

SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Umar Ata Bandial
Mr. Justice Syed Mansoor Ali Shah
Mr. Justice Amin-ud-Din Khan

Civil Petitions No.3236, 3283 & 3494 to 3496 of 2019.

(Against the judgment dated 09.07.2019 of the High Court of Sindh, Karachi passed in Constitution Petitions No.D-2635, D-2575, D-3509, D-2441& D-2447 of 2018)

Abid Amin (*in CP No.3236/19*)

Ahmed Humayun Sheikh (*in CP No.3283/19*)

National Accountability Bureau (*in CPs-3494 to 3496*)

..... Petitioners

Versus

National Accountability Bureau (*in CP No.3236/19*)

Federation of Pakistan, etc (*in CP No.3283/19*)

Asif Brohi (*in CP No.3494/19*)

Qamar Hussain (*in CP No.3495/19*)

Nadeem Anwar Ilyas & another (*in CP No.3496/19*)

..... Respondents

For petitioners:

Mr. Arshad M. Tayebaly, ASC.
(*in CPS-3236 & 3283/2019*)

For NAB:

Mr. Naeem Tariq Sagheer,
Spl. Prosecutor.

For respondents/co-accused:

Mr. Abid Naseem, ASC
(*in CP-3496/19*)

Date of hearing:

17.01.2022

JUDGMENT

Syed Mansoor Ali Shah, J. – By this order, we shall decide all the above-captioned petitions as they arise out of the same judgment of the Sindh High Court.

2. The petitioners, Abid Amin and Ahmed Humayun (“petitioners”), seek leave to appeal against the judgment of the Sindh High Court, dated 09.07.2019, whereby the High Court has declined to quash the Reference No.21/2017 filed against them under the National Accountability Ordinance, 1999 (“**NAB Ordinance**”), despite quashing the same Reference against four of their co-accused, the bank employees, namely, Qamar Husain, Nadeem Anwar Ilyas, Nausherwan Adil and Asif Brohi, (“co-accused”) while the National Accountability Bureau (“**NAB**”)

has, by its petitions, challenged the quashment of the Reference against the co-accused, bank employees, by the impugned judgment.

2. Brief facts of the case are that petitioners are directors and shareholders of M/s Azgard Nine Limited ("**ANL**"), a public limited company. The ANL obtained financial facility/loan from different financial institutions. Upon default of the financial facility, the ANL arrived at a settlement with 22 financial institutions and got the debt restructured by entering into a Debt Swap Agreement, a Master Restructuring Agreement and other supplemental agreements for an amount of Rs.10.5 billion. The National Bank of Pakistan (**NBP**) played a lead role amongst the 22 financial institutions by purchasing the shares of M/s. Agritech Ltd, a subsidiary of the ANL, at a price of Rs.35 per share and adjusting the same against the outstanding debt of the ANL with the NBP and 21 other financial institutions. The co-accused are senior bank employees of the NBP who were involved in restructuring and rescheduling the loans of the ANL.

3. The financial settlement arrived at under the aforementioned agreements has since been implemented, and none of the financial institutions has challenged the same in any court of law. However, multiple complaints were filed by one Transparency International on the ground that the officers of the NBP misused their authority and bought the shares of M/s. Agritech Limited at a higher price, i.e., at Rs.35/- per share instead of Rs.13.47/- per share, thus causing a colossal loss of Rs.3.02 billion to the national exchequer.

4. As the NAB Reference against the petitioners was not filed with the approval of the State Bank of Pakistan, the petitioners and the co-accused filed applications under Section 265-K, Cr.P.C, before the trial court, i.e., the Accountability Court, for their acquittal or discharge from the case. The applications were dismissed by the Accountability Court and the constitutional petitions filed under Article 199 of the Constitution read with Section 561-A, CrPC, by the petitioners against the order of the trial court met the same fate at the High Court by the impugned judgment. However, the constitutional petition filed by the co-accused succeeded and the Reference to their extent was quashed by the High Court, holding the same to have been filed in violation of Section 31-C of the NAB Ordinance.

5. The learned counsel for the petitioners submitted that it is an admitted position that the ANL defaulted on the loans and as a result 22 financial institutions rescheduled the loan through Debt Swap Agreement and Master Restructuring Agreement for an amount of Rs.10.5 billion, and the said agreements were duly approved by the State Bank of Pakistan. The matter was of defaulted loans and rescheduled loans; therefore, before investigating and filing the Reference thereon the NAB should have sought permission from the State Bank of Pakistan, as required under Section 31-D of the NAB Ordinance, which was admittedly not done, hence the entire proceedings are without jurisdiction and liable to be quashed. Learned counsel for the co-accused supported the submissions of the petitioners.

6. The learned Special Prosecutor, NAB controverted the contention of the petitioners vehemently and submitted that there is a difference between *restructuring* and *rescheduling* of the loans. Section 31-C refers to restructured loans while Section 31-D refers to rescheduled loans. In the present case, the loans were restructured; hence, Section 31-D of the NAB Ordinance is not attracted.

7. We have heard the learned counsel at some length and gone through the record of the case. As the question involved in the present petitions revolves around the meaning and scope of Sections 31-C and 31-D of the NAB Ordinance, the provisions thereof are reproduced hereunder for convenience of reference:-

31-C. Court to take cognizance of offence with prior approval of the State Bank.- No Court established under this Ordinance shall take cognizance of an offence against an officer or an employee of a bank or financial institution for writing off, waving, restructuring or refinancing any financial facility, interest or mark-up without prior approval of the State Bank of Pakistan.

31D. Inquiry, investigation or proceedings in respect of imprudent bank loans, etc.- Notwithstanding anything contained in this Ordinance or any other law for the time being in force, no inquiry, investigation or proceedings in respect of imprudent loans, defaulted loans or rescheduled loans shall be initiated or conducted by the National Accountability Bureau against any person, company or financial institution without reference from Governor, State Bank of Pakistan.

Provided that cases pending before any Accountability Court before coming into force of the National Accountability Bureau (Second Amendment) Ordinance, 2000, shall continue to be prosecuted and conducted without reference from the Governor, State Bank of Pakistan.

The bare reading of the above provisions shows that under Section 31-C the Accountability Court cannot take cognizance, under the NAB Ordinance, of an offence against an officer or an employee of a bank or financial institution for *writing off, waving, restructuring or refinancing*

any financial facility, interest or mark-up, without prior approval of the State Bank of Pakistan. While under Section 31-D, no inquiry, investigation or proceedings in respect of *imprudent loans, defaulted loans or rescheduled loans* can be initiated or conducted by the NAB against any person, company or financial institution without reference from the Governor, State Bank of Pakistan. Unlike Section 31-C that relates to only taking cognizance of an offence by the Accountability Court, Section 31-D provides protection even against initiation of inquiry, investigation or proceedings against a person or a company in respect of *imprudent loans, defaulted loans or rescheduled loans*. The protection provided under Section 31-D is, therefore, broader and more expansive. Admittedly, the ANL had defaulted on the loans extended by multiple financial institutions, and it was that default that led the ANL and the financial institutions to enter into Debt Swap and Master Restructuring Agreements, under which the loans were restructured and as a consequence the servicing of the debt to the financial institutions stood rescheduled.

8. The High Court has not granted the relief prayed to the petitioners on the ground that the financial arrangement between the ANL and the financial institutions was *restructured* and not *rescheduled*; hence, Section 31-D is not attracted to the case of the petitioners. This observation of the High Court is not well founded. First of all, Section 31-D is also attracted in respect of a "defaulted loan". Defaulted loan means the failure to fulfill the obligation to repay the loan.¹ Admittedly, it was the inability of the ANL to service its debt that necessitated the said agreements; hence, the ANL had defaulted on its loans. "Default" means "failure to fulfill an obligation, especially to repay a loan."² The present case thus relates to a "defaulted loan", and this act of default alone attracts Section 31-D of the NAB Ordinance. The High Court has failed to consider this aspect of Section 31-D of the NAB Ordinance and its applicability to the facts of the present case.

9. In order to differentiate between restructuring and rescheduling, the High Court referred to the definitions of these terms provided in the Prudential Regulations as amended under BPRD Circular 13 of 2016 dated 07.10.2016 (reproduced hereunder for reference) to hold that restructuring and rescheduling are different terms:

¹ Oxford English Dictionary

² Oxford English Dictionary

Restructuring means such concessions to the borrower, due to borrowers' financial difficulty, which the bank/DFI would not otherwise consider. Restructuring normally involves modification in the terms & conditions of the financing/securities and generally includes, amongst others, alteration of repayment period, repayable amount, installment amount, mark-up rates (due to reasons other than competitive pricing) etc.

Rescheduling means such concession in the grace period or modification in the repayment dates of principal loan amount (without changing overall loan tenor), due to borrowers' financial difficulty, which the bank/DFI would not otherwise consider."

The highlighted portion of the above definitions appearing in the BPRD Circular shows that "Restructuring" is a comprehensive and a broad-ranging term, which includes "Rescheduling". One of the modes of restructuring can be rescheduling. Therefore, for the purposes of the NAB Ordinance, the two terms can be read as having been used interchangeably. Further, the NAB Ordinance has not defined any of the terms used in Sections 31-C and 31-D, namely, *writing off, waving, restructuring, refinancing, imprudent loans, defaulted loans or rescheduled loans*; therefore, their general dictionary meanings are to be considered, for understanding their import and scope. The terms, "debt restructuring" and "debt rescheduling", have been defined in the Oxford Dictionary of Business and Management, thus:

Debt restructuring means the adjustment of a debt, either as a result of legal action or by agreement between the interested parties, to give the debtor a more feasible arrangement with the creditors for meeting the financial obligations.³

Debt rescheduling means a change in the terms of outstanding loans in which the debtor has repayment difficulties. The rescheduling can take the form of an entirely new loan or an extension of the existing loan repayment period, deferring interest or principal repayments.⁴

Reading of these definitions also shows that while both the terms signify a financial settlement, *restructuring* is an all-embracing term, which includes *rescheduling*.

10. However, more important than hairsplitting technical banking terms, is to understand the legislative intent, purpose and objective of enacting Sections 31-C and 31-D of NAB Ordinance, and question ourselves why in such cases, the NAB has not been allowed to proceed, or the Accountability Court has not been allowed to take cognizance, unless there is a permission or approval of the State Bank of Pakistan. The answer is obvious: through the mode of restructuring or rescheduling, the default of the outstanding financial liability of a person

³ Oxford Dictionary of Business and Management, Pakistan Edition (5th Edition). pp.165-166.

⁴ Ibid.

or a company or a financial institution is remedied and default rectified, and this exercise is blessed by the consent and permission, not only of the financial institution concerned but also of the State Bank of Pakistan, the apex fiscal authority in the country. Such a financial arrangement/settlement is accepted by the financial institutions because the alternative may be outright default on the debt.

11. Thus, the conversion of the default into a viable financial arrangement between the parties arrived at by the blessing of the State Bank of Pakistan cannot be questioned, doubted or ignored unless the State Bank of Pakistan, the apex overseeing authority, so permits. Any unilateral intervention by the NAB into restructured and rescheduled loans would seriously undermine the authority of the apex fiscal institution in the country, i.e., the State Bank of Pakistan. It would also render any such financial settlement meaningless, thereby generating mistrust and lack of faith and confidence amongst the business community against the State Bank of Pakistan. Any such mistrust could be disastrous and result in destabilizing the economy. Such an act would also offend the constitutional value of economic justice and the fundamental right to trade and business.

12. The legislative intent, purpose and objective of enacting Sections 31-C and 31-D of the NAB Ordinance, in the said backdrop, becomes clear: to safeguard sound and stable functioning of the economic, banking and fiscal governance in the country by honouring the financial decisions of the State Bank of Pakistan. The import of these provisions, therefore, has to be understood in this larger constitutional perspective and legislative intent, purpose and objective, not by losing into the technicalities of the financial terms used in Sections 31-C and 31-D of the NAB Ordinance, which have not been given any special meaning under the NAB Ordinance and can safely be treated general financial terms as understood in common parlance.

13. In the present case, it is an admitted position that company of the petitioners, the ANL, defaulted on several loans and as a result its liability was restructured and rescheduled under various financial agreements. To date, no financial institution has come forward to oppose the case of the petitioner. It is also an admitted position that the said agreements have been duly implemented, and liabilities thereunder have been settled between the parties. The learned Special Prosecutor, NAB

has also frankly conceded that no permission of the State Bank of Pakistan was ever sought and no such reference was made by the Governor, State Bank of Pakistan. We, therefore, hold that no inquiry, investigation or proceedings could have been initiated against the petitioners without a reference from the Governor, State Bank of Pakistan in terms of Section 31-D of the Ordinance.⁵

14. For the above reasons, the proceeding initiated by the NAB against the petitioners is found violative of the provisions of Section 31-D of the NAB Ordinance, and thus the consequent filing of the Reference against the petitioners is also without lawful authority and of no legal effect. The High Court has failed to correctly interpret and apply the provisions of Section 31-D of the NAB Ordinance, in the present case. We, therefore, convert the petitions of the petitioners, i.e., C.Ps. No.3236 and 3283 of 2019, into appeals and allow the same. The constitutional petitions of the petitioners are accepted, and the proceedings initiated by the NAB including the inquiry, investigation, and Reference, and the proceedings pending before the Accountability Court on that Reference are quashed. For the same reasons, the petitions filed by the NAB, i.e., C.Ps. No.3494 to 3496, are dismissed.

15. Needless to say that the NAB is free to proceed *de novo* against the petitioners and the co-accused, by complying with the necessary legal requirement of Sections 31-C and 31-D of the NAB Ordinance.

Judge

Judge

Islamabad,
17th January, 2022.

Approved for reporting.

Judge

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⁵ Construction put to the provisions of Section 31-D of the NAB Ordinance, in case of their non-compliance, by the Sindh High Court in *Kaloodi International v. Federation* PLD 2001 Kar 311 and *Naseem v. Federation* PLD 2013 Kar 357 is approved.