

In the Supreme Court of Pakistan

(Appellate Jurisdiction)

Present:

Mr. Justice Anwar Zaheer Jamali, HCJ

Mr. Justice Mian Saqib Nisar

Mr. Justice Amir Hani Muslim

Mr. Justice Iqbal Hameedur Rahman

Mr. Justice Khilji Arif Hussain

Civil Appeal No.870/2014

(On appeal from judgment of High Court of Sindh, Karachi
dated 12.6.2014, passed in CP No.B-2072/2014)

and

C.M.A. No.1099 of 2016

(Application by respondent No.1 to grant
one-time permission to go abroad)

and

C.M.As No. 3545, 3557 and 5173 of 2014

(applications for impleadment)

Federation of Pakistan through Secretary, M/o Interior.

Appellant

Vs.

General (R) Pervez Musharraf and others

Respondents

For the appellants	:	Mr. Salman Aslam Butt, Attorney General for Pakistan
For the applicants	:	Mr. Tariq Asad, ASC (CMA-3545/14) Mr. Inam-ur-Rahim, ASC (CMA-5173/14) Sh. Ahsan-ud-din, ASC(CMA-3557/14)
For respondent No.1	:	Dr. Muhammad Farough Naseem, ASC Assisted by Faisal Fareed Hussain, Adv
For FIA	:	Mr. Qaiser Masood, Addl. Dir. Law. Malik Javed, Asst. Dir. Law.
Date of hearing	:	16-03-2016

JUDGMENT

Anwar Zaheer Jamali, C.J.- This civil appeal, with leave
of the Court, arises out the judgment dated 12.6.2014, passed by

learned Division Bench of the High Court of Sindh, Karachi, in C.P No. 2072/2014, whereby the said petition filed by respondent No.1 was disposed of in the following manner:-

- “(a) The Memorandum No.12/74/2013-ECL, dated 5th April 2013, placing the name of General (retired) Pervez Musharraf on Exit Control List is struck down.
- (b) Since the direction contained in this judgment is self-executory, therefore, the operation of this judgment is suspended only for fifteen days, during which the respondents, if so desire, may file appeal in the honorable Supreme Court.
- (c) Pending applications are also disposed of accordingly.”

2. Brief facts leading to this litigation are that on 21.4.2014, respondent No.1 had instituted the above referred Constitutional Petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 (in short “the Constitution”) before the High Court of Sindh, Karachi, with the following prayer:-

- “(a) declare the memorandum bearing No.12/74/2013-ECL dated 5.4.13 (Annex D) and the letter No.ECL/12/74/2013-ECL dated 2.4.14 (Annex-L) to be completely without jurisdiction, unconstitutional, illegal, void ab initio and of no legal effect, while quashing the same and clarifying that the petitioner is free to travel within, without or outside Pakistan and any order of the Court is self executory and is to be implemented forthwith by the Respondents and all functionaries superior or sub-ordinate to them;
- b) permanently and pending disposal of the main petition suspend the operation of the memorandum bearing No.12/74/2013-ECL dated 5.4.13 (Annex D) and the letter No.ECL/12/74/2013-ECL dated 2.4.14(Annex L) while

restraining the Respondents, their officers, agents and cronies and all functionaries superior or subordinate to them from hampering, hindering and stopping the Petitioner's movement within, without or outside Pakistan in any manner whatsoever, while further mandating them not to take any adverse action against the Petitioner;

- c) award costs and special costs;
- d) award any other relief deemed fit."

3. In a nutshell, the grievance of respondent No.1 was that inclusion/placement of his name in the Exit Control List (ECL) and refusal to withdraw his name from it was without jurisdiction, illegal and, *inter alia*, violative of Articles 3, 4, 9, 10A, 14 and 15 of the Constitution, thus, liable to be struck down.

4. The appellant and the proforma respondents No.1 to 3, in their comments, challenged the maintainability of the petition before the High Court of Sindh and contended that inclusion of name of respondent No.1 in the ECL on 05.4.2013 was in compliance of the observation of the High Court of Sindh, contained in its order dated 29.03.2013, and further directions issued by the Supreme Court of Pakistan in this regard vide order dated 08.04.2013 to the Federal Government. Thus, there was no justification for its removal, unless such directions were withdrawn.

5. The High Court in its impugned judgment had taken note of all these relevant aspects of the case; the case-law cited at the bar, and came to the conclusion that once the petition before the Apex Court, wherein the interim order directing the Federal Government

to include the name of respondent No.1 in ECL was finally disposed of vide order dated 03.7.2013, for all intent and purposes the interim order dated 08.4.2013 ceased to operate. More so, as by this order, no protection was provided to it and it was clear legal position that on passing a final order or judgment in the proceedings, all interim orders will merge into it and will stand vacated, unless so protected by the Court, which is not the position in the instant case. At leave stage, this Court, while taking note of the relevant facts, has formulated following points for consideration:-

3. After hearing the learned Attorney General for Pakistan and the learned ASC representing respondent No. 1, we grant leave to consider, inter alia, whether:-

- (i) The order of this Court dated 8.4.2013 was not an interim order that merged into the final order of 3.7.2013 but an independent and final as regards the restriction on the respondent's travel abroad, and thus the principle of merger was not attracted?*
- (ii) The High Court could have struck down the Office Memorandum of 5.4.2013, issued expressly in compliance with the order of the High Court dated 29.3.2013 duly re-affirmed by this Court on 8.4.2013?*
- (iii) Without modification or reversal of the order of this Court of 8.4.2013 the Respondent can be permitted to leave the country?*
- (iv) The said Memorandum having been passed in compliance with the order of the High Court was not covered by clause (f) of Rule 2 of the Exit from Pakistan (Control) Rules, 2010?*

C.M.A. No. 3565 of 2014

- 4. This C.M.A. is allowed and operation of the impugned judgment is suspended. However, the appeal, arising out of this petition, be fixed for hearing within one month, subject of availability of Bench."*

6. We have heard the arguments of learned Attorney General for Pakistan on behalf of the appellant. His sole contention is that inclusion of name of respondent No.1 in the ECL vide letter

No.12/74/2013 ECL, dated 05.4.2013 issued by the Ministry of Interior, was solely on the basis of such direction contained in the order dated 08.4.2012, which despite final disposal of the petition vide judgment dated 03.7.2013, still holds the field. His further submission is that the interim order passed in the proceedings, issuing direction to the Federal Government for placement of name of respondent No.1 in the ECL, will not, *ipso facto*, stand vacated upon final disposal of the petition, unless specifically so ordered by the Court.

7. Responding to the arguments of learned Attorney General for Pakistan, learned ASC for respondent No.1 strongly contended that the submissions of learned Attorney General that despite final disposal of the petitions, the interim order passed therein will remain operative is entirely misconceived and ill-founded inasmuch as if the intention of the Court at the time of final disposal of the petition had been to protect or keep intact the arrangements made under the interim order passed in the proceedings, there could have been a specific reference in this regard in the final order, which is admittedly not the position in case in hand. In support of his arguments that interim order passed during the proceedings of a case will stand merged/vacated, unless so protected in the final order, he placed reliance upon plethora of case-law, which has been already intelligently scanned, summarized and discussed in the impugned judgment. Concluding his submissions, learned ASC

strongly urged for the dismissal of this appeal, being devoid of merits.

8. We have perused the material placed on record and carefully considered the submissions of learned Attorney General and the learned ASC. As their whole arguments revolve around the applicability of ad-interim order dated 08.04.2013, in the wake of final order dated 03.07.2013, therefore, before discussing their respective contentions, it will be useful to reproduce hereunder the operative part of these two orders respectively, which read as under:-

Order dated 08.04.2013

“8. The Counsel representing the petitioners particularly Mr. A.K. Dogar and Mr. Hamid Khan, have submitted that the respondent General Rtd. Pervaiz Musharraf be taken into custody to ensure that he remains available within the country for the purpose of trial under Article 6 of the Constitution read with the provisions of High Treason (Punishment) Act, 1973. We, however, of the opinion that in the first instance, notice of these petitions be served on the said respondent for tomorrow. The inspector General of Police, Islamabad and, if necessary, the Inspectors General of Police in the Provinces, shall ensure service on the aforesaid respondent. The Secretary, Interior shall also make sure that if the name of the aforesaid respondent General Rtd. Pervaiz Musharraf is not already on the Exit Control List, this shall be done forthwith and a compliance report of this order shall be submitted in Court during the course of the day. The Federation and all its functionaries shall also ensure that the respondent does not move out of the jurisdiction of Pakistan until this order is varied/modified.”

Order dated 03.7.2013

“3. We are consciously, deliberately and as submitted by Mr. Muhammad Ibrahim Satti, learned Senior Advocate Supreme Court for the respondent, not touching the question of “abrogation” or “subversion” or “holding in abeyance the Constitution” or “any conspiracy in that behalf” or indeed the question of suspending or holding the Constitution in abeyance or the issue as to abetment or collaboration in the acts mentioned in Article 6 of the Constitution. This is so because any finding/observation or view expressed by us may potentially result in prejudice to the Inquiry/Investigation or subsequent trial should that take place as a result of such investigation.

4. The Federal Government has, as noted above, proceeded in furtherance of its constitutional obligation envisioned in Article 6 of the Constitution and for the present this suffices in terms of the said Article and the reliefs respectively sought by the petitioners in these petitions. We, therefore, dispose of these petitions in the above terms with the observation that the Federal Government shall proceed as per undertaking dated 26.06.2013, reproduced above without unnecessary delay.”

9. The perusal of order dated 08.4.2013, reveals that it was passed in Civil Petition No.2255/2010 and four other connected petitions No.14, 16, 17 and 18 of 2013, filed by different parties against respondent No.1, as an ad-interim arrangement before even issuing notices of such proceedings to him. As could be seen from its language and tenor, the purpose of this order was to ensure the name of respondent No.1 in the ECL forthwith as an interim arrangement during the course of the day. Thereafter, the proceedings were held on several dates of hearing after due notice to

respondent No.1 and as a result, upon the statement of learned Attorney General for Pakistan dated 26.06.2013, reproduced in the opening paragraph of the order dated 03.7.2013, the petition was disposed of in terms of the undertaking given by the Federal Government, without any further directions to keep the ad-interim order dated 08.4.2013 alive/intact. The submission of the learned Attorney General that letter dated 05.4.2013, issued by the Ministry of Interior, cannot be withdrawn unless the interim order dated 08.4.2013 was modified or withdrawn is on the face of it totally ill-founded, as the letter placing the name of respondent No.1 in the ECL was issued three days prior to the said order on the basis of some observations contained in the order dated 29.03.2013, passed by the High Court of Sindh in Criminal Bail Application No.262 and 263 of 2013, whereby respondent No.1 was granted transitory bail for a limited period of 21 days with the condition that till such time he would not leave the country without permission from the Trial Court. Thus, it cannot be said that it was the interim order dated 08.4.2013, which formed basis of such action from the appellant against respondent No.1 or the appellant needed any further instruction, in this regard from the Apex Court. In due course, all matters relating to the custody of an accused, restricting his liberty or freedom of movement are to be dealt with by the Courts ceased of the criminal cases against him or by the Federal Government in terms of the Exit from Pakistan (Control) Ordinance, 1981 and the

rules framed thereunder. The superior Courts are, therefore, normally reluctant in passing orders of such nature, except in some exceptional circumstances, which is not the position here at this stage, as understandably the Respondent No.1 is facing trial before different criminal Courts/Special Court for the charged offences, which are competent to regulate all issues as regards his custody.

10. During the hearing of this appeal, we have more than once enquired from the learned Attorney General for Pakistan the stance of the Federal Government as to whether they intend to retain the name of respondent No.1 in the ECL for any valid reason in terms of the Exit from Pakistan (Control) Ordinance, 1981, and the rules framed thereunder, as reportedly several criminal cases against him are *sub judice* before different Courts/Special Court, but he was unable to come out with any specific instructions from the Federal Government in this regard, except that the inclusion of name of respondent No.1 in the ECL vide Ministry of Interior letter dated 05.4.2013 is solely on account of directions issued by the Court and for no other reason. In order to appreciate such arguments of learned Attorney General for Pakistan, we have also perused the said letter of the Ministry of Interior available in the Court file at Page-92, which reads thus:-

*“GOVERNMENT OF PAKISTAN
MINISTRY OF INTERIOR*

No.12/74/2013-ECL

Islamabad, the April 5, 2013

MEMORANDUM

Subject: PLACEMENT OF EXIT CONTROL LIST.

It has been decided to place the name of General (Rtd) Pervez Musharaf (Passport # AJ0848364-Diplomatic) , on Exit Control List under Section 2 of Exit from Pakistan (Control) Ordinance, 1981.

2. All concerned are requested to take immediate action in the matter.

*(Mazhar Javed Rana)
Section Officer (ECL)
Tel:9208179”*

11. A plain reading of this letter reveals that it was issued on 05.4.2013 i.e. three days before the ad-interim order referred to by the learned Attorney General for Pakistan without disclosing any reason and it also does not contain reference of any order or directions of the High Court or the Apex Court in this regard. Thus, looking to the legal position, as elaborately discussed by the High Court in the impugned judgment with reference to the case-law from Pakistani and Indian jurisdiction, and having analyzed peculiar facts and circumstances of the case, we have no hesitation to hold that the moment final order dated 03.7.2013, disposing of all the five connected petitions, was passed by this Court without extending any protection to the ad-interim order dated 08.4.2013, the same stood merged into the final order and lost its efficacy and operation forthwith.

12. Apart from the above discussion, considering the question of inclusion or retaining the name of respondent No.1 in the ECL, thereby restricting his freedom of movement, we also cannot

lose sight of the fact that under Article 15 of the Constitution freedom of movement is one of the fundamental rights guaranteed to every citizen of the Country, which cannot be abridged or denied arbitrarily on mere liking or disliking, without any lawful justification for this purpose. More so, when Article 4 of the Constitution further guarantees right to every individual, to be dealt with in accordance with law. It will be pertinent to mention here that in the shape of Exit from Pakistan (Control) Ordinance, 1981, read with Exit from Pakistan (Control), Rules, 2010, a complete mechanism is provided for the situation, which needs to restrict the movement of any person from going abroad, where there is lawful and valid justification for this purpose. But in the instant matter such option has not been exercised as yet by the Federal Government upon independent application of mind to the case of respondent No.1 or by the Special Court constituted under Article 6 of the Constitution or the other Courts of law where respondent No.1 is facing proceedings relating to different criminal cases registered against him.

13. Admittedly, order dated 08.04.2013 was passed before issuing notice of the petitions to Respondent No.1 and it was *ad-interim* or to say it interim or temporary in nature. The words '*ad-interim*' and '*interim*' have been defined in Black's Law Dictionary (9th Edition) as under:

"ad interim: In the meantime; temporarily."

“interim: Done, made, or occurring for an intervening time; temporary or provisional.”

From the above connotation of these two words, it is safely deducible that the above referred order, for all intent and purposes, was a temporary order, which stood merged/vacated in terms of the final order dated 03.07.2013.

14. The perusal of impugned judgment reveals that the learned Division Bench of the High Court of Sindh Karachi, has correctly appreciated the relevant facts of the case, aptly taken into consideration the case-law cited at the bar, and recorded valid and cogent reasons for granting requisite relief to the Respondent No.1, thereby striking down the memorandum No.12/74/2013-ECL dated 05.4.2013, issued by the Ministry of Interior. Not only this, but mindful of the sensitive nature and political hype of the issue, as an abundant precaution, it had also suspended the operation of impugned judgment for a period of 15 days to enable the appellant and proforma respondents to avail any other appropriate remedy, including their right to challenge the impugned judgment before the Apex Court. Still the appellant took no independent stance/decision in the matter, except following the remedy of challenging the said judgment in this appeal, which, as discussed above, is devoid of merits.

15. Foregoing are the reason for our short order dated 16.3.2016, which read as under:-

“We have heard the arguments of learned Attorney General for Pakistan on behalf of the Appellant and Dr. Farough Naseem, learned ASC for Respondent General (R) Parvez Musharraf. For the reasons to be recorded separately, this appeal is dismissed. However, this order will not preclude the Federation of Pakistan or the Special Court, seized of the proceedings under Article 6 of the Constitution against Respondent General (R) Parvez Musharraf, from passing any legal order for regulating his custody or restricting his movement.

2. *The Misc. Applications for impleadment as party are dismissed, having become infructuous. CMA No.1099/2016, is not pressed by the learned ASC for the respondent, which is dismissed accordingly.”*

Chief Justice

Judge

Judge

Islamabad,
16th March, 2016.

Not approved for reporting.

﴿صداقت﴾

Judge

Judge