

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Asif Saeed Khan Khosa
Mr. Justice Sardar Tariq Masood
Mr. Justice Tariq Parvez

Civil Appeal No. 118 of 2016

(Against the judgment dated 09.12.2015 passed by the Islamabad High Court, Islamabad in Writ Petition No. 3980 of 2015)

Abdul Hameed Dogar

...Appellant

versus

Federal Government through the Secretary, Ministry of Interior and two others

...Respondents

For the appellant:	Syed Iftikhar Hussain Gilani, Sr. ASC
For respondent No. 1:	Mr. Salman Aslam Butt, Attorney-General for Pakistan
For respondent No. 2:	Mr. Farogh Nasim, ASC
For respondent No. 3:	Nemo.
Dates of hearing:	23.02.2016 & 24.02.2016

JUDGMENT

Asif Saeed Khan Khosa, J.: A criminal case against respondent No. 2 namely General (Retd.) Pervez Musharraf on the charge of committing high treason is presently pending trial before a Special Court constituted under the Criminal Law Amendment (Special Court) Act, 1976 and, therefore, we shall be circumspect in what we observe in the present judgment lest any observation made by us may prejudice the trial of the said case and shall endeavor to confine our comments mainly to what has already

been said or declared on the subject by different courts of the country, including this Court, and the legal position relevant to the issues raised through the present appeal.

2. During the pendency of his trial before the Special Court respondent No. 2 had filed a miscellaneous application seeking a direction to the Federal Government to investigate all those persons who had aided or abetted the said respondent in allegedly committing the crime in issue and to submit an amended or additional statement as well as a statement of formal charges before the Special Court against such other persons in terms of sections 5(1) and 5(3)(a) of the Criminal Law Amendment (Special Court) Act, 1976. On 21.11.2014 the said application filed by respondent No. 2 was disposed of by the Special Court through a majority decision and a direction was issued to the Federal Government to treat Mr. Shaukat Aziz and Mr. Zahid Hamid, who held the offices of the Prime Minister and the Federal Minister for Law on 03.11.2007 respectively, and the present appellant namely Mr. Abdul Hameed Dogar, a Judge of this Court on the said date, as co-accused of respondent No. 2 and to submit an amended or additional statement as well as a statement of formal charges in terms of the above mentioned provisions of the Criminal Law Amendment (Special Court) Act, 1976 against them. The present appellant challenged the said order passed by the Special Court before the Islamabad High Court, Islamabad through Writ Petition No. 5010 of 2014 and the said writ petition was heard by a learned Division Bench of that Court along with some other writ petitions and Intra-Court Appeals. During the pendency of those matters a consensus emerged between all the parties, including the Federal Government, that the role of "any person" as an aider or abettor of respondent No. 2 may be properly investigated "at large" and that all such persons may be provided "full opportunity of hearing" by the investigating agency. On the basis of such consensus the learned Division Bench of the Islamabad High Court, Islamabad set aside the impugned order dated 21.11.2014 passed by the Special Court and disposed of all the matters, including the writ

petition filed by the present appellant, on 10.11.2015 with a clarification that "The parties to the present litigation shall not be prejudiced by the impugned order or any adverse view drawn therein. Likewise, I.O, Investigating Agency or JIT whatever the case may be shall not be influenced by such observations made in the impugned order."

3. The ensuing date of hearing before the Special Court was 27.11.2015 and on that date the Special Court passed an order which has generated the controversy that has been brought before this Court through the present appeal. The relevant portions of the order passed by the Special Court on 27.11.2015 are reproduced below:

"3. Mr. Muhammad Akram Sheikh, while appearing on behalf of the prosecution stated before us in clear and unequivocal terms that fresh investigation in this case has to take place. -----

4. From the contents of the judgment it appears that all the parties gave consent before the Islamabad High Court that the matter be reinvestigated as the investigation that was carried out earlier was not conclusive and hence defective. -----

6. Let the process of the investigation commence. The Investigation Team shall record statements of Mr. Pervaiz Musharraf, Mr. Justice Abdul Hameed Dogar, Mr. Shoukat Aziz and Mr. Zahid Hamid afresh. -----"

4. The appellant assailed the said order passed by the Special Court before the Islamabad High Court, Islamabad through Writ Petition No. 3980 of 2015 but the said writ petition was dismissed by the said Court *in limine* on 09.12.2015. Hence, the present appeal by leave of this Court granted on 27.01.2016.

5. We have heard the learned counsel for the parties at some length and have perused the relevant record of the case with their assistance. It has been pointed out by the learned counsel for the appellant that it was for the first time that through the order dated 21.11.2014 the Special Court had introduced the appellant as an accused person in the case of high treason which order had

subsequently been set aside by the Islamabad High Court, Islamabad on 10.11.2015 but despite setting aside of its earlier order dated 21.11.2014 the Special Court had reintroduced the appellant as a suspect in the said criminal case through its order dated 27.11.2015 and a writ petition filed by the appellant against the said order had been dismissed by the Islamabad High Court, Islamabad on 09.12.2015. It has been argued by the learned counsel for the appellant that after setting aside of its order dated 21.11.2014 the Special Court was left with no basis or material whatsoever for reintroducing the appellant as a suspect in the relevant case for the purposes of investigation *qua* his involvement. It has also been contended by the learned counsel for the appellant that in a number of judgments handed down by this Court as well as by some High Courts it had categorically been held and declared that it was General (Retd.) Pervez Musharraf alone who was responsible for imposition of emergency in the country on November 03, 2007 and that introduction of the appellant as a suspect in the said matter by the Special Court was not only purely speculative in nature but was also based upon no material whatsoever. In support of this contention the learned counsel for the appellant has placed reliance upon the cases of Sindh High Court Bar Association through its Secretary and another v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others (PLD 2009 SC 879), Gen. (R.) Parvez Musharraf v. Nadeem Ahmed (Advocate) and another (PLD 2014 SC 585) and Moulvi Iqbal Haider and others v. Federation of Pakistan through Secretary M/o Law and Justice and others (2013 SCMR 1683). He has further argued that the Special Court had no jurisdiction to add the appellant as a co-accused of respondent No. 2 in the trial of the relevant criminal case instituted by the Federal Government or to direct that the appellant was to be associated with any fresh investigation of the said case to be conducted by an investigating agency. The learned counsel for respondent No. 2 started his arguments by contesting this appeal with reference to some parts of the judgments rendered by this Court in the cases of Justice Hasnat Ahmed Khan and others v. Federation of

Pakistan/State (PLD 2011 SC 680), Gen. (R.) Parvez Musharraf v. Nadeem Ahmed (Advocate) and another (PLD 2014 SC 585) and Ghulam Abbas Niazi v. Federation of Pakistan and others (PLD 2009 SC 866) but he has finally submitted that he has no objection to acceptance of this appeal, setting aside of the impugned order passed by the Islamabad High Court, Islamabad on 09.12.2015 and removal of the names of the appellant and two others from the impugned order passed by the Special Court on 27.11.2015. He has, however, prayed that this Court may clarify that the Federal Government may associate any person with the fresh investigation being conducted into the matter of the alleged commission of high treason. The learned Attorney-General for Pakistan has referred to the provisions of section 5 of the Criminal Law Amendment (Special Court) Act, 1976 and has maintained that in "a case" regarding commission of high treason it lies within the exclusive jurisdiction of the Federal Government to determine as to against whom a complaint is to be forwarded to the Special Court for trial, who is to be included in the list of accused persons to be tried in "the case", what are to be the charges against the persons to be tried and who would be the witnesses to be produced in support of the charges. He has gone on to submit that the Special Court has no jurisdiction to introduce any person to be tried in such a case or to require any person to be associated with investigation of such a case. Upon a query made by the Court the learned Attorney-General has categorically stated that the Federal Government firmly stands by its written comments submitted before the Islamabad High Court, Islamabad in connection with the appellant's Writ Petition No. 5010 of 2014. In the said comments the Federal Government had clearly maintained that the Special Court had no jurisdiction to name the appellant and two others as co-accused of respondent No. 2 and that "This will tend to defeat the ends of justice and trial against the only accused and beneficiary of the Emergency".

6. After hearing the learned counsel for the parties and going through the record of the case we have straightaway observed that

the confusion prevailing with the Special Court as well as the Islamabad High Court, Islamabad over the issue of aiders and abettors of respondent No. 2 in the alleged commission of high treason by him would have been removed or would have become easier to resolve if the relevant extracts of different judgments handed down by this Court and the High Court of Sindh, Karachi read out before us by the learned counsel for the appellant and reproduced in the following paragraphs had been adverted to by those courts.

7. In the case of Sindh High Court Bar Association through its Secretary and another v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others (PLD 2009 SC 879) a 14-member Bench of this Court had categorically held on 31.07.2009 as follows:

"80. Seen in the above perspective, the actions of General Pervez Musharraf dated 3rd November, 2007 were the result of his apprehensions regarding the decision of Wajihuddin Ahmed's case and his resultant disqualification to contest the election of President. Therefore, it could not be said that the said actions were taken for the welfare of the people. Clearly, the same were taken by him in his own interest and for illegal and unlawful personal gain of maneuvering another term in office of President, therefore, the same were mala fide as well. **The statement made in Proclamation of Emergency that the situation had been reviewed in meetings with the Prime Minister, Governors of all the four Provinces, and with Chairman, Joint Chiefs of Staff Committee, Chiefs of the Armed Forces, Vice Chief of Army Staff and Corps Commanders of the Pakistan Army, and emergency was proclaimed in pursuance of the deliberations and decisions of the said meetings, was incorrect.** The Proclamation of Emergency emanated from his person, which was apparent from the words "I, General Pervez Musharraf...." used in it."

(Underlining and bold letters have been supplied for emphasis)

The said portion of the judgment rendered in the case of *Sindh High Court Bar Association* was reproduced and reiterated by another 14-member Bench of this Court in the later case of Gen. (R.) Parvez Musharraf v. Nadeem Ahmed (Advocate) and another (PLD 2014 SC 585) decided on 30.01.2014.

8. In the above mentioned case of Gen. (R.) Parvez Musharraf v. Nadeem Ahmed (Advocate) and another (PLD 2014 SC 585) decided by a 14-member Bench of this Court on 30.01.2014 Jawwad S. Khawaja, J. had, in his concurring separate opinion, concluded as follows regarding the persons placed in the appellant's position:

"15. Nowhere in the above quoted texts is the former Chief Justice mentioned as the cause for declaring the emergency and he was certainly not the only one affected by it. In a narrow context, all judges of the superior courts in office on November 3rd, 2007 were directly affected by the Proclamation of Emergency. The majority of these judges suffered from this act, as they were unlawfully prevented from performing the duties of their Constitutional office. **The remaining judges in the minority who decided to take the unconstitutional oath of office, on the other hand, could be perceived as beneficiaries of the aforesaid act of the petitioner.** -----"

(Underlining and bold letters have been supplied for emphasis)

The difference between an aider/abettor and a beneficiary is quite obvious. A person aiding or abetting another in an act is privy to the act itself but a beneficiary takes benefit or advantage of the act after the event and he may not necessarily be a party to the act itself.

9. In the case of *Sindh High Court Bar Association (supra)* this Court had concluded and declared that emergency had been imposed by respondent No. 2 on 03.11.2007 while acting on his own and in his personal interest. The following extracts from the judgment delivered in that case are relevant in this regard:

"60. From the contents of the letter of the Prime Minister, it cannot be said that he issued any direction to the Armed Forces in terms of Article 245 of the Constitution to act in aid of the civil power, nor the actions of General Pervez Musharraf of 3rd November, 2007 could be said to have been taken or done while acting in aid of the civil power. Even otherwise, the letter was addressed to the President of Pakistan and not to the Chief of Army Staff. But for the sake of argument, it may be stated that even if the letter was addressed to the Chief of Army Staff, it could not be construed to give to the latter any power to take the kind of steps that he took in pursuance of the aforesaid letter. -----
In the instant case too, no power vested in the Chief of Army Staff General Pervez Musharraf under the Constitution and the law to issue Proclamation of Emergency and PCO No. 1 of 2007 on a letter of the Prime Minister written to the President bringing to his notice the national security situation, which was worsening on account of terrorism, extremism, militancy, suicide attacks and

the erosion of trichotomy as a result of suo motu actions being taken by some members of the superior judiciary. If the President, on receipt of such a letter, wanted to take any action including imposition of emergency, the same would have been in terms of constitutional provisions on emergency. **Nowhere the Prime Minister asked the President to take the actions that he took on 3rd November, 2007. In any case, it was not an advice tendered by the Prime Minister in terms of Article 48 of the Constitution. Neither on receipt of such a letter, could the President have authorized Chief of Army Staff to take that kind of steps.** The Constitution does not empower the President to issue an Oath Order, which he did in pursuance of Proclamation of Emergency and PCO No.1 of 2007. Instead of upholding the Constitution in terms of the oath taken by him as member of the Armed Forces he violated the Constitution, suspended it, assumed to himself unconstitutional and illegal powers and imposed upon the country unconstitutional and illegal emergency and PCO No. 1 of 2007. Likewise, in terms of his oath as President of Pakistan, instead of preserving, protecting and defending the Constitution, and performing his functions, honestly, to the best of his ability, faithfully in accordance with the Constitution and the law, and always in the interest of the sovereignty, integrity, solidarity, well-being and prosperity of Pakistan, issued Oath Order, 2007, illegally assumed to himself power to remove Judges of the superior Courts in violation of Articles 2A and 209 of the Constitution, which respectively required the securing of independence of judiciary and the guaranteeing of the tenure of the Judges of the Supreme Court and the High Courts.

80. Seen in the above perspective, the actions of General Pervez Musharraf dated 3rd November, 2007 were the result of his apprehensions regarding the decision of Wajihuddin Ahmed's case and his resultant disqualification to contest the election of President. Therefore, it could not be said that the said actions were taken for the welfare of the people. **Clearly, the same were taken by him in his own interest and for illegal and unlawful personal gain** of maneuvering another term in office of President, therefore, the same were mala fide as well. The statement made in Proclamation of Emergency that the situation had been reviewed in meetings with the Prime Minister, Governors of all the four Provinces, and with Chairman, Joint Chiefs of Staff Committee, Chiefs of the Armed Forces, Vice Chief of Army Staff and Corps Commanders of the Pakistan Army, and emergency was proclaimed in pursuance of the deliberations and decisions of the said meetings, was incorrect. **The Proclamation of Emergency emanated from his person, which was apparent from the words "I, General Pervez Musharraf..." used in it.**

82. As to the constitutionality and the legality of the acts/actions of 3rd November, 2007, General Pervez Musharraf himself, in an interview to a foreign TV news channel (BBC) admitted that he had taken unconstitutional steps. Relevant portion from his interview, as reported in the Daily DAWN of 18th November, 2007 is reproduced below:

The daily DAWN, Islamabad, 18th November, 2007

NO ILLEGAL STEP TAKEN BEFORE NOV.
PRESIDENT:

"Before March, I was very good. Suddenly did I go mad after March or suddenly **my** personality changed, am I Doctor Jekyll and Mister Hyde or what is it?" He said.

"Am I such a person?"

"Please go into the details, the causes. What I am doing? Have I done anything unconstitutional, yes, I did it on Nov. 3.

"Did I do it before? Not once."

85. In the light of the above discussion, the actions of General Pervez Musharraf dated 3rd November, 2007, viz., Proclamation of Emergency, PCO No. 1 of 2007 and Oath Order, 2007, etc. are held and declared to be unconstitutional, illegal, mala fide and void ab initio. -----

176. It has already been held that Abdul Hameed Dogar, J, and other Judges who made oath, or were appointed, in violation of the order dated 3rd November, 2007 passed by a seven-member Bench of this Court in Wajihuddin Ahmed's case were not even de facto Judges, inter alia, on the ground that **the actions taken by General Pervez Musharraf** from 3rd November, 2007 to 15th December, 2007, including the appointments and/or oaths of such Judges, were mala fide as the same were taken by him for his own benefit, and did not fall within the scope of his authority under the Constitution and the law and in any case, they were not taken in the interest of the State, or for the welfare of the people."

(Underlining and bold letters have been supplied for emphasis)

In his separate and concurring opinion recorded in that case Jawwad S. Khawaja, J. had observed as under:

"3. For reasons which have been spelt out in the main judgment, there can be no doubt at all that the aforesaid actions of 3rd November, 2007 were un-Constitutional. **It is for this obvious reason that General Musharraf, lacking legitimate authority abused the office of Chief of Army Staff and relied on the physical force which had been placed under his command.** -----"

(Underlining and bold letters have been supplied for emphasis)

After such conclusions reached and declarations made by this Court in the said case it was for the Federal Government to consider the advisability or otherwise of getting a fresh investigation conducted for tracing out or identifying the aiders and abettors of respondent No. 2 in the matter but it was surely

not for the Special Court or the Islamabad High Court, Islamabad to require or approve a fresh investigation for the search of such phantoms or apparitions.

10. In the subsequent case of Moulvi Iqbal Haider v. Federation of Pakistan & others (Constitution Petition No. D-454 of 2009 decided on 14.10.2010) a learned Division Bench of the High Court of Sindh, Karachi had unmincingly declared as follows:

"11. ----- We are also of the opinion that the proclamation of PCO dated 03.11.2007, promulgated by **Rtd. General Pervaiz Musharraf** clearly shows that **certainly he is the person who is responsible for abrogation and subversion of the Constitution and is liable to be prosecuted for committing high treason.** ---
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(Underlining and bold letters have been supplied for emphasis)

The said judgment passed by the High Court of Sindh, Karachi had been challenged before this Court but a 3-member Bench of this Court had disposed of the civil petition for leave to appeal filed in that regard on 03.07.2013 without interfering with the impugned judgment. A reference in this respect may be made to the case of Moulvi Iqbal Haider and others v. Federation of Pakistan through Secretary M/o Law and Justice and others (2013 SCMR 1683). Later on in the case of Gen. (R.) Parvez Musharraf v. Nadeem Ahmed (Advocate) and another (PLD 2014 SC 585) this Court had noticed in the above mentioned context as under:

"11. During the course of arguments, Raja Muhammad Ibrahim Satti admitted, on Court query, that petitioner General (R) Pervez Musharraf had a notice of the petition filed by Moulvi Iqbal Haider before the Sindh High Court through citation published in Daily Dawn and further that after dismissal of the said petition by the said Court Moulvi Iqbal Haider challenged the order before the Supreme Court in which General Musharraf was represented by him (Raja Muhammad Ibrahim Satti). The case is reported as Moulvi Iqbal Haider v. Federation of Pakistan through Ministry of Law and Justice (2013 SCMR 1683)."

It is not denied that after fixing of the entire and exclusive responsibility of committing high treason upon him by the High Court of Sindh, Karachi respondent No. 2 herein had never

challenged the same before this Court despite having the requisite knowledge in that regard.

11. The following portions of the later judgment handed down by a 14-member Bench of this Court on 30.01.2014 in the case of Gen. (R.) Parvez Musharraf v. Nadeem Ahmed (Advocate) and another (PLD 2014 SC 585) had made the matter even simpler:

"12. The petitioner had proclaimed State of Emergency pursuant to a letter received from the then Prime Minister of Pakistan (letter reproduced in PLD 2009 SC 879 supra at page 1035 para 58). **At this stage, the Court asked him as to whether the Prime Minister advised the President to act in violation of the Constitution to which the answer was no. The Court further asked him whether the Prime Minister had given any advice to impose State of Emergency or the petitioner acted in his own discretion, to which Mr. Satti replied that the petitioner acted in his own discretion.** -----

37. ----- in fact, petitioner's learned counsel frankly admitted, on Court query, first that the then Prime Minister Mr. Shaukat Aziz had written a letter to the President of Pakistan and not to the Chief of Army Staff; second that the Prime Minister had not advised him to impose the State of Emergency rather "**the petitioner acted in his own discretion**". This frank admission by his counsel has further weakened his case for review. How could petitioner in his capacity as Chief of Army Staff or even as President act on his own discretion. He had no power under the law to impose State of Emergency and make Judges of the Supreme Court and High Courts dysfunctional notwithstanding the mandate of Article 48 of the Constitution -----"

(Underlining and bold letters have been supplied for emphasis)

12. We have reproduced above what this Court and the High Court of Sindh, Karachi have already observed and declared in various judgments and such observations and declarations are relevant to the issue of aiders and abettors of respondent No. 2 in the alleged commission of high treason by him brought before us through the present appeal. As the trial of respondent No. 2 for the said offence is presently pending before the Special Court, therefore, we have restrained ourselves from recording our own opinions on the issue lest any opinion expressed by us may prejudice the case of the said respondent before the Special Court. The observations and declarations made by this Court and the

High Court of Sindh, Karachi in the cases mentioned above have already attained finality and they are in the public domain and, thus, any reference to the same by us in the present judgment may not be inappropriate.

13. Another critical aspect of the case in the context of the present appeal is that it was for the first time that through the order dated 21.11.2014 the Special Court had introduced the present appellant and two others as accused persons in the case of high treason against respondent No. 2 which order had subsequently been set aside by the Islamabad High Court, Islamabad on 10.11.2015 but despite setting aside of its earlier order dated 21.11.2014 the Special Court had reintroduced the appellant and two others as suspects in the said criminal case through its order dated 27.11.2015 and a writ petition filed by the appellant against the said order had been dismissed by the Islamabad High Court, Islamabad on 09.12.2015. We have found the learned counsel for the appellant to be quite justified in maintaining that after setting aside of its order dated 21.11.2014 the Special Court was left with no occasion whatsoever for reintroducing the appellant and two others as suspects in the relevant case for the purposes of investigation *qua* their involvement in commission of the alleged offence. Conducting investigation into the matter was surely a prerogative of the Federal Government and the Special Court had no jurisdiction to direct the investigating agency to associate the appellant or any other particular person with such investigation.

14. Section 5 of the Criminal Law Amendment (Special Court) Act, 1976 contemplates commencement of the proceedings of the Special Court through forwarding of a complaint in writing to it by the Federal Government against particular accused person or persons. By virtue of the provisions of section 202 of the Code of Criminal Procedure, 1898, which Code is applicable to a Special Court to some extent by virtue of the provisions of Section 6(1) read with section 2(a) of the Criminal Law Amendment (Special

Court) Act, 1976, a court, on receipt of a complaint of an offence of which it is authorised to take cognizance may postpone the issue of process for compelling the attendance of the person or persons complained against and either inquire into the case itself or direct an inquiry or investigation to be made "for the purpose of ascertaining the truth or falsehood of the complaint". This clearly shows that a court seized of a complaint may or may not direct an inquiry or investigation to be made and if it does so direct then the direction can only be for ascertainment of truth or falsehood of "the complaint", i.e. the allegations leveled against the person or persons complained against by the complainant. There is no jurisdiction available with such court under the said provisions of the law to direct an inquiry or investigation against a person or persons not formally complained against before the court by the complainant. Apart from that an inquiry or investigation can be directed by a court to be conducted under the said provisions of the law before the issuance of process against the person complained against and not at a stage where the trial of the person complained against has already commenced and is nearing its conclusion, as in the present case.

15. For what has been discussed above this appeal is allowed and all references to the present appellant and two others in the impugned orders passed by the Special Court and the Islamabad High Court, Islamabad on 27.11.2015 and 09.12.2015 respectively as suspects to be associated with any fresh investigation into the offence of high treason allegedly committed by respondent No. 2 are set aside. A fresh investigation into the said offence by associating any person with the same lies within the prerogative of the Federal Government but the Special Court or the Islamabad High Court, Islamabad could not name any individual to be associated with any such investigation. There is no provision in the Criminal Law Amendment (Special Court) Act, 1976 requiring the Special Court to await the result of any fresh investigation or to postpone the trial of an accused person till an amended or additional statement of the case or list of accused persons or the

charge is submitted by the Federal Government after such fresh investigation. The Special Court is, therefore, expected to proceed with the trial of respondent No. 2 with all convenient dispatch and without any unnecessary delay.

Judge

Judge

Judge

Announced in open Court at Islamabad on 26.02.2016.

Judge

Islamabad
February 26, 2016

Approved for reporting.