

Stereo. HCJDA 38.
Judgment Sheet
IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

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W.P. No.80733/2022.

Munir Ahmed

Versus

Federation of Pakistan, etc.

JUDGMENT

Date of hearing: **22.03.2022.**

Petitioner by: M/s Muhammad Azhar Siddique,
Zeeshan Afzaal Hashmi and Roha
Khan, Advocates.

Respondents by: Mr. Nasar Ahmad, Additional
Attorney General.

Mr. Sheraz Zaka, Assistant Attorney
General.

Binyamin, Section Officer, Cabinet
Division, Islamabad.

ASIM HAFEEZ, J. Fundamentally, subject matter controversy is whether denial on the part of the Federal Cabinet / Government ('Government') to disclose / public the record of '*Tosha-Khana*' is lawful and justiciable, and if such act is covered within the scope of privileges available in terms of section 7 clause (f) & (g) and section 16 (1) clause (a)(ii) of the Right of Access to Information Act, 2017 (Act, 2017). Government claimed that record of '*Tosha-Khana*' is classified, and immunity is available because disclosure of such information / details would be prejudicial to the interests of the State of Pakistan and

detrimental to international relations. Petitioner had sought but denied access to information. Hence, instant petition.

2. In support of alleged claim of *privileged* information, Government was directed to produce unpublished record in the Chambers and submit affidavit of the head of the department of the 'Tosha-Khana', as per the requirements of Article 6 of Qanun-e-Shahadat Order 1984. Affidavit of Mr. Amir Ashraf Khawaja, Cabinet Secretary is produced, contents whereof are reproduced hereunder,

"I, Aamir Ashraf Khawaja, Cabinet Secretary, do hereby solemnly affirm and declare as under:-

1. *The Toshakhana was made the responsibility of Cabinet Division under Rules of Business 1973.*
2. *Prior to 1973, Ministry of Foreign Affairs (MOFA) and Establishment Division were responsible for it.*
3. *On the Orders of the Honorable Court, the record was sought by the Cabinet Division from MOFA and Establishment vide letter No.8/5/2017-TK dated 24-02-2023.*
4. *The Ministry of Foreign affairs(MOFA) vide letter No.DCP (V-VII)-1-Misc/2023 and Establishment Division letter No.1/2/2023-Admn-III dated 02.03.2023, have written that no record of Toshakhana is available with them.*
5. *That the complete information from 2002 onwards is submitted to the Honourable Court for perusal (in camera).*
6. *That as already submitted, the information/record available with the Cabinet Division (from 1973 to 2001) is sketchy/unverifiable. As directed by the Honourable Court, whatever is available is being submitted for perusal (in camera).*
7. *That the information submitted for perusal (in camera) is strictly as per record of Toshakhana (Both verified and unverifiable) and that nothing has been withheld.*
8. *The Federal Cabinet on 22-02-2023 has declassified the information (without name of presenting dignitary/country). The same is being displayed on website of the Cabinet Division. The new approved Toshakhana procedure is now in vogue.*
9. *The uploaded Toshakhana information 2002 onwards till to date is in compliance of the Cabinet approval contained in its decision dated 22-02-2023. This information is based on Toshakhana record as per declaration by all concerned in accordance with the "procedure for Acceptance and Disposal of Gifts".*

3. Government, *pendente-lite* proceedings, released limited record of 'Tosha-Khana' from the year 2002 till March 13th, 2023, but with a *caveat* that identity / source(s) of the providers of gift(s) was withheld, on the plea that disclosure would have repercussions and impact on the foreign relations. It was informed that Cabinet had constituted committee for reviewing the regulatory regime of 'Tosha-Khana' and to recommend statutory framework for dealing with the procedure for acceptance and disposal of foreign gifts.

Government showed reluctance in disclosing record of 'Tosha Khana' from 1990 to 2001, on the premise that record was incomplete and otherwise unverifiable – supporting material for authentication is missing. Government categorically informed that record before the year 1990 is not available. It is alleged that Cabinet assumed control of the record of 'Tosha-Khana' after 1973, before which Ministry of Foreign Affairs and Establishment Division were responsible for maintaining the record, and non-availability of record was confirmed upon intimation by the Ministry of Foreign Affairs. Aforesaid facts are iterated in the Affidavit. Learned Additional Attorney General placed on record signed copies of record of 'Tosha-Khana', already released for public consumption, which is made part of these proceedings. – wherein source(s) / identity of the providers of gifts was not disclosed.

4. Upon hearing learned Additional Attorney General, following issues arise and need determination.

- i. Whether ownership of the gifts under reference vests in the Government or recipient of gift(s), and at what point in time ownership in the gift(s) changes hands?*
- ii. Whether failure to disclose / declare gifts by the recipient constitute culpable wrongdoing, liable to appropriate action?*

iii. Whether immunity claimed qua the source(s) / identity of providers of gift(s) provider is lawfully claimable?

iv. Whether Government is lawfully justified in claiming immunity from disclosure of record of 'Tosha-Khana' from 1990 to 2001?

5. Learned Additional Attorney General submits that gifts provided, either by the heads of foreign State(s) or foreign dignitaries to the Government / Public functionaries of Pakistan are not by virtue of any private relationship or individual bond but due to their status as the Government / Public functionaries, being representatives of the Government of Pakistan. Submits that foreign gift(s) cannot be construed as private gifts. Adds that recipient(s) of gifts are legally obligated to disclose and declare the details of the gifts received – notwithstanding absence of protocol staff at the occasion. Further submits that if recipient(s) intends to acquire gifts, they must convey their intention to purchase, whereupon procedure for disposal of gifts is followed, in terms whereof, evaluation is carried out for determining the payable price. Adds that upon payment of ascertained price by recipient(s) ownership in the gift(s) changes hands. Learned Additional Attorney General submits that immunity for the period from 1990 to 2001 is claimed since the record was incomplete and not duly verifiable. Upon being asked, law officer submits that official records are maintained and preserved for fixed timeframe and thereafter the record is disposed / destroyed after fulfilling legal / administrative requirements.

On the issue of immunity qua the identity / source(s) of gift(s) providers, learned Additional Attorney General submit that head(s) of some foreign states are generous and gave valuable gifts to the Government / Public functionaries, and if their identity is disclosed, such disclosure would create frenzy, generate unnecessary speculation and affect foreign relations. Adds that

disclosure of identity / source of gifts providers is otherwise against the diplomatic norms.

ORDER OF THE COURT.

6. Before addressing the questions, it is imperative to identify the class of Government / Public functionaries, those are subject to the regulatory framework of gifts and disposal thereof. Clause (13) of the '*Procedure for the Acceptance and Disposal of Gifts*' of 18.12.2018 describes class of persons, which is reproduced hereunder for understanding,[by and large the scope of Government / Public functionaries remain similar in the context of procedures prescribed from time to time.]

*"The procedure shall apply to the President/Head of the Government and their family members, Chairman Senate, Speaker National Assembly, **Chief Justice of the Supreme Court**, Governors of the Provinces, Members of the Federal Cabinet, Attorney General for Pakistan, Ministers of State, Deputy Chairman Senate, Deputy Speaker national Assembly, Dignitaries holding ministerial status, Members of Provincial Cabinets, **Judges of Supreme Court, Chief Justice/Judges of the High Courts**, Parliamentarians and other elected representatives, **all Government servants (Civil and Military)** as well as autonomous bodies and their spouse/dependents, members of the Provincial Governments, **other members of public visiting abroad as members of official delegation.**"*

[Emphasis supplied]

7. During hearing of the case learned Additional Attorney General is asked to confirm that complete information / details of all the recipients of gift(s) for the period from 2002 till 11.03.2023 is publicized, who categorically stated that details of the gifts and recipients thereof are provided, but with respect to those gifts which are disclosed / declared by the recipients, and no information was available with respect to undisclosed / undeclared gifts. It is difficult to individually identify the identity of those Government / Public functionaries who

had received gift(s) from the head(s) of the foreign states / dignitary(ies) but failed to disclose / declare the gifts.

In the context of the concerns expressed by the learned counsel for the petitioner that record was incomplete, it is iterated that all Government Servants, (Civil and Military) Chief Justice and Judges of the Supreme Court and Chief Justices / Judges of the High Courts and other Constitutional Courts, are obligated to report, disclose and declare the gift(s) received, and non-reporting incurs action suggested in terms of Clause (1) of the *Procedure for the Acceptance and Disposal of Gifts*. Clause (1), *ibid*, which reads as,

“The responsibility for reporting the receipt of the gifts shall devolve on the individual recipient. All gifts received by a Government servant, irrespective of their prices, must be reported to the Toshakhana in the Cabinet Division, Government of Pakistan. If it is found, on checking, that an individual has not reported the receipt of a gift, appropriate action will be taken against him under the relevant rules.”

[Emphasis supplied]

8. There is no second thought that ownership of gift(s) received exclusively vests in the Government of Pakistan. Undoubtedly, option of purchase is available to the recipient but only upon fulfilling the procedural and codal / legal requirements. And upon payment of price, as determined, ownership in the gifts is conferred on the recipient – [there are gifts, whose prices are either below the permissible limit or so insignificant that retention is allowed without any payment. This category of gifts is different]. I concur with the submissions of learned Additional Attorney General that gifts are not provided to the individuals, out of any personal affection or bonding, but being the Government / Public functionaries, representing the State of Pakistan - this status / privilege is an essential qualification for the recipient of gift(s). Families / members of official delegations are subject to same limitations, obligations and procedure(s), as

applicable to the Government / Public functionaries. In every case, the dominion over the gift(s) remains with the Government and possession of the gifts is a mere entrustment. Recipient(s), entrusted with the property, may seek purchase of gifts but subject to the procedure prescribed for disposal – which *inter alia* includes the first step of disclosure of gift(s), declaration of intention to purchase, assessment / ascertainment of the price and payment of consideration. And unless all these requisite conditions are met, the ownership in the gift(s) or dominion over them vests and continues to vest in the Government, and recipient is merely a trustee, holding gift(s) on behalf of the Government of Pakistan –gift(s), held as trustee, will not even become the part of the estate of the recipient, unless procedure prescribed is followed.

In view of the above, it is declared that act of non-disclosure, non-declaration or non-payment of price qua the gift(s) is culpable wrongdoing, attracting malfeasance, misconduct and breach of trust. It is expected that Government / Public functionaries, those who had received the gift(s) but had, so far, neither disclosed nor declared the identity of gifts, must voluntarily declare receipt / possession of gifts, failing which said persons are likely to be exposed to criminal action or departmental proceedings, as the case may be. It is pertinent to mention that criminal breach of trust is otherwise a punishable offence under Pakistan Penal Code 1860. Nobody is above the law, nor anyone could be allowed to make gains or enrich itself at the expense of causing loss to the State and prejudice to the people of Pakistan.

9. Another matter is regarding the immunity claimed qua disclosure of source (s) / identity of providers of gift(s). Reasons pleaded are heightened speculation and unnecessary debate amongst the public and repercussions for

foreign relations. This reasoning is fallacious and ridiculously absurd. Learned Additional Attorney General when asked, failed to show that non-disclosure of the identity / source(s) of the providers of gift(s) is a universally followed practice, or established principles of successful diplomacy or foreign relations. Foreign relations / policy is always guided and directed in the context of the interest of the State and benefit of its people. Source(s) / identity of the provider(s) of gift(s) is not a state secret, nor was it treated as scared information, either in our neighbouring country, on the eastern border, or in western democracies, where gifts received are accordingly disclosed along identity of the providers of those gift(s). Shyness on the part of the Government is difficult to comprehend. It is believed that claim of immunity pleaded is nothing but a figment of colonial mindset, which mindset must be abandoned / off-loaded now, if Rule of law and equality before the law need to be established. Now, after seventy-five years of our independence it is imperative that people of Pakistan be treated as citizens / fountainhead of all power, instead of being the subjects in colonial set-up. People of Pakistan have the right to know details of 'Tosha-Khana', what was gifted and who gifted it.

This Court is of the considered opinion that disclosure of the source(s) / identity of the providers of gifts, even if gifts provided are expensive and manifests the generosity of the providers / donors, would in fact promote and foster good feelings between the people and above all bring transparency in the affairs of the State. It is absurd to conceive that sovereignty of Pakistan or its relations with foreign States would be jeopardized, threatened, risked or exposed merely upon disclosing the source(s) / identity of the providers of gift(s). Objection qua non-disclosure of the source(s) / identity of the provider(s) of

gift(s) is unwarranted, and in fact withholding of such information would generate speculations and enhance distrust between people and Government / Public functionaries. Non-disclosure of information is in fact denial of right of the people of Pakistan to know, rights which are available and enjoyed by citizens of other countries / nations. Gifts provided are not offered or provided for forging personal relationship or individual bonding, nor for surreptitiously gaining veiled / hidden political or economic benefits. Pakistan is not an exception in the world, that its foreign relations would be adversely affected merely because information / details of '*Tosha-Khana*' are shared with the people of Pakistan. In view of the above, no substantial ground is available to extend the immunity claimed, which claim of the Government is unjustified and same is repelled. Provisions of the Right of Access to Information Act 2017 and Articles 6 and 158 of the Qanun-e-Shahadat Order, 1984 extends no support qua alleged claim of immunity, in the context of record of '*Tosha-Khana*'. Rights of the People of Pakistan to know details of the source(s) / identity of provider(s) of gift(s) cannot be denied, curtailed or curbed on flimsy reasons / grounds.

10. Now I deal with the issue of disclosure of record of '*Tosha Khana*' from 1990 to 2001. Grounds pleaded are that record for the relevant period is incomplete and unverifiable, hence, immunity be extended. This is no ground at all let alone persuasive enough to declare the record classified. Claim of immunity is a mere excuse to keep the details buried, allowing it to be removed / destroyed surreptitiously, in the manner the records from 1947 to 1990 are found missing. It is expected that Government will hold an inquiry into the factum of loss of record, its partial availability, ascertain cause for disappearance / no-

availability of the records, fix responsibility and hold the perpetrators liable / accountable.

In view of the above. claim of immunity qua the records of '*Tosha-Khana*' from 1990 to 2001 is dismissed, and Government is directed to make public the records of '*Tosha Khana*' from the years 1990 to 2001 along the source(s) / identity of the providers of gift(s).

11. Equality before the law is the cornerstone of our constitutional polity and society, and to achieve it the journey may be arduous, prolonged, and long-drawn-out but eventual triumph cannot be denied to the robust and resilient people of Pakistan. Yes, this journey can be shortened, provided the Government / State guarantees policy of zero tolerance to all forms of inequality, be it social, political or economic.

12. This Court is informed that incumbent Government has enforced *Procedure for the Acceptance and Disposal of Gifts, 2023* and proposed a legislation, i.e., *Toshakhana (Management and Regulation) Act, 2023*. It is for the Government to prescribe rules for regulating the matters dealing with the acceptance, retention or disposal of gifts. This court is conscious of its jurisdiction in terms of Article 199 of the Constitution of Pakistan, which cannot be stretched to proceed to legislate, which is the sole domain of the Parliament.

13. These proceedings relating to the issue of disclosure of details of '*Tosha-Khana*' are decided and stand concluded in following terms,

- i. *Ownership of gifts vests in the Government and continues to remain so unless procedure prescribed for acceptance and disposal of gifts is followed.*
- ii. *Failure to disclose / declare the identity of gifts constitutes a culpable wrongdoing.*

- iii. *Government is directed to disclose the source(s) / identity of the providers of gifts from 1990 till 13th of March 2023, within period of seven days of the receipt of certified copy of this order.*
- iv. *Government is directed to disclose / public record of Tosha Khana from 1990 to 2001, within period of seven days of the receipt of certified copy of this order.*

(ASIM HAFEEZ)
JUDGE

M. S. Aleem

APPROVED FOR REPORTING.

JUDGE