

IN THE SUPREME COURT OF PAKISTAN  
(Original Jurisdiction)

PRESENT:

Mr. Justice Iftikhar Muhammad Chaudhry, CJ  
Mr. Justice Ghulam Rabbani  
Mr. Justice Khalilur Rehman Ramday

CONSTITUTION PETITION NO. 58 OF 2010  
WITH CIVIL MISC. APPLICATION NO.3387 OF 2010

Mir Muhammad Idris & another ... PETITIONERS

VERSUS

Federation of Pakistan through Secretary  
Ministry of Finance & others ... RESPONDENTS

For the petitioners:	Mr. Manzoor Qadir, ASC Mr. G.N. Gohar, AOR
For the applicant (CMA.3387/10)	Barrister Zafarullah Khan, ASC
On Court notice:	Maulvi Anwar-ul-Haq Attorney General for Pakistan
For respondent No.3:	Mr. Abid S. Zubairi, ASC Kh. Muhammad Farooq, Sr. ASC Dr. Ibrar Baig, SEVP Mr. Fazal-ur-Rahman, EVP Mr. Tariq Zafar Iqbal, Regional Chief Mr. Saeed Khan, Legal Head
For respondent No. 2:	Mr. M. Bilal, Sr. ASC Mr. Babar Bilal, ASC Syed Safdar Hussain, AOR Mr. Amjad Iqbal, Joint Director
For respondent No. 1:	Mr. Ali Sher, S.O.
Date of hearing:	05.01.2011 .-.-.

**J U D G M E N T**

Iftikhar Muhammad Chaudhry, CJ –. By the above  
Constitution Petition, the petitioners have challenged the validity of the

reappointment of respondent No. 3, Syed Ali Raza as President of the National Bank of Pakistan (NBP) for fifth time for one year commencing from 01.07.2010 by the respondent No. 1, Federation of Pakistan through Secretary, Ministry of Finance, Government of Pakistan. It has been prayed that the notification of his reappointment vide No. F.1(8)Bkg-III/2000 dated 10.04.2010 be declared illegal, null and void and that the respondent No.3 be restrained from acting as President NBP. It has further been prayed that the respondent be directed to produce a list of those personalities who got benefits of loans written off by the respondent No. 3 since his first appointment i.e. from 01.07.2000 till 31.07.2010.

2. The case of the petitioners is that the respondent No.3 was, initially, appointed as President, NBP for a period of three years w.e.f. 01.07.2000, for another period of three years w.e.f. 01.07.2003, for yet another period of three years w.e.f. 01.07.2006 and for a further period of one year w.e.f. 01.07.2009 and then for one year more w.e.f. 01.07.2010. It is stated that before the expiry of his previous term of one year commencing from 01.07.2009 *vide* notification dated 20.03.2010, the respondent No.3 was reappointed till further orders; however, by another notification dated 21.03.2010, the first mentioned notification dated 20.03.2010 was withdrawn and then by a notification dated 10.04.2010, he was again reappointed for a period of one year w.e.f. 01.07.2010. The grievance of the petitioners is that the respondent No.3 is holding office of President NBP illegally and unlawfully, his reappointment for fifth term being void ab initio.

3. Mr. Manzoor Qadir, ASC for the petitioners contended that in view of the provision of section 11(3)(d) of the Banks

(Nationalization) Act, 1974 as amended by the Banks (Nationalization) (Amendment) Act, 1997, a person could be appointed as President NBP for not more than two terms, but the respondent No. 3 was reappointed from time to time as President NBP for several terms by making amendments in the Banks (Nationalization) Act, 1974, hereinafter referred to as the Act of 1974 illegally with a view to extend favour to him. The learned counsel submitted that on promulgation of the Act of 1974 as amended, the ownership, management and control of all banks including the NBP stood transferred and vested in the Federal Government w.e.f. 01.01.1974. Section 11(1) of the Act of 1974 provided that a Bank shall have a Board consisting of a President and not less than five and not more than seven other members to be appointed by the Federal Government for a period of three years while under section 11(3)(d) *ibid*, a person could be so reappointed for a further period of three years. However, while the respondent No.3 was holding office of President by reappointments, in order to favour him to continue with it, a further amendment in section 11(3)(d) was brought about by Ordinance No. XII of 2006 dated 31.05.2006, providing that the reappointment may be made for "such further term or terms as may be determined". The said Ordinance, according to learned counsel, stood repealed at the expiration of 120 days as it was not laid before the National Assembly within the said period, however, the aforesaid amendment was reintroduced by another Ordinance No. XXIX of 2006 dated 04.11.2006 operative from 28.09.2006, which too stood repealed on expiry of the prescribed period since the same was not laid before the National Assembly. Later, learned counsel emphasized, this exercise of amending the Act of 1974 continued persistently, such

as by means of Ordinance No. IV of 2007 dated 05.02.2007 effective from 28.01.2007 and Ordinance No. XXVIII of 2007 dated 04.06.2007 effective from 28.05.2007 evidently to accommodate the respondent No.3. Ultimately, learned counsel contended, the said amendment was incorporated unconstitutionally by way of the Finance Act, 2007.

4. The learned counsel further submitted that during the tenure of respondent No. 3, loans of billions of rupees were written off to accommodate influential borrowers with the result that the annual profits of the bank started showing evident decline since 2007, therefore, there was no justification for his reappointment as President. He stressed that the Act of 1974 could not have been amended through the Finance Act, 2007, as the Finance Act only dealt with fiscal matters, and was passed, not by both the Houses of Parliament, but by the National Assembly alone; therefore, as a consequence the notification dated 10.04.2010 whereby the respondent No. 3 was reappointed for a period of one year w.e.f. 01.07.2010, having been issued in pursuance of an invalid law, was void. In support, he placed reliance on Sindh High Court Bar Association v. Federation of Pakistan (PLD 2009 SC 879).

5. Barrister Zafarullah Khan, ASC appeared in CMA No. 3387 of 2010 filed for impleadment as party. He reiterated the arguments made by Mr. Manzoor Qadir and added that the Ordinance No. XII of 2006 dated 31.05.2006 under which the respondent No.3 was reappointed for the third term died its natural death after lapse of 120 days as it was never laid before the National Assembly, but he was allowed to continue holding the post illegally.

6. Mr. Abid Zubairi, ASC, learned counsel for respondent No.3 submitted that the amendments in the Act of 1974 were to be seen by

the Court as a whole and not just the amendment in section 11(3)(d) of the Act of 1974 whereby the appointment of President could be made for such further term or terms as may be determined. He contended that the appointment of respondent No.3 made vide notification dated 10.04.2010 for a period of one year from 01.07.2010 to 30.06.2011 was a past and closed transaction and the declaration by the Court, if any, would have a prospective effect not affecting his such appointment. According to him, the Finance Act was an Act of Parliament, duly assented to by the President under Article 75 of the Constitution to be seen as falling within the scope of Article 73(4) & (5). Mr. Zubairi, alternatively, argued that in case the Court came to the conclusion that amendment in the Act of 1974 could not have been brought about through the Finance Act, therefore, it would void, not void *ab initio* and it would also not revive the old law. He has placed reliance on Sindh High Court Bar Association's case, Dr. Mobashir Hasan v. Federation of Pakistan (PLD 2010 SC 265), Abul A'la Maudoodi v. Govt. of West Pakistan (PLD 1964 SC 673) and Hajji Muhammad Hussain v. Province of Blochistan (NLR 1995 CrLJ 313).

7. Khawaja Muhammad Farooq, Sr. ASC also appeared on behalf of respondent No. 3. He argued that the petitioners' averment that the Act of 1974 was amended from time to time for the benefit of respondent No.3 could not be maintained on the ground that *mala fides* could not be attributed to the legislature; Constitution/Writ Petitions were filed in the High Court of Sindh and the Lahore High Court with the same prayer by the employees of the Bank who had individual grievances, which were *sub judice*, therefore, in line with the general principle of jurisprudence that the higher courts should have the benefit of judgment/views of the lower courts, the High Courts

should be allowed to proceed with the matters pending before them; the appointment of respondent No.3 was in accordance with the provisions of the Act of 1974 as amended from time to time; the Bank had flourished on account of vast experience in the banking industry of the respondent No. 3, who had earned appreciation and praise both from national as well as international forums for his professional competence and his efforts for enhancing the international rating of the Bank; the amendment of the Act of 1974 by means of the Finance Act was valid as in the past many laws, such as Companies Ordinance, Securities and Exchange Commission Act, Social Security Ordinance, Khushhali Bank and even the Act of 1974 itself had been amended by various Finance Acts/Ordinances; the respondent No. 3 was not the authority to write off the loans, which was done by the Board in accordance with the policy guidelines/circulars issued by the State Bank of Pakistan, reports whereof were submitted to the State Bank and were also reflected in the annual reports of the Banks; and that the actions taken, orders passed, notifications issued during the currency of a repealed Ordinance did not lose legal force and continued to hold the field and could not be called in question on account of lapse/repeal of the Ordinance.

8. Learned Attorney General for Pakistan also followed same line of arguments of respondent No.3. However, he stated that if section 11(3)(d) of the Act of 1974 was declared unconstitutional, it would have effect on other such like provisions, which were amended by means of Finance Act, 2007. Therefore, he emphasized to save this provision as respondent No.3 otherwise will retire on 30.06.2011.

9. Mr. M. Bilal, Sr. ASC appeared on behalf of State Bank of Pakistan and stated that respondent No.3 was appointed with the

concurrence of Ministry of Finance in accordance with existing law. No arguments were advanced on behalf of Federation of Pakistan nor request was made to engage a counsel.

10. We have heard the learned counsel and have gone through the relevant provisions of the law and Constitution as also the case law cited at the bar.

11. The main question falling for determination by this Court in the instant case is whether section 11(3)(d) of the Act of 1974, which related to the appointment of Chairman, President and members of the NBP Board, could have been amended by the Finance Act, 2007 [Money Bill] passed in terms of Articles 73 and 75 of the Constitution. Therefore, for better understanding to determine this question, it will be pertinent to reproduce below Article 73 of the Constitution, which defines Money Bill, and section 11(3) of the Act of 1974 before and after amendment brought about in its clause (d) by way of the Finance Act, 2007: -

### **Article 73 of the Constitution**

#### **"73. Procedure with respect to Money Bill.**

(1) Notwithstanding anything contained in Article 70, a Money Bill shall originate in the National Assembly: Provided that simultaneously when a Money Bill, including the Finance Bill containing the Annual Budget Statement, is presented in the National Assembly, a copy thereof shall be transmitted to the Senate which may, within seven days, make recommendations thereon to the National Assembly.

(1A) The National Assembly shall, consider the recommendations of the Senate and after the Bill has been passed by the Assembly with or without incorporating the recommendations of the Senate, it shall be presented to the President for assent.

(2) For the purpose of this Chapter, a Bill or amendment shall be deemed to be a Money Bill if it contains provisions dealing with all or any of the following matters, namely: -

- (a) the imposition, abolition, remission, alteration or regulation of any tax;

- (b) the borrowing of money, or the giving of any guarantee, by the Federal government, or the amendment of the law relating to the financial obligations of that Government;
  - (c) the custody of the Federal Consolidated Fund, the payment of moneys into, or the issue of moneys from, that Fund;
  - (d) the imposition of a charge upon the Federal Consolidated Fund, or the abolition or alteration of any such charge;
  - (e) the receipt of moneys on account of the Public Account of the Federation, the custody or issue of such moneys;
  - (f) the audit of the accounts of the Federal Government or a Provincial Government; and
  - (g) any matter incidental to any of the matters specified in the preceding paragraphs.
- (3) A Bill shall not be deemed to be a Money Bill by reason only that it provides:-
- (a) for the imposition or alteration of any fine or other pecuniary penalty, or for the demand or payment of a licence fee or a fee or charge for any service rendered; or
  - (b) for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.
- (4) If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the National Assembly thereon shall be final.
- (5) Every Money Bill presented to the President for assent shall bear a certificate under the hand of the Speaker of the National Assembly that it is a Money Bill, and such certificate shall be conclusive for all purposes and shall not be called in question."

**"Section 11 of the Act of 1974:**

- (1) .....
- (2) .....
- (3) The Chairman, the President, and other members of the Board representing the Federal Government's direct and indirect shareholding" –
  - (a) Shall be appointed by the Federal Government, in consultation with the State Bank, for a term of three years, on such terms and conditions as may be fixed by the General Meeting of the bank; provided that the Chairman and the President shall be appointed from amongst professional bankers whose names are included in a panel of bankers qualified to be maintained and varied, from time to time, by the State Bank;
  - (b) May be removed for misconduct or physical and mental incapacity before the expiry of the



- three years' term by the Federal Government in consultation with the State Bank;
- (c) Shall stand removed if he becomes ineligible on any of the grounds specified in subsection (12); and
  - (d) May be reappointed by the Federal Government, in consultation with the State Bank of Pakistan, for a further period of three years.

**Clause (d) after amendment by the Finance Act, 2007**

- "(d) may be reappointed by the Federal Government, in consultation with the State Bank of Pakistan, for such further term or terms as may be determined."

Article 73(2) of the Constitution, reproduced above, reflects that a Bill or amendment shall be deemed to be a Money Bill if it contains provisions dealing with all or any of the matters enumerated in clauses (a) to (g) of Paragraph 2 of this Article. In our opinion, reappointment of Chairman, the President and other members of the Board of NBP does not fall within ambit of clauses (a) to (g) *ibid*. Thus, it is crystal clear that the amendment in question could not have been introduced in clause (d) of subsection (3) of section 11 of the Act of 1974 by way of Finance Act, 2007, as it lacked constitutional requirement envisaged by Article 70 of the Constitution, i.e. approval by two Houses of Parliament. Be that as it may, when confronted with the definition of the Money Bill reproduced above, Mr. Abid Zubairi, ASC for respondent No.3 candidly conceded that the subject matter of amendment of section 11(3)(d) of the Act of 1974 was not covered by Money Bill, therefore, the amendment on that score, in the light of the law laid down in Sindh High Court Bar Association's case, was unconstitutional and could not be upheld. However, his submission was that as was done in the precedent case, the instant matter be also referred back to the appropriate legislature. The learned Attorney General for Pakistan,

who appeared in response to the notice issued to him in terms of Order XXVIA Rule 1 CPC submitted that in such eventuality the danger was that the other legislation carried out under the Finance Act might be affected by such a declaration, therefore, restraint ought to be exercised. As for the fear expressed by the learned Attorney General, suffice it to say that no other provision either of the Act of 1974 or of any other law amended by a Finance Act having been challenged by anyone before us, this judgment will be confined to the issue involved in the present case, namely, the unconstitutionality of the amendment of section 11(3)(d) of the Act of 1974 brought about by the Finance Act, 2007. We are afraid the submission of Mr. Zubairi that the instant matter be also referred back to the appropriate legislature, as was done in the Sindh High Court Bar Association's case, has no force. As a matter of fact, the learned counsel has not appreciated the law laid down in the said case, wherein this Court, after having held that the amendment in the Supreme Court (Number of Judges) Act, 1997, effected by the Finance Act, 2008 was unconstitutional and illegal, further held that the appointments of Judges over and above the strength as already determined under the Act of 1997 could not be sustained on that score as well, and as a result, certain Judges of the Supreme Court were made to relinquish office. In the instant case, we are confronted with almost a similar situation. Since, admittedly, the amendment made in section 11(3)(d) of the Act of 1974 by the Finance Act, 2007 was unconstitutional and illegal, the appointment of respondent No.3 made under an unconstitutional and illegal legislation would not remain unaffected as the foundation on which its superstructure rested stood removed. The argument of the learned counsel for respondent No. 3 that the

appointment of respondent No.3 was made by the Federal Government in exercise of the power conferred upon it by a legislative instrument passed by the concerned legislature, therefore, the same was not liable to be interfered with being a past and closed transaction is not tenable. If the appointments of Judges were affected on account of a similar defect in legislation, how the appointment of respondent No.3, who, too, was appointed under such an unconstitutional and illegal amendment could be protected.

12. As for the submission of the learned counsel for the petitioners that a large number of loans had been written off during the tenure of respondent No.3, we would not like to go into the said question in the instant case as the said matter is sub judice before this Court in another case.

13. For the foregoing reasons, the instant Constitution Petition is allowed. The reappointment of respondent No.3 Syed Ali Raza as President NBP by way of notification dated 10.04.2010 is declared to be unconstitutional and he shall cease to hold office as President NBP with immediate effect.

14. CM No. 3387 of 2010 is disposed of.

CHIEF JUSTICE

JUDGE

JUDGE

ANNOUNCED ON 14th January, 2011  
At Islamabad.

CHIEF JUSTICE  
APPROVED FOR REPORTING