.

Instead, FBL endorsed the captioned 'Bill of Lading' in favour of Axios Bank with the following instructions:

“Please pay/deliver to the order of Axios Credit Bank Ltd”

Since the FBL processed the documents as per LC as such the complainant lodged the complaint against FBL regarding non-payment of LC amount of USD 582,125/-. However, as per UCP 600 Article '7', only the Opening Bank is bound to make payment.

50. As per complainant on 05.09.2017, FBL received 2 new LCs from the same Opening Bank (Axios Bank). While advising those LCs FBL sent e-mail to the exporter that they will not discount those LCs unless those are confirmed by "A" rated Bank. Similar instruction seems having not been sent to the complainant before shipment of disputed export documents. As per complainant during meeting with Mr. Zeeshan Rauf (Head commercial Banking & SME) & others on 08.09.2017, the Bank staff stated that they made a mistake and actually got confused with the names of the banks, i.e. Axiom and Axios. The complainant stated that bank requested him to forget whatever happened in the past and that they will get his export payments released from Axios.

51. The Bank as per record prima facie accepted the LC and accordingly handled the documents of 60 days but could not obtain payment from Axios Bank for which the complainant cannot be held responsible. Apart from this, the Bank was also aware that against "E" Form the funds are required to be necessarily repatriated and thus the Bank was required to deal with the LC case diligently as per procedure but failed initially to determine and advise the complainant correctly about Axios Bank's rating and secondly, after shipment as per LC terms could not get the funds of shipment realized from Axios Bank. The Axios Bank which confirmed the maturity date was responsible to make to FBL as per Covering Schedule of FBL. The buyer's banker is responsible to honour the LC claim to FBL, as per UCP 600.

52. All the follow up correspondence exchanged by Faysal Bank Limited (FBL) with Axios Bank reveals that Faysal Bank Limited (FBL) reiterated and put all pressure upon Axios Bank by writing to its President & CEO as well as Head of Compliance based in Kuala Lumpur, Malaysia for payment of bill amount under LC issued by it.

53. As per UCP 600, the Opening Bank was liable to honour their acceptance on maturity against DA LC issued by Axios Bank. When it did not honour the same on one or the other reason, the FBL ought to have initiated action to file a case against Axios Bank for payment of Bill amount with ICC Pakistan and ICC Paris but this legal step seems not to have been initiated as yet. Besides, it also seems FBL has not raised the issue or taken any initiative against Axios Bank's Regulator in Gambia that that Axios Bank is not fulfilling its contractual obligation as per undertaking under LC. The Axios Bank's latest message whereby it doubted the intentions of its client (applicant) does not affect its commitment given under LC for payment. Complying presentation was made in accordance with the terms and conditions of the credit and the applicable provisions of these rules and international standard banking practices. On receipt of shipping documents Axios Bank found the same in order and therefore did not report any discrepancy therein within 5 working days to beneficiary's Bank. Therefore, Axios Bank under Article 7 of UCP 600 is bound to make payment of the Bill amount.

54. In the circumstances, it has been established that the peculiar fault lies on the part of FBL. The bank miserably failed to handle the consignment with the diligence and utmost orders of learned Banking Mohtasib is sustainable/maintainable in the eyes of law. The representation of the FBL is required to be rejected by the appellant forum. The impugned orders of learned Banking Mohtasib being unexceptional is required to be upheld by the appellant forum.

55. Needless to mention that this representation has been filed by Bank repeating the contents of the pleadings already made before the learned Banking Mohtasib. Nothing turns on the same as it fails to answer the reasoning

of learned Banking Mohtasib and not even contain denial of the factual observations for his impugned decision. No grounds stand made out for interference with the decision of the Banking Mohtasib. Undoubtedly Banking Mohtasib's decision is based on sought reasoning and supported by the law. Thus, the representation is devoid of any merits and is liable to be rejected. Banking Mohtasib impugned order do not warrant any interference. Consequently Banking Mohtasib order is sustainable and unexceptional having no illegality or improbability.

56. Accordingly, the President has been pleased to (a) reject the instant Representation of Faysal Bank Limited and (b) to uphold the impugned orders of Banking Mohtasib. Compliance is to be reported to the Banking Mohtasib within 30 days of the receipt of this order."

3. Mr. Kashif Hanif, Advocate appeared on behalf of the petitioner and submitted that the orders under challenge are without jurisdiction as the respective fora have no authority to pass a binding order. Learned counsel further submitted that the proceedings before the Banking Mohtasib were ultra vires of the Constitution, hence, any decision arrived at is *void ab initio*. In a nutshell, learned counsel challenged the very jurisdiction of the Banking Mohtasib to entertain the complaint and pass orders thereupon.

4. Mr. Shayan Ahmed, Advocate represented the respondent No.3 and supported the orders subject matter of this petition. Learned counsel submitted that the Banking Mohtasib was duly empowered under the law to entertain and decide the complaints filed by the respondent No.3 and the decision arrived at was in consonance with the law. Learned counsel submitted that the responsibility of the petitioner was determined by the Banking Mohtasib and the challenge thereto was dismissed by the President. It was submitted that in view of the two concurrent findings of fact, no interference was merited in the exercise of the Constitutional jurisdiction of this Court.

5. We have heard the arguments of the respective learned counsel and have also considered the documents to which our surveillance was solicited. The factual controversy, referred to in detail by the respective learned counsels, is not being determined herein as such matters are generally beyond the scope of Article 199 of the Constitution. Therefore, we confine the ambit of the present deliberation to the question of whether the Banking Mohtasib, and the President thereafter, had the jurisdiction to entertain, proceed with and decide a complaint filed there before.

6. Section 82 of the Banking Companies Ordinance 1962 (“**BCO**”) demarcates the role of the Banking Mohtasib and the power to entertain proceed with and decide complaints is expressly contained therein. The BCO is to be read in conjunction with the Federal Ombudsman Institutional Reforms Act 2013 (“**FIORA**”), section 10 whereof grants additional powers to enable the said forum to implement its recommendations, orders and directives. The jurisdiction and ambit of the Banking Mohtasib was recently deliberated at length by a learned Divisional Bench of this Court in the judgment dated 05.04.2019 in the case of *Muslim Commercial Bank Limited vs. Federation of Pakistan and others* in CP D 905 of 2017 and connected matters (“**MCB**”), wherein this Court was pleased to uphold the jurisdiction of the Banking Mohtasib, subject to certain observations with regard to the ambit thereof. The jurisdiction and ambit of the Banking Mohtasib stands determined in *MCB* and on the basis thereof the arguments of the petitioner, challenging such jurisdiction, are untenable. The ratio of *MCB* is applicable squarely in the present facts and circumstances and no argument has been led before us to distinguish the said authority.

7. In view of the reasoning and rationale herein contained we are of the considered view that no justification has been placed before us to merit any interference in the orders under scrutiny, therefore, the present petition, along with pending applications/s, is hereby dismissed with no order as to costs.

JUDGE

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