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JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Writ Petition No.58871 of 2022

Shaffat Ibrahim Khan

Versus

*Chairman National Accountability
Bureau and others*

JUDGMENT

DATE OF HEARING 24.10.2023

PETITIONER BY Mr. Muhammad Tayyab Gull, Advocate

RESPONDENTS BY Mr. Tahir Mehmood Ahmed Khokhar, Deputy
Attorney General for Pakistan

Mr. Muhammad Waseem Javed, Special Prosecutor for
NAB

RAHEEL KAMRAN, J. – Through the instant petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 (‘the Constitution’) the petitioner while alleging to be the *bonafide* purchaser in possession of the property bearing No.8-A, Shabbir Road, Lahore Cantt. and relying upon the judgment dated 28.08.2020, passed by the High Court of Balochistan, Quetta, has prayed that the restriction placed by the Military Estate Officer, Walton Cantonment, Lahore Cantt/respondent No. 3 over the said property may be declared to be without lawful authority and he be directed to remove the said restriction and provide him with the copy of the GLR after entering name of the petitioner in his record as lawful owner of the said property.

2. Brief facts of the case are that the petitioner purchased plot No.8/A, comprising Survey No. 176/8/A, total land measuring 506.2 Sq.Yds. situated at Shabbir Road, Lahore Cantt., out of which 1/3rd share was owned by Nisar Hussain Shah (respondent No.4), who sold it by execution of a sale deed registered with the Sub-Registrar, Aziz Bhatti Town, Lahore Cantt. on 27.08.2016, vide Document No. 5558, Book No. 1, Volume No.2256. Subsequently, when the petitioner

approached respondent No.3 to enter his name in the GLR, he came to know that with respect to 1/3rd share of respondent No.4 a freezing order was passed by the NAB authorities on 18.02.2009 which was confirmed by the Accountability Court, Quetta on 21.11.2009. Cr. Ehtisab Appeal No.07/2011 was filed to challenge the order of the Accountability Court, Quetta dated 21.11.2009, which was partially allowed vide order dated 30.11.2011 whereby the case was remanded to the trial Court after setting aside the impugned order. Subsequently, vide judgment dated 04.10.2013 passed by the Accountability Court-II, Balochistan, Accountability Court Reference No.12/09 filed by the NAB against respondent No.4 was ultimately dismissed and he was acquitted from the charges including the property in dispute. Against that, NAB preferred Criminal Acquittal Ehtesab Appeal No. 06 of 2013 challenging acquittal of respondent No.4, which was also dismissed by the High Court of Balochistan, Quetta vide judgment dated 28.08.2020 against which leave to appeal has been sought by the NAB through Criminal Petition No.1243 of 2020 filed before the Supreme Court of Pakistan.

3. Learned counsel for the petitioner contends that respondent No.4 from whom the petitioner has purchased the property in dispute stands acquitted from the charge of acquiring the said property from corruption and corrupt practices by the trial Court and the appeal filed thereagainst has also been dismissed. He maintains that though the NAB has challenged the acquittal of respondent No.4 before the Supreme Court but till-date no leave granting order has been passed and double presumption of innocence is attached to the acquittal of respondent No.4 by the trial Court as maintained by the High Court in appeal. He emphasizes that at present there is no freezing order in field, therefore, there exists no legal justification for refusal to remove restriction over the property in question. He finally contends that respondent No.3 is legally bound to enter name of the petitioner in the record as lawful owner of the property in question and issue him a copy of GLR to which he is entitled under the law.

4. Conversely, learned Special Prosecutor for NAB opposed the instant petition by arguing that the petitioner purchased the property in dispute from respondent No.4 during the pendency of the NAB's appeal against his acquittal by the Accountability Court-II, Balochistan, Quetta which was in violation of section 23 of the National Accountability Ordinance, 1999 ('the Ordinance'). It is contended that section 23 *ibid* places an embargo on transfer or creating any charge on the property owned and possessed by the accused during the pendency of the trial. He further submits that respondent No.4 sold the property in dispute to the petitioner during the pendency of the appeal against his acquittal and the appeal being continuation of the trial, such transfer of the disputed property in the name of the petitioner was *void* and unlawful. He concludes his arguments while stating that acquittal of respondent No.4 has not been finalized so far since the same has been still assailed before the Supreme Court of Pakistan where Criminal Petition No.1243 of 2020 is pending adjudication.

5. Learned Deputy Attorney General for Pakistan has also supported the arguments advanced by the learned Special Prosecutor, NAB.

6. Arguments heard. Record perused.

7. Opposition of the instant petition is based on two grounds: firstly, sale of the property in dispute during the pendency of the appeal was in violation of section 23 of the National Accountability Ordinance, 1999, secondly, the NAB has filed Criminal Petition No. 1243 of 2020 against acquittal of respondent No.4 which is pending adjudication before the apex Court.

8. Prior to its omission on 22nd June 2022 through the National Accountability (Amendment) Act, 2022 [Act No. XI of 2022], section 23 of the Ordinance read as follows:

23. Transfer of property void.-

(a) Notwithstanding anything contained in any other law for the time being in force after the Chairman NAB has initiated an inquiry or investigation into any offence

under this ordinance, alleged to have been committed by an accused person, accused person or any relative or associate of accused person or any other person on his behalf, shall not transfer by any means whatsoever, or create a charge on any property owned by him or in his possession, while the inquiry, investigation or proceedings are pending before the NAB or the Court; and any transfer of any right, title or interest or creation of charge on such property shall be void.

(b) Any person who transfers, or creates a charge on property in contravention of subsection (a) shall be punishable with the rigorous imprisonment for a term, which may extend to 3 years and shall also be liable to fine not exceeding the value of the property involved;

Provided that such transfer of any right, title or interest or creation of a charge on such property shall not be void if made with the approval of the Court, subject to such terms and conditions as the Court may deem fit”.

9. It is noteworthy that the *proviso* to section 23 *ibid* was inserted in Ordinance pursuant to the direction issued by the Supreme Court of Pakistan in the case of Khan Asfandiyar Wali and others Vs. Federation of Pakistan through Cabinet Division, Islamabad and others (PLD 2001 SC 607) wherein, *inter alia*, *vires* of the Ordinance were assailed for violation of fundamental rights embodied in Chapter 1 of Part II of the Constitution to reflect that transfer of property by an accused person or any relative or associate of such person or any other person on his behalf or creation of charge on any movable or immoveable property owned by him or in his possession, while inquiry, investigation or proceedings before the Accountability Court was pending, not to be void if made with approval of the Court subject to such terms and conditions as the Court deems fit.

10. The purpose and object behind promulgation of section 23 of the Ordinance has been expounded by the Supreme Court in the case of Khan Asfandiyar Wali (Supra) in the following terms:-

“Section 23 ibid is an interlocutory measure to prevent persons accused of such offences to frustrate the objects of law by creating third party interest in respect of illegally acquired property, thereby creating hurdles in the object of law i.e. to eradicate corruption and corrupt practices and hold accountable all those persons accused of such practices and matters ancillary thereto. The purpose of this power is more to preserve the

property acquired by the accused through corruption and corrupt practices so that ultimately if the guilt is proved the same can be taken back from him in accordance with law. Section 23 of the NAB Ordinance is also preventive in nature and prescribes penalties for the accused person who attempts to alienate or transfer by any means property after the Chairman NAB has initiated investigation, inquiry or proceedings have commenced against him in an Accountability Court. Put differently, it is in the nature of a restraint order. The protective measures are not by way of punishment but with a view to ensure that the final decision is not rendered redundant.”

11. Punishment for the offence of corruption and corrupt practices has been prescribed under Section 10 of the Ordinance not only in custodial terms but includes, amongst others, forfeiture to the appropriate government or the concerned financial institution such assets and pecuniary resources as are found to be disproportionate to the known sources of income or which are acquired by money obtained through corruption and corrupt practices, whether in the name of the holder of the convict or any of his dependents or *benamidars*. Section 23 *ibid*, as held by the Supreme Court in the case of Khan Asfandar Yar Wali (Supra), provides for an interlocutory measure to prevent persons accused of corruption and corrupt practices to frustrate the objects of law.

12. In the instant case, respondent No.4 sold the property in question to the petitioner on 27.08.2016 after his acquittal by the Accountability Court-II, Quetta vide judgment dated 04.10.2013 in Accountability Reference No.12 of 2009 and during pendency of the Criminal Acquittal Ehtisab Appeal No.06 of 2013. One of the primary questions would be to ask whether provisions of the repealed section 23 of the Ordinance extended in their application to the cases in appeals before the High Court under the Ordinance?

13. Since section 23 of the Ordinance not only restricted the exercise of fundamental rights enshrined in Articles 23 and 24 of the Constitution of the Islamic Republic of Pakistan, 1973 but also prescribed an offence under section 23(b) *ibid*, therefore, it could only be construed strictly. The word “Court” used in section 23 of the

Ordinance has been defined in section 5(g) the Ordinance to mean the Accountability Court. It does not include the High Court. An amendment was made in section 9(b) by insertion of phrase “including High Court” through Ordinance No. IV of 2000 to eclipse authority of the High Court to grant bail in cases under the Ordinance, however, such statutory prohibition could not abridge or takeaway jurisdiction of the High Courts to grant bail under Article 199 of the Constitution to any person accused of an offence under the Ordinance, as held by the Supreme Court of Pakistan in the cases of Khan Asfandiyar Wali and others Vs. Federation of Pakistan and others (PLD 2001 SC 607) and Muhammad Iqbal Khan Noori and others v. National Accountability Bureau and others (PLD 2021 SC 916). The distinction between the Court and the High Court, as maintained by the Ordinance, is equally manifest from section 32 which provides the remedy of appeal against final judgment of the Court before the High Court to be heard by a Bench of not less than two judges. It is one of the cardinal principles of interpretation of criminal statutes that such enactments are not to be extended by construction. In the case of Mirza Shaukat Baig and others Vs. Shahid Jamil and others (PLD 2005 SC 530), the Supreme Court of Pakistan quoted with approval the following passage of lord Halsbury from the English Judgments reported as (1891) AC 107 and (1952) AC 189:

“ It seems to me that, construing the statute by adding to it words which are neither found there in north for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction, and I am wholly unable to adopt the view that, where a statute is expressly said to codify the law, you are at liberty to go outside of the code so created, because before the existence of that code another law prevailed. In the construction of statute the duty of the Court is limited to interpret the words used by the legislature and it has no power to fill in any gaps disclosed. To do so would we do use of the function of the legislature”.

14. The proviso inserted in section 23 of the Ordinance which provided a remedy to any person to seek approval of transfer from the Court, entailed inquiry into facts that could not be held in appeal before

the High Court. This lent an additional justification for not extending application of Section 23 *ibid* to the High Court.

15. For the above reasons, we are of the view that after conclusion of the trial resulting in acquittal of an accused, the restriction imposed by law under section 23 comes to an end and provisions of the said section do not extend in their application to the High Court. Be that as it may, upon admission of an appeal against acquittal, High Court is possessed of all powers of the trial Court to pass any incidental order qua freezing of assets under section 12 of the Ordinance read with section 423 of the Code of Criminal Procedure, 1898 which *mutatis mutandis* applies to the proceedings under the Ordinance as mandated by Section 17(a) of the Ordinance.

16. Adverting now to the second plea of the NAB that the instant petition be dismissed inasmuch as filed Criminal Petition for Leave to Appeal has been filed before the Supreme Court to assail acquittal of respondent No.4 against dismissal of the Criminal Acquittal Ehtisab Appeal No.06 of 2013. In this regard, it is noted that an acquittal carries double presumption of innocence and the same could be reversed only when found blatantly perverse, illegal, arbitrary, capricious or speculative, shocking or arrested impossibility. Reliance in this regard is placed on judgments of the Supreme Court in the cases of Mst. Anwar Begum Vs. Akhtar Hussain alias Kaka and 2 others (2017 SCMR 1710) and Muhammad Shafi alias Kuddoo Vs. The State and others (2019 SCMR 1045).

17. On the last date of hearing, the learned Law Officer had sought some time to place on record a copy of the aforesaid Criminal Petition. However, that has not been done. Even during the course of hearing today we have asked the learned Special Prosecutor for NAB about the leave granting order and/or restraining order, if any, passed by the Supreme Court but he has not produced any such order for perusal of this Court. In this scenario, we are of the view that acquittal earned by respondent No.4 from the trial Court and upheld by the Appellate Court still holds the field.

18. There is admittedly a registered sale deed in favour of the petitioner which is a title document. We are of the firm opinion that unless and until operation of judgment of the High Court of Balochistan dated 28.08.2020 is suspended or stay against transfer or alienation of the property in question is granted by the Supreme Court, there stands no legal impediment in the way to seek removal of any restriction placed on the property purchased by the petitioner from respondent No.4 who succeeded in earning an acquittal from the learned trial Court that was maintained by the High Court in appeal. The moment final judgment in the trial Court was announced, restriction under section 23 *ibid* came to an end and became inoperative, therefore, respondent No.4 was free to transfer the property in question in the exercise of his rights guaranteed by Articles 23 and 24 of the Constitution of Islamic Republic of Pakistan, 1973. Therefore, we cannot refuse a relief in this case in absence of any order passed by the Supreme Court restricting transfer of property, merely on the assertion that NAB has filed a petition for leave to appeal.

19. For the foregoing reasons, we ***allow*** this writ petition with a direction to respondent No.3 to remove the restriction placed on the property in question, enter name of the petitioner in his official record and provide him a copy of the GLR in accordance with law within ***thirty days*** of presenting a certified copy of this judgment unless otherwise the NAB obtains and produces before the aforementioned respondent any order passed by the Supreme Court restricting such transfer. There shall be no order as to costs.

((**ALI BAQAR NAJAFI**)
JUDGE

((**RAHEEL KAMRAN**)
JUDGE

Approved for Reporting.

JUDGE

JUDGE