

IN THE HIGH COURT OF SINDH AT KARACHI

C.P.No. D- 734 of 2008

M/s. Sardar Muhammad Ashraf D. Baloch (Pvt.) Ltd & others

Versus

National Bank of Pakistan & another

BEFORE:

Mr. Justice Mushir Alam, CJ

Mr. Justice Mohammad Shafi Siddiqui,

Date of Hearing: 30.10.2012

Petitioner: Through Mr. Asim Mansoor Khan Advocate

Respondent No.1 Through M/s. Khalid Anwar, Mustafa Ali and Yousuf
Naseem Advocates

Respondent No.2: Through Mr. Muhammad Ashraf Mughal DAG

J U D G M E N T

Muhammad Shafi Siddiqui, J.- The petitioners have filed this petition with prayers that the two directors i.e. petitioners No.2 and 3 have not obtained any loan from respondent No.1 and that the balance sheet for the year 2003 where a loan against their names was written off by the respondent No.1 is liable to be struck down.

2. Pursuant to this prayer and the memo of petition, the respondent No.1 filed a detailed counter affidavit challenging at the very outset the maintainability of this petition. He submits that the petition pertains to a loan and guarantee hence on account of it being a commercial dispute and contractual obligation, no such declaration as is prayed for, can be granted in writ jurisdiction. Learned Counsel submits that the petition has been filed malafidely to protect the petitioners No.2 & 3 from criminal prosecution. It was further submitted that in view of the alleged grievances raised by the petitioners, a suit is an efficacious and adequate remedy which was not availed since it had become hopelessly barred by limitation. He submits that the petition suffers from laches and that it is thus abuse to the process of law. There is no justified cause for the petitioner to file this petition and it also suffers from doctrine of estoppel.

3. Learned Counsel for the respondent No.1 in support of his arguments has taken us to 1st para of the petition wherein the petitioner has asked for the enforcement of the fundamental rights. However, per learned Counsel it has not been

explained as to what fundamental rights were violated which compelled them to file this constitutional petition. Learned Counsel has then referred to para-2 of the petition pursuant to which it is admitted that the petitioner No.1 purchased 50.93% shares of Metropolitan Steel Corporation Limited vide Sale Agreement dated 09.5.1992 from Privatization Commission on the terms and conditions embodied in the said agreement on which date the petitioners No.2 & 3 were the Directors on the board of the company. Learned Counsel then took us to para-4 which is with regard to novation of the agreement executed between one Sardar Muhammad Ashraf D. Baloch Private Limited, petitioner No.1, M/s. Metro Management Private Limited and also Estate Engineering Corporation through Privatization Commission. Learned Counsel for the respondent No.1 referred to paras 6, 12 and 13 of the petition and submits that the petitioners in the above paras agreed and undertook to pay loan/dues amounting to Rs.456 million and also that the respondent No.1 has illegally written off the loan liabilities of Metropolitan Steel Corporation against petitioners No.2 & 3 whose names have been shown in the balance sheet of 2003. He thus submits that the extract from the balance sheet of 2003 was on account of the performance of the statutory duties as provided under section 252 onwards of the Companies Ordinance, 1984 and hence for all the time available to the petitioners in case they were aggrieved of such loan as being written off against their names, which has not been done at the relevant time and such entries were challenged in the year 2008 and hence suffered from laches as well.

4. Section 255 of the Companies Ordinance deals with the powers and duties of the auditors. Subsection (3) of Section 255 of the Companies Ordinance, 1984 read as under:-

“(3) The auditors shall make a report to the members of the company on the account and books of account of the company and on every balance-sheet and profit and loss account or income and expenditure account and on every other document forming part of the balance-sheet and profit and loss account or income and expenditure account, including notes, statements or schedules appended thereto which are laid before the company in general meeting during his tenure of office, and the report shall state___

- (a) Whether or not they have obtained all the information and explanation which to the best of their knowledge and belief were necessary for the purposes of the audit.
- (b) Whether or not in their opinion proper books of accounts as required by this Ordinance have been kept by the company;
- (c) Whether or not in their opinion the balance-sheet and profit and loss account or the income and expenditure account have been drawn up in conformity with this Ordinance and are in agreement with the books of accounts;
- (d) Whether or not in their opinion and to the best of their information and according to the explanations given them the said accounts give the information required by this Ordinance in the manner so required and give a true and fair view—
 - (i) in the case of the balance-sheet, of the state of the company’s affairs as at the end of its financial year;
 - (ii) in the case of the profit and loss account or the income and expenditure account, of the profit or loss or surplus or deficit, as the case may be, for its financial year, and
 - (iii) in the case of the statement of changes in financial position or sources and application of funds of a listed

company, of the changes in the financial position or the sources and application of funds for its financial year,

- (e) whether or not in their opinion---
 - (i) The expenditure incurred during the year was for the purpose of the company's business; and
 - (ii) the business conducted, investments made and expenditure incurred during the year were in accordance with the objects of the company; and
- (f) Whether or not in their opinion zakat deductible at source under the Zakat and Ushr Ordinance, 1980 (XVIII of 1980) was deducted by the company and deposited in the Central Zakat Fund established under section 7 of that Ordinance.”

5. He submits that the auditors enjoyed statutory powers in terms of the above provision and the petitioner in fact has challenged the entity of the audit report issued pursuant to the duties that has been performed under subsection (3) of Section 255 *ibid.* Learned Counsel thus submits that the petition is liable to be dismissed on these legal objections alone without touching the merits of the case.

6. In reply to the above legal submissions, learned Counsel for the petitioner submits that the extract from the balance sheet of National Bank of Pakistan at serial No.25 which deals with Metropolitan Steel Corporation Limited, the names of three Directors was mentioned. As against this, the annual report 2003 of Metropolitan Steel Corporation Limited suggests that none of these three Directors were there in the company as shown in the annual report of 2003. Similarly the novation of the

agreement dated 27.11.1994 shows that the petitioners No.2 & 3 were neither party nor they obliged to sign the same since it was executed by M/S Metro Management Pvt. Ltd. which has subsequently purchased the shares of Metropolitan Steel Corporation Ltd. He claimed that petitioners No.2 & 3 resigned from the directorship on 16.1.1993 and the corporate law authority was duly informed on 27.1.1993 and then subsequently on 27.11.1994 the Metropolitan Steel Corporation was sold to Metro Management Pvt. Limited and as such names of petitioners No.2 & 3 were wrongly shown in the balance sheet of 2003 against whom the loan was written off.

7. Mr. Muhammad Ashraf Khan Mughal, learned DAG has adopted the arguments of learned Counsel for the respondent No.1.

8. I have heard the learned Counsel for the parties and perused the record. Without touching the merits of the case, it appears that the petitioners have challenged a number of controversies which either arisen out of some contractual obligation or some disputed questions of facts. It is by now a settled law that such disputed questions of facts or contractual obligations cannot be invoked in constitutional jurisdiction of High Court. These are routine contractual disputes between private parties and public functionaries and are not open to scrutiny under writ jurisdiction. The doctrine of indoor management whereby one private company sold its share to another private company without involving the bank is also not open

for a judicial review in this writ jurisdiction. The alleged novation agreement meant for parties inter se and it had no effect to the grant of loan by respondent No.1 as respondent No.1 was not the signatory of any novation agreement and hence provisions of contract Act which deals with novation of agreement would not apply or would not bind respondent No.1 to cause effect of novation agreement.

9. Learned Counsel for the respondent No.1 has relied upon the case of Haq Nawaz Vs. Zonal Chief National Bank of Pakistan reported in 2001 MLD 1477 whereby it was held that the parties executing agreement on their own sweet-will cannot be permitted to enforce such contract through constitutional petition as laid down in the case of Mumtaz Masood reported in 1994 SCMR 2287.

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10. It is also observed in the case of Ch. Muhammad Ismail Vs. Fazaldad & others reported in PLD 1996 SC 246 that the jurisdiction conferred on the High Court under Article 199 and 203 of the Constitution being of extraordinary nature must be exercised sparingly and that the Court has to be specially conscious in exercising its constitutional jurisdiction when other adequate remedy was available to the parties invoking such jurisdiction. It was also observed by the Hon'ble Supreme Court in the aforesaid judgment that if the litigants were allowed to take all sorts of disputes to the High Court under writ jurisdiction without first following other remedies available to them under the law, it would not only increase working load of the High Court but

also defeat provisions of law by which same remedies were made available. Such spree on the part of the litigants would amount to abuse of constitutional jurisdiction.

11. Similarly in another case relied upon by the learned Counsel for the respondent reported in NLR 1995 CLJ 574, it was held that the rights of the parties were exclusively founded on private contract, however it cannot be enforced by making a resort to writ jurisdiction. Another question that has been answered in the above referred case law is that although National Bank of Pakistan is a creation of a statute yet it cannot be amenable to writ jurisdiction in absence of violation by it of any law/ or rules.

12. Learned Counsel for the respondent has also relied upon the case of Abdul Ghani Saeed Vs. National Bank of Pakistan reported in NLR 1982 Service 239 with regard to principles for maintaining this petition. In the case *ibid* the first test prescribed is that as to whether the statutory body is performing functions of State involving exercise of any sovereign or public power and the second test is as to whether the government substantially controls the corporation and the latest test is as to whether the funds used by the corporation are provided by the government. These three tests were applied in the case referred above by the Division Bench of this Court and held that applying these tests in case of National Bank of Pakistan there can be no difficulty in holding that the sovereign or public powers and that the

control of the National Bank of Pakistan hardly vests in the government, except the government may lay down policy and appoint directors and Chief Executives. In terms of the judgment referred above, this was enough for the Bench to declare that the right to file petition cannot be maintained against National Bank of Pakistan.

13. Learned Counsel for the respondent No.1 has further relied upon the case of M/s. Sandal Fibres Limited Vs. Government of Pakistan (PLD 1982 Lahore 400) wherein it has held that:

“--- a perusal of letter of credit opened by respondent-Bank itself shows that it was established in pursuance to an agreement between the parties. There is no violation of either any statute or of statutory rule and as such, it is difficult to see as to how this petition can be maintained. ----
13. There cannot be any doubt that a Constitutional petition cannot be maintained to enforce contractual rights unless it is shown that there has been some violation of any statute or rules having force of law. No such question arises in the present case. This petition is, therefore, not maintainable.”

14. Needless to mention that balance sheet for 2003 is in compliance of law and not in violation of law against which a petition can be maintained.

15. Similarly the learned Counsel for the respondent No.1 has referred another case of Habib-ur-Rahman Unnar Vs. Government of Sindh (PLD 2004 Karachi 728) wherein in para-33 it is observed as under:-

“33. However, if the State or its agents have executed a contract and entered into the field of contract (situation No.2), then the relations are no longer governed by the Constitutional provisions but by the legal valid contract which determines rights and obligations of the parties interse, therefore, no question arises of violation of Articles 4 and 25 of the Constitution when the State or its agents purporting to act within the field of contract, perform any act. In this field, they can only claim rights conferred upon them by contract and are bound by the terms of contract only unless some statute steps in and confers some special authority power or obligation on the State in the contractual field which is apart from the contract.”

16. Thus the reliance of the petitioner upon a private agreement whereby the petitioners sold their shares to another private limited company in the name of Metro management Private Limited is of no benefit to the petitioners and that too when the National Bank of Pakistan/respondent No.1 was not a signatory to the said agreement. It is an admitted fact that in terms of para-8 of the petition, the petitioners No.2 & 3 were the directors of Metropolitan Steel Corporation until 15.1.1993. However, the subsequent sale of the shares of Metropolitan Steel Corporation to

Metro Management Private Limited is a question which is to be determined by a Court of competent jurisdiction.

17. It is also noticeable that the balance sheet is the creation of statutory compliance by the auditors pursuant to Section 252/255 of the Companies Ordinance, 1984 and a resort to challenge such entries in the balance sheet of National Bank of Pakistan dated 2003 suffers not only from laches but are also apparently hit by doctrine of estoppel. The statutory compliance under Companies Ordinance, 1984 weigh much higher than the annual report of Metropolitan Steel Corporation Ltd. and the private agreement.

18. The dispute that has been canvassed before us is not the one which could be amenable to writ jurisdiction. The petitioner by invoking civil or banking jurisdiction (as the case may be) could have assailed the impugned balance sheet at the relevant time which was an efficacious and adequate remedy.

19. It is thus clear that on account of all these contracts between the private party and the Government, the right of petition as a rule cannot be maintained. More importantly there are disputed questions of facts regarding directorship of petitioners No.2 & 3 at the crucial time. The petitioner on the one hand claims that in terms of Form 29 issued under the Companies Ordinance for the crucial period of 1993 the

name of petitioners No.2 & 3 are not incorporated then on the other hand the extract from the balance sheet of National Bank of Pakistan for 2003 also issued in statutory compliance reveals that such names of petitioners No.2 & 3 are very much available against whom loan was written off. Needless to mention that such loan amount could not have been written off without their diligent effort.

20. Without touching the merits of the case, the petition was dismissed by short order dated 30.10.2012 and above are the reasons in support thereof.

Chief

Justice

Judge