

Form No:HCJD/C-121
ORDER SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Case No. W.P.No.36748/2022

Jan Muhammad Tayab Vs Federation of Pakistan & others

S.No.of order/ Proceeding	Date of order/ Proceeding	Order with signature of judge, and that of parties or counsel, where necessary.
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01.02.2023 M/s Waqas Ahmad Mir, Mian Tariq Hassan, Hassan Ali and Jahangir Dogar, Advocates for the petitioner.
M/s Rehan Nawaz and Dr. Shahid Raza, Advocates for respondent-SBP.
Mr. Asad Ali Bajwa, D.A.G.

This constitutional petition challenges the order dated 12.5.2022 passed by the Presiding Officer of the Foreign Exchange Regulation Appellate Board (Appellate Board). The impugned order states that:

“The order dated 21.04.2022 passed for deposit of the surety of the equivalent amount of the penalty imposed by the adjudicating officer of State Bank of Pakistan has not been complied with. Time is sought by the learned counsel for the appellant. In the interest of justice, one more opportunity is granted to the appellant to submit the surety. To come up on 27.05.2022.”

2. Prior to this vide order dated 21.4.2022 while relying upon Section 23C (4) of the Foreign Exchange Regulation Act, 1947 (**“the Act, 1947”**) the Presiding Officer of the Appellate Board had required the petitioner who is the appellant before the Appellate Board to deposit a surety equivalent to the amount of penalty imposed upon the petitioner and this was held to be a *sine qua non* for the appeal to be entertained and decided. The petitioner prays for holding the provisions of Section 23C (4) to be unconstitutional on the ground that it offends the rights of the petitioners

to be treated in accordance with law fairly and justly.

Also that the right of the petitioner to access of justice is also infringed thereby.

3. Section 23C (4) of the Act, 1947 provides that:

"23C(4) No appeal shall be admitted for hearing unless the appellant deposits in cash with the Appellate Board the amount of penalty or, at the discretion of the Appellate Board, furnishes security equal in value to such amount of penalty."

4. A reading of the provisions set out above shows that it clearly provides that no appeal shall be admitted for hearing unless the appellant before the Appellate Board deposits in cash amount of penalty or at the discretion of the Appellate Board furnishes security equal in value to such amount of penalty. Therefore, there is a complete prohibition enacted by sub-section (4) of Section 23C to the hearing of the appeal unless the pre-condition is satisfied by an appellant. Suffice to say that this clearly is an infringement of the right which inheres in the petitioner to access to justice. One of the most important planks of the right of access to justice is the right to file at least one appeal against the order which affects the rights of a person. The right to file an appeal must be unimpeded and should not be circumscribed by a condition which surely takes away that right. Sub-section (4) of Section 23C is one such provision which in fact is tantamount to taking away the right of the petitioner in not only filing of the

appeal but also the hearing to be granted on that appeal irrespective of whether it fulfills the condition or not. It is one thing to say that the petitioner may be burdened with a condition in case he seeks the suspension of the determination of a liability against him pending the appeal but another aspect entirely to provide in the law that the hearing of the appeal will be contingent upon the fulfillment of a condition precedent which if unfulfilled takes away the right of appeal. A clear distinction will have to be drawn between the two circumstances. Surely, under civil law a money decree can only be suspended if adequate security is provided by the judgment debtor and as determined by appellate court. But that mere fact does not mean that in case of failure to do so the appeal shall not be heard on its merits and that the appellant will be deprived of grant of hearing in the appeal itself unless he deposits the security equivalent to the amount of penalty. Sub-section (4) of Section 23C is a clog on the right of the petitioner to be dealt with in accordance with law. The petitioner has the right of filing at least one appeal and for that appeal to be heard without any pre-conditions attached to it. This is a fundamental right under the Constitution and springs from Article 10A (Right to fair trial) which provides, inter alia, that for the determination of civil rights and obligations, a person shall be entitled to due

process. It also emanates from Article 4. This right has been established in a plethora of superior court judgments. See for example Asfandiyar Wali v. Federation of Pakistan (PLD 2001 SC 607) at 909. The right is absolute and cannot be taken away by laying down a condition which undermines that right.

5. Learned counsel for the petitioner has also referred to rule 8 of the Adjudication Proceedings and Appeal Rules, 1998 which makes the receipt of an appeal by the Appellate Board subject to compliance with sub-section (4) of Section 23C of the Act, 1947. Thus, the Rules too prohibit the Appellate Board from hearing the appeal unless the condition is satisfied.

6. Such a condition has been the subject to litigation before the superior courts. In Messrs Chenab Cement Product (Pvt.) Ltd. and others v. Banking Tribunal Lahore and others (PLD 1996 Lahore 672) while relying upon an earlier judgment passed by the Supreme Court of Pakistan in Messrs Eastern Rice Syncicate v. Central Board of Revenue, Government of Pakistan and others (PLD 1959 Supreme Court (Pak.) 364) a Full Bench of the Lahore High Court stated as under:-

"8. The question as to whether the right of appeal can be made subject to condition of deposit came before the Supreme Court of Pakistan in M/s. Eastern Rice Syndicate v. Central Board of Revenue PLD 1959 SC (Pak.) 364 wherein it was ruled that such a condition, amount to negation of the right of appeal itself. We are, therefore, of the view that the proviso to section 9 places an unreasonable restriction on the right of appeal and cannot, therefore, be upheld."

7. In view of the above, this petition is allowed. The impugned orders are set aside. Consequently, it is held that sub-section (4) of Section 23C of the Act, 1947 as well as rule 8 of the Rules (to the extent that rule makes the receipt of an appeal subject to the compliance with sub-section (4) of Section 23C of the Act) as unconstitutional and violative of the fundamental rights of the petitioner and they are hereby struck down.

(SHAHID KARIM)
JUDGE

Approved for reporting.

JUDGE

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Rafaqat Ali