

IN THE SUPREME COURT OF PAKISTAN

(Review Jurisdiction)

Present

Mr. Justice Iftikhar Muhammad Chaudhry, ACJ.

Mr. Justice Rana Bhagwandas

Mr. Justice Muhammad Nawaz Abbasi

CRIMINAL REVIEW PETITION NO. 44 OF 2003.

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CRIMINAL MISC. APPLICATION NO. 230 OF 2003.

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CRIMINAL ORIGINAL PETITION NO. 41 OF 2002.

*(On review from the judgment/order dated
08.05.2003 passed by this Court in Cr. Misc.
Appeal No.27 of 2001)*

The State through

National Accountability Bureau, Islamabad. Petitioner

Vs.

Haji Nasim-ur-Rehman Respondent.

*For the petitioner : Mr. Naveed Rasul Mirza, ASC.
Mr. M.S. Khattak, AOR.*

*For the respondent : Mr. Fakhr-ud-Din G. Ibrahim, Sr. ASC.
Mr. Yahyah Afraidi, ASC.
Mr. Mehr Khan Malik, AOR.
Respondent (in-person).*

Date of hearing : 16.09.2004.

ORDER

IFTIKHAR MUHAMMAD CHAUDHRY, ACJ. – *Haji Nasim-ur-*

*Rehman (respondent son of Haji Anwar-ur-Rehman was proceeded
against by the National Accountability Bureau (herein after referred
to as ‘NAB’) for accumulating/acquiring immense wealth/assets,
disproportionate to his known sources of the income, under Section 18(g)
read with Section 24 of the National Accountability Bureau Ordinance,
1999 (herein after referred to as ‘NAB Ordinance’) before the*

Accountability Court Peshawar. As he did not appear before the Court in response to notice issued to him, therefore, reference under Section 31-A of the NAB Ordinance was submitted against him on 3rd March 2001. Learned Trial Court convicted/ sentenced him to three years R.I. on 12th March 2001. He preferred Criminal Appeal No.3 of 2001 before the Peshawar High Court, Peshawar, through attorney, which was dismissed in limine on 19th June 2001. Being dissatisfied from the order of the High Court respondent preferred a petition for leave to appeal under Article 185(3) of the Constitution of Islamic Republic of Pakistan (herein after referred to as 'the Constitution') before this Court through his attorney namely Fazal Mehmood. As he had not surrendered therefore, petition filed by him was found to be not maintainable under Order XXIII Rule 8 of the Supreme Court Rules, 1980 (herein after referred to as 'Rules, 1980'), and it was returned to him by the office. Against the office objection, Mr. M.A. Qureshi, AOR for respondent Nasim-ur-Rehman, preferred Misc. Appeal under Order V Rule 3 of the Rules, 1980. On the appeal, same objection was raised and office solicited orders as to whether it may be returned to the respondent until he surrenders or the same should be put up for hearing in Chamber. However, Misc. Appeal was entertained, and was disposed of being Appeal No.27 of 2001 finally on 26th June 2002. Relevant para from the order is reproduced herein below:-

"I have heard Mr. K.M.A. Samdani Sr. ASC at length and in the peculiar circumstances of the case, I direct that this petition be registered as Cr. Misc. Appeal under Order V Rule 3, Supreme Court Rules, 1980. Adverting to the merits of the case, it is obvious that unless petitioner surrenders, no relief can be granted to him. As soon as he surrenders himself, he can move bail application before the competent court, which shall

decide the same on its own merits, because there is no bar in the way of the petitioner to seek any relief under the law and none can be estopped to have recourse to the legal remedies available to a citizen of Pakistan.

It was seriously complained that NAB authorities and the Police functionaries are unnecessarily harassing the family members of Haji Nasim-ur-Rehman including his old father, brothers wife and children. It is not known as to when and how they would adopt a humane attitude. This is a peculiar course of action available with the police functionaries to coerce and harass the family members who are not at all at fault. Obviously they cannot be made a scapegoat for the failure of the authorities to trace the real culprit out or the fugitive from the law. I have taken a serious notice of this particular aspect of the instant case, therefore, I direct the NAB authorities as well as the police officials not to coerce or harass the family members of the petitioner Haji Nasim-ur-Rehman in any manner. They are further directed not to act or proceed otherwise than strictly in accordance with law. Disposed of.”

It is pertinent to note that respondent, during hearing of above Misc. Appeal, did not surrender as evident from the order.

2. *Later on, Haji Nasim-ur-Rehman preferred a petition under Article 204 of the Constitution in Criminal Misc. Appeal No. 27 of 2001, complaining that despite directions contained in the order dated 26th June 2002, not to coerce and harass in any manner his family members, his father has been arrested, therefore, besides seeking his release from custody, restraint order was solicited against NAB for not causing the arrest of any other family member. On 1st October 2002 following order was passed on this Misc. Application:-*

“In terms of order dated 26th of June 2002, an unambiguous direction was issued by this Court that no family member of the petitioner should be harassed or victimized by NAB authorities in any manner and that

no action otherwise than in accordance with law shall be taken. Notwithstanding the aforesaid order, NAB authorities had arrested father of Haji Nasim-ur-Rehman and that is why notice was issued to Mr. Naveed Rasul Mirza to appear in person and it was once again reiterated that NAB authorities should not violate the restraint order of this Court qua the family members of the petitioner.

Mr. K.M.A. Samdani, Senior ASC informs that old and infirm father of the petitioner has been enlarged on bail by Peshawar High Court and submits that previous orders of this Court were violated by the NAB authorities.

Mr. Naveed Rasul Mirza, Prosecutor General NAB has apprised us about the signing of a consolidated Reference against the father, brothers and nephews of the petitioner.

In the first instance after passing of the order by this Court, if at all, NAB authorities wanted to nab the father of the petitioner, they ought to have taken this Court in to confidence. Before proceeding further with the matter, we deem it appropriate to examine the entire record giving rise to Reference which is still in the pipeline, and direct that Anwar-ur-Rehman, father, Masood-ur-Rehman, Mujeeb-ur-Rehman (brothers) and wife and children of the petitioner shall not be arrested or harassed by NAB authorities.

Relist on 14th October 2002.”

Subsequently on different dates, matter was taken up but adjourned for one or the other reason.

3. *However, on 8th May 2003, impugned order was passed in Criminal Misc. Appeal No.27 of 2001, although it had already been finally disposed of on 26th June 2002. Relevant paras there from are reproduced herein below:-*

“Considering the case from all angles and the salient features emerging from the instant case, we are of the view that it is a fit case for interference. Accordingly this appeal is allowed, with the result that order dated 19th of June 2001 challenging the conviction and

sentence awarded to petitioner under the NAB Ordinance by the Accountability Court of the Peshawar High Court is set aside with the result that petitioner's appeal shall be deemed to be still pending before the Peshawar High Court. Petitioner is directed to surrender himself before the Peshawar High Court, and his appeal shall be decided within one month. Similarly, the Accountability Court shall also decide the reference pending against the petitioner within 30 days positively from today.

Meanwhile petitioner Haji Nasim-ur-Rehman shall not be arrested by NAB/or any agency without prior permission of this Court, subject to his furnishing security in the sum of Rs. fifty lacs (Rs.50,00000/-) with one surety in the like amount to the satisfaction of the Registrar of the Peshawar High Court."

Meanwhile, notice for contempt of Court was also issued to NAB against which it preferred ICA, which is pending for decision and simultaneously instant review petition has been filed.

4. *Learned State Counsel on behalf of petitioner contended that:-*

- a) Order dated 8th May 2003 has been passed erroneously in Criminal Misc. Appeal No.27 of 2001 as it stood disposed of on 26th June 2002, therefore, it deserves to be recalled.*
- b) In Criminal Misc. Application order dated 16th September 2001, passed by Peshawar High Court, Peshawar, dismissing the appeal of respondent against the judgment of the Accountability Court dated 14th March 2001, could not have been set aside as against this order, petition for leave to appeal was never filed nor leave was granted and due to such error on the face of record, impugned order is not sustainable.*

- c) *Respondent was not entitled to any relief as he did not surrender in compliance of the conviction order passed by the Accountability Court and maintained by Peshawar High Court, dated 2nd April 2001 and 19th June 2001, respectively and even before this Court on 26th June 2002, when Criminal Misc. Appeal No.27 of 2001 was disposed of finally, therefore, granting relief to a person who is fugitive from law, is unwarranted in the eyes of law, therefore, all pervading bail order passed in favour of respondent, may be recalled, allowing the petitioner to proceed against him in accordance with law.*
- d) *The respondent being involved in the criminal cases, therefore he was not entitled to endless protection as has been observed in the impugned order that without the permission of the Court he shall not be arrested by the NAB or any agency, as such observations being contrary to settled principles of law deserve to be reviewed.*

5. *On the other hand Mr. Fakhr-ud-Din G. Ibrahim, learned counsel for respondent contended that:-*

- i) *This petition is not maintainable because vide order dated 8th May 2003, the order of the Peshawar High Court, dated 19th June 2001 whereby it declined to entertain the appeal against the judgment of the Accountability Court has been set aside and in post remand proceedings, learned Peshawar High Court has set aside the order of the Accountability Court-III, dated 2nd April 2001 and has remanded the case to the Accountability Court where the trial of the respondent is pending,*

therefore, in such situation, review of the impugned judgment is unwarranted, as such petition be dismissed as having become infructuous.

- ii) *The superior Courts have encouraged the decisions of the cases on merits and as the respondent was convicted by the Accountability Court No.III in absentia vide judgment dated 2nd April 2001, and after the remand of the case, matter is being examined presently by the Accountability Court on merits, as in the meantime, no stay order was obtained by the petitioner, therefore, the order, which is just, reasonable and fair, needs no interference under the garb of argument that the order dated 8th May 2003 is without jurisdiction or illegal.*

Reliance in this behalf was placed by the learned counsel upon the judgments reported as Raunaq Ali v. Chief Settlement Commissioner (PLD 1973 SC 236) and Province of the Punjab v. S. Muhammad Zafar Bukhari (PLD 1997 SC 351).

- iii) *Respondent is not fugitive from law as during hearing of the Cr. Misc. Appeal No.27 of 2001, he surrendered before the Court on 21st April 2003, therefore, on having fulfilled the requirement of law, he has been admitted to bail subject to his furnishing security in the sum of Rs.fifty lacs (Rs.50,00000/-) with one surety, therefore, merely on account of error committed by the office in enlisting the Cr.O.P.41 of 2000, instead of Cr. Misc. Application No.27/2001, respondent cannot be penalized.*

6. We have heard parties counsel and gone through the relevant record carefully. The narration of the facts noted herein above manifestly makes it clear that:-

- 1) Criminal petition for leave to appeal filed by respondent against the judgment of the Peshawar High Court, Peshawar passed in Cr. Ehtesab Appeal No.3 of 2001, was not entertained by the office and the order questioning the non-entertainment of Cr.PSLA dated 22nd August 2001 was kept intact by disposing of Cr. Misc. Appeal No.27 of 2001, vide order dated 26th June 2002, relevant para therefrom has already been reproduced herein above, meaning thereby that in petition for leave to appeal the judgment of the Peshawar High Court, dated 19th June 2001 was not set aside.
- 2) Allegedly NAB authorities violated the order dated 26th June 2002 by causing the arrest of father of respondent Nasim-ur-Rehman, therefore, for initiating proceedings of contempt of Court Criminal Orig. Petition being No.41 of 2002 was moved on 14th September 2002. A perusal of record reveals that in that Orig. Petition, grievance in respect of causing the arrest of detainee Anwar-ur-Rehman was highlighted. For reference contents of the prayer clause reads as follows:-

“1. The Detenue Anwar-ur-Rehman may kindly be released from the illegal detention/custody and detaining authorities may be directed not to arrest the other family members of the petitioner including his wife, children, brothers and nephews till the final

decision of the case. Any other appropriate relief deemed fit kindly be granted to the petitioner/detenué.

2. It is also prayed that the family members of the petitioner including his wife, children, brothers and nephews may not kindly be arrested without prior permission of this Honourable Supreme Court.

3. In peculiar circumstances of the case proceedings under contempt may kindly be initiated against the respondent in view of violation of this Honourable Court order dated 26.6.2002 in the interest of justice.”

It is interesting to note that no assertion in respect of the case of respondent Nasim-ur-Rehman was made in the contempt application but surprisingly, on 16th April 2003, an application for fixation of the Criminal Petition and providing protection against harassment and arrest of the respondent without surrendering before this Court was filed, which was ordered to be fixed by the learned Single Judge before the Bench on 21st April 2003 with direction to office to put up the relevant file of Criminal Petition, filed by respondent in the Court on the said date. A perusal of order dated 21st April 2003 reveals that respondent surrendered himself before the Court with his counsel and the case was postponed for 23rd April 2003. On this date, arguments were heard and the judgment was announced on 8th May 2003. Relevant para therefrom has already been reproduced herein above.

7. A perusal of judgment under review reveals that following errors are apparent on the face of record:-

- 1) Order of the Peshawar High Court dated 19th June 2001 declining to entertain the appeal of the respondent against the order of Accountability Court has been set aside, despite*

of the fact that petition for leave to appeal was not fixed nor its notice was given to State, therefore, without granting leave to appeal, as is required under the Constitution, relief was granted to the respondent for which he was not entitled because he has not surrendered as required under the law. .

- 2) As the Criminal Petition filed by the respondent Haji Nasim-ur-Rehman was not entertained in view of final order dated 26th June 2002, passed in Cr. Misc. Appeal No.27 of 2001, the respondent was not entitled to pre-arrest bail because his grievance in the contempt application was in respect of arrest of his father and causing harassment to his other family members by the NAB authorities.*
- 3) The Criminal Petition for leave to appeal filed by respondent was not enlisted for hearing on 23rd April 2003, therefore, the State had been condemned unheard.*
- 4) In Criminal Original Petition, the Accountability Court was directed to decide the reference pending before it against the respondent, expeditiously, although no proceedings in respect of the said reference were instituted before the Peshawar High Court or before this Court.*
- 5) In contempt proceedings, protective bail was granted to the respondent by making direction to the NAB or any other agency not to arrest the respondent without prior permission of this Court.*

8. It is important to note that in Criminal Original Petition, respondent had never prayed for grant of reliefs, which have been given to him as it is

*indicative from the above synopsis of the orders. Besides it, on appearance of the respondent, he was liable to be taken into custody because he was a convict but surprisingly, he was allowed to go scot free as is evident from the order dated 21st April 2003. It may also be noted that according to Order XXIII Rule 8 First Proviso of the Rules, 1980, it is obligatory upon the convict, who approaches the Court that first of all, he should surrender to the order of imprisonment, meaning thereby that on surrendering before the Court, he should be taken into custody and then the Court might order his release on bail and if such person is not taken into custody or not admitted to bail, then he will be deemed to be fugitive from law and would not be entitled to any relief as has been held in the case of **Hayat Bakhsh v. State** (PLD 1981 SC 265).*

9. *Learned counsel appearing for petitioner stated that in the case of **Chan Shah v. The Crown** (PLD 1956 FC 43) it has been held that the Court is not supposed to act in aid of a person who has no respect for the law, as according to him, the respondent being fully aware that he had been convicted/sentenced to three years R.I. by the Accountability Court on 12th March 2001 had not surrendered to the order of imprisonment, despite the fact that his appeal was also dismissed by the Peshawar High Court, having found it not entertainable because it was filed through attorney. Similarly, petition filed by him for leave to appeal was returned to him being not entertainable in terms of Order XXIII Rule 8 of the Rules, 1980 and against the order of declining to entertain the petition, Civil Misc. Application filed on his behalf under Order V Rule 3 of the Rules, 1980 was also disposed of finally on 26th June 2002, wherein it was categorically observed that unless petitioner-Nasim-ur-Rehman surrenders, no relief can be granted to him. It was further observed that as soon as he surrenders himself, he can move bail application before the*

competent Court, who shall decide the same on its own merits because there is no bar in the way of the petitioner to seek any relief under the law and none can be estopped to have recourse to the legal remedies available to a citizen of Pakistan.

10. We are quite in agreement with the view point of the learned counsel and in view of observations in the case of **Chan Shah** (ibid) we are persuaded to observe that besides the convict, AOR or ASC who appeared on his behalf, should have ensured that respondent surrendered to the order of imprisonment and on his arrest the Advocate could have requested for suspension of the sentence of the convict, otherwise, it would be presumed that he is not discharging his duties faithfully. Similarly, in the case of **Hayat Bakhsh** (ibid) this Court after having surveyed the precedent law with regard to the right of a convict, who is fugitive from law observed that “there is considerable weight in the argument that when a convict becomes fugitive before filing a petition for leave to appeal, his petition itself would not be properly constituted”. It was also observed that “if a convict becomes fugitive, he disentitles himself of the relief claimed from the Court. Likewise, if a convict absconds away after filing a petition for leave to appeal, or obtaining bail orders, for this reason as well, he would deprive himself of the relief claimed in the petition”. Similarly in the case of **Awal Gul v. Zawar Khan** (PLD 1985 SC 402), the principle laid down in the case of **Hayat Bakhsh** (ibid) has been reiterated.

11. There is yet another important judgment delivered by this Court in the case of **Benazir Bhutto v. State** (1999 SCMR 1619), in the context of interpretation of Order XXIII, Rule 8 First proviso of the Rules, 1980, it was held as follows:-

“From a bare reading of Rule 8 (ibid) it is apparent that this rule is applicable to petition filed wherein leave to appeal is sought against any order of imprisonment or

fine. The first Proviso to Rule 8 envisages that aid for securing interference by this Court with a judicial order for imprisonment or fine against which leave to appeal is sought, is entertained only when the surrender is first made to order for imprisonment. The above rule is in conformity with the fundamental rule of the administration of justice that persons seeking aid of justice in a criminal case should submit to the due process of justice. Clearly, the Court would not act in aid of person who is a fugitive from justice and the petition filed by such a person against his imprisonment seeking leave to appeal is not entertainable unless and until the condition precedent laid down in the above rule is fulfilled i.e. surrender first, entertainment of petition later. In Chan Shah v. the Crown PLD 1956 FC 43), it was observed:--

“We cannot conceive of a more flagrant violation of this condition than case---like the present---where the individual seeks the interference of the Sovereign to obtain revision of a judicial order, when he is himself engaged in setting that judicial order at naught.”

The concluding passage in the case of Chan Shah (supra) reads thus:--

“ It follows, from what has been said above, that Attorneys and Advocates who appear to present petitions, on the criminal side---other than those which lie as of right--- are under duty to see that they are acting in furtherance of justice. It seem to us that this duty is clearly violated when aid, for securing interference by this Court with a judicial order, is given by these officers of the Court to persons who, to their knowledge, are in contempt, i.e., as fugitives from justice, without at the same time ensuring that such persons conform to the judicial orders applicable to them. In the present case, the minimum requirement, in relation to this Court, was that the Attorney should have taken steps to secure the appearance of the petitioner before this Court on the first day that the petition came up for hearing. He may, at the same time, have moved, through counsel, for an order suspending execution of the High Court sentence. The course adopted by the Attorney in the present case was, in our opinion, not in accordance with his proper duty. “(underlining is mine by way of emphasis).

The decision in the case of Chan Shah supra was rendered when the Rules, 1956 were in force. Rule 5-B of Order XXIV thereof is the corresponding provision of the First Proviso to Rule 8 of Order XXIII of the Rules.”

12. *It may also be noted that in the above noted case, although Misc. Appeal, against the order of Deputy Registrar (Judicial) of this Court was allowed and petition was entertained, in view of the facts and circumstances of the case but as far as principle of law is concerned, it has been highlighted therein.*

13. *There can be no cavil with the proposition as argued by the learned counsel for respondent that this Court has always encouraged decision of cases on merits and if the order is just, reasonable and fair, it needs no interference. To substantiate his argument he has relied upon Raunaq Ali v. Chief Settlement Commissioner (PLD 1973 SC 236) and Province of the Punjab v. S. Muhammad Zafar Bukhari (PLD 1997 SC 351). But in our considered opinion both the judgments otherwise are of no help to him because in these cases, the question of exercise of discretionary jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan was discussed. However, we are inclined to observe that a convict is entitled to relief, if he himself abides by the norms of justice. Apparently in the instant case, the conduct of respondent makes it clear that he was fugitive from law as has been pointed out herein above, therefore, he had no right to claim relief from the Court in his favour because otherwise it would amount to rewarding him for remaining absconder. With utmost respect at our command, we are constrained to hold that in view of facts and circumstances of the case, respondent was not entitled to the relief, which was allowed to him vide order under review and as per the synopsis of the order reproduced herein above, the judgment being contrary to the principles laid down in the cases of Chan Shah, Hayat Bakhsh, Awal*

Gul, and Benazir Bhutto (ibid), as well as to statutory provisions of law i.e. Order XXIII Rule 8 of the First Proviso of the Rules, 1980, shall be deemed to have been given 'per incuriam'.

14. In the different dictionaries like **Jewett's Dictionary of English Law—Second Edition**, the definition of the 'judgment in per incuriam' is "the decision given through want of care or a decision which is the result of oversight". In **Bourier's Law Dictionary**, 'judgment in per incuriam' has been defined as "decision given through inadvertence". Similarly in **Bellentine's Law Dictionary –Third Edition**, the word 'judgment in per incuriam' is defined "passed through lack of care". Likewise **Black's Law Dictionary**, defines the expression "judgment in per incuriam" as follows:-

"Per incuriam (per in-kyoor-ee-am) adj. (of a judicial decision) wrongly decided, usu, because the Judge or Judges were ill-informed about the applicable law.

"As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned, so that in such cases some features of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must in our judgment, consistently with the stare decisis rule which is an essential part of our law, be of the rarest occurrence." Rupert Cross & J.W.Harris President in English Law 149 (4th Ed. 1991)."

In "**Words and Phrases**" First Edition by D.Varagarajan, the expression "per incuriam" has been defined as follows:-

"A decision would be treated as given per incuriam when it is given in ignorance of term of statute, or a rule having the force of law. An order passed without reference to the relevant provisions of the Act and

without any citation of authority is per incuriam (see Municipal Corporation of Delhi v. Gurnam Kaur AIR 1989 SC 38). In the case of Punjab Land Development and Reclamation Corporation Ltd. v. Presiding Officer (1990) 77 FJR 17; (1990) 3 SCC 682, the Supreme Court explained the principle of per incuriam and held that the Latin expression per incuriam means through inadvertence. A decision can be said to be given per incuriam when a High Court has acted in ignorance of the decision of the Supreme Court.”

In Whartan’s Law Lexicon, the word ‘per incuriam’ has been defined as follows:-

“Per incuriam through want of care. An order of the Court obviously made through some mistake or under some misapprehension is said to be made per incuriam”

This Court in the case of Province of the Punjab v. Dr. S. Muhammad Zafar Bukhari (PLD 1997 SC 351) had an occasion to examine the scope of ‘per incuriam’. As per facts of this case, Dr. S.Muhammad Zafar Bukhari and others instituted a writ petition in the Lahore High Court, Lahore being aggrieved of amendment in the Punjab Health Department Service Rules, 1979. The Writ Petition was accepted holding that the writ petitioners are eligible to be considered for promotion as Professors. The Government approached this Court, inter alia, on the strength of arguments that the matter, decided by the High Court, pre-imminently falls within the exclusive jurisdiction of the Service Tribunal and High Court had wrongly assumed the jurisdiction. Reliance was placed in support of the proposition on NWFP and another v. Sheikh Muzffar Iqbal (PLD 1994 SC 539). This Court after examining the judgment observed that it was not brought to the notice of the learned Judge of the High Court, thus the direction issued, could have not been made, therefore, the judgment of

the High Court was declared to be 'per incuriam'. Relevant para therefrom is reproduced herein below for convenience:-

“A decision is given per incuriam when Court has acted in ignorance of a previous decision of its own or of a Court of co-ordinate jurisdiction which covered the case before it in which case it must decide, which case to follow or when it has acted in ignorance of a House of Lords' decision, in which case it must follow the decision; or when the decision is given in ignorance of the term of a statute or rule having statutory force. A decision should not be treated as given per incuriam, however, simply because of a deficiency of parties, or because the Court had not the benefit of the best argument and, as a general rule, the only cases in which decisions should be held to be given per incuriam are those given in ignorance of some inconsistent statute or binding authority.”

The upshot of above discussion is as follows:-

1) **Criminal Review Petition No. 44 of 2003** *is allowed in the following terms:-*

- i) *As has been observed herein above, respondent Nasim-ur-Rehman had succeeded in getting relief contrary to the law discussed herein above, as well as provisions of the Rules 1980 and the consistent practice, prevalent for the hearing of petition under Article 185(3) of the Constitution, being a person fugitive from law, he had not surrendered to the order of imprisonment, passed by the Accountability Court on 12th March 2001, therefore, he was not entitled to the relief, which has been extended to him.*
- ii) *We are conscious of the fact that it finds mention in order dated 21st April 2003, passed in Criminal Original Petition No.41 of 2000, that respondent Nasim-ur-Rehman*

had surrendered but record is silent whether he was taken into custody or not. Be that as it may, because the judgment under review suffers from number of errors on the face of record, which have been highlighted herein above, therefore, following the principles laid down in the authorities, discussed herein above, the order under review dated 8th May 2003 calls for interference, notwithstanding the fact that on post remand proceedings, learned Peshawar High Court, Peshawar accepted the Ehtesab Appeal No.3 of 2001, filed by respondent Haji Nasim-ur-Rehman and case had been remanded on 4th June 2003, to the Accountability Court for fresh trial, in accordance with law, under Section 31-A of the NAB Ordinance 1999.

- iii) Because the Courts are required to do justice though the heaven may fall, as has been enshrined in maxim fiat-justitia-ruat-coelum, therefore, for sake of administration of justice the portion of the order under review, whereby the judgment of the Peshawar High Court, dated 19th June 2001 was set aside and case was remanded for hearing of the appeal, is kept intact.*
- iv) However, grant of unbridled protection to the petitioner for not arresting him by the NAB authorities or any other agency without prior permission of the Court, is recalled, with the clarification that if the respondent is involved in any criminal case, he can be arrested and interrogated in accordance with law and no prior permission shall be required to be obtained from this Court.*

v) *Nevertheless, the respondent shall continue to remain on bail for a period of two weeks. In the meantime, he will apply to the Accountability Court for bail-before-arrest but if he fails to get the bail, he shall be dealt with by the Accountability Court in accordance with law.*

2. **Criminal Misc. Application No. 230 of 2003** *stands disposed of because no order is required to be passed as the order, whereby respondent has been granted unlimited protection, has been recalled.*

3. **Criminal Original Petition No. 41 of 2002** *shall remain pending till the decision of the I.C.A. filed by the NAB against the order, in pursuance whereof notices of contempt of Court have been issued to its Prosecutor General.*

J.

J.

*Announced in open Court this the
2nd day of November 2004.*

J.

Judge.

APPROVED FOR REPORTING.

Irshad

CRIMINAL REVIEW PETITION NO. 44 OF 2003 ETC.

The Criminal Review Petition does not contain the certain facts in detail which would need to be made part of the judgment. Haji Nasimur Rehman was convicted under Section 31-A of NAB Ordinance 1999 by Accountability Court at Peshawar, on 2.4.2001 and he without surrender before the law, filed an appeal in the Peshawar High Court which was dismissed in limine on 19.6.2001 being not maintainable. The convict then, without surrender, filed a Criminal Petition for leave to appeal before this Court against the dismissal of his appeal by the High Court but the same was not entertained by the office, whereupon he filed a Criminal Misc. Appeal No. 27/2001 against the above order of Assistant Registrar which was placed before the then Hon'ble Chief Justice in chamber at Lahore and the Hon'ble Chief Justice disposed of this miscellaneous appeal in chambers with direction for registration of criminal petition. However, during the hearing of this miscellaneous appeal, it was pleaded that NAB and police authorities were causing harassment to the family members and old parents of convict, who were not accused in any case and the Hon'ble Chief Justice directed the concerned authorities not to harass the family members of convict. Subsequently, Criminal Original No. 41 of 2002 was filed wherein it was complained before the Court that the order dated 26.6.2002 passed by this Court in Crl. Misc. Appeal No. 27 of 2001 was not being complied with by the concerned authorities. Mr. Naveed Rasul Mirza, Prosecutor General, NAB, while appearing in criminal original, before the Bench headed by the then Hon'ble Chief Justice of Pakistan, gave assurance to the Court that the family members of convict would not be harassed. However, the criminal original petition No. 41/02 came up for hearing on 2.10.2002,

17.10.2002, 28.10.2002, 19.11.2002 and then on 21.4.2003, on which date the convict surrendered before this Court and a notice was issued to prosecutor General NAB for 23.4.2003. The criminal original was finally heard on 23.4.2003 and order was announced on 8.5.2003 as under :-

“Haji Nasim ur Rehman was proceeded against by the NAB authorities, and Reference No. 2 of 2001 was filed against him under section 24 of the NAB Ordinance but on account of his absence from the trial Court, vide judgment dated 2nd of April 2001 of the Accountability Court III Peshawar, petitioner was convicted under section 31-A of the NAB Ordinance, and was sentenced to undergo RI for three years in absentia. An appeal was preferred before the Peshawar High Court but the same was dismissed on 19.6.2001 on the ground that petitioner did not surrender before the High Court.

Petitioner has surrender himself before this Court on 21st of April 2003, and prays that by entertaining the instant petition by this Court, petitioner’s appeal be ordered to be heard on merits by the High Court. Mr. Muhammad Munir Peracha ASC for the petitioner submits that co accused of the petitioner namely Haji Anwar ur Rehman, Masud ur Rehman, Majib ur Rehman, Faisal Saleem and Asad Saleem have been acquitted by the learned Judge of the Accountability Court III Peshawar on 18.1.2003 and 11.2.2003. It is contended by learned counsel that the Accountability Court at Peshawar be directed to hear and dispose of the pending reference against the petitioner expeditiously in the light of the directions of this Court contained in Haji Kabir Khan’s case.

Considering the case from all angles and the salient features emerging from the instant case, we are of the view that it is fit case of interference. Accordingly, this appeal is allowed, with the result that order dated 19th of June 2001 challenging the conviction and sentences awarded to petitioner under the NAB Ordinance by the Accountability Court of the Peshawar High Court is set aside with the result that petitioner’s appeal shall be deemed to be still pending before the Peshawar High Court. Petitioner is directed to surrender himself before the Peshawar High Court, and his appeal shall be decided within one month. Similarly, the Accountability Court shall also decide the reference pending against the petitioner within 30 days positively from today.

Meanwhile, petitioner Haji Nazismur Rehman shall not be arrested by NAB/ or any agency without prior permission of this Court, subject to his furnishing security in the sum of Rs. Fifty lac (Rs. 50,00,000/-) with one surety in the like amount to the satisfaction of the Registrar of the Peshawar High Court.”

2. *The criminal original No. 41 of 2002 was fixed in the cause list for 23.4.2003 and the order dated 8.5.2003 was also passed in criminal original but the concerned official of Court instead of preparing the title of Criminal Original No. 41/02, on the order inadvertently prepared the title of Criminal Miscellaneous Appeal No. 27 of 2001 and this clerical mistake created confusion and complication. Be that as it may, the errors and defects pointed out in the order dated 8.5.2003 would render it liable to review and in addition to the above, certain facts would also need clarification as under:-*

- a) The Criminal Original No. 41 of 2001 was inadvertently treated as Criminal Miscellaneous Appeal No. 27 of 2001.
- b) Criminal Petition for leave to appeal against the judgment of Peshawar High Court by virtue of which appeal filed on behalf of Haji Namimur Rehman against his conviction and sentence under Section 31-A of NAB Ordinance, 1999, was dismissed in limine, was pending before this Court but was not fixed for hearing with criminal original.
- c) The bail was granted to the convict, after he surrendered before this Court on 21.4.2003.
- d) The convict was not granted omnibus or general bail rather it was a conditional bail to enable him to surrender before the High Court which had to continue pending disposal of appeal and reference.

3. *With the above addition, I agree with the judgment.*

Muhammad Nawaz Abbasi,
J.(8)

IN THE SUPREME COURT OF PAKISTAN

(Review Jurisdiction)

Present

Mr. Justice Iftikhar Muhammad Chaudhry, ACJ.

Mr. Justice Rana Bhagwandas

Mr. Justice Muhammad Nawaz Abbasi

CRIMINAL REVIEW PETITION NO. 44 OF 2003.

&

CRIMINAL MISC. APPLICATION NO. 230 OF 2003.

&

CRIMINAL ORIGINAL PETITION NO. 41 OF 2002.

*(On review from the judgment/order dated
08.05.2003 passed by this Court in Cr. Misc.
Appeal No.27 of 2001)*

The State through

National Accountability Bureau, Islamabad. Petitioner

Vs.

Haji Nasim-ur-Rehman Respondent.

*For the petitioner : Mr. Naveed Rasul Mirza, ASC.
Mr. M.S. Khattak, AOR.*

*For the respondent : Mr. Fakhr-ud-Din G. Ibrahim, Sr. ASC.
Mr. Yahyah Afraidi, ASC.
Mr. Mehr Khan Malik, AOR.
Respondent (in-person).*

Date of hearing : 16.09.2004.

*Kindly fix the above titled case for announcement of judgment before the
Court today at 9.30 a.m., as directed by Hon'ble Acting Chief Justice. Notices to
concerned parties may kindly be issued as well.*

P.S. TO H.A.C.J.

DR(J)

CA(FIXTURE)

IN THE SUPREME COURT OF PAKISTAN

(Review Jurisdiction)

Present

Mr. Justice Iftikhar Muhammad Chaudhry, ACJ.

Mr. Justice Rana Bhagwandas

Mr. Justice M. Javed Buttar

CRIMINAL REVIEW PETITION NO. 44 OF 2003.

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CRIMINAL ORIGINAL PETITION NO. 41 OF 2002.

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The State through

National Accountability Bureau, Islamabad. Petitioner

Vs.

Haji Nasim-ur-Rehman Respondent.

For the petitioner : Mr. M.S. Khattak, AOR.

*For the respondent : Mr. Arshad Ali Chaudhry,
on behalf of Mr. Mehr Khan Malik, AOR.*

Date of hearing : 19.01.2005.

ORDER

IFTIKHAR MUHAMMAD CHAUDHRY, ACJ. *Reserved*

*judgment in above titled case is announced today in open Court in
presence of counsel for the parties, noted herein above.*

ACJ.