

IN THE HIGH COURT OF SINDH, AT KARACHI

PRESENT:-

MR. JUSTICE SHAMSUDDIN ABBASI

MR. JUSTICE ADNAN IQBAL CHAUDHRY

Const. Petition No.D- 6339 of 2018

Petitioner	Muhammad Haseeb Fatani son of Muhammad Hanif Fatani through M/s Khawaja Shams-ul-Islam and Khawaja Saif-ul-Islam, Advocates.
Respondents	Federation of Pakistan and others through Mr. Mukesh Kumar Khatri, DAG.
Summit Bank Ltd	Through Mr. Hamid Idrees, Advocate.
Bank Islami Ltd	Through Mr. Ijaz Hussain Shirazi, Advocate.
Muslim Commercial Bank	Through Mr. Rajendar Kumar, Advocate.
Dates of hearing	02.12.2020 and 04.12.2020
Date of order	<u>24.12.2020</u>

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ORDER

Shamsuddin Abbasi, J:- Muhammad Haseeb Fatani, Petitioner herein has impugned Memorandum dated 21.08.2013, issued by Ministry of Interior, Government of Pakistan, whereby his name was placed on Exit Control List {ECL} under section 2 of the Exit from Pakistan (Control) Ordinance, 1981 on the recommendations of State Bank of Pakistan {SBP} /Summit Bank Limited {SBL} owing to Suit No. B-71/2011 for recovery of Rs.286.105 million against M/s Fatani Impex {Pvt} Limited {hereinafter referred to as Company} and its guarantors and Directors, one of whom was the Petitioner. It was also represented by Summit Bank to the SBP that the Directors of the Company, including the Petitioner, had misappropriated the charged assets, left for Canada, and applied for nationality thereat; that the Petitioner had recently come to Pakistan and it was apprehended that he would leave Pakistan again without settling his debt.

2. The recommendation for placing the Petitioner on ECL was made on the basis of Rule 2(e) of the Exit from Pakistan (Control) Rules, 2010, which provided that a person could be prohibited from leaving Pakistan if it is a “case of two or more key or main directors of

a firm, in default of loan or liabilities exceeding one hundred million rupees". The Petitioner filed this petition on 01-09-2018 when his application for renewal of passport was turned down as his name was on the ECL.

3. During pendency of petition, M/s Summit Bank Limited, who was not party to this petition, filed CMA No.15155 of 2019 under Order 1 Rule 10, CPC, for impleading it as necessary party. Summit Bank has brought on record the facts that Suit No.B-71/2011 filed by it under the Financial Institutions (Recovery of Finances) Ordinance, 2001 was decreed on 28-11-2013 jointly and severally against the defendants, including the Petitioner as guarantor, for a sum of Rs. 286.105 million plus markup. In Execution No. 20/2014, Summit Bank realized Rs. 109.5 million by selling the mortgaged properties; but a sum of Rs. 275.191 million, including accumulating cost of funds, is still recoverable. Summit Bank also filed a Criminal Complaint No.31 of 2015 before the Banking Court against the Petitioner under Section 20 of Financial Institution {Recovery of Finances} Ordinance, 2001 alleging misappropriation of hypothecated and pledged assets. The trial Court took cognizance, but Petitioner failed to appear and contest the proceedings, therefore, he was declared proclaimed offender after completing all legal formalities.

4. Another CMA No.16286 of 2019 under Order 1 Rule 10, CPC was filed by Bank Islami Pakistan Limited {BIPL} for joining it as a party in the present proceedings stating therein that said bank also filed Suit No. B-37/2013 under the Financial Institutions (Recovery of Finances) Ordinance, 2001 against M/s Fatani Impex {Pvt} Ltd. and its guarantors including the Petitioner; that said suit was decreed on 14-05-2013 for Rs. 82,231,736 plus cost of funds, and Execution No. 01/2014 remains unsatisfied. Bank Islami also filed Criminal Complaint No.22 of 2014 before the Banking Court against the Petitioner under Section 20 of Financial Institution {Recovery of Finances} Ordinance, 2001. The trial Court took cognizance of the matter and after adopting legal procedure declared the Petitioner as proclaimed offender.

5. Muslim Commercial Bank Limited {MCBL}, as successor of NIB Bank, also filed CMA No.26484 of 2020 under Order 1 Rule 10, CPC,

for becoming a necessary party in the subject matter stating therein that it too filed Suit No. 49/2011 under the Financial Institutions (Recovery of Finances) Ordinance, 2001 against Fatani Impex (Pvt.) Ltd. and its guarantors and directors, including the Petitioner; that said suit was decreed on 28-11-2011 for Rs. 47,743,636/- plus cost of funds, and Execution No. 25/2012 remains unsatisfied. MCBL also lodged a Criminal Complainant No.05 of 2011 against the Petitioner before the Banking Court under Section 20 of Financial Institution {Recovery of Finances} Ordinance, 2001, and after initiating legal proceedings he was declared proclaimed offender.

6. The above facts brought on the record by the intervenors were not disputed by learned counsel for the Petitioner. In view of such facts we are of the view that the intervenors are necessary parties. Therefore, we allow CMA No. 15155/2019, CMA No. 16286/2019 and CMA No. 26484/2020 and direct the office to add Summit Bank Ltd., Bank Islami Pakistan Ltd. and MCB Bank Ltd. as respondents in the title of this petition in red-ink.

7. It is also a matter of record that J.M. No.30 of 2011 was filed by M/s Fatani Impex {Pvt} Ltd. for voluntary winding-up. It was wound up by order dated 24-02-2015 and proceedings in liquidation are pending.

8. It was contended on behalf of the Petitioner that placement of his name on ECL by Government of Pakistan is arbitrary and without disclosing any reason; that neither any show cause notice was issued to the Petitioner nor was the memorandum served on the Petitioner, hence in violation of Rule 3 of Exit from Pakistan {Control} Rules, 2010. It was submitted that the Petitioner was neither key nor main director of the company as such placement of his name on ECL is in gross violation of Rule 2{e} of Exit from Pakistan {Control} Rules, 2010. At the same time it was submitted that the dispute between the Petitioner and the aforesaid financial institutions were private disputes excluded from the purview the ECL. It was further submitted that fundamental rights of the Petitioner guaranteed under Articles 4, 8, 9, 10A, 15 and 25 of the Constitution of Pakistan, 1973 have been denied to him by the Respondents. Reliance was placed on the cases of *Slackness in the Progress of Pending Enquiries relating to*

Fake Bank Accounts etc. {2019 SCMR 332}, *Messrs United Bank Ltd v Federation f Pakistan and others* {2014 SCMR 856}, *Messrs Zurash Industries {Pvt} Ltd v Federation of Pakistan and others* {PLD 2011 Karachi 385}, *Muhammad Sadiq v Federation of Pakistan and others* {PLD 2016 Sindh 263}, and *Hassan Raza v. Federation of Pakistan* {2012 CLD 92}. Learned counsel further submitted that in view of the case of *Mustafa Impex v. Government of Pakistan* (PLD 2016 SC 808), the power of the Federal Government to prohibit exit from Pakistan had to be exercised by the Cabinet. Hence it is prayed for removal of the Petitioner's name from ECL.

9. In contra, the learned DAG submits that name of the Petitioner has rightly been placed on ECL as M/s Fatani Impex {Pvt} Limited is a company in default of which he is one of the directors. It is next submitted that the Petitioner is defaulter of three banks and decrees have been passed against his Company by competent Courts of law and he has also been declared proclaimed offender by the Courts of competent jurisdiction in criminal complaints filed by the respective banks as such the petitioner is not entitled to the relief{s} claimed and prayed for dismissal of the petition. In support of his submissions, he has placed reliance on the case of *Mrs. Humaira Khurram Khan v Secretary Ministry of Interior and others* {2016 P.Cr.L.J. 1226} and *S. Akbar Ali Shah v Federation of Islamic Republic of Pakistan* {2011 MLD 1536}.

10. The learned counsel appearing on behalf of the banks have adopted the same arguments as advanced by the learned DAG.

11. Heard and record perused minutely.

12. Admittedly, the Petitioner is one of the directors and guarantors of M/s Fatani Impex {Pvt} Limited, which availed financial facilities from Summit Bank Limited {SBL}, Bank Islami Pakistan Limited {BIPL} and Muslim Commercial Bank Limited {MCBL}, but failed to repay the finances whereupon the banks initiated recovery proceedings by way of filing suits and criminal complaints under the provisions of Financial Institution {Recovery of Finances} Ordinance, 2001 before the Banking Courts. The suits were decreed and execution applications were filed, yet the decreed amounts are

outstanding against the Petitioner. The cases relied upon by learned counsel for the Petitioner do not advance his case. In *United Bank Ltd. v. Federation of Pakistan* (2014 SCMR 856) the banking suit against the petitioner had yet to be adjudicated. In Suo Moto Case relating to *Slackness in the Progress of Pending Enquiries related to Fake Bank Accounts etc.* (2019 SCMR 332), the Chairman of a Political Party and the Chief Minister of a Province were ordered to be removed from ECL pending a re-examination of a JIT report. In *Muhammad Sadiq v. Federation of Pakistan* (PLD 2016 Sindh 263) the petitioner was sentenced till rising of the Court and with fine. His name was ordered to be removed from the ECL when he had served his sentence. In *Zurash Industries (Pvt.) Ltd. v. Federation of Pakistan* (PLD 2011 Kar 385) the banking suit against the petitioner was still pending and warrants for his arrest in the criminal complaint against him had been suspended by the High Court on a quashment application. In *Hassan Raza v. Federation of Pakistan* {2012 CLD 92} the liability of the petitioner was less than Rs. 100 million and thus not falling within Rule 2(1) of the Exit from Pakistan (Control) Rules, 2010. Therefore, all of the said cases are distinguishable. The reliance placed by learned counsel on the case of *Mustafa Impex v. Government of Pakistan* {PLD 2016 SC 808} is also misplaced as the judgment in *Mustafa Impex* was delivered on 18-08-2016, after the impugned Memorandum dated 21-08-2013, and it has been clarified by the Supreme Court in *Pakistan Medical & Dental Council v. Muhammad Fahad Malik* {2018 SCMR 1956} that the enunciation in *Mustafa Impex* was applicable prospectively.

13. The aspect of the matter which is of immense importance is that the Petitioner has remained fugitive from law as he did not appear before the Banking Courts in the criminal complaints against him and was declared proclaimed offender. He deliberately concealed himself and avoided to face the allegations of offences under section 20 of the Financial Institutions (Recovery of Finances) Ordinance, 2001. We are conscious of the fact that the failure of the Petitioner to face the legal proceedings draws an adverse inference against him that he just wants removal of his name from ECL and save his skin from the clutches of law. Worth to mention here that C.P. No.D-5199 of 2015, filed by petitioner's brother, Muhammad Hafeez Fatani, impugning the same memorandum, whereby his name too was

placed on ECL with the name of the petitioner, was tagged with this petition on the request of petitioner's counsel. The said petition was filed through attorney Muhammad Zakaria as at the relevant point of time Muhammad Hafeez Fatani was out of country and he intended to come to Pakistan and face the legal proceedings pending against him and by an order dated 22.10.2019 his name was ordered to be scored off from ECL to enable him to come to Pakistan and face the civil as well as criminal proceedings pending against him before competent forums. But he never turned up as is evident from the record. In the case in hand, there is every likelihood that the Petitioner will leave the country, if his name is ordered to be removed from ECL, just to save his skin from the clutches of law. Hence, in view of this background of the matter, the relief as asked for cannot be granted in favour of the Petitioner.

14. It is a settled proposition of law that a fugitive from law and Courts loses some of the normal rights granted by the procedural as also substantive law. In the case in hand, admittedly the Petitioner has neither joined the legal proceedings nor made appearance before the relevant Courts and proceedings as provided under sections 87 and 88, Cr.P.C. have already been initiated declaring the Petitioner as proclaimed offender. A judicial discretion cannot be exercised in favour of a person who is fugitive from law. It is a well-established proposition that abscondence of a person disentitles him to ask for any relief which is discretionary.

15. For the foregoing reasons, we are of the view that the petitioner has failed to make out a case for removal of his name from ECL. This petition is, therefore, dismissed as being devoid of any merit.

JUDGE

JUDGE

Adnan Iqbal Chaudhry J. - With additional reasons and observations that follow, I am in agreement with my esteemed brother.

2. While the superior courts have time and again held that the mere pendency of a civil claim or a criminal case against a person is

not ordinarily a ground for placement on ECL, this is not a case of mere pendency, but a case where the civil claims have since been decreed against the Petitioner and he is absconding in the criminal proceedings initiated against him. In these circumstances, the grounds taken by the Petitioner that he was not heard before or after placement of his name on the ECL and that no reason was specified for doing so, while relevant in the year 2013 when the impugned Memorandum was issued, are grounds that had been overtaken by subsequent events. Although those events had taken place much prior to the petition, the Petitioner did not think fit to address the same in filing this petition. A copy of the Petitioner's passport shows that it had expired on 30-03-2015, but its validity was extended by the High Commission at Dhaka uptill 29-03-2016. Thus, apparently, the Petitioner has been in Pakistan at least since March 2016, if not before, and yet there is nothing to show that he made any payment in execution proceedings towards the decrees against him as guarantor/surety, or that he surrendered before the Banking Courts where he was declared proclaimed offender. Thus, at present, the petitioner is a fugitive from law.

3. Learned counsel for the Petitioner had cited *Hassan Raza v. Federation of Pakistan* (2012 CLD 92) to argue that the dispute between the Petitioner and the aforesaid financial institutions were 'private disputes' excluded from the purview of the Exit from Pakistan (Control) Ordinance, 1981 by virtue of sub-rule (2)(a) of Rule 2 of the Exit from Pakistan (Control) Rules, 2010 which provides that:-

*“(2) Nothing in sub-rule (1) shall apply to –
(a) persons involved in private disputes where government interest is not at stake, except cases of fraud against foreign banks and reputable companies with significant foreign investments”.*

On a careful examination of *Hassan Raza's* case it appears that though it was argued that the dispute between Pak Libya Holding Co.(Pvt.) Ltd. and the petitioner was of a private nature and excluded by sub-rule (2)(a) of Rule 2 *supra*; but no finding was given by the Court that finance sought to be recovered by non-government banking companies were 'private disputes' within the meaning of sub-rule (2)(a) of Rule 2. In the end, that petition was allowed on the

ground that liability of the petitioner was far less than Rs. 100 million, whereas sub-rule (1)(e) of Rule 2 of the Exit from Pakistan (Control) Rules, 2010 envisaged placement on ECL only in cases of liability exceeding Rs. 100 million. In the case at hand, the decrees outstanding against the Petitioner are in excess of Rs. 100 million.

4. It will be seen that the exclusion of 'private disputes' by sub-rule (2)(a) of Rule 2 of the Exit from Pakistan (Control) Rules, 2010 is of those private disputes 'where government interest is not at stake'. We were not assisted by learned counsel on the scope of the words 'government interest' and whether government interest cannot extend to recovery of loans by non-government banking companies. Therefore, and since the fate of this petition turns on another aspect of the matter, we do not embark on a discussion on the scope of sub-rule (2)(a) of Rule 2 of the Exit from Pakistan (Control) Rules, 2010 and leave that for a case more appropriate.

5. As noted above, since the Petitioner did not appear before the Banking Courts to face criminal complaints against him under section 20 of the Financial Institutions (Recovery of Finances) Ordinance, 2001, he is presently a proclaimed offender. The principle that the Court will not come to the aid of a person who is a fugitive from the law was articulated as far back as *Chan Shah v. The Crown* (PLD 1956 FC 43) where Justice Cornelius opined that:-

"The present is an 'individual case', and in our opinion, it is an essential condition of the administration of justice, in a case affecting an individual or individuals, that the persons concerned should submit to the due process of justice. We cannot conceive of a more flagrant violation of this condition than a case – like the present – where the individual seeks the interference of the Sovereign to obtain revision of a judicial order, when he is himself engaged in setting that judicial order at naught".

The above principle of administration of justice was reiterated by the Supreme Court of Pakistan in *Hayat Bakhsh v. The State* (PLD 1981 SC 265).

6. In view of the foregoing, we are not inclined to exercise writ jurisdiction in favor of the Petitioner to order his removal from the

ECL when he is a fugitive from the process of the Banking Courts seized of criminal complaints against him. The Petitioner should first surrender before said Courts, and if those Courts decide to exempt his personal appearance, the Petitioner should exhaust the remedy of review provided by section 3 of the Exit from Pakistan (Control) Ordinance, 1981. With these observations, this petition is dismissed.

JUDGE