IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.311 of 2022

[Atif Ahmed & another ……v……Securities and Exchange Commission of Pakistan & others]

Dates of Hearing	:	07.06.2022 & 08.06.2022
Plaintiffs through	:	M/s. Haider Waheed, Ahmed Masood, Zoha Sirhindi, Munim Masood, Muhammad Altaf, Agha Mustafa Durrani & Samil Malik Khan, Advocates.
Defendants through	:	Mr. Ijaz Ahmed, Advocate for defendant No.2 a/w Mr. Atifuddin, Legal Counsel of SBP. Mr. Tariq Qureshi, Advocate for defendant No.3 a/w Mr. Ghulam Akbar Lashari, Advocate. Mr. Jahanzeb Awan, Advocate for defendant No.4 a/w M/s. Rashid Mahar, Advocate and Mr. Muhammad Usman Ahmed, Advocate. Mr. Wasiq Hussain Malik, Advocate for defendant No.6. Mr. Raza Mohsin Qizilbash, Director (Legal), SBP. Mr. Muhammad Akhtar Javed, Director Banking Policy Regulation Department, SBP. Syed Shahzad Akram, Attorney of Summit Bank.

O R D E R

Zulfiqar Ahmad Khan, J:- This is a suit for declaration, injunction and damages. Whilst the declaration sought is that the Public Announcement of Intention dated 30.03.2020, 21.05.2021 and its extension dated 17.11.2021 be declared illegal on the ground that the defendant No.6 being acquirer is not a fit and proper person to acquire 51% shares and control of the defendant No.4 (“Summit

Bank"). The plaintiffs have also sought directions against the defendant No. 1 to 3 (SECP, SBP & PSX) that they be restrained from accepting or recognizing transfer of shares of the Summit Bank to defendant No.6 ("Mr. Lootah").

2. This order aims to decide following applications:

(1) <u>CMA No.3006/2022.</u> The plaintiffs have filed this application under Order XXXIX Rule 1 & 2 CPC with prayer that defendant No.6 be restrained from acquiring further shares of defendant No.4.

(2) <u>CMA No.1031/2015.</u> The defendant No.4 has moved this application under Order XXXIX Rule 4 CPC to vacate the ad-interim order dated 27.04.2022.

3. The lis at hand has arisen in the circumstances as described by applicants/plaintiffs where Mr. Lootah being owner of defendant No.5 ("Surroor Investments Limited") which is one of the major sponsors of Summit Bank as well as was its Chairman, on 30.03.2020 made a public announcement in respect of acquiring 51% shareholding and control of the Bank. The plaintiffs have alleged that Mr. Lootah is not a fit and proper person to acquire shares of the Bank as Mr. Lootah in May, 2011 requested the then President of the Bank to provide certain funds in the form of loan to M/s. Suroor Investments with respect to subscribe the sponsor's portion of the shares issued by the Bank. At the same time, Mr. Lootah also made the plaintiff No.2 (Mr. Aqeel Karim Dhedi-AKD) understand that he was the sole shareholder of M/s. Suroor Investments and facing difficulties in arranging the requisite funds for subscribing to the sponsor's portion of right issue of the Bank and further provided an understanding that the SBP had already allowed him to arrange the requisite funds

locally in Pakistan to subscribe to the rights issue whereupon Mr. AKD arranged an amount of Rs.856,457,130/- and directly deposited the same in the Right Shares Account of Bank against which 85,645,713 ordinary shares were issued by the Bank in the name of M/s. Suroor Investments as Right Shares and the terms and conditions of this loan were documented in the form of Loan Agreement executed between Mr. AKD and Mr. Lootah on behalf of M/s. Suroor Investments. As the time went by, per learned counsel M/s. Suroor Investments as well as Mr. Lootah defaulted and failed to make any repayment as per the loan agreement owing to which Mr. AKD filed a suit No.551/2019 for specific performance and recovery of the amount. It is alleged by the plaintiffs that Mr. Lootah filed his reply in the said suit and introduced on record that he had obtained a pardon from National Accountability Bureau (NAB) and is now a witness in the investigation and reference pending before NAB and further submitted that M/s. Suroor Investments is under investigation by NAB.

4. It is further stated in the plaint and prayed through instant application that Mr. Lootah is not a fit and proper person as prescribed in Part-II of Corporate Governance Regulatory Framework for Banks to acquire 51% shareholding and control of the Summit Bank for the reasons that not only Mr. Lootah obtained pardon from NAB but also he is a defaulter of Loan Agreement dated 30.06.2011 and that he being previous Chairman of Summit Bank embroiled the Bank in the banking scams causing loss to the shares of the Bank.

5. SBP filed the counter affidavit to the injunction application with the plea that the Summit Bank is technically an insolvent entity

with a negative equity of over PKR 15 billion and has been incurring operational losses, therefore, SBP as part of its supervisory responsibilities is engaged with the Bank to ensure recapitalization of the Bank. It is stated by SBP that fresh injection of equity by Mr. Lootah has been authorized by the shareholders of the Bank including Mr. AKD by passing the resolutions at the Annual General Meeting of the Bank held on 11.11.2021. It is further introduced on record by SBP that existing shareholding of the Bank is not being transferred to Mr. Lootah rather he is acquiring the shares through a public offer and competency of Mr. Lootah will be judged as per law and regulation.

6. Summit Bank has also contested the injunctive application by filing a reply/counter affidavit. It is introduced on record by the said Bank that the present action at law has been preferred by the plaintiffs just to undermine the Bank and pushing the said ailing entity towards shutdown. It is further stated that paid-up capital of the Bank, net of losses, stood at negative PKR 19.995 billion as of 31 March 2022 as against the statutory requirement of PKR 10 billion prescribed by SBP while the capital adequacy ratio of the Bank stood at negative 63.20%. The said Bank has 2,143 employees, and paying tax worth PKR 1573 million; provides banking services to 499,375 accountholders and has a deposit base of PKR 108 billion. It is stated that plaintiffs do not have the requisite shareholding i.e. 10% or more as per Section 286 of the Companies Act, 2017 to initiate any such proceedings as the plaintiffs are the minority shareholders and do not even collectively own more than 0.0274% shareholding of the Bank and through the lis at hand the plaintiffs are eager to undermine the

well-established principle of rule of majority, therefore, the present action at law and the interlocutory application be dismissed. It is further asserted that before preferring the present suit before this court, Mr. AKD filed a complaint before the SBP which was later on withdrawn by him and present suit echoes the said complaint, which was in fact withdrawn by Mr. AKD. It is further stated in the counter affidavit by the Bank that Mr. AKD participated in the 14th Annual General Meeting of the Bank and voted in favour of increase in the authorized capital of the Bank and issuance of new shares to Mr. Lootah but under the garb of lis at hand, the plaintiffs while settling their score want to bring the Bank to closure causing joblessness to thousands of employees, and they are not even inclined to inject the funds by themselves or has indicated any other alternate sources, where on the other hand, the investment being made by Mr. Lootah will benefit the Bank in shape of increasing in 41,686 shareholders and value of shares will enhance.

7. The defendant No.6 (Mr. Lootah) filed counter affidavit too and in his reply, he denied the assertions and allegations leveled against him by the plaintiffs. He also stated that Mr. AKD participated in 14th Annual General Meeting of the Bank and voted in favour of increase in the authorized capital of the Bank and issuance of new shares to him and the plaintiffs are trying to achieve, what they failed in the previous suit.

8. The defendant No. 1, 3 & 5 have not filed any counter affidavit /reply to the injunctive application. The learned counsel for the plaintiffs with the aforesaid backdrop argued that Mr. Lootah was

involved in a banking scam which is pending before the NAB Court and the offence of like nature is against the wellbeing and interest of the country, therefore, Mr. Lootah is not a fit and property person to acquire the shares of the Bank. He argued that defendant No.6 concealed material facts which are matter of record. He further introduced on record that Mr. Lootah chose to conceal his ownership of M/s. Suroor Investment which constitutes a material misstatement, therefore, he has committed breach of statutory provisions. He further contended that palintiffs' main concern arises from the risk to the Bank and its shareholders in approving shares subscription to Mr. Lootah who is not fit and proper person and has been directly involved in cases wherein he caused the Bank to come to the verge of financial collapse. He further pointed out that Mr. Lootah sought pardon from the court which was granted to him and such pardon amounts to admitting the guilt, therefore, on this score alone, he is not a fit and proper person. He further stated that minimum capital requirement has not been met by the Bank since 2018 and there is nothing on record available to show that the Bank will fail in the next few weeks or even the next year if the proposed transaction offered by Mr. Lootah is not proceeded with. He vociferously contended that Mr. Lootah willfully delaying investment in the Bank for over 2 years in order to evade legal scrutiny especially the fit and proper test. While concluding his submissions, he submitted that every person has to undergo the statutory provisions and the rule of law is the principle under which all persons, institutions and entities are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated. Learned counsel placed his reliance

to the precedents reported as 2019 YLR 345, PLD 2019 S.C. 43 and PLD 2016 Sindh 50.

9. Learned counsel for the defendant No.2, 4 & 6 presented their stance one after another. Mr. Aijaz Ahmed, learned Senior Counsel appeared on behalf of SBP. According to him, per Section 13 of the Banking Companies Ordinance, 1962, no Bank can commence business unless it has prescribed paid up capital, which for the defendant Bank, net of losses, is lot lesser than the statutory requirement of PKR 10 billion prescribed by SBP. Thrust of arguments of learned senior counsel is that SBP is engaged with the shareholders and the plaintiffs are also shareholders of the Bank themselves and they raised no objection to allow the transfer of shares in favour of Mr. Lootah in AGM held on 11.11.2021. Per learned counsel the case is a matter of public importance as 499,375 account holders of defendant No.4 will be benefited, therefore, Mr. Lootah may be allowed to commence the transaction. To meet with the objection of fit and proper test raised by the learned counsel of the plaintiffs, Mr. Ahmed replied that fit and proper test is a continuous exercise and it is in the domain of the SBP to undertake the same, therefore, the plaintiffs do not have prima facie case on their own footing. While concluding his esteemed submissions, he introduced on record that the shareholders have decided to get the funds from Mr. Lootah to run the day to day affairs of the Bank.

10. Mr. Jahanzaib Awan, Advocate set forth the stance of the Bank. The main stance of Mr. Awan is that the plaintiffs are in litigation with defendant No.6 since 2019 by filing a suit No.551/2019 wherein

the plaintiffs injunction application was also dismissed by this Court vide order dated 13.12.2021 and the plaintiff impugned the said order in a High Court Appeal and sought an injunctive relief which was also declined. He further introduced on record that the plaintiffs were participants in the AGM of the Bank wherein they did not raise any objection with regards transfer of shares to Mr. Lootah and even consented to this initiative, therefore, the plaintiffs plea is barred by estoppel by own conduct. He stated that if the plaintiffs had any grievance regarding transferring of the shares to Mr. Lootah , they had a remedy to challenge the minutes of the AGM which they failed. While summing up, learned counsel submits that the plaintiffs have failed to prove the ingredients of the injunctions rather, the Bank has made out a case for evacuation of the ad interim injunction granted earlier to the plaintiffs and the balance of convenience is in allowing the defendant No.6 to inject fresh equity of PKR 15 billion in the Bank during its rehabilitation process as the defendant No.4 is undercapitalized and facing imminent liquidation, and if fresh equity is not injected in it immediately the Bank will collapse, therefore, the ad-interim order dated 27.04.2022 be vacated. In order to strengthen and validate his submissions made supra, learned counsel placed his reliance on the precedents of Superior Courts reported as 2018 PLD Sindh 222, 2010 MLD 1267, (1992) 1 SCC 719, 2013 CLC 454 Lahore, PLD 2018 Lahore 198, 1998 MLD 362, PLD 1971 SC 376, 1986 PLD Karachi 574 and 2021 PLD 436.

11. Learned counsel for the defendant No.6 argued that it has not been brought on record that Mr. Lootah is owner of M/s. Suroor Investments. He vociferously argued that Mr. AKD is biased against

Mr. Lootah as they are in constant litigation, therefore, a false, frivolous and vexatious litigation is being preferred against Mr. Lootah just to prolong the matter of injecting the fresh equity in the Bank at a time when the Bank is facing greatest hardship. Learned counsel further argued that pardon granted to Mr. Lootah was not in the process of a voluntary return or a plea bargain under NAB Laws, therefore, this plea cannot be equated with voluntary return or plea bargain, and per Section 26 of the Act. He further contended that Mr. Lootah has never been convicted or sentenced by any court of law, therefore, he is a fit and proper person. Learned counsel further argued that Mr. AKD has biasness against Mr. Lootah and he is dragging him into false litigation to satisfy his ego and it is not for the first time that plaintiffs have filed suit against Mr. Lootah but in the past too plaintiffs filed suit No. 551/2019 against him wherein this court refused the injective relief against Mr. Lootah and even at the Appellate Forum i.e. in HCA No.08/2022 the plaintiffs failed to get any fruit, therefore, the plaintiffs have again preferred this suit just to defame Mr. Lootah for which the said defendant reserves his right to sue the plaintiffs for damages and false prosecution.

12. While rebutting the submissions made as supra, Mr. Haider Waheed, learned counsel for the plaintiffs stated that it is a settled principle that prescriptions of statute are not mere technicalities and disregard thereof renders entire process into miscarriage of justice. He further agitated that fit and proper test as mandated per section 14(5)(a) of the Banking Companies Ordinance, 1962 should have been done in advance. Learned counsel for the plaintiffs met the submissions made supra by the defending counsel with sheer denial.

He reiterated that pardon is a guilt, therefore, a perpetrator/malefactor involved in an offence which is against the interest and well-being of any country cannot be termed as a fit and proper person. Without prejudice to the main case argued by him, he proposed that let funds be injected by Mr. Lootah in the Bank, however, issuance of shares to Mr. Lootah be restrained until the defendant No.2 and 4 conducts the relevant scrutiny as to Mr. Lootah's fit and proper test.

13. Heard the arguments and perused the material on record. I would like to take up injunction application (**CMA No.3006/2022**) filed by the plaintiff and the application (**CMA No.8020/2022**) moved under Order XXXIX Rule 4 CPC by the defendant No.4 for vacating the injunctive order dated 27.04.2022 together**.** At this point of time, the pivotal thrust of the counsel of the Bank is that the Bank is undercapitalized and facing imminent liquidation and if fresh equity is not injected in it immediately, as the Bank has 2,143 employees and 499,375 accountholders, and owing to the restraining order, they are not in a position to have funds injected by Mr. Lootah and transfer the shares to latter's name and every day of stay is causing irreparable loss to the Bank and the public at large and it is a matter of public importance that the fresh equity be injected in the Bank immediately. In my view, the court is under obligation to keep in mind the socio-economic needs of society and should be aware of its own obligation towards society, the problem of balancing the social interest and individual interest should yield to public interest. In addition to public convenience as relevant consideration for grant of interlocutory injunction, the court must also consider the effect of an

injunction on the rights of third persons. In the case of **Abu Dhabi Medical Devices Co. L.L.C. v. Federation of Pakistan,** reported in **SBLR 2010 (Sindh) 1313**, the expression public importance and public interest had been discussed in the following words:-

> **"The expression "public importance" is not capable of any précised definition. It can only be defined by process of judicial inclusion or exclusion. Each case has to be judged in the circumstances of the case as to whether the question of public importance is involved but it is settled that public importance must include a purpose or aim in which the general interest of the community as opposed to the particular interest of the individual directly or widely concern. Public Interest is very wide expression and embraces public security, public order and public morality. Expression Public Interest in common parlance means an act beneficial to general public and action taken in public interest necessarily means an action taken for public purpose".**

14. It is sine qua non as to whether the plaintiff in facts and circumstances of the case should or should not be granted an injunction. Looking into down-to-earth and pragmatic perseverance, one in my humble view should not stick to the rigidities and complexities or litmus test of legal character but it needs some more generous comprehension to meet up all exigencies. Lord Cottonham said, in Taylor v. Salmon:

> **"It is the duty of a court of equity to adapt its practice and course of proceedings, as far as possible, to the existing state of society and to apply its jurisdiction to all those new cases, which from the progress daily made in the affairs of men, must continually arise and not from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy". (1838) 4 Myln & Cr 134. (C M Row. Law of Injunctions, Eighth Edition.)**

15. This leads me to consider the pros and cons of this cause where law confronted first and foremost with the old age golden rule of granting injunction that requires:

> (i) The prima facie existence of right in the plaintiff and its infringement by the defendants or the existence of a prima facie case in favour of the plaintiff;
>
> (ii) An irreparable loss, damages or injuries which may occur to the plaintiff if the injunction is not granted;
>
> (iii) The inconvenience which the plaintiff will undergo from withholding the injunction will be comparatively greater than that which is likely to arise from granting it or in other words the balance of inconvenience should be in favour of the plaintiff.

16. It is prescription of Law that all three essential ingredients must be fulfilled for a favorable order and absence of anyone of such ingredients does not warrant grant of injunction. Court at this stage is to make a tentatively, assessment of the case for enabling itself to see whether these three requisites for grant of injunction exist in favour of plaintiff or not. Relief of injunction is discretionary and is to be granted by any court according to sound legal principles and *ex-debito justice*. Existence of prima facie case is to be judged or made out on the basis of material/evidence on record at the time of hearing of injunction application and such evidence of material should be of the nature that by considering the same, court should or ought to be of the view that plaintiff applying for injunction was in

all probability likely to succeed in the suit by having a decision in his favour. The term "prima facie case" is not specifically defined in the Code of Civil Procedure but the consensus is that in order to satisfy about the existence of a prima facie case, the pleadings must contain facts constituting existence of right of the plaintiff and its infringement at the hands of the opposite party. Balance of convenience is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiff, the inconvenience caused to the plaintiff would be greater than that would be caused to the defendant, if the injunction is granted. It is thus for the plaintiff to show that the inconvenience caused to him would be greater than that which may be caused to the defendant. Irreparable loss is ment to be the loss, which is incapable of being calculated on the yardstick of money. An injunction as is well known is an equitable remedy and accordingly is to conform to the well-known maxim of the law of equity that “he who seeks equity must do equity”. The law as contained in the Specific Relief Act is governed by the aforesaid principle, therefore, a plaintiff who ask for an injunction must be able to satisfy the court that his own acts and dealings in the matter have been fair, honest and free from any taint or illegality and that if in dealing with the person against whom he seeks the relief, he has acted in an unfair or un-equitable manner, he cannot have this relief[1].

17. Apart from above, this court in the case of Al-Tamash Medical Society v. Dr. Anwar Ye Bin Ju reported in **2017 MLD 785** went on to hold as under:-

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[1] Shahzad Trade Links v. MTW Pak Assembling Industries Pvt. Ltd. (**2016 CLC 83**) and Sayyid Yousaf Hussain Shirzai v. Pakistan Defence Officers’ Housing Authority & others (**2010 MLD 1261**).

> **"An injunction is an equitable relief based on well-known equitable principles. Since the relief is wholly equitable in nature, the party invoking the jurisdiction has to show that he himself was not at fault. The phrase prima facie case in its plain language signifies a triable case where some substantial question is to be investigated or some serious questions are to be tried and this phrase 'prima facie' need not to be confused with 'prima facie title'. Before granting injunction the court is bound to consider probability of the plaintiff succeeding in the suit. All presumptions and ambiguities are taken against the party seeking to obtain temporary injunction. The balance of convenience and inconvenience being in favour of the defendant i.e. greater damage would arise to the defendant by granting the injunction in the event of its turning out afterwards to have been wrongly granted, than to the plaintiff from withholding it, in the event of the legal right proving to be in his favour, the injunction may not be granted. A party seeks the aid of the court by way of injunction must as a rule satisfy the court that the interference is necessary to protect from the species of injury which the court calls irreparable before the legal right can be established on trial. In the technical sense with the question of granting or withholding preventive equitable aid, an injury is set to be irreparable either because no legal remedy furnishes full compensation or adequate redress or owing to the inherent ineffectiveness of such legal remedy. Ref: (C.M Row Law of Injunctions, Eighth Edition)".**

18. In the case of Messrs Getz Pharma (Pvt.) Limited and others v. Novartis AG and others (2022 CLD 61), this court went on to hold that provision of Order XXXIX, Rule 4 of C.P.C. can be invoked, seeking vacation of previous injunction order, when it is unduly harsh and or unworkable, or where the injunction order sought to be recalled is ex-parte. The reported decisions, which explains the scope of Order XXXIX, Rule 4 of C.P.C. does not require detailed discussion, crux of which is delineated that "provision of O. XXXIX, R. 4, C.P.C.

can be invoked seeking vacation of previous injunction order when it is unduly harsh and or unworkable, or where injunction order sought to be recalled is ex-parte".

19. Taking into consideration the facts of the case and averments made, I have no disinclination in my mind to reckon that the plaintiffs have failed to make out prima facie case and in fact the balance of convenience lies in favour of the defendants. No question of sustaining any irreparable injury ascends to the plaintiff.

20. Before parting with the above, this court cannot slack its eyes from the statutory provisions introduced on record by learned counsel for the plaintiffs as mandated per section 14(5)(a) of the Banking Companies Ordinance, 1962, clause G-5 (2)(3)(4) of Corporate Governance Regulatory Framework and Regulations 8 & 9 of Prudential Regulations For Corporate/Commercial Banking that bank/DFI. The crux of these statutory provisions is that the person eager to acquire share of any company/bank has to undergo fit and proper test in advance before acquiring the same; the defendant No.2's (State Bank of Pakistan) prior approval is required for any change in the existing sponsor shareholdings; the bank/defendant No.4 has to ensure to give prior intimation to the defendant No.2/SBP before dealing with any investor and seek SBP's/defendant No.2's approval for allowing due diligence. It is settled principle that prescriptions of statute are not mere technicalities and disregard thereof would render entire process into miscarriage of justice.

21. In the wake of above discussion, the listed interlocutory applications are disposed of in the following terms:

The injunctive order dated 27.04.2022 is hereby recalled with the directions that fresh equity which is being injected by the defendant No.6 into defendant No.4 through Public Announcement of Intention dated, 30.03.2020, 21.05.2021 and 17.11.2021 (annexure E to E-2) be let to be injected forthwith while keeping in mind that Fit and Proper Test is undertaken by the defendant No.2 as per statutory prescriptions, being the sole ambit of the defendant No.2/SBP. Since the defendant No.4/summit bank is undercapitalized and facing great hardship, the exercise as mandated above, be accomplished forthwith.

Karachi
Dated:01.07.2022 J U D G E

Aadil Arab