

Form No: HCJD/C.

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Case No: Writ Petition No.1274 of 2015

Nasir Ali Shah Bukhari and 2 others

Vs.

Federation of Pakistan and 7 others

Petitioners by: Mr. Amjad Hussain Bokhari, Hasham Hayat Wathra & Barrister Hamza Randhawa, Advocates.
Respondents by: Mr. Salman Akram Raja, Malik Ghulam Sabir, Advocates.

Date of Decision: 05.05.2015.

AAMER FAROOQ, J.- Petitioners No.1 & 3 are share holders to the extent of 40% and 2% respectively in petitioner No.2 which company holds significant shareholding in respondent No.3 i.e. KASB Bank Limited. Respondent No.3 was licensed in the year 1995 by respondent No.2 and by the year 2013 it had 105 Branches across Pakistan in 45 cities, customer base of approximately 1,50,000 and Rs.62 billion in deposits. On 14.11.2014 respondent No.2 wrote to respondent No.1 seeking a moratorium order under section 47 of Banking Companies Ordinance, 1962 (the Ordinance), which was granted by the Federal Government and therefore, a formal moratorium order was passed on the same date i.e. 14.11.2014. Respondent No.2 subsequently entered into an agreement with respondent No.5, in which respondent No.3 was also a party, whereby respondent No.5 was assigned the task to prepare a report with respect to assets and liabilities of respondent No.3 for the purposes of passing any reconstruction or amalgamation order, as provided in section 47(5) of the Ordinance.

2. In the instant Constitutional petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the petitioners seek relief which *inter alia* includes the declaration that the agreement between respondents No.2, 3 & 5 is ultra vires and null and void, restraining respondents No.1 & 2 from rushing into selling petitioners' shares in KASB Bank Limited, declaration that purported sale of the petitioners' shares in respondent No.3 is illegal and without lawful authority, declaration that the proposed reconstruction/amalgamation scheme is in violation of provisions

of the Ordinance, declaration that refusal on part of respondent No.2 to consider the proposal by respondent No.7 to invest money in respondent No.3 be declared as without legal effect and direction to State Bank of Pakistan to consider the same. The petitioners earlier had filed a Constitutional petition in this Court (Writ Petition No.398/2015) claiming almost the same relief, however, the same was withdrawn unconditionally on 22.04.2015.

3. Learned counsel for the petitioners *inter alia* submitted that though the moratorium order dated 14.11.2014 has not been challenged in the instant petition however, the same has been passed in an arbitrary and mechanical manner without application of mind. Learned counsel read out provisions of section 47 of the Ordinance and submitted that they provide vast powers to respondent No.2 which tantamount to sell the property i.e. the shares of the petitioners which is a judicial function and can be exercised by the Courts alone. In support of his contentions learned counsel placed reliance on the case titled *Sheikh Riaz ul Haq and another v. Federation of Pakistan through Ministry of Law and others* (PLD 2013 SC 501). Learned counsel further submitted that under section 47(1) of the Ordinance no guidelines have been provided that on what basis the moratorium order can be passed by respondent No.2 and by providing that when there exist good reasons for doing so the moratorium order can be passed by the referred respondent No.2 after seeking approval from respondent No.1 wide discretion has been granted to State Bank of Pakistan by the legislature. Similarly learned counsel submitted that provisions of subsection (3), (5), (11), (13), (15) and (16) of section 47 of the Ordinance *ibid* are classic example of excessive delegation which is not permissible. In support of his contention learned counsel placed reliance on the case *in the matter of: Reference No.2 of 2005 by the President of Pakistan* (PLD 2005 SC 873). Reliance was also placed on the cases titled *Jibendra Kishore Achharyya Chowdhury and 58 others v. The Province of East Pakistan and Secretary, Finance and Revenue (Revenue) Department, Government of East Pakistan* (PLD 1957 SC 9), *Pakistan Tobacco Company Limited and others v. Government of N.W.F.P. through Secretary of Law and others* (PLD 2002 SC 460), *Director Food N.W.F.P and another v. Messrs Madina Flour and General Mills (Pvt.) Limited and 18 others* (PLD 2001 SC 1) and *Brig. (Retd.) F.B. Ali and another v. The State* (PLD 1975 SC 506), *Vasanthial v. State of Bombay* (AIR 1961 SC 4), *East and West Steamship v. Pakistan* (PLD 1958 SC 41), *Province of West Pakistan v. Siraj ul Haq* (PLD 1966

SC 854) and *Benazir Bhutto v. FOB* (PLD 1988 SC 416). Learned counsel again emphasized that where power is provided by the legislature to transfer property rights of a person through an order, the same amounts to judicial power which cannot be exercised by the legislature and is the sole prerogative of judiciary exercising the judicial power. In this regard learned counsel again placed reliance on the case cited as PLD 2013 SC 501 *supra* to substantiate the argument that the judicial function amounts to determination of rights relating to life and liberty etc. It was further contended that the provisions of section 47 *ibid* are in conflict with the concept of fair trial and the powers of the Courts cannot be exercised by respondent No.1 i.e. Government of Pakistan through Finance Ministry. It was also argued by the learned counsel that under section 48 of the Ordinance, it is mandatory that the draft scheme of amalgamation be placed before the shareholders of respondent No.3 and as respondent No.2 proposes to merge respondent No.3 in respondent No.6. It is contended next that the agreement executed by respondents No.2, 3 & 5 provides that the report to be prepared by respondent No.5 shall be kept confidential which excludes the petitioners from examining the same whereas the referred report has to form basis for sale of shares of the petitioners in respondent No.3 or any further action to be taken by respondents No.1 & 2. Learned counsel also pointed out that the petitioners have introduced a buyer/investor namely respondent No.7 to respondent No.2 for injection of capital and also to salvage respondent bank, however, the proposal by the referred investor who is credible and has international recognition has been rejected by respondent No.2. In this regard learned counsel pointed out various letters written by the referred investor to respondent No.2 to which no positive reply was given by the referred respondent.

4. Learned counsel for respondent No.2 *inter alia* submitted that it is an established principle of law that no relief can be granted on ground of speculation. Learned counsel submitted that the entire case of the petitioners is based on speculation that their rights shall be prejudiced whereas there is nothing to that effect on record. In support of his contention learned counsel placed reliance on the cases titled *OMV (Pakistan) Exploration GMBH, Islamabad v. Federation of Pakistan through Secretary, Revenue Division Islamabad and 2 others* (2012 PTD 396), (2010 PLC (CS) 478), (2000 SCMR 1017), (2002 SCMR 970), (2006 MLD 978), (1981 PLC 286, PLD 1983 SC 358). Learned counsel further submitted that section 47 of the Ordinance has a parallel provision across the border by way of section 45

Banking Regulation Act, 1949 and both the provisions are *pari materia*. Learned counsel pointed out that the management of respondent No.3 is in place and so is the Board of Directors, meaning thereby that the petitioners still have the control over respondent No.3. Learned counsel further emphasized that the confidentiality under the agreement in question is required to be maintained for protection of the investors/share holders as well as the petitioners and respondent No.3 inasmuch as if report is made public then the share value of respondent bank may further slide down. The learned counsel acknowledged that in light of the report prepared by respondent No.5 the draft scheme for amalgamation has been prepared, which has been shared with respondent No.3 and on the same objections have been filed by the referred respondent. It was further contended that equity is in negative therefore, respondent No.3 is being merged in respondent No.6 for Rs.1000/-. Learned counsel also read subsections (6) & (5h) of section 47 of the Ordinance to show that protection is awarded to the share holders as well as management of any banking company against which a moratorium has been passed and further action is to be taken. In this regard learned counsel highlighted that under section 47(6) the proposed scheme on reconstruction/amalgamation has been shared with the management of the banking company and objections have been raised to the draft scheme prepared by respondent No.2. Moreover, it was argued that under subsection 5(h) of section 47 the petitioners again have security. Learned counsel further pointed out various letters written to respondent No.3 prior to 14.11.2014 emphasizing raising capital of respondent No.3 and improving its state of affairs failing which action under section 47 would be taken. The learned counsel also contended that section 48 of the Ordinance is not applicable to cases where the amalgamation takes place under section 47 inasmuch as section 47 *ibid* starts with a non-obstante clause which excludes all other provisions of law as well as provisions contained in the same Part of the Ordinance, sections 47 & 48 are in Part 3 of the Ordinance; the issues agitated in the earlier writ petition (Writ Petition No.398/2015) cannot be re-agitated because the referred petition was dismissed as withdrawn unconditionally by this Court vide order dated 22.04.2015.

5. The counsel for the petitioners in rebuttal submitted that the instant petition is not pre-mature and is competent inasmuch as respondent No.2 has unlawfully and illegally passed the moratorium order without hearing the petitioners; office of the petitioners has been occupied and forcibly taken over; the petitioners cannot exercise any right as the management committee

has been constituted by respondent No.2. It was further contended that the petitioners have a fundamental, vested and legal right to be associated with the process of valuation of shares/assets of the bank. The petitioners are being deprived of their property viz: shares compulsorily at a throw away price in violation of their fundamental rights guaranteed under the Constitution. It was pointed out that the Hon'ble Supreme Court of Pakistan in Pakistan Steel Mills case, Haris Steel case have struck down such bargains as being in violation of fundamental rights. Learned counsel has placed reliance on the case titled *Dr.Akhtar Hussain v. Federation of Pakistan etc.* (2012 SCMR 455), and *Federation of Pakistan and others v. Shaukat Ali Mian and others* (PLD 1999 SC 1026). It was also contended that it is fallacious to assert that since the objections to the draft scheme have been filed, therefore, there is no right to file the present petition. Learned counsel also submitted that the Court may grant any relief as circumstances may require.

6. In our country State Bank of Pakistan namely respondent No.2 is the regulator and the licensing authority of all the banks operating in Pakistan. In this behalf under section 27 of the Ordinance no company/association/individual can carry on banking business in Pakistan unless it holds a license issued by respondent No.2. The license issued is subject to terms and conditions as is deemed appropriate by State Bank of Pakistan. However, under subsection (3) to section 27 mandatory provisions are laid down which any banking company has to fulfill in order to obtain a license from the State Bank and the same are as follows:

- (a) that the company is or will be in a position to pay its present or future depositors in full as their claims accrue;
- (b) that the affairs of the company are not being or are not likely to be conducted in a manner detrimental to the interests of its present or future depositors;

Being a regulator the State Bank of Pakistan has extensive powers to monitor the business of any banking company and the referred powers are provided to it by and under the Ordinance. Some of the powers which the State Bank of Pakistan has and can exercise regarding the conduct and business of the banking company are as follows:

- i. Power to cancel the license (section 27(4))
- ii. Power to laid down guidelines (section 33(b))
- iii. Power to inspect the affairs of banking company (section 40)

- iv. Power to remove Directors of other managerial persons from office (section 41(a))
- v. Power to supersede Board of Directors of a banking company (section 41(b))
- vi. Power to call for information (section 43(a))
- vii. General powers under section (42)
- viii. Make an application for winding up of a banking company (section 43(f))
- ix. Power to apply Federal Government for suspension of business and to prepare a scheme of reconstruction or amalgamation (section 47).

As mentioned above the aforementioned provisions provide some of the regulatory and supervisory powers to the State Bank of Pakistan and in addition to the same there are many other provisions whereby the State Bank of Pakistan can regulate and monitor the business of banking company and issue guidelines/directions from time to time. In the present case respondent No.2 exercised the power under section 47 of the Ordinance as it believed that there are good reasons for obtaining an order of moratorium in respect of KASB Bank Limited. The petitioners have not assailed order of moratorium and almost all the issues raised in the instant petition were raised in the earlier writ petition (Writ Petition No.398/2015) which was withdrawn unconditionally, as mentioned above. In so far as raising the same issues in the present petition is concerned, it is barred under Order XXIII of Code of Civil Procedure (C.P.C.). Since C.P.C. is applicable in the Constitutional petitions as held in the case titled *Hussain Bakhsh v. settlement commissioner, Rawalpindi and others* (PLD 1970 SC 1), therefore, Order XXIII C.P.C. is attracted.

7. In the instant petition, the entire controversy between the parties revolves around sections 47 and 48 of the Ordinance. It is therefore, essential that the referred sections be reproduced for the sake of brevity. Section 47 reads as follows:

“47. Powers of State Bank to apply to Federal Government for suspension of business by a banking company and to prepare scheme of reconstruction or amalgamation.—(1) Notwithstanding anything contained in the provisions of this Part or in any other law or any agreement or other instrument, for the time being in force, where it appears to the State Bank that there is good reason so to do, the State Bank may apply to the Federal Government for an order of moratorium in respect of a banking company.

(2) The Federal Government, after considering the application made by the State Bank under sub-section (1),

may make an order of moratorium staying the commencement or continuance of all action and proceedings against the company for a fixed period of time on such terms and conditions as it thinks fit and proper and may from time to time extend the period so however that the total period of moratorium shall not exceed six months.

(3) Except as otherwise provided by any directions given by the Federal Government in the order made by it under sub-section (2) or at any time thereafter, the banking company shall not during the period of moratorium make any payment to any depositors or discharge any liabilities or obligations to any other creditors.

(4) During the period of moratorium, if the State Bank is satisfied that—

- (a) in the public interest; or*
- (b) in the interests of the depositors; or*
- (c) in order to secure the proper management of the banking company; or*
- (d) in the interests of the banking system of the country as a whole, it is necessary so to do, the State Bank may prepare a scheme —*
 - (i) for the reconstruction of the banking company, or*
 - (ii) for the amalgamation of the banking company with any other banking institution (in this section referred to as "the transferee bank").*

(5) The scheme aforesaid may contain provisions for all or any of the following matters, namely:—

- (a) the constitution, name and registered office, the capital assets, powers, rights, interests, authorities and privileges, the liabilities, duties and obligations, of the banking company on its reconstruction or, as the case may be, of the transferee bank;*
- (b) in the case of amalgamation of the banking company, the transfer to the transferee bank of the business, properties, assets and liabilities of the banking company on such terms and conditions as may be specified in the scheme;*
- (c) any change in the Board of Directors, or the appointment of a new Board of Directors, of the banking company on its reconstruction or, as the case may be, of the transferee bank and the authority by whom, the manner in which and the other terms and conditions on which, such change or appointment shall be made and in the case of appointment of a new Board of Directors or of any director, the period for which such appointment shall be made;*
- (d) the alteration of the memorandum and articles of association of the banking company on its reconstruction or, as the case may be, of the transferee bank for the*

purpose of altering the capital thereof or for such other purposes as may be necessary to give effect to the reconstruction or amalgamation;

- (e) *subject to the provisions of the scheme, the continuation by or against the banking company on its reconstruction or, as the case may be, the transferee bank, of any actions or proceedings pending against the banking company immediately before the date of the order of moratorium;*
- (f) *the reduction of the interest or rights which the members, depositors and other creditors have in or against the banking company before its reconstruction or amalgamation to such extent as the State Bank considers necessary in the public interest or in the interests of the members, depositors and the creditors or for the maintenance of the business of the banking company;*
- (g) *the payment in cash or otherwise to depositors and other creditors in full satisfaction of their claim—*
 - (i) *in respect of their interest or rights in or against the banking company before its reconstruction or amalgamation; or*
 - (ii) *where their interest or rights aforesaid in or against the banking company has or have been reduced under clause (f), in respect of such interest or rights as so reduced;*
- (h) *the allotment to the members of the banking company for shares held by them therein before its reconstruction or amalgamation, weather their interest in such shares has been reduced under clause (f) or not, of shares in the banking company on its reconstruction or, as the case may be, in the transferee bank and where any members claim payment in cash and not allotment of shares, or where it is not possible to allot shares to any members, the payment in cash to those members in full satisfaction of their claim—*
 - (i) *in respect of their interest in shares in the banking company before its reconstruction or amalgamation; or*
 - (ii) *where such interest has been reduced under clause (f) in respect of their interest in shares as so reduced;*
- (i) *the continuance of the services of all the employees of the banking company, excepting such of them who, not being workmen within the meaning of the Industrial Disputes Ordinance, 1959, are specifically mentioned in the scheme, in the*

banking company itself on its reconstruction or, as the case may be, in the transferee bank at the same remuneration and on the same terms and conditions of service, which they were getting or, as the case may be, by which they were being governed immediately before the date of the order of moratorium:

Provided that the scheme shall contain a provision that—

- (i) the banking company shall pay or grant not later than the expiry of the period of three years from the date on which the scheme is sanctioned by the Federal Government, to the said employees the same remuneration and the same terms and conditions of service as are applicable to employees of corresponding rank or status of a comparable banking company to be determined for this purpose by the State Bank whose determination in this respect shall be final;*
- (ii) the transferee bank shall pay or grant not later than the expiry of the aforesaid period of three years, to the said employees the same remuneration and the same terms and conditions of service as are applicable to the other employees of corresponding rank or status of the transferee bank subject to the qualifications and experience of the said employees being the same as or equivalent to those of such other employees of the transferee bank:*

Provided further that if in any case under clause (ii) of the first proviso any doubt or difference arises as to whether the qualification and experience of any of the said employees are the same as or equivalent to the qualifications and experience of the other employees of corresponding rank or status of the transferee bank, the doubt or difference shall be referred to the State Bank whose decision thereon shall be final;

- (j) notwithstanding anything contained in clause (i) where any of the employees of the banking company, not being workman within the meaning of the Industrial Relations Ordinance, 1969 (XXIII of 1969) are specifically mentioned in the scheme under clause (i), or where any employees of the banking company have by notice in writing given to the banking company or, as the case may be, the transferee bank at any time before the expiry of one month next*

following the date on which the scheme is sanctioned by the Federal Government, intimated their intention of not becoming employees of the banking company on its reconstruction or, as the case may be, of the transferee bank, the payment to such employees of compensation, if any, to which they are entitled under the Industrial Relations Ordinance, 1969 (XXIII of 1969), and such pension, gratuity, provident fund and other retirement benefits ordinarily admissible to them under the rules or authorizations of the banking company immediately before the date of the order of moratorium;

- (k) any other terms and conditions for the reconstruction or amalgamation of the banking company;*
- (l) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out.*

(6) A copy of the scheme prepared by the State Bank shall be sent in draft to the banking company and also to the transferee bank and any other banking company concerned in the amalgamation, for suggestions and objections, if any, within such period as the State Bank may specify for this purpose.

(7) The State Bank may make such modifications, if any, in the draft scheme as it may consider necessary in the light of the suggestions and objections received from the banking company and also from the transferee bank, and any other banking company concerned in the amalgamation and from any members, depositors or other creditors of each of those companies and the transferee bank.

(8) The scheme shall thereafter be placed before the Federal Government for its sanction and the Federal Government may sanction the scheme without any modifications or with such modifications as it may consider necessary; and the scheme as sanctioned by the Federal Government shall come into force on such date as the Federal Government may specify in this behalf:

Provided that different dates may be specified for different provisions of the scheme.

(9) Upon the coming into operation of the scheme or any provision thereof, the scheme or such provision shall be binding on the banking of [x x x] company or, as the case may be, on the transferee bank and any other banking company concerned in the amalgamation and also

on all the members, depositors and other creditors and employees of each of those companies and of the transferee bank, and on any other person having any right or liability in relation to any of those companies or the transferee bank.

(10) On such date as may be specified by the Federal Government in this behalf, the properties and assets of the banking company shall, by virtue of and to the extent provided in the scheme, stand transferred to, and vest in, and the liabilities of the banking company shall, by virtue of and to the extent provided in the scheme, stand transferred to, and become the liabilities of, the transferee bank.

(11) If any difficulty arises in giving effect to the provisions of the scheme, the Federal Government may by order do anything not inconsistent with such provisions which appears to it necessary or expedient for the purpose of removing the difficulty.

(12) Copies of the scheme or of any order made under sub-section (11) shall be laid on the table of the Legislature, as soon as may be, after the scheme has been sanctioned by the Federal Government, or as the case may be, the order has been made.

(13) Where the scheme is a scheme for amalgamation of the banking company, any business acquired by the transferee bank under the scheme or under any provision thereof shall, after the coming into operation of the scheme or such provision, be carried on by the transferee bank in accordance with the law governing the transferee bank, subject to such modifications in that law or such exemptions of the transferee bank from the operation of any provisions thereof as the Federal Government, on the recommendation of the State Bank, may, by notification in the official Gazette, make for the purpose of giving full effect to the scheme:

Provided that no such modification or exemption shall be made so as to have effect for a period of more than seven years from the date of the acquisition of such business.

(14) Nothing in this section shall be deemed to prevent the amalgamation with {one or more banking institutions} by a single scheme of several banking companies in respect of each of which an order of moratorium has been made under this section.

[(14-A) The provisions of this section shall apply also to a banking company in respect of which no order of moratorium has been made and in its application to such a banking company, shall have effect as if—

- (a) in sub-section (5), the words and comma "During the period of moratorium" were omitted;
- (b) in sub-section (6), the references to the date of the order of moratorium were references to the date specified under subsection (8) for the coming into force of the scheme; and
- (c) in sub-section (14), the words "in respect of each of which an order of moratorium has been made under this section" were omitted.]"

Section 48 reads as follows:

"48. Procedure for amalgamation of banking companies.—
(1) Notwithstanding anything contained in any law for the time being in force, no banking company shall be amalgamated with another banking company, unless a scheme containing the terms of such amalgamation has been placed in draft before the shareholders of each of the banking companies concerned separately, and approved by a resolution passed by a majority in number representing two-thirds in value of the shareholders of each of the said companies, present either in person or by proxy at a meeting called for the purpose.

(2) Notice of every such meeting as is referred to in sub-section (1) shall be given to every shareholder of each of the banking companies concerned in accordance with the relevant articles of association, indicating the time, place and object of the meeting, and shall also be published at least once a week for three consecutive weeks in not less than two newspapers which circulate in the locality or localities where the registered offices of the banking companies concerned are situated, one of such newspapers being in a language commonly understood in the locality or localities.

(3) Any shareholder, who has voted against the scheme, of amalgamation at the meeting or has given notice in writing at or prior to the meeting to the company concerned or the presiding officer of the meeting that he dissents from the scheme of amalgamation, shall be entitled, in the event of the scheme being sanctioned by the State Bank to claim from the banking company concerned, in respect of the shares held by him in that company, their value as determined by the State Bank when sanctioning the scheme and such determination by the State Bank as to the value of the shares to be paid to dissenting shareholder shall be final for all purposes.

(4) If the scheme of amalgamation is approved by the requisite majority of shareholders in accordance with the provisions of this section, it shall be submitted to the State Bank for sanction and shall, if sanctioned by the State Bank by an order in writing passed in this behalf be binding on the banking companies concerned and also on all the shareholders thereof;

Provided that in case of foreign banking companies, notwithstanding the fact that the scheme of the amalgamation is not approved by the requisite majority of shareholders, such sanction may be granted by the State Bank, upon a certificate issued by their respective head offices, approving the scheme.]

(5) Where a scheme of amalgamation is sanctioned by the State Bank under the provisions of this section, the State Bank shall transmit a copy of the order sanctioning the scheme to the registrar before whom the banking companies concerned have been registered and the registrar shall, on receipt of any such order, strike off the name of the company (hereinafter in this section referred to as the amalgamated banking company) which by reason of the amalgamation will cease to function.

(6) On the sanctioning of scheme of amalgamation by the State Bank, the property of the amalgamated banking company shall, by virtue of the order of sanction, be transferred to and vest in, and the liabilities of the said company shall, by virtue of the said order be transferred to and become the liabilities of the banking company which under the scheme of amalgamation is to acquire the business of the amalgamated banking company, subject in all cases to the terms of the order sanctioning the scheme.

[(7) In this section, "banking company" means any banking company and includes the National Bank of Pakistan, the Agricultural Development Bank of Pakistan, the Industrial Development Bank of Pakistan, the House Building Finance Corporation, investment finance companies, venture capital companies, housing finance companies, leasing companies, [, branch of a foreign banking company doing business in Pakistan³ and any other financial institution covered under section 3A.]"

8. The plain reading of subsections (1) & (2) of section 47 of the Ordinance shows that the Federal Government on the application of State Bank of Pakistan under subsection (1) may make an order of moratorium with respect to any bank for a fixed time period (not exceeding six months) or on such terms and condition as it thinks fit and proper. Under subsection (1) the State Bank of Pakistan can make an application for passing order of moratorium to the Federal Government, if it feels that there are good reasons to do so. A wide power/discretion has been conferred on respondent No.2 to make the abovementioned application. It is an established principle that the discretion has to be exercised in a fair and reasonable manner. The petitioners in the present writ petition as well as the earlier petition have not assailed the moratorium order dated 14.11.2014.

9. The thrust of the arguments by the learned counsel for the petitioners is that the scheme provided in section 47 *ibid* confers vast discretionary powers on State Bank of Pakistan/respondent No.2 amounting to excessive delegation whereby it can take decisions with respect to the property and assets of the petitioners, which power in essence is judicial in nature and therefore, cannot be exercised by the executive. In the petition as well as during the course of arguments no challenge was made with respect to the vires of section 47 of the Ordinance and it was only with respect to the exercise of powers the concern was shown. In this regard learned counsel submitted that under subsection (5) of section 47 various measures are provided including the transfer of capital assets, rights and obligations and even Board of Directors of the bank which under the scheme of legislation respondent No.2 has absolute power to do so and since the assets/properties belong to the petitioners, therefore, they cannot be deprived of the same without a judicial pronouncement. Under Article 24 of the Constitution of the Islamic Republic of Pakistan, 1973 no person is to be deprived of his property save in accordance with law.

10. In this behalf in sub Article (3) of Article 24 it is provided that nothing in Article 24 shall affect the validity of *inter alia* any law providing for taking over of the management of any property by the State for a limited period, either in the public interest or in order to secure the proper management of the property or for the benefit of its owner. The arguments by the learned counsel for the petitioners that the scheme provided in section 47 and the powers with the State Bank of Pakistan with respect to any financial institution under section 47 being case of excessive delegation, is not tenable. Section 47 is a valid law and provides a comprehensive mechanism for dealing with the eventuality that where any financial institution placed under moratorium cannot survive on its own then a scheme for reconstruction or amalgamation can be prepared by respondent No.2 and keeping in view the scheme it may contain provisions for all or any of the matters mentioned in subsection (a) to (l) of subsection (5). Moreover, under section 47 (6) a self contained protection is also provided whereby any scheme that is prepared by respondent No.2 is to be shared with the financial institution which is under moratorium and with respect to which the scheme is being devised for objecting to the scheme and in case the objections are raised under subsection (7) the State Bank of Pakistan may make such modifications and amendments in the scheme in response to the suggestions and objections raised. It is only

after a right to object is provided to the financial institution vis-à-vis the scheme of arrangement, the scheme under subsection (8) of section 47 is placed before the Federal Government for its approval. In the present case the draft scheme was shared with the management of respondent No.3 and even objections have been filed to the same.

11. The examination of the case law cited by the learned counsel for the petitioners and plain reading of section 47 show that the nature of powers being exercised by respondent No.2 is not determination of any dispute or rights and liabilities as a result of a dispute happening in past. The power under section 47 is executive and has been exercised in the capacity as a regulator of the banking company. Even otherwise it was observed by the Hon'ble Supreme Court of Pakistan in the case titled *The Tariq Transport Company Lahore v. The Sargodha-Bhera Bus Service Sargodha* (2) *The Regional Transport Authority Lahore* and (3) *The Provincial Transport Authority Lahore* (PLD 1958 SC 437) that whether the act is judicial, quasi judicial or administrative is clouded by a confusion which at time is extremely difficult to resolve and no clear-cut distinction between these three functions can be discovered in modern States where expertise is a dominating feature of Government more than one function is combined in administrative capacity and more often than not an administrative agency discharges not only legislative and administrative but also judicial functioning. Therefore, where executive is empowered under the law to prepare a scheme in respect of any banking company, in its capacity as supervisory/regulatory it cannot be said to be exercising judicial functioning in any way. Learned counsel for the petitioners also argued that the exercise of power by respondent No.2 under section 47 is the result of excessive delegation which, according to him is not permissible. Learned counsel in support of his submission placed reliance *inter alia* on the case titled *Pakistan Tobacco Company Limited and others v. Government of N.W.F.P through Secretary Law and others* (PLD 2002 SC 460) to show that excessive delegation is not permissible. In the present case the legislature authorized the regulator namely respondent No.2 to exercise the power of suspension of business and prepare a scheme of amalgamation/reconstruction and in this regard no further delegation has been allowed to any person other than respondent No.2 to act in this regard. The mere fact that extensive power is given by the legislature to the State Bank of Pakistan to take action when it feels that there are good reasons to exercise the same cannot be said to be the case of excessive delegation.

12. The learned counsel for the petitioners also argued that the petitioners are not being associated in the process of sale carried out by respondents No.2 & 5 for merger with respondent No.6. Respondent No.2 pointed out that the process already stands completed and the report compiled by A.F. Ferguson & Co. has been submitted to the State Bank of Pakistan and the element of confidentiality was made part of the agreement on the sole ground that the capital markets are sensitive and in case any financial position of respondent No.3 is divulged in the capital market then the share value of the referred bank may depreciate further. Submissions made by the learned counsel for respondent No.2 has substance inasmuch as in the share market such like information carry substantial weight and in case the actual financial position, in light of the report, is disclosed to public the same can have adverse effect on the already feeble financial health of KASB Bank Limited.

13. The fact that the petitioners have introduced an investor from China namely respondent No.6 who is willing to invest a sizable sum of money in respondent No.3 bank in order to salvage its condition is something which respondent No.2 in its sole discretion can look into it and if the terms offered are viable in the best judgment of State Bank of Pakistan the same may be considered as part of the scheme, however, this matter is purely a commercial and financial issue with respect to which this Court would not like to make any observation in the instant petition.

14. The provisions of subsections (6) & (7) discussed above provide ample protection to the interest of the petitioners inasmuch as it is mandatory upon the State Bank of Pakistan that once a scheme of amalgamation or reconstructing is prepared it shall share the same with respondent No.3 and its Board of Directors/management. The petitioners and the management of respondent No.3 have objected to the scheme and it is essential must have raised all factual or legal objections with respect to the referred scheme devised by State Bank of Pakistan and voice its concerns with respect to the same.

15. Section 48 of the Ordinance, is not applicable in the present case as amalgamation/ merger is taking effect under section 47 *ibid* which starts with a non-obstante clause and excludes all other sections of the Ordinance, contained in the same Part. The following case law regarding the scope of non-obstante clause is instructive:

"The very purpose of non obstante clause is that the provision shall prevail over any other provision and that

other provision shall be of non consequence (Interpretation of Statutes by Bindra in the case of Elahi Cotton Vs Commissioner of Income Tax (PLD 1997 SC 582), the Honourable Supreme Court observed as follows:-

Non obstante clause in section 80-D of the Income Tax Ordinance, 1979 is for the purpose of liability to pay minimum tax of half per cent on the annual turnover. This will exclude any provision of the Ordinance which may be inconsistent with it. But the same does not exclude the application of other provisions of the Ordinance which are not inconsistent with section 80-D.

In the case of Arif Hussain Shah Vs Operative Director, Administration, Electric Equipment Manufacturing Co.Ltd etc (PLD 1979 Lahore 603) it was observed as follows:

The precise question which calls for determination in this case is the effect of “non obstante” clause used in subsection (6). The word “non obstante” means “notwithstanding”. It means “despite” or “in spite of” A “non obstante” clause is used in a provision to indicate that the provision should prevail despite anything to the contrary in any provisions. No doubt one of the object is to indicate that despite any repugnancy between the provision containing a “non obstante” clause and another provision the former should prevail. This clause owes its origin to the fact that in the year 1950 a British king began to issue licences to do such and the such thing “non obstante” any law to the contrary.

(While interpreting “non obstante” clause, it should first be ascertained what the enacting part of the section provides on a fair construction of words used according to their natural and ordinary meaning as a “non obstante” clause is to be understood as operating to set-aside as no longer valid any thing contained in relevant existing law which is inconsistent in the new enactment. The enacting part of the Statute must, where it is clear, be taken to control the non obstante clause where both cannot be read harmoniously for, even apart from such clause a later law abrogates an earlier law clearly inconsistent with it.

In the case of Muhammad Mohsin Ghummon etc Vs Government of Punjab etc (2013 SCMR 85) it was observed as follows:

One of the foundational principles governing the interpretation of non obstante clause is that it has to be read

in the context of what the legislature intended in the enacting part of the provision. In 'interpretation of Statutes' by NS Bindra, the author with reference to specific precedent case law precisely addresses this issue and comments as follows:

It has to be read in the context of what the legislature conveys in the enacting part of the provision. It should first be ascertained what the enacting part of the section provides on a fair construction of words used according to their natural and ordinary meaning and the non obstante clause is to be understood as operating to set aside as no longer valid anything contained in relevant existing law which is inconsistent with the new enactment. The enacting part5 of a Statute must, where it is clear, be taken to control the non obstante clause where both cannot be read harmoniously , for even apart from such clause a later law abrogates earlier laws clearly inconsistent with it.

The proper way to construe a non obstante clause is first to ascertain the meaning of the enacting part on a fair construction of its words. The meaning of the enacting part which is so ascertained is then to be taken as overriding anything inconsistent to that meaning in the provisions mentioned in the non obstante clause. A non obstante clause is usually used in a provision to indicate that that provision should prevail despite anything to the contrary in the provision mentioned in such non obstante clause. In case there is any inconsistency between the non obstante clause and another proviso one of the objects of such a clause is to indicate that it is non obstante clause which would prevail over the other clauses. It does not, however, necessarily mean that there must be repugnancy between the two provisions in all such cases. The principle underlying non obstante clause may be invoked only in the case of 'irreconcilable conflict.' "

Sections 47 & 48 are in the same Part of the Ordinance therefore, section 47 excludes section 48.

16. The argument raised by the learned counsel for respondent No.2 that the instant writ petition is premature inasmuch as objections pertaining to scheme of amalgamation are pending and the petition is based on apprehension, has substance. In this behalf the reliance was placed on the case titled *OMV (Pakistan) Exploration GMBH, Islamabad v. Federation of Pakistan through Secretary, Revenue Division Islamabad and 2 others* (2012 PTD 396). In the referred case this Court held that it is an established principle of law that on the basis of mere apprehension of

the parties, writ cannot be issued. In *Nabi Bakhsh Khan Khoso v. Branch Manager National Bank of Pakistan* (2000 SCMR 1017) where in Constitutional jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, notice issued by the Bank was challenged, it was held that no adverse action has been taken yet, therefore, writ is premature. The Hon'ble Supreme Court of Pakistan refused to grant leave against the order of the High Court.

17. In view of the foregoing discussion, the present writ petition is without force and is dismissed.

(AAMER FAROOQ)
JUDGE

Approved For Reporting