IN THE HIGH COURT OF SINDH AT KARACHI

C.P.No.D-2377 of 2012

Bank Alfalah Limited.

Versus

Federation of Pakistan & others

BEFORE:
Mr. Justice Mushir Alam, CJ
Mr. Justice Mohammad Shafi Siddiqui

Date of Hearing:	27.11.2012
Petitioner:	Through M/s. Makhdoom Ali Khan and Sami-ur-Rahman Advocates
Respondent No.1:	Through Mr.Javed Farooqui DAG.
Interveners	Through Mr. Z.U. Mujahid Advocate

J U D G M E N T

Muhammad Shafi Siddiqui, J.- This petition is arising out of the impugned notice dated 6.6.2012 followed by subsequent notices dated 18.6.2012 including that of 22.6.2012. The petition also impugns the order dated 15.9.2011 passed by Special Court Offences in respect of Banks on application under section 94 Cr.P.C.

2. Briefly the facts of the case are that the petitioner operates as commercial bank incorporated under the Banking Companies Ordinance, 1962 having numerous branches throughout Pakistan. Various ruling members of Abu Dhabi through holding companies and individuals claimed to be shareholders of the petitioner. It is claimed that the respondent No.2 who is under the active control of respondent No.1 was established under the FIA Act, 1974 and that respondents No.3 & 4 works under the control and supervision of respondent No.2. That an

inquiry was initiated by respondents No.1 to 4 as Inquiry No.1/2011 against certain employees of the petitioner on the basis of an individual's complaint dated 03.11.2009.

3. The main grievance of the complainant was that the employees of the petitioner No.1 sanctioned auto loans on the basis of bogus documents and repossess and auctioned the vehicles at through away prices to their favorities. Pursuant to such complaint an FIR bearing No.1/2011 dated 08.4.2011 was registered against four employees of petitioner charged under the provisions of Pakistan Penal Code. Subsequently interim charge-sheet dated 23.4.2011 bearing No. 30/2011 and supplementary charge sheets dated 19.9.2011, 25.10.2011 and 04.11.2011 were filed before the Special Court Offences in respect of Banks. Apart from this inquiry the petitioner himself entered into an inquiry to probe the issues which resulted in termination of the concerned employees who were found involved.

4. It is claimed that petitioner extended all manners of cooperation to the respondents No.1 to 4. Subsequently it is claimed that the respondents No.1 to 4 started causing harassment to the petitioner and its employees which tactics included their arrival at the branches of the petitioner at odd hours using abusive derogatory language even with the senior officers. Pursuant to such affairs petitioner filed a Petition bearing No. 3298/2011 challenging the authority of respondent No.4 to take action against private commercial bank under the Act of 1974 which constitution petition was dismissed. Subsequently the petitioner filed a civil petition for leave to appeal which is currently claimed to be pending. However, the current petition claims to have been filed in the

light of new facts and circumstances which have arisen after filing of earlier C.P. No. D-3298/2011 and the judgment thereunder. It is contended that recently on 6.6.2012 the petitioner received notices from the office of respondent No.3 duly signed by respondent No.4 seeking blanket information relating to its auto finance business from its branches. The said notice included an attached form said to have containing questions to be provided to the respondents with reference to particulars of each loan separately branch-wise duly signed by the Branch Manager. It is claimed that such information being sought confirms that this is a fishing and roving inquiry and the respondent simply intends to trawl all the information and documents of the petitioner relating to auto loan in the hope of finding some incriminating evidence against it. Such notice was followed by reminder dated 18.6.2012 and 22.6.2012 which are also impugned here to comply with the impugned notice.

5. An independent opinion was sought by the petitioner with regard to such affairs and it was opined that the information being sought by respondent through impugned orders were confidential and protected under the law and as such this information cannot be sought without Court order under section 94 of the Cr.P.C. That based on such information the petitioner wrote on 20.6.2012 communicating the information and opinion that they have sought. On reply to the said letter the petitioner was informed on 22.6.2012 for the first time that requisite permission from Court has already been obtained vide order dated 15.9.2011. The order dated 15.9.2011 was attached with the subsequent notice/reply dated 22.6.2012 as claimed by the learned Counsel for the petitioner.

6. It is claimed by the learned Counsel for the petitioner that it is a non-speaking order as it is simply without application of mind typed by the Presiding Officer as "allowed" and placed a signature and stamp thereunder. It is claimed that the petitioner was never given any notice pursuant to such application under section 94 Cr.P.C. for which they were entitled under the law. It is contended that in the application respondents have sought information regarding eight specific auto loans and this specific information has already been provided by the petitioner as confirmed by them in their reply dated 22.6.2012 and subsequent notices impugned here were/are in fact a roving and fishing expedition which is not permissible under the law.

7. It is further claimed that the respondent No.5 could not pass orders without first issuing notice to the petitioner. It is further claimed that the manner in which the impugned order was passed violates the due process of law and natural justice as enshrined in the Constitution and Section 24-A of the General Clauses Act. It is claimed that any order under section 94 Cr.P.C must relate to specific document and the Court is required to examine the request and provide finding that whether those particular documents are necessary in the inquiry or trial and as such a blanket order could not be passed allowing the respondent to seek all and/or any kind of information from the petitioner as and when required. Learned Counsel further submits that such roving inquiry to dig out a case violated (i) Sections 9 and 10 of the Economic Reforms Act, (ii) Section 10 of the Banks Nationalization Act, (iii) Section 33-A of the Banking Companies Ordinance, 1937, (iv) Sections 5 and 6 of the Bankers Book Evidence Act.

8. Learned Counsel submits that the impugned order effectively transfer judicial authority to the respondent No.3 and is therefore void ab initio. Learned Counsel for the petitioner thus prayed for setting aside of the impugned notices and order passed by respondent No.5

9. Learned Counsel in support has relied upon the case of (i) Central Bank of India Ltd. v. P.D Shamdasani (AIR 1938 Bombay 33), (ii) Hussenbhoy Abdoolabhoy Lalji & others v. Rashid B. Vershi (AIR 1941 Bombay 259). Learned Counsel also relied upon Re State of Norway's Application (No.1) (1989 1 All England Report 66), First American Corp and another v. Shaikh Zayed Al-Nahyan & others (1998 4 All England Report 439). Learned Counsel has relied upon the case of Hudabiya Engineering (Pvt.) Ltd. v. Pakistan (PLD 1998 Lah 90).

10. Learned Counsel submits that even under the Customs Act similar provision i.e. Section 26 is provided and similar powers were vested with the Customs authorities and the said provisions were interpreted by the Hon'ble Supreme Court in the case of Assistant Director, Intelligence and Investigation, Karachi v. M/s. B.R. Herman & others (PLD 1992 SC 485 Relevant 491). The aforesaid judgment talks about the specific purposes and the roving inquiry and shooting in the dark was not permitted therein.

11. Mr. Z.U. Mujahid learned Counsel for the Intervener submits that this petition is not maintainable as the earlier Constitution Petition bearing No. 3298/2011 wherein the quashment was sought was dismissed. He submits that since the impugned order was passed on 15.9.2011 therefore, this ground is not available to the petitioner now. It

is urged that the review application filed in respect of order dated 15.9.2011 passed on application under section 94 Cr.P.C was dismissed on 27.11.2012. Learned Counsel further submits that the copies of charge sheet are available wherein specified role of each and every officer indulged in this scam is established in addition to the bail order passed on Bail Application No. 504/2011 which confirms the involvement of the management of the petitioner bank in car loan scam. Leaned Counsel further submits that the bank is avoiding to furnish information on the ground that this petition is pending.

12. Learned DAG adopted the arguments of Mr. Z.U. Mujahid and submits that this is only permission which has been sought and no adverse order has been passed as it is not a trial, therefore the petitioner has no right to maintain this petition.

13. We have heard the learned Counsel for the petitioner and perused the record.

14. Dealing first with the arguments as to the maintainability of the petition, in terms whereof learned counsel for respondent No.2 submitted that the petitioner is excluded from agitating the grounds which were available to the learned counsel for the petitioner earlier when CP No.D-3298 of 2011 was pending and which points and grounds were not raised, we may observe that it has been categorically argued and established that the impugned order dated 15.09.2011 since passed exparte without issuing any notice was never provided to the petitioner nor it forms part of the earlier proceedings. There is no rebuttal to the arguments that for the first time the impugned order

dated 15.09.2011 passed by the Special Court (Offences in respect of Bank) was provided to the petitioner by a letter dated 22.06.2012 and subsequently this instant petition on the said cause was filed. We are, therefore, of the view that since order dated 15.09.2011 was never provided earlier and since it was an order which was passed exparte without issuing any notice, the petitioner does not acquire any knowledge or information of the same and hence the petitioner cannot be single out on the ground that they have earlier preferred a petition seeking quashment of the FIR which was dismissed.

15. Learned counsel for the petitioner appears to have attacked the impugned order dated 15.09.20112 on many folds such as that it is a non-speaking order, issued without notice and that it is a blanket order, vague and without application of mind and on the basis of such order it is claimed that respondents are initiating roving and fishing exercise. Reliance was placed on Section 24-A of the General Clauses Act, 1897.

16. Although bare reading of section 24-A of the General Clauses Act, 1897 provides that the authority, office or person making an order or issuing any direction under the powers conferred by or under any enactment shall give reasons for making such order, however, careful examination of the definition clause reveals that no such definition of "authority, office or person" were provided in the Act ibid. Different benches of this Court as well as of the Supreme Court have discussed this issue as to whether the provisions of section 24-A of the General Clauses Act would or would not apply to the judicial proceedings or judicial orders. In the case of Imitaz Saleem Ahmad v. CitiBank reported in 2005 CLD 995 it has been observed as under:-

"In case the application for leave to defend, reply of the application by the respondent Bank and impugned order are put in a juxta position then it is crystal clear that the Banking Court has passed the impugned decree without application of mind which is not in consonance with the law laid down by the Honourable Supreme Court in Mollah Ejahar Ali's case PLD 1970 SC 173. Even the public functionaries are bound after addition of section 24-A in the General Clauses Act to decide the controversy between the parties after application of mind with reasons as per law laid down by the Honourable Supreme Court in Messrs Airport Support Services's case 1998 SCMR 2268.

As the impugned judgment and decree is not in consonance with the law laid down by the Honourable Supreme Court, therefore, the same is set aside and the appeal is accepted. Meaning thereby the suit filed by the respondent and application of the appellant for leave to defend the suit shall be deemed to be pending before the Banking Court. The parties are directed to appear before Banking Court No.2, Lahore on 15.06.2004 who is directed to decide the case afresh after application of mind in accordance with law as expeditiously as possible."

17. Similarly in the case of Malik Zaheer Nawaz v. Pakistan Industrial Leasing Corporation reported in 2002 CLD 739 the learned Division Bench observed as under:-

"4. The impugned order itself reveals that the learned Banking Court did not advert to the contents of the application filed by the appellants and dismissed the same as time-barred and merely mentioned one sentence that the application is also dismissed on merits. The superior Courts always insisted that the Judicial Officers must pass judgments with reasons. In arriving to this conclusion we are fortified by the dictum laid down in Mollah Ejahar Ali v. Government of East Pakistan and others (PLD 1970 SC 173). After addition of section 24-A of the General Clauses Act it is the duty even of the public functionaries to pass orders with reasons as per principles laid down in Messrs Airport Support Services v. The Airport Manager, Quaid-e-Azam International Airport, Karachi and others (1998 SCMR 2268)."

18. Similarly in the case of Al-Hidayat Textile v. Soneri Bank Limited reported in 2003 CLD 105 it has been observed as under:-

"5. Hon'ble Supreme Court of Pakistan has time and again disapproved the passing of such perfunctory judgment. It is settled law that judicial order must be a speaking order manifesting by itself that

> *the Court has applied its judicial mind to the issues and points of controversy involved in the causes. Furthermore, when the reasons would not be forthcoming, obviously the Appellate Court would be deprived of the views of the subordinate Court. In any case, the impugned judgmental, which is not a speaking judgment and devoid of reasons, is not sustainable in law being in contravention of law declared by the Supreme Court of Pakistan in various cases, like Adamjee Jute Mills Ltd. v. The Province of East Pakistan and others (PLD 1959 SC (Pak.) 272). Gouranga Mohan Sikdar v. The Collector, Import and Export and 2 others (PLD 1970 SC 158), Mollah Ejahar Ali v. Government of East Pakistan and others (PLD 1970 SC 173) and Muhammad Ibrahim Khan v. Secretary, Ministry of Labour and others (1984 SCMR 1014).*"

19. Similarly in the case of Naeem Yasin v. United Bank Limited reported in 2005 CLD 389 similar view was taken by the Division Bench of Lahore High Court.

20. We have very minutely perused the record and specially the impugned order which is available at page 317 appeared in the application which itself starts from page 315. It appears that the presiding officer of the Special Court has simply endorsed/typed the word "allowed" and put his signature under the cover of stamp and date. This mode and method of dealing with the judicial application under section 94 Cr.P.C. is not acceptable. More importantly when no notice was issued by presiding officer it has become all that important for the judicial officer to apply its judicial mind and give a substantial reasoning and finding for allowing or disallowing the subject application. Admittedly, the application was allowed without issuing any notice which is one of the grounds of the learned counsel for the petitioner.

21. In the case of Hussenbhoy Abdoolabhoy Lalji & others v. Rashid B. Vershi (AIR 1941 Bombay 259), the learned Bench was of the following view:-

"The learned Magistrate, therefore, in this case should have applied his mind to the question whether the inspection of these documents is relevant to the complainant's case. He has not done so, because he considered the decision of this Court precluded him from doing so. We think the decision of this Court in 39 Bom L R 1187 against the auditors of the Central Bank above referred to, if it went so far as that, was wrong and must be overruled. The learned Magistrate must apply his mind to the question whether the documents, of which inspection is sought, are relevant or not."

22. Similarly in the case of Central Bank of India Ltd. v. P.D Shamdasani (AIR 1938 Bombay 33) the Bench observed as under:-

"I would say that, in my view, there is no justification whatever for the suggestion that when A Magistrate makes an order for production under section 94, Criminal P.C., which he can do whenever he thinks such an order necessary or desirable for the purposes of the proceedings before him, he thereby commits himself to the proposition that inspection of all the documents production of which is ordered must necessarily follow. The cases on which Broomfield J. relied for that proposition, viz. 15 Cal 109 and 5 Bom L R 980 do not in my opinion go nearly as far as that. Certainly the Bombay case does not. I think all that those cases decide is that the power to order production under section 94 involves a power in the Court to grant inspection of the books after the order to produce has been complied with. But it would be very inconvenient if the Magistrate could not order production of books until he had arrived at a point in the case at which he was in a position to consider whether a right of inspection should be granted or not. Usually inspection should only be given of particular documents shown to be relevant, and not of documents in bulk. In point of fact, in this case I do not think that any order for production was ever made against the Bank. When the Magistrate wrote the word 'Comply' on the application for an order for production, that seems to have been a direction to the office which was followed by a mere letter of request to the Bank, and the suggestion that the Magistrate in writing the word 'Comply' on the application intended to commit himself to the view that the whole of this lorry load of books, production of which he was requesting, could properly be inspected by the applicant and the further suggestion that the Bank, in complying with the letter of request without raising any question as to their obligation to do so, thereby precluded themselves from subsequently objecting to inspection, seem to me wholly untenable……

….No doubt that order purported to be made under S. 94 Criminal P.C., but for the reasons I have given, I think that in law it must be taken to have been made under S. 6, Banker's Books Evidence Act, since in my opinion that is the only Act under which the Court can deal with the right to inspect a banker's book. Even had the order been made under S. 94, Criminal P.C., I think that it would have been contrary to the ordinary practice of this Court, and indeed to

principles of natural justice, to have set aside an order which had been made at the instance of the Bank without giving the Bank an opportunity of being heard. However, if the order was made under the Banker's Books Evidence Act, the bank had a statutory right to be heard. In my opinion therefore the order of this Court must be held not to be binding upon the bank, and it follows therefore that the order of the learned Magistrate made on 15th May must be set aside, unless was come to the conclusion, after hearing the bank, that on the merits, inspection of these documents ought to be given to the complainant."

23. Dealing with the point of non-speaking order and application of provisions of Section 24-A of General Clauses Act, 1897, we agree with the submission of the learned counsel for the petitioner and we do not approve such manner and method in which the said application was allowed i.e. without any application of mind and reasoning.

24. Further dealing with the other limb of arguments which attacked the said order as it was issued without any notice we are of the view that they are certain provisions of law under Criminal Procedure Code which do not require issuance of notices or if issued would lose its force and applicability such as (i) allowing magistrate to cause raid at any premises and procure incriminating material and articles, (ii) remand order which if issued notices would also lose its effectiveness, similarly Section 87, 22-A Cr.P.C. and 5 of Illegal Dispossession Act. Similarly the provisions of section 94 Cr.P.C. are articulated and enacted in the aid of investigation process in such manner that the issuance of notice of this application would lose its force and would become redundant. At the same time, in situation like instant case it has become double duty of presiding officer to apply its mind and pass a reasoned order. Such orders however are open to appeal and judicial review if reasons assigned to it are not sustainable under the law.

25. In the case of Justice Khurshid Anwar Bhinder v. Federation of Pakistan reported in PLD 2010 SC 483 it is observed by the Hon'ble Supreme Court as under:-

> *41. No stricture was passed qua their eligibility, integrity, entitlement, qualifications and besides that their removal from the office of Judges does not amount to be a stigma and therefore, the doctrine of `audi alteram partem' argued with vehemence cannot be pressed into service which otherwise is not universally recognized due to certain limitations. Let us examine the doctrine itself which was referred to time and again by the learned Advocate Supreme Court on behalf of petitioners. "In Seneca's Medea, it is said: "a judge is unjust who hears but one side of a case, even though he decides it justly ". Based on this, has been developed "Audi alteram partem" as a facet of natural justice". (Seneca Medea 4 BC-AD 65). `Audi alteram partem' means hear the other side; hear both sides. Under the rule, a person who is to decide must give the parties an opportunity of being heard before him and fair opportunity to those who are parties in the controversy for contradicting or correcting anything prejudicial to their view." (emphasis provided). (Union of India v. Tulsiram Patel AIR 1985 SC 1416 at p.1460). The petitioners were admittedly not a party in the main controversy. "Since the audi alteram partem rule is intended to inject justice into the law, it cannot be applied to defeat the ends of justice, or to make the law lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation. `Audi alteram partem' rule as such is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications." (Emphasis provided). (Maneka Gandhi v. Union of India AIR 1978 SC 597). It may not be out of place to mention here that by now it is well established that "where a right to a prior notice and an opportunity to be heard before an order is passed would obstruct the taking of prompt action, such a right can be excluded. Thus, the rule may be discarded in an emergent situation where immediate action brooks no delay to prevent some imminent danger or injury or hazard to paramount public interests." (Swadeshi Cotton Mills v Union of India AIR 1981 SC 818, (1981) 51 Comp Cas 210 SC, (1981) 2 SCR 533. Note: Decisions in Maneka Gandhi v Union of India AIR 1978 SC 597, (1978) 1 SCC 248, Mohinder Sindh Gill v The Chief Election Commissioner AIR 1978 SC 851, (1978) 1 SCC 405, Union of India v Tulsiram Patel AIR 1985 SC 1416, (1985) 3 SCC 398. The `audi alteram Partem' rule would be excluded, if importing the right to be heard has the effect of paralyzing the administrative process or the need, for Promptitude or the urgency of the situation so demands. (Pearlberg v Varty (Inspector of Taxes), [1971] 1 WLR 728 (CA), [1971] 2 All ER 552 (CA). A prima facie right to opportunity to be heard may be excluded by implication in the following cases:--*

(i) When an authority is vested with wide discretion

(H.W.R. Wade & C.F. Forsyth: Administrative Law, 7th Ed., at p.391 H.W.R. Wade & C.F. Forsyth: Administrative Law, 7th Ed., at p.392)

(ii) When the maxim `expressio unius est exclusio alterius' is involved

(Colquhoun v Brooks 21 QBD 52 at p. 62 Humphrey's Executor v. United States (1935) 295 US 602)

(iii) Where absence of expectation of hearing exists

(Y.G. Shivakumar v B.M. Vijaya Shankar (1992) 2 SCC 207, AIR 1992 SC 952)

(iv) When compulsive necessity so demands

(Union of India v. W.N. Chadha (supra)

(v) When nothing unfair can be inferred

(Union of India v. W.N.Chadha (supra)

(vi) When advantage by protracting a proceeding is tried to be reaped

(Ram Krishna Verma v State of U.P. (1992) 2 SCC 620, AIR 1992 SC 1888).

(vii) When an order does not deprive a person of his right or liberty

(Indian Explosive Ltd. (Fertiliser Division), Panki, Kanpur v State of Uttar Pradesh (1981) 2 Lab LJ 159)

(viii) In case of arrest, search and seizure in criminal case

(Union of India v W.N. Cldha 1993 Cr LJ 859, 1993 Supp (4) SCC 260, AIR 1993 SC 1082)

(ix) In case of maintaining academic discipline

(1992) 2 SCC 207)

(x) In case of provisional selection to an academic course

(S.R. Bhupeshkar v Secretary, Selection Committee, Sarbarmathi Hostel, Kilpauk, Medical College Hostel Campus, Madras AIR 1995 Mad 383 (FB)

(xi) In case of enormous malpractices in selection process

(Biswa Ranjan Sahoo v Sushanta Kumar Dinda (1996) 5 SCC 365, AIR 1996 SC 2552)"

26. Similarly in this case also nothing by means of allowing an application under section 94 Cr.P.C. with reasons could be deemed to be passed as it only pertains to investigation of certain offences allegedly committed and to bring the guilt home for which such exercise was carried out. It would certainly not an unfair or compulsive demand and does not deprive a person of his right of defence as far as merit is concerned.

27. As we have observed that it is a case wherein the offence appears to have been committed by sanctioning auto loan on the basis of bogus documents and subsequently re-possessing the vehicle and passing on to their favorites on throwaway prices. In order to unveil such crime the requisite documents are prima facie source which could lead to the crime and the culprit itself. The proviso to section 94 apparently does not seem to have applied here as the documents that apparently required are not covered by Banker's Book Evidence Act, 1891. In terms of section 2 of bankers' books include ledgers, day-books, cash books, account-book and all other books used in the ordinary business of bank.

28. In the case of EF Graves v. Pitumal Hoondamal reported in AIR(30) 1943 Sindh 51 on which learned counsel for petitioner relied, the learned Bench held as under:-

"*As we have pointed out, and as the learned Magistrate himself says, S. 94, Criminal P.C. gives power to the Court to require the*

production of documents when it considers their production is necessary or desirable for purposes of investigation, and if documents are considered necessary or desirable for that purpose, we think that, before any order under this section can be made, it must appear, at lease prima facie, that they are likely to be relevant evidence in the case. We may perhaps refer in support of this view to two cases of the Bombay High Court. ….

This was a case of a banker's books, but other commercial concerns are equally entitled to protection from disclosure of matters which have nothing to do with the case before the Court, which disclosure may be detrimental generally to their interests and may therefore be used by the persons accused as a lever to secure withdrawal of the prosecution. In the present case, the Magistrate has made an inquiry into the relevancy of the documents asked for, as we have said, his order shows that he considers such inquiry improper because the accused, he thinks, should not be expected to disclose their defence. We are aware of no reason why accused persons should be reluctant to disclose an honest defence, and the learned advocate who appears for them before us states that he was at all times anxious to disclose his defence. This defence, however, was not disclosed or even indicated in the application for production which was made; and, in view of the learned Magistrate's order we can hardly accept that the anxiety to disclose it was made manifest at any later stage before the order on the application was made.

….If the transactions relied upon by the prosecution are proved to amount to offences of cheating, then whether other transactions between the parties were honestly performed will make no difference. It is no defence that the association of the accused with the complainant has resulted in a net profit to the complainant. So also transactions between the complainant and persons other than the accused appear unlikely to have the slightest bearing on the decision of this case. The learned advocate for the accused in fact has not been able to satisfy us that any of the documents asked for will be material.

We think that the Magistrate took an entirely wrong view of his duty before making the order under S. 94, Criminal P.C., which he made. The application itself disclosed no grounds why production of documents was necessary or desirable. It was the duty of the Magistrate to consider whether their production was necessary or desirable, and it was not open to him to evade his responsibility on the plea that he might have to hear the nature of the defence which the accused might make. The nature of the documents asked for was not such that having regard to the facts of the case, their relevance in the trial could be considered in any way apparent without explanation, and no such explanation was given or is as yet forthcoming. On these grounds, therefore, we think that the order should not have been passed, and we allow the application and set it aside accordingly."

29. In the case of Hudabiya Engineering (Pvt.) Ltd. v. Pakistan (PLD 1998 Lah 90) it has been held as under:-

> "*On consideration of various provisions of the Protection of Economic Reforms Act, 1992, we have reached the conclusion that so far as foreign currency accounts are concerned, the holders thereof, have complete immunity from inquiry and scrutiny and complete secrecy must be maintained in respect of those accounts which cannot be violated by any agency or functionary. That being so, neither the Income Tax Authorities nor Federal Investigation Agency had any jurisdiction to hold any inquiry in respect of the transactions in the foreign currency accounts nor could the same be made basis of criminal prosecution.*"

30. It appears that the documents claimed in the above referred case comes within the definition provided in Bankers' Books Evidence Act, 1891 whereas the documents that are being sought here are not covered by the proviso of section 94. That also does not mean that since it is beyond the proviso, therefore, the Court dealing with such application could pass a non-speaking order without application of mind. The terms of section 94 itself suggest that whenever any Court or any officer incharge considers that the production of any document or other documents is/are necessary or desirable for the purpose of an investigation, inquiry, trial or other proceedings under this code by or before such Court or officer, such Court may issue a summon or such officer an order to the persons in whose possession or power such documents or thing is believe to be requiring him to attend and produce it, or to produce it at the time and place stated in the summons or order. Legislature has purposely not left it to the mercy of officer incharge and it was left at the discretion of the Court to cause the production of such documents or material. This by itself shows that the application of mind, reasoning is pre-requisite at the time of passing order under section 94.

The requisite documents required for investigation are beyond the Bankers' Books Evidence Act 1891 and as such no secrecy or privilege could be claimed in respect of those documents which apparently and allegedly involve in committing offence including but not limited to agreements of loan, ID Card etc. and/or any other document which were utilized in sanctioning the auto loan.

31. Relying on the judgment of Assistant Director, Intelligence and Investigation, Karachi v. M/s. B.R. Herman & others (PLD 1992 SC 485) it is urged that section 26 of the Customs Act empowers the officer to require, in writing, information from any personnel concerned with the import, export, purchase, sale, transport, shortage or handling of any goods for the purpose of determining the legality or illegality of such import, export, etc. and learned counsel submitted that since the identical powers were provided in Section 26, therefore, the interpretation as laid down by the Hon'ble Supreme Court should follow while discussing Section 94 of the Cr.P.C. The operative part of the judgment ibid is reproduced as under:-

> *"….The object of section 26 of the Customs Act is to empower the authority to ask for information or require the production of documents or inspect the same in order to determine the legality or illegality of importation or exportation of goods which have been imported or exported, the value of such goods, the nature, amount and source of the funds or the assets with which goods were acquired and the customs duty chargeable therein or for deciding anything incidental thereto. The authority can only for specific purposes of determining the legality or illegality call for such information as required by section 26. The authorized officer can call upon any importer or exporter to furnish information in case where such determination is required. It cannot make a roving inquiry or issue a notice by merely shooting in the dark in the hope that it will be able to find out some material out of those documents and then charge the party of irregularity or illegality."*

32. The reliance of the learned counsel for the petitioner on Section 26 of the Customs Act would turn nothing. Apparently section 26 of the Customs Act empowers a person requiring production for examination of documents or record. In terms of section 2 of Customs Act person includes a company, an association, a body of individuals whether incorporated or not. Thus it is the officer concerned which was empowered under the Act who may require in writing any person, department, company or organization to furnish such information as is held by that person, department, company or organization which in the opinion of the appropriate officer is required for the completion of such audit, inquiry or investigation. However, the language of section 94 is quite distinct and different. Section 26 of the Customs Act deals with the executive powers while section 94 deals with the judicial powers. Dealing the arguments of conducting roving or fishing inquiry such principle would definitely apply but not for the purposes of causing issuance of notice to concerned accused before passing any order under section 94 Cr.P.C. otherwise the purpose of investigation would be frustrated more importantly when the documents agitated for, could not be considered to be privilege or secrete.

33. Two English judgments have been relied upon which substantially touches the fishing and roving expedition which are reproduced as under:-

34. The case of Re State of Norway's Application (No.1) (1989 1 All England Report 66) deals with the fishing and roving inquiry. The issue E in this judgment deals with the fishing and it has been observed as under:

> "*This is readily understandable: although 'fishing' has become a term of art for the purposes of many of our procedural rules dealing with applications for particulars of pleadings, interrogatories and discovery, illustrations of the concept are more easily recognized than defined. It arises in cases where that is sought is not evidence as such, but information which may lead to a line of inquiry which would disclose evidence. It is the search for material in the hope of being able to raise allegations of fact, as opposed to the elicitation of evidence to support allegations of fact which have been raised bona fide with adequate particularization. In the present context, 'fishing' may occur in two ways. First, the evidence' may be sought for a preliminary purpose, such as the process of pre-trial discovery in the United States. The fact that this is clearly impermissible for the purposes of the 1975 Act is established in the Westinghouse case and was equally so held by this court in relation to the 1856 Act in Radio Corp of America v. Rauland Corp [1956] All ER 549 [1956] QB 618. This is irrelevant in the present context, since the 'evidence' is required for the trial itself. But 'fishing' is in my view also relevant in another sense in the present contest, as the judge rightly indicated. It is perhaps best described as a roving inquiry, by means of examination and cross-examination of witnesses, which is not designed to establish by means of their evidence allegations of fact which have been raised bona fide with adequate particulars, but to obtain information which my lead to obtaining evidence in general support of party's case.*"

35. The other judgment that was relied upon by the learned counsel for the petition is the case of First American Corp and another v. Shaikh Zayed Al-Nahyan & others (1998 4 All England Report 439) which also deals with the issue of fishing and roving expedition. The earlier judgment was also relied upon in this case.

36. It has been observed that the impugned order dated 15.09.2011 was passed on an application filed under section 94 Cr.P.C. and categorically eight pay orders which purportedly used in fake transactions in granting auto loan and the subject application referred above while dealing with the only above referred eight transactions moved to the Court that in order to complete the investigation full particulars/contacts, AOF, S.S. cards, bank statements, credit/debit vouchers showing the above transactions are required by the concerned

agency i.e. FIA. Prima facie the said application is meant for only the said eight transactions and the application is neither meant nor could be considered for any other alleged transaction and accordingly the application was allowed. This permission does not empower the investigation officer to use it as a tool to conduct fishing or roving expedition and would ask for any document that they wish for. We agree with the submissions of the learned counsel for the petitioner that such roving expedition could not be allowed to be conducted under the garb of impugned order which is admittedly complied with as the petitioner has categorically stated that all the requisite information required by the investigation officer in pursuance of eight referred transactions have been provided, however, in case the respondents required further probe with regard to any other fraudulent transaction, they instead of relying on the impugned order may approach the concerned Court for seeking permission. Needless to mention that such permission, if at all required, would be considered by the Court in accordance with law and a speaking order with reference to the necessity and requirement of the investigating agency should be made in black and white instead of passing a blanket order without application of mind as it has been observed in the impugned order and since it is the requirement of the investigating agency that such applications are allowed without issuance of notice, it has become all that important for the presiding officer to conduct strictly in accordance with law and the application may not be granted as a matter of routine. The pith and substance of the application has to be considered and the necessity has to be looked into otherwise

such orders in the hands of the investigating agency may become a tool of blackmailing.

37. The privilege that has been claimed by the petitioner in terms of Section 12 of the Banks (Nationalization) Act, 1962, 33-A of the Banking Companies Ordinance, 1962, and Sections 9 and 10 of Economic Reforms Ordinance, 1992 to maintain secrecy, we may observe that all foreign companies and foreign investments are subservience to Constitution of Pakistan and local laws. For convenience sake above provisions of law are reproduced hereunder:-

33-A of the Banking Companies Ordinance, 1962

> *"'33-A. **Fidelity and Secrecy**.---(1) Subject to subsection (4), every bank and financial institution shall, except as otherwise required by law, observe the practices and usage customary among bankers and, in particular, shall not divulge any information relating to the affairs of its customers except in circumstances in which it is, in accordance with law, practice and usage customary among bankers, necessary or appropriate for a bank to divulge such information.*
>
> *(2) Every president, chairman, member of the Board, administrator, auditor, adviser, officer or other employee of any bank and financial institution shall, before entering upon his office, make a declaration of fidelity and secrecy in such form as may be prescribed.*
>
> *(3) Notwithstanding anything contained in subsections (1) and (2), every balance-sheet and profit and loss account statement prepared by a bank and financial institution shall include statements prepared in such form and manner as the State Bank may specify in respect of written off loans or any other financial relief of five hundred thousand rupees or above allowed to a person as well as the provision, if any, made for bad or doubtful debts.*
>
> *(4) The State Bank of Pakistan may, if satisfied that it is necessary so to do at the time of holding general elections under any law relating thereto, publish a list of persons to whom any loans advances or credits were extended by a bank or financial institution, either in their own names or in the names of their spouses or dependents or of their business concerns (if mainly owned and managed by them) which were due and payable and had not been*

paid back for more than one year from the due date, or whose loans were unjustifiably written off in violation of banking practices, rules or regulations on or after such date as may be determined by the Government:

Provided that before publishing the name of any person in any such list he shall be given prior notice and, if he so requests, an opportunity of hearing."

Section 12 of the Banks (Nationalization) Act, 1974

"12. Fidelity and secrecy. (1) The Chairman and Members of the Council, every bank, Members of its Board of Management and Chief Executive, by whatever name called, shall observe, except as otherwise required by law, the practices and usages customary among bankers and, in particular, shall not divulge any information relating to the affairs of its constituents except in circumstances in which it is, in accordance with law or practice and usages customary among bankers, necessary or appropriate for a bank to divulge such information.

(2) The Chairman and Members of the Council, Members of the Board of Management of every bank, every Administrator, Auditor, Adviser, Officer or other employee of the Council or a bank shall, before entering upon his office, make a declaration of fidelity and secrecy in such form as may be prescribed."

Section 9 and 10 of Economic Reforms Act, 1992

9. Secrecy of Banking Transaction

Secrecy of bonafide banking transactions shall be strictly observed by all banks and financial institutions, by whosever owned, controlled or managed.

10. Protection of Financial Obligation.

All financial obligations incurred, including those under any instrument, or any financial and contractual commitment made by or on behalf of the Government shall continue to remain in force, and shall not be altered to the disadvantage of the beneficiaries."

38. The above provisions themselves provides way to cater the demand of law in the aid of justice.

39. Such absolute privilege or secrecy cannot be claimed at the risk and cost of committing offences either under the Code or under the special law. Such secrecy under the laws would be restricted to those acts which are performed bonafidely and are not subject to any investigation that is being conducted by any investigating agency. A question arises that there would be no benefit in claiming secrecy and privileges in respect of those transactions which are bonafide and the necessity of secrecy and privilege are necessary in transactions such as one in hand otherwise there will be no benefit of such provisions of law. In our view a blanket cover by means of an order cannot be provided to such document or local companies or even on foreign investments. The secrecy and privileges are to be established in respect of each and every particular case and hence a generalize kind of privilege cannot be granted in such way as is being claimed by the petitioner. Question similar to the grounds raised by the learned counsel for the petitioner came before a Bench of Hon'ble Supreme Court in the case of Irshad Ahmad Shaikh v. The State reported in 2000 SCMR 814 wherein the protection under the Economic Reforms Act, 1992 was claimed. The relevant portion of the same is reproduced as under:-

> *"……Complete secrecy in respect of transactions in the foreign currency accounts has like connotations and it is for this reason that section 94 of the Criminal Procedure Code requires an order of the Court even for criminal injuries and investigations in contemplation of that section. Sections 6, 7 and 8, dealing with protections of fiscal incentives, for transfer of ownership to private sector arid for foreign and Pakistani investments are not relevant for our purposes here. Section 9 of the Act, ordaining secrecy of banking transaction has some relevance because secrecy therein, having been limited to bona fide banking transactions, makes the section a little bit different that section 5(3), which is all pervasive, and contemplates maintenance of "complete secrecy" in respect of banking transactions in foreign currency. The distinction is obvious. Section 5(3), specific to foreign currency accounts carries secrecy irrespective of bona fide or otherwise whereas banking*

transactions generally, a broader concept, would entail secrecy only if bona fide. Here, however, it may be noted that the complete secrecy even in section 5(3) is not in respect of all "transactions in the foreign currency accounts", implying that there can be some possible exceptions to the generlised protection and cover. Neither section 5(3) nor section 9, therefore, would spell out secrecy where a penal act or omission would spell out secrecy whereas penal act omission is involved though even in such regard the initiative, aid and assistance of the relevant Court, as in section 94 of the Criminal Procedure Code, has a direct bearing. In other words the secrecy would be complete and even total except for the limited purpose permitted by such a Court as aforementioned. Section 94 of the Criminal Procedure Code is this:--

> *94-1. Whenever any Court or any officer-in-charge of a police station considers that' the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or Officer, such Court may issue summons, or such officer a written order, to the person in Whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order:--*
>
> *Provided that no such officer shall issue any such order requiring the production of any document or other thing which is in the custody of a bank or banker as defined in the Bankers' Books Evidence Act, 1891 (XVII of 1891), and relates, or might disclose any information which relates to the bank account of any person except--*
>
> *(a) for the purpose of investigating an offence under sections 403/406, 408 and 409 and sections 421 to 424 (both inclusive) and sections 465 to 477-A (both inclusive) of the Pakistan Penal Code, with the prior permission in writing of a Sessions Judge; and'*
>
> *(b) in other cases, with prior permission in writing of the High Court.*
>
> *(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.*
>
> *(3) Nothing in this section shall be deemed to affect the Evidence Act, 1872, sections 123 and 124 or to apply to a later, postcard, telegram or other documents or any parcel or thing in the custody of the Postal or Telegraph Authorities. "*

The only other substantive provision in the Act is section 10 and that has no direct bearing in this controversy. We may also mention here that the emerging conclusion is consistent with the norms of international law and practices as even in tax havers,

such as Switzerland, the right to claim secrecy of accounts clearly gives way where culpability intervenes.

Much the same outcome would follow when the preamble of the Act is examined. Such is as below:--

> *Where it is necessary to create a liberal environment for savings and investments; and other matters relating thereto;*
>
> *And whereas a number of economic reforms have been introduced and are in the process of being introduced to achieve the aforesaid objectives;*
>
> *And whereas it is necessary to provide legal protection to these reforms in order to crest; confidence in the establishment and continuity of the liberal economic environment created thereby".*

No further ambiguities remaining, it is unnecessary to trace the legislative history of the .legislation. The upshot, therefore, of the discussion is that the High Court was manifestly right in holding that nothing that is I contained in Act XII of 1992 provides a blanket protection vis-a-vis criminal acts and. liabilities and that, to the extent permissible by section 94 of the Criminal Procedure Code the order of the High Court passed thereunder was not open to any legitimate question."

40. Thus, in the light of the above observation of the Hon'ble Supreme Court the petitioner is precluded from raising such contention in the generalized form, more importantly as we have already observed it is not the kind of investigation that would be governed by any of the above enactment since it involves a question of granting auto loan on the basis of bogus document such as Auto loan agreement, ID Card of individuals who never applied for such loan. It is mainly related to their officers concerned and it is to be seen whether any public exchequer, cess was involved and/or misappropriated including but not limited to the offence that has already been registered.

41. It is for these reasons that this petition was disposed of in terms of the short order passed on 20.12.2012 whereby the impugned notice dated 06.06.2012 followed by other notices including but not limited to

the notice dated 22.06.2012 were set aside and the respondents were left with the option to apply to the concerned Court under section 94 Cr.P.C. requiring the petitioner or any of its officer to produce such documents/material as may be necessary for the purpose of carrying out the investigation in respect of FIR in accordance with law. Needless to reemphasize that such order if passed/made under section 94 of the Criminal Procedure Code shall be subject to Article 24-A of the General Clauses Act in terms whereof a well-reasoned order was required in the absence of any notice to the alleged accused or officer concerned of the petitioner. We do not feel necessity of setting aside the impugned order dated 15.09.2011 since it has, for all intent and purposes been complied with and setting aside of such order would only complicate the issues rather than resolve the controversy under the present facts and circumstances of the case when the investigation which was required to be conducted in respect of eight transactions had already been conducted pursuant to the information provided in compliance of the notices.

Dated: Judge

Chief Justice