

Form No: HCJD/C-121.

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

ICA No.16 of 2015

Ehsan Ullah Qureshi

Vs

United Bank Limited

S. No. of order/ proceedings	Date of order/ proceedings	Order with signature of Judge and that of parties or counsel where necessary.
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06	31.03.2015	Mr. Ahmed Awais, Advocate for the appellant. Mr. Habib Ahmed Bhatti, Advocate for the respondent.
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C.M. No.1024/2015

This is an application under section 12(2) of Code of Civil Procedure, 1908 (CPC) on behalf of appellant/judgement debtor seeking setting aside and recalling of orders dated 29.01.2015 passed in ICA No.16/2015 and 03.12.2014 passed in Execution Petition No.01/2012 in C.S. No.08/2010 whereby the appeal filed by the appellant was dismissed and application under section 15(6) read with section 19(5) filed by respondent/bank was allowed.

2. The facts in brief are that in the suit for recovery filed by the respondent bank (C.S.No.08/2010) a compromise decree was passed

by this Court under Banking Jurisdiction on 07.04.2011. The execution application was filed (EP No.1/2012 in C.S. No.08/2010) for the execution of the referred compromise decree. The appellant/applicant filed objection petition and the respondent/bank filed an application under section 19(3) read with section 15(6) of Financial Institutions (Recovery of Finances) Ordinance, 2001 (the Ordinance) seeking possession of the mortgaged property namely house # 197, street # 22, F-11/2, Islamabad. The objection petition of the appellant was dismissed and the application under section 19(3) *ibid* was allowed by this Court in execution proceedings vide order dated 03.12.2014. Appeal was filed by the applicant(ICA No.16/2015), which was dismissed vide order dated 29.01.2015.

3. The learned counsel for the applicant, *inter alia*, submitted that the orders passed in Execution Petition as well as in Appeal are without jurisdiction inasmuch as the Hon'ble Supreme Court of Pakistan in case titled "National Bank of Pakistan vs. Saif Textile Mills Ltd." (***PLD 2014 SC 283***) has declared section 15 of Financial Institutions (Recovery of Finances) Ordinance, 2001 (the Ordinance) as *ultra vires* the Constitution.

4. The learned counsel for the respondent/bank opposed the application and submitted that in pursuance of orders passed by this Court warrants of possession were issued and the applicant undertook to deliver vacant possession of the house in question by 15th of March, 2015 and also in this regard signed an undertaking on 28.02.2015. It was further contended by the learned counsel that cheque for the sum of Rs:5 million(rupees five million only) was also tendered towards the discharge of the decretal liability which was dishonoured. Learned counsel further submitted that section 19(5) of the Ordinance operates independently from section 15 inasmuch as this is a case of legislation by reference and in light of the law laid down by Lahore High Court in case titled “UBL vs. Defence Housing Authority” (2004 CLC 215) it has been held that the provisions of section 15 operate independently when incorporated in section 19(5).

5. The sole ground on which the above mentioned orders passed by this Court have been assailed is the lack of jurisdiction on part of this Court due to striking down of section 15 *ibid*. The Hon’ble Supreme Court of Pakistan in PLD 2014 SC 283 *supra* observed as follows:

44. Be that as it may, it is not necessary to adjudicate upon this aspect of the matter, as we have already held that the above mentioned

material provisions of section 15 of the Ordinance of 2001 are ultra vires to the Constitution. The rump of the section that remains is incapable of being severed and its presence in the statute would at best be ineffective and at worse cause for further mischief, therefore, the entire section 15 of the Ordinance of 2001 is held to be ultra vires to the Constitution. Such a course of action would be in accordance with the law, as laid down by this Court in the case of Baz Muhammad Kakar and others v. Federation of Pakistan through Ministry of Law and Justice, Islamabad and others (PLD 2012 SC 870).

45. In the light of aforesaid discussion and in terms thereof, the provisions of section 15 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 are held to be ultra vires to the Constitution of the Islamic Republic of Pakistan, 1973.

6. Some of the subsections of section 15 were incorporated in section 19 of the Ordinance by reference. In this regard for the sake of brevity sub-section 5 of section 19 is reproduced below and is as follows:

“(5) The provision of sub-section (5), (6), (7), (8), (9), (10), (11) and (12) of section 15 shall, mutatis mutandis, apply to sales of mortgaged, pledged or hypothecated property by a financial institution in exercise of its powers conferred by sub-section (3).”

The plain reading of this section shows that above mentioned subsections of section 15 are applicable mutatis mutandis in cases of sale of the mortgaged, pledged or hypothecated property undertaken by the financial institution under subsection 3 of section 19. In this regard the word 'mutatis mutandis' has been defined in Black's Law Dictionary 19th Edition as "necessary changes; all necessary changes having been made". The legislation whereby certain provisions of a section in the statute are incorporated into the other is generally known as legislation by reference. The scope and purport of such kind of legislation was discussed by the Hon'ble Supreme Court of Pakistan in judgement reported as **1985 SCMR 70** and it was held that effect of incorporation by reference to the provision of an Act is as if a new Act has come into force containing those provisions subject to such modification and alteration, if any, as made by or indicated in adopted Act. In another case from across the border reported as AIR 2002 SC 3499, it was observed as follows:

"When an earlier Act or certain of its provisions are incorporated by reference into a latter Act, the provisions so incorporated become part and parcel of the later Act as if they had been bodily transposed into it. The incorporation of an earlier Act into a

later Act is a legislative device adopted for the sake of convenience in order to avoid verbatim reproduction of the provisions of the earlier Act into the later. But this must be distinguished from a referential legislation, which merely contains a reference or the citation of the provisions of an earlier statute. In a case where a statute is incorporated, by reference into a second statute the repeal of the first statute by a third does not affect the second. The later Act alongwith the incorporated provisions of the earlier Act constitute an independent legislation, which is not modified or repealed by a modification or repeal of the earlier Act. However, where in late Act there is a mere reference to an earlier Act, the modification, repeal or amendment of the statute this is referred will also have an affect on the statute in which it is referred. Whether a formal statute is merely referred to or cited in a later statute or whether it is wholly or partially incorporated therein, is a question of construction.”

In the case “Aamir Raza Ashfaq vs. Minhaj Ahmed Khan” (2012 SCMR 6) the Hon’ble Supreme Court of Pakistan clinched the law on the subject and observed as follows:

“Referential legislation broadly is of two kinds i.e. either a specific provision of a certain Act is incorporated into another Statute or the provision of a certain Statute is incorporated by a general reference. Laws including the adopted provisions do not remain static and issues crop up when the adopted provisions are amended in the earlier Statute. The question whether subsequent

amendments in such adopted provisions either by specific incorporation or by a general reference would be ipso facto read into the latter has been a subject of judicial comment. In Bajaya v. Gopikabai and another (AIR 1978 SC 793), the Court was of the view as follows:--

Broadly speaking, legislation by referential incorporation falls in two categories: First, where a statute by specific reference incorporates the provisions of another statute as of the time of adoption. Second, where a statute incorporates by general reference the law concerning a particular subject, as a genus. In the case of the former, the subsequent amendments made in the referred statute cannot automatically be read into the adopting statute. In the case of latter category, it may be presumed that the legislative intent was to include all the subsequent amendments also, made from time to time in the generic law on the subject adopted by general reference. This principle of construction of a reference statute has been neatly summed up by Sutherland, thus:

A statute which refers to the law of a subject generally adopts the law on the subject as of the time the law is invoked. This will include all the amendments and modifications of the law subsequent to the time the reference statute was enacted.

(Vide, Sutherland's Statutory Construction, Third Edition, Article 5208, page 5208).

Corpus Juris Secundum also enunciates the same principle in these terms:

...Where the reference in an adopting statute is to the law generally which governs the particular subject, and not to any specific statute or part thereof,... the reference will be held to include the law as it stands at the time it is sought to be applied, with all the changes made from time to time, at least as far as the changes are consistent with the purpose of the adopting statute."

In a rather instructive judgment of the Lahore High Court in Pakistan International Airlines Corporation v. Chairman, Punjab Labour Appellate Tribunal, Lahore (PLD 1979 Lahore 415), the rule of interpretation in this context was summed up as follows:--

"37. The rule of interpretation to be inferred from all the references quoted above is:

(a) When a statute adopts a part or all of another statute by specific or descriptive reference, the adoption takes the statute as it exists at that time and the adopted, provisions with necessary adaptations if any became a part of the adopting statute as if it was written down in it;

(b) any subsequent addition to or modification of the adopted statute, can be included in the - adopting statute only if so expressly or impliedly provided in the adopting statute;

(c) When particular sections of an earlier statute are expressly incorporated into a later statute the other sections of the earlier statute may be referred to in order to resolve any ambiguity or obscurity that may arise in its interpretation of that section;

(d) When the adopting statute refers to law generally which governs a particular subject, the reference in such a case includes not only the law in force at the date of adopting Act but all subsequent laws on the particular subject referred to, in so far as they are consistent with the adopting law;

(e) When Legislature in adopting the procedural provisions of another Act, made substitutions in certain instances, it will be inferred that in matters not specified no substitutions were intended."

In a recent judgment of the Supreme Court of India dated 11-1-2011 passed in Messrs Girnar Traders v. State of Maharashtra and others (Civil Appeal No. 3703 of 2003 and Civil Appeal No. 292 of 2011), a similar view was taken and it was held as follows:--

"Reference to an earlier law in the latter law could be a simple reference of provisions of earlier statute or a specific reference where the earlier law is made an integral part of the new law, i.e., by incorporation. In the case of legislation by reference, it is fictionally made a part of the latter law. We have already noticed

that all amendments to the former law, though made subsequent to the enactment of the latter law, would ipso facto apply and one finds mention of this particular aspect in section 8 of the General Clauses Act, 1897. In contrast to such simple reference, legal incidents of legislation by incorporation is that it becomes part of the existing law which implies bodily lifting provisions of one enactment and making them part of another and in such cases subsequent amendments in the incorporated Act could not be treated as part of the incorporating Act. Ultimately, it is the expression and/or the language used in the new law with reference to the existing law that would determine as to under what class of referential legislation it falls."

The effect of this referential legislation [section 11(8) of the Act] would be that any Constitutional amendment made in the said Article would be read into the amended provision of the Act. Consequently the amendments brought about in Article 105 of the Constitution by virtue of the 18th Amendment (Act X of 2010) would be fully applicable. Article 105 as amended reads as follows:--

"105. Governor to act on advice, etc.---
(1) Subject to Constitution, in the performance of his functions, Governor shall act [on and] in accordance with the advice of the Cabinet [or the Chief Minister]:

[Provided that [within fifteen days] the Governor may require the Cabinet or, as the case may be, the Chief Minister to reconsider such advice, whether generally or otherwise, and the Governor shall [within ten days] act in accordance with the advice tendered after such reconsideration.] (Emphasis is supplied).

(2) The question whether any, and if so what, advice was tendered to the Governor by the Chief Minister [or Cabinet] shall not be inquired into in, or by, any court, tribunal or other authority.

[(3)]

(a)

.....

(b)

.....

(5) The provisions of clause [(2)] of Article 48 shall have effect in relation to a Governor as if reference therein to "President" were reference to "Governor".]

The principle of Parliamentary Democracy or supremacy of the Parliament which underlie the afore-mentioned provision is also reflected at the Federal Level in Article 48(1) of the Constitution qua the binding nature of the advice tendered by the Prime Minister to the President and has time and again been highlighted by this Court. In a seminal judgment titled as Mian Muhammad Nawaz Sharif v. President of Pakistan (PLD 1993 SC 473 at 567), it was held as follows:--

"Our Constitution, in fact, is designed to create a parliamentary democracy. The President in this set-up is bound to act, in the exercise of his functions, in accordance with the advice of the Cabinet or the Prime Minister [Article 48(1)] and the Cabinet in its turn is collectively responsible to the National Assembly [Article 91(4)] though the Prime Minister holds office at the pleasure of the President. However, the President cannot remove him from his office as long as he commands the confidence of the majority of the members of the National Assembly [Article 91(5)]. In view of these provisions, the system of Government envisaged by the Constitution of 1973 is of the Parliamentary type wherein the Prime Minister as Head of the Cabinet is responsible to the Parliament, which consists of the representatives of the nation.

It is manifest, therefore, that in the scheme of our Constitution the Prime Minister in administering the affairs of the Government is neither answerable to the President nor in any way subordinate to him. In formulation of the policies of his Government and in the running of its affairs, the Prime Minister is answerable only to the National Assembly and not to the President. Indeed, it is the President who is bound by the advice of the Prime Minister or the Cabinet in all matters concerning formulation of policies and administration of the affairs of the Government

and not the other way about, as appears to have been mistakenly understood. Undoubtedly, the President may require the Cabinet or the Prime Minister, as the case may be, to reconsider any advice tendered to him but the President is bound to act on the advice tendered, even if it be the same, after consideration. Undoubtedly, both are expected to work in harmony and in close collaboration for the efficient running of the affairs of the State but as their roles in the Constitution are defined, which do not overlap, both can exercise their respective functions unhindered and without bringing the machinery of the Government to a standstill. Despite personal likes or dislikes, the two can co-exist Constitutionally. Their personal likes or dislikes are irrelevant so far as the discharge of their Constitutional obligations are concerned. Despite personal rancour, ill-will and incompatibility of temperament, no deadlock, no stalemate, no breakdown can arise if both act in accordance with the terms or the Oath taken by them, while accepting their high office. They have sworn:

not to allow their personal interest to influence their official conduct or their official decisions."

And taken Oath:

"to do right in all circumstances, to all manner of people, according to law, without fear or favour, affection or ill-will."

In yet another Full Court judgment of this Court in Sindh High Court Bar Association v. Federation of Pakistan (PLD 2009 SC 879), the Hon'ble Chief Justice of Pakistan, Mr. Justice Iftikhar Muhammad Chaudhry, speaking for the Court, reiterating the ratio laid down in Al-Jehad Trust v. Federation of Pakistan (PLD 1997 SC 84), observed as follows:--

"198. In Al-Jehad Trust v. Federation of Pakistan (PLD 1997 SC 84), it was held that in respect of appointments of Judges as contemplated under Articles 177 and 193 of the Constitution, advice of the Cabinet or Prime Minister under Article 48(1) would be attracted, but the same would be further qualified by, and subject to the ratio decided of the judgment passed in Al-Jehad Trust v. Federation of Pakistan (PLD 1996 SC 324). Following the principles enunciated in the aforesaid two judgments, it is declared that in the matter

of appointment of Judges of the High Courts, the Governor could act only on the advice of the Chief Minister in terms of Article 105 of the Constitution. In this view of the matter, the fact that the recommendations of the Governor in the case of the respondents Nos.3 and 4 acting otherwise than on the advice or in absence of the advice of the Chief Minister were invalid even though the same coincided with the recommendation of Abdul Hameed Dogar, J."

In a recent case pertaining to appointment of Vice Chancellor of Government College University, Faisalabad, a learned Division Bench of the Lahore High Court in Intra Court Appeals Nos. 243 and 245 of 2010 has already held that the Chancellor of the University/Governor of Punjab is bound by the advice tendered by the Chief Minister qua appointment of Vice-Chancellor. In this judgment, the Chancellor/Governor of the Punjab was a party and the judgment has attained finality and it was not interfered with by this Court.

8. In the case of "ZTBL vs. Said Rehman" (2013 SCMR 642) reference was made to cases from other jurisdiction which are as follows:

31. In Wood's Estate case [1886] 31 Ch D 607, the Court while commenting upon this mode of legislation observed that "if a subsequent Act brings into itself by reference some or the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen or printed in it and the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all." In *Rajya v. Gopikabai* (AIR 1979 SC 79), the Indian Supreme Court, highlighted the broad categories of legislation by reference and opined as under:--

"Broadly speaking, legislation by referential incorporation falls into two categories: First where a statute by specific reference incorporates the provisions of another statute as of the time of adoption. Second, where a statute incorporates by general reference the

law concerning a particular subject as a genus. In the case of the former, the subsequent amendment made in the referred statute cannot automatically be read into the adoption statute. In the case of latter category, it may be presumed that the legislative intent was to include all the subsequent amendments also made from time to time in the general law on the subject adopted by general reference. This principle of construction of a reference statute has been aptly summed up by Sutherland thus:

A statute which refers to law of a subject generally adopts the law on the subject as of the time the law is invoked. This will include all the amendments and modifications of the law subsequent to the time the reference/statute was enacted."

The examination of the above mentioned case law makes it clear that where legislation is by reference and specific provisions from an Act or section(s) are incorporated into another provision then they operate as if they have been specifically penned in that referred section or provision meaning thereby they operate independently from the Act or section from which they have been taken. The Hon'ble Supreme Court of Pakistan although struck down the entire section 15 of the Ordinance, however, made no reference to subsection 5 of section 19 or otherwise other provisions of section 19. The safe conclusion which can be arrived at from the case law aforementioned is that the subsections of section 15 mentioned in section 19(5) operate independently and are to be considered as part of section 19 of the Ordinance as if incorporated in

the referred section not withstanding section 15 ibid. Moreover, as laid down by the Hon'ble Supreme Court of Pakistan in the referred case law where there is specific legislation by reference any amendment or repeal of the borrowed statute/provision does not effect the provisions/statute in which the same are incorporated.

9. Since the provisions of section 19 are attracted only where decree has been passed in favour of the financial institution against the customer and in the execution proceedings the pledged/hypothecated/mortgaged property is being auctioned/sold, therefore, the reference to the subsection of section 15 as provided in subsection 5 of section 19 is to be made with necessary changes as the legislature has provided that the same apply 'mutatis mutandis'.

10. In view of the foregoing discussion since the impugned orders do not suffer from want of jurisdiction, therefore, the present application is not maintainable and is dismissed.

(ATHAR MINALLAH)
JUDGE

(AAMER FAROOQ)
JUDGE

Blue slip added.
Ataf Malik

Approved for registering.