

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

I.C.A. No.594 of 2012
Syed Azhar Abbas Jafri
Versus.

HBFC Workmen Union of Pakistan and others

Date of Hearing: 13.12.2016
Appellant by: Mr. Faisal Siddiqui, Advocate.
Respondents by: Mr. Hashmat Ali Habib, Advocate for
respondent No.1,
Mr. Ehsan Ahmad Khawaja, Advocate for
respondent No.4/State Bank of Pakistan,
Mr. Sultan Mazhar Sher, Advocate for
respondent No.5,
Mr. M.A. Rehman Qureshi, Advocate for
respondent No.8.

MIANGUL HASSAN AURANGZEB, J:- Through the instant Intra Court Appeal, the appellant, Syed Azhar Abbas Jaffri, impugns the judgment dated 16.10.2012, passed by the learned Single Judge in Chambers, whereby Writ Petition No.2488/2012 filed by respondent No.1 (HBFC Workmen Union of Pakistan Collective Bargaining Agent), was allowed and the appellant's appointment as Managing Director/Chief Executive Officer ("CEO") of House Building Finance Corporation Limited ("HBFCL"), was declared as not in accordance with the law. Furthermore, it was directed that the benefits derived by the appellant while holding the said post should be recovered from him.

2. In Writ Petition No.2488/2012, respondent No.1 had *inter alia* challenged the appointment of the appellant (who was a Singaporean national) as CEO of HBFCL, primarily, on the ground that Section 11(12)(c) read with Section 11-A of the Banks (Nationalization) Act, 1974 ("the 1974 Act") had barred the appointment of a foreign national as CEO of HBFCL. Furthermore, the writ petitioner had leveled allegations of mismanagement and maladministration in HBFCL during the appellant's tenure as CEO. The writ petitioner also seems to have been aggrieved by the appellant's continuation in the office beyond his three-year

tenure. Writ petition No. 2488/2012, was instituted on 26.07.2012 (i.e. more than three-years after the appellant's appointment as CEO of HBFCL).

3. The grounds which prevailed with the learned Single Judge-in-Chambers in allowing the writ petition were that the appellant had assumed the charge of the office of the CEO of HBFCL on the day after the Federal Government issued the notification nominating the appellant as CEO of HBFCL, and that this was prior to the confirmation accorded by the Board of Directors of HBFCL. Furthermore, it was held that the appellant was not eligible to have been appointed as the CEO of HBFCL in terms of Section 11 (12) (c) of the 1974 Act because the appellant happened to be a Singaporean National.

4. Learned counsel for the appellant submitted that Section 11 of the 1974 Act applied to HBFC until 2011 (when the Banks (Nationalization) (Amendment) Act, 2011 was enacted), but the said provision did not, at any stage, apply to HBFCL; that the appellant, prior to his appointment as CEO of HBFCL had disclosed that he was a Singaporean national; that the direction given by the learned Single Bench to recover all the benefits taken by the appellant during his tenure as CEO of HBFCL was against the law well settled by the Superior Courts; that the writ petitioner had filed Writ Petition No.2488/2012 three years after the appellant's appointment as CEO of HBFCL; and that respondent No.8, (HBFCL) had not been impleaded as the respondent in writ petition No.2488/2012. Learned counsel for the appellant during the course of his arguments submitted that he would be satisfied that the impugned judgment dated 16.10.2012 is set aside only to the extent of the direction given therein regarding recovery of benefits derived by the appellant while serving as CEO of HBFCL.

5. On the other hand, learned counsel for the contesting respondents defended the impugned judgment dated 16.10.2012 and reiterated their stance taken in the writ petition No.2488/2012. Furthermore, it was submitted that the appellant had represented himself to be a Pakistani national at the time of his appointment as CEO of HBFCL; that in terms of Section 11 (12)

(c) read with Section 11-A of 1974 Act, the appellant was not qualified to be appointed as CEO of HBFCL; that the direction given by the learned Single Judge as regards recoveries to be made from the appellant was perfectly in order. Learned counsel for the respondents prayed for the appeal to be dismissed.

6. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

7. The House Building Finance Corporation (“HBFC”) was established under the provisions of the House Building Finance Corporation Act, 1952 (“HBFC Act”). Section 36 of the said Act provided that no provision of law relating to the winding up of companies or corporations shall apply to the HBFC, and HBFC shall not be wound up save by an order of the Federal Government and in such manner as it may direct. Through Order (S.R.O.941(I)/2009) dated 31.10.2009, issued by the Federal Government (Finance Division), HBFC was wound up in exercise of the powers conferred under Section 36 of the HBFC Act by transferring all its assets, contracts, liabilities, proceedings, business and undertakings to HBFCL. By virtue of the said Order, for all intents and purposes, HBFCL stepped into the shoes of HBFC. The said Order was published in the Gazette of Pakistan on 31.10.2009. There are earlier drafts of an Order under Section 36 of the HBFC Act, but they do not seem to have been published in the official gazette.

8. Now, as regards the appellant’s appointment as CEO of HBFCL, vide notification dated 05.01.2009, the Federal Government (Finance Division) nominated the appellant as CEO of HBFCL for a period of three years. The Board of Directors of HBFCL confirmed the appellant’s nomination as CEO of HBFCL by a board resolution passed through circulation. The documents annexed at pages 79 and 80 to this appeal show that four out of the six Directors signed the said resolution, which was in the following terms:-

“That the nomination of Syed Azhar Abbas Jafri as Managing Director/CEO of HBFCL vide ministry of Finance notification

No.F.6(4)IF.II/2005, dated January 05, 2009 be and is hereby confirmed with immediate effect.”

9. The fifth Director, namely, Mr. Zaigham Mahmood Rizvi, vide e.mail dated 09.01.2009 confirmed his earlier verbal approval regarding the said resolution. The sixth Director, namely, Mr. Tariq Iqbal Khan, changed the wording/language of the said resolution, and on 06.01.2009, approved the same in the following terms:-

“Consequent upon the nomination by the ministry of Finance, the Board of Directors be and hereby resolves to appoint Syed Azhar Abbas Jafri as the Managing Director of House Building Finance Corporation Limited in place of Mr. M. A. Wahid with immediate effect.”

10. On 16.02.2009, the State Bank of Pakistan gave a clearance to the appellant's appointment as Managing Director of HBFCL. Earlier, vide letter dated 24.12.2008, the State Bank of Pakistan had conveyed its in-principle clearance for the appellant's appointment as Managing Director of HBFCL. In the proforma for the 'fit & proper test', the appellant had disclosed that he was a Singaporean National. The office of Director General, Inter Service Intelligence had also cleared the appellant for the said appointment.

11. In the meeting of Board of Directors of HBFCL held on 23.02.2009, the Board welcomed the appellant and rectified the Board's earlier approval of the appellant's appointment, which was passed through circulation. Some of the resolutions that were passed by the Board of Directors in the said meeting dated 23.02.2009, were as follows:-

“RESOLVED THAT: “The appointment of Mr. Azhar A. Jaffri as Managing Director, HBFCL for a term of three years w.e.f. 06.01.2009 is approved.”

“RESOLVED THAT: “Mr. Azhar Abbas Jaffri is appointed as Chairman of the Board of Directors for a term of three years effective 22.02.2009.”

12. The appellant's three-year tenure expired in January 2012. However, the appellant continued to perform his duties as Managing Director of HBFCL. Section 199 (3) of Companies Ordinance, 1984, in effect provides that a retiring Chief Executive shall continue to perform his function until his successor is

appointed unless the non-appointment of his successor is due to any fault on his part or his office is expressly terminated.

13. Soon after the expiry of the appellant's tenure, the Company Secretary of HBFCL, vide letter dated 10.01.2012, brought to the notice of the Federal Government that the appellant's three-year tenure as CEO of HBFCL had expired on 05.01.2012. Furthermore, the Federal Government was informed that the Board of Directors of HBFCL in its meeting held on 21.09.2011, had decided that the retiring CEO would continue to hold his office in order to avoid any interruption in the business. The Federal Government was asked to advise in case the appellant's term was to be extended for a further term of three years. This is because Article 72 of the Articles of Association of HBFCL provides that the Chief Executive of HBFCL shall be appointed by the Board with the prior approval of the Federal Government. Furthermore, Article 73 provides that the Chief Executive shall be a whole time officer of HBFCL and shall be appointed by the Board for a period of three-years, extendable for a further term by the Board upon the advice of the Federal Government.

14. Vide letter dated 07.05.2012, the State Bank of Pakistan informed the Finance Division (Government of Pakistan) that the matter regarding the appointment of the Managing Director of HBFCL was under its active consideration. It appears that the appellant continued to perform the duties of CEO of HBFCL until the impugned judgment dated 16.10.2012, was passed by the learned Single Bench. It was after the said judgment that Mr. Saeed Khan, the senior most Executive Director of HBFCL was tasked to look after the work of the said office.

15. Section 11 of the 1974 Act contains general provisions pertaining to management of banks. Section 11(2)(c) of the said Act, *inter alia*, provides that no person shall be eligible for appointment as the Chairman, the President, or a member of the Board if he is not a citizen of Pakistan. HBFC was one of the corporations listed in Section 11-A of the said Act to which the provisions of Section 11 apply. By virtue of Banks (Nationalization) (Amendment) Act, 2011 ("the 2011 Act"), 'HBFC' was omitted from

list of corporations in Section 11-A of the 1974 Act. Therefore, after the enactment of the 2011 Act on 15.12.2011, the general provisions pertaining to management of banks contained in Section 11 of the 1974 Act, were no longer applicable to HBFC. Hence, after the enactment of the 2011 Act, it was not necessary for the CEO of HBFCL to be a Pakistani national. Conscious of this fact, the learned Single Judge took the view that since the 2011 Act, was enacted after the appellant's appointment as CEO of HBFCL, his appointment was unlawful as the same was in violation of Section 11 (2) (c) of the 1974 Act. We have no reason to fault this conclusion drawn by the learned Single Judge.

16. As regards the contention of the learned counsel for the appellant that prior to enactment of the 2011 Act, Section 11(2)(c) of the 1974 Act applied to HBFC and not to HBFCL, the same is not tenable. Section 11-A of the 1974 Act starts with a non-obstante clause and has effect notwithstanding anything to the contrary contained in any other law for the time being in force or in any agreement, contract, award, memorandum and article of association or any other instruments. Therefore, neither the instrument creating HBFCL or converting HBFC into HBFCL, nor HBFCL's memorandum and articles of association could override the mandate of Section 11-A of the 1974 Act. Furthermore, Federal Government's Order (S.R.O.941(I)/2009) winding up HBFC and transferring its assets etc., to HBFCL was gazetted on 31.10.2009 (i.e. after the appellant's appointment as CEO of HBFCL). Therefore, the appellant's appointment was hit by Section 11 (2) (c) read with Section 11-A of the 1974 Act.

17. The respondents do not dispute the fact that the appellant while subjecting himself to the 'fit & proper test' by the State Bank of Pakistan, candidly disclosed that he was a Singaporean national. The proforma for the said test submitted by the appellant is at Page 75 of this appeal. It is not denied that he did work during the period for which he was appointed as CEO of HBFCL. Since the appellant made a disclosure regarding his foreign nationality prior to his appointment, we are of the view that he should not have been burdened with the direction for the recoveries of

benefits to which the CEO of HBFCL would be otherwise entitled. This view of ours is fortified by the following case law:-

- (i) In the case of Engineer-in-Chief Branch Vs. Jalaluddin (PLD 1992 SC 207), the respondent was allowed a higher pay scale to which he was subsequently held not be entitled. The department had also directed the recovery of the over-payment for a period of 12 months from the respondent. The Hon'ble Supreme Court held that the department was not entitled to recover the amount drawn by the respondent during the period when the letter entitling him to a higher pay scale remained in the field.
- (ii) In the case of Administrator, District Council Vs. Ghulab Khan (2001 SCMR 1320), the Hon'ble Supreme Court held that salaries of employees cannot be withheld on the ground that their appointments were illegal or made in violation of the relevant recruitment rules.
- (iii) In the case of Asad Ali Alvi Vs. Secretary, Government of Punjab (2007 PLC (C.S.) 924), it has been held by the Hon'ble Lahore High Court as follows:-

"It is settled principle of law that no one can be deprived of his salary for the work which has been done by him and even it has been held in Administrator, District Council, Larkana and another v. Ghulab Khan and 5 others 2001 SCMR 1320 that salaries of the employees cannot be withheld on the ground that the appointment was illegal being made in violation of the relevant rules and in fact action should have been initiated against those who were sitting at the helm of affairs for such irregularities. Reliance is also placed upon Zafar Mahmood Malik v. Water Management Specialist and 5 others 2005 PLC (C.S.) 4, Nisar Ahmad and others v. Town Committee, Khairpur Tamewali through Administrator 2004 PLC (C.S.) 382 and Khalid Parveen v. D.E.O (Female) Secondary, Karak and others 2003 PLC (C.S.) 1376."

- (iv) In the case of Shaukat Ali Vs. District Government, through Nazim/Chairman Selection Committee (2005 PLC (C.S.) 790), the services of the petitioner/teacher were terminated on the ground that the documents produced by him at the time of his appointment were bogus. The authorities also issued a recovery notice regarding the amount received by the petitioner during the period he performed his duties.

Since the petitioner had performed his duties as a teacher, the Hon'ble Lahore High Court set aside the notice of recovery of the salary received by the petitioner.

- (v) In the case of Khalida Parveen Vs. District Education Officer (2003 PLC (C.S.) 1376), the salary of an Arabic Teacher for a period 34 months was withheld on the ground that her appointment was irregular and in violation of the rules. The Hon'ble Peshawar High Court accepted her writ petition and directed the department to release her salary for the whole period she was in service of the department.
- (vi) In the case of Mumtaz Ali Mangi Vs. National Bank of Pakistan (1995 PLC (C.S.) 119), the petitioner's out of turn promotion in violation of the statutory rules was cancelled. The Hon'ble High Court of Sindh upheld the cancellation of the petitioner's promotion, but observed that the respondents were not entitled to recover the salary and other benefits received by the petitioner prior to the cancellation of this promotion.

18. In view of the above, the appeal in hand is allowed only to the extent of setting aside the direction in the impugned judgment dated 16.10.2012 to recover the benefits derived by the appellant during the period he served as CEO of HBFCL. There shall be no order as to costs.

19. Appeal partly allowed.

(ATHAR MINALLAH)
JUDGE

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2017.

(JUDGE)

(JUDGE)

APPROVED FOR REPORTING

Qamar Khan*

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