

2016 C L D 224

[Lahore]

Before Shams Mehmood Mirza, J

Ch. SAEED ULLAH and others---Petitioners

Versus

Messrs FAYSAL BANK LTD. and another---Respondents

W. P. No. 13263 of 2013, decided on 4th March, 2015.

(a) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

---Ss. 10 & 22(6)---Constitution of Pakistan, Art. 199---Constitutional petition---Maintainability---Suit for recovery of loan amount---Leave to defend---Imposition of condition while granting leave to defend---Permissibility--- Appeal against order in leave application, maintainability of---Defendant filed application for leave to defend which was conditionally accepted by Trial Court subject to deposit of certain amount within one month---Validity---Banking Court, while granting leave to defend suit in terms of S. 10(8) of Financial Institutions (Recovery of Finances) Ordinance, 2001, was empowered to impose conditions on defendants---Rigors of S. 22(6) of Financial Institutions (Recovery of Finances) Ordinance, 2001 were fully applicable and remedy of appeal was not available against such order---Party could not be allowed to challenge orders through constitutional petition which were otherwise non-appealable, as it would amount to negate provisions of Financial Institutions (Recovery of Finances) Ordinance, 2001, which prohibited remedy of appeal against leave granting order---Banking Court, in its discretion, could also impose any condition while granting leave to defend the suit in terms of S. 10(9) of Financial Institutions (Recovery of Finances) Ordinance, 2001---Constitutional petition was dismissed in circumstances.

Syed Sighir Ahmad Naqvi v. Province of Sindh through Chief Secretary and another 1996 SCMR 1165; Crescent Factories Vegetable Ghee Mills and 5 others v. National Bank of Pakistan PLD 1985 Lah. 150; Muslim Commercial Bank Limited v. Judge Banking Court II, Faisalabad and others 2002 CLD 991; Sheikh Gulzar Ali and Co. Limited and others v. Special Judge, Special Court of Banking and another 1991 SCMR 590; Mian Rafique Saigol and another v. Bank of Credit and Commerce International (Overseas) Limited and another PLD 1996 SC 749 and Messrs Shaheen Pumps (Pvt.)

Limited v. Messrs Beacon Engineering Industry and another 2006 MLD 1709 rel.

(b) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

---Preamble---Constitution of Pakistan, Art. 199---Constitutional petition---Maintainability--- Principles--- High Court is slow in encouraging parties to circumvent provision of special statute in respect of orders which they seek to challenge by petition under Art. 199 of the Constitution--- If an error is capable of being corrected by superior court in exercise of its appellate jurisdiction, which is although available at conclusion of proceedings, it would be sound exercise of discretion if High Court refuses to exercise its jurisdiction under Art. 199 of the Constitution during pendency of proceedings---Where a Tribunal is created under law, and which is intra vires the Constitution, it has right to render decision rightly or wrongly---Mere erroneous exercise of jurisdiction by special court does not render its decision to be illegal and without lawful authority so as to be amenable to extraordinary Constitutional jurisdiction of High Court.

Syed Sighir Ahmad Naqvi v. Province of Sindh through Chief Secretary and another 1996 SCMR 1165; Crescent Factories Vegetable Ghee Mills and 5 others v. National Bank of Pakistan PLD 1985 Lah. 150; Muslim Commercial Bank Limited v. Judge Banking Court II, Faisalabad and others 2002 CLD 991 and Sheikh Gulzar Ali and Co. Limited and others v. Special Judge, Special Court of Banking and another 1991 SCMR 590 rel.

(c) Administration of justice---

---Rights and obligations, enforcement of---Principles as to applicable law and procedure---When a statute gives right and provides forum for adjudication of such rights, remedy had to be sought only under provision of that statute---For enforcement of rights or obligations under a statute, only remedy available to person aggrieved is to get adjudication of same under that statute.

Syed Sighir Ahmad Naqvi v. Province of Sindh through Chief Secretary and another 1996 SCMR 1165 and Crescent Factories Vegetable Ghee Mills and 5 others v. National Bank of Pakistan PLD 1985 Lah. 150 rel.

(d) Administration of justice---

---Adjudication and disposal of cases by Tribunals---Principles---Where Tribunal is created under law, which is intra vires the Constitution, the Tribunal has right to render

decision rightly or wrongly.

Sheikh Gulzar Ali and Co. Limited and others v. Special Judge, Special Court of Banking and another 1991 SCMR 590 rel.

Barrister Hassan Nawaz for Petitioners.

Mian Muhammad Azhar Saleem for Respondents.

ORDER

SHAMS MEHMOOD MIRZA, J.---Through this writ petition, order dated 16.04.2013 passed by Banking Court, Lahore has been challenged whereby conditional leave to defend the suit was granted to the petitioners with the direction to deposit a sum of Rs.994,195.05.

2. Brief facts of the case are that respondent No.1 bank filed a suit (suit No.1313 of 2010) against the petitioners for recovery of a sum of Rs.1,380,846.95 wherein application for leave to defend the suit was filed by the petitioners taking a number of objections. After hearing the arguments on the application for leave to defend the suit, the learned Banking Court granted leave to defend the suit to the petitioners subject to the deposit of Rs.994,195.05 within a period of one month. It is the imposition of condition on the grant of leave that has been challenged by the petitioners.

3. Section 22(6) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (the Ordinance) provides that there shall be no appeal against leave granting orders passed by the banking court. Section 22(6) of the Ordinance reads as under:

No appeal, review or revision shall lie against an order accepting or rejecting an application for leave to defend, or any interlocutory order of the Banking Court which does not dispose of the entire case before the Banking Court other than an order passed under subsection (11) of section 15 or subsection (7) of section 19.

The moot point in this writ petition is whether a provision in the special statute which renders an order non-appealable can be circumscribed by filing a writ against the said order. Faced with this dilemma, it is often argued that the bar contained in the above provision does not extend to an order granting conditional leave to defend the suit in terms of section 10(9) of the Ordinance. A perusal of section 10 of the Ordinance more particularly its subsections (8) and (9), however, negate this argument. Subsections (8) and (9) of section 10 read as

under

(8) Subject to section 11, the Banking Court shall grant the defendant leave to defend the suit if on consideration of the contents of the plaint, the application for leave to defend and the reply thereto is of the view that substantial questions of law or fact have been raised in respect of which evidence needs to be recorded.

(9) In granting leave under subsection (8), the Banking Court may impose such conditions as it may deem appropriate in the circumstances of the case, including conditions as to deposit of cash or furnishing of security (underlining is mine)

From the combined reading of the above provisions, it is evident that a banking court is empowered, while granting leave to defend the suit in terms of subsection (8) to impose conditions on the defendants. It may also be noted that in the present case, the PLA filed by the petitioner was allowed and leave to defend the suit was granted, notwithstanding the imposition of the condition. The rigors of section 22(6) of the Ordinance, therefore, were fully applicable and the remedy of appeal was not available to the petitioner against order dated 16.04.2013.

4. The question that needs to be determined is whether a party can be allowed to challenge in writ jurisdiction orders against which the remedy of appeal is specifically barred in the statute. The answer on principle and on authority is in negative. A party cannot be allowed to challenge orders through a constitutional petition which are otherwise non-appealable as it would amount to negating the provisions of the Ordinance which prohibit the remedy of an appeal against leave granting orders. It is established law that when a statute gives a right and provides a forum for adjudication of such rights, remedy has to be sought only under the provisions of that statute. Thus for enforcement of a right/obligation under a statute, the only remedy available to the person aggrieved is to get adjudication of rights under the said statute. Reference in this regard is made to a judgment reported as Syed Sighir Ahmad Naqvi v. Province of Sindh through Chief Secretary and another" 1996 SCMR 1165 in which it was held that where a statute excludes a right of appeal against an interim order, the same could not be bypassed by challenging it through a constitutional petition and that the effected party has to wait till the said order matures into a final order and thereafter to challenge the same before the proper forum created for that purpose in the statute. A similar view was expressed in "Crescent Factories Vegetable Ghee Mills and 5 others v. National Bank of Pakistan" PLD 1985 Lahore 150 and "Muslim Commercial Bank Limited v. Judge Banking Court-II, Faisalabad etc." 2002 CLD 991. Indeed it would achieve a startling result if an order can be challenged in a writ petition when the appeal against the said order is barred under the statute. Besides, the High Court should be slow in

encouraging parties to circumvent the provisions of special statute in respect of orders which they seek to challenge by writ petition under Article 199 of the Constitution. If an error is capable of being corrected by a superior Court in exercise of its appellate jurisdiction, although available at the conclusion of the proceedings, it would be sound exercise of discretion if this Court refuses to exercise its jurisdiction under Article 199 of the Constitution during the pendency of the proceedings.

5. The law is also very clear that where an inferior tribunal is created under a law, which is otherwise intra vires the Constitution, it has a right to render a decision rightly or wrongly. Mere erroneous exercise of jurisdiction by Special Court does not render its decisions to be illegal and without lawful authority so as to be amenable to the, extraordinary jurisdiction of this Court. Reference in this regard is made to the judgment report as "Sheikh Gulzar Ali & Co. Limited and others v. Special Judge, Special Court of Banking and another" 1991 SCMR 590.

6. The Banking court in its discretion can also impose any condition while granting leave to defend the suit in terms of section 10(9) of the Ordinance, which reads as under,

In granting leave under subsection (8), the Banking Court may impose such conditions as it may deem appropriate in the circumstances of the case, including conditions as to deposit of cash or furnishing of security.

The above provision shows that the Banking Court has the discretion in the matter of imposition of condition while adjudicating upon the application for leave to defend. There are a number of judgments upholding the right of the courts to impose conditions on the defendants in the order granting leave to defend the suit. Reference in this regard may be made to the judgments reported as Mian Rafique Saigol and another v. Bank of Credit and Commerce International (Overseas) Limited and another PLD 1996 SC 749 and M/s Shaheen Pumps (Pvt.) Limited v. M/s Beacon Engineering Industry and another 2006 MLD 1709. This Court on purpose is not dilating upon the facts which led to the Banking court to impose the condition of payment by the defendants lest it may prejudice the case of the petitioners in the appeal, if and when a decree is passed against them.

7. In the result, this writ petition being not maintainable is hereby dismissed.

SL/S-113/L

Petition dismissed.