

IN THE SUPREME COURT OF PAKISTAN

(Original Jurisdiction)

Present:

Mr. Justice Iftikhar Muhammad Chaudhry, CJ
Mr. Justice Ijaz Ahmed Chaudhry
Mr. Justice Gulzar Ahmed

Crl. Misc. A.No. 486 of 2010 in Crl.A.No.22 of 2002
(Implementation proceedings of judgment of this Court, passed in NRO case)

And

**Suo Motu Case No.4 of 2010 and CMAs No.1080, 1238,
1239 1253, 1254, 3222, 3242, 3545, 3873 & 4118 of
2010**

Suo Motu Action regarding appointment of convicted person namely,
Ahmed Riaz Sheikh (NRO Beneficiary) as Additional Director, FIA

Adnan A. Khawaja

Appelant (s)

VERSUS

The State

Respondent(s)

For the Federation

: Mr. Muneer A. Malik,
Attorney General for Pakistan
Mr. Dil Mohammad Alizai, DAG

For the NAB

: Mr. K.K.Agha, P.G
Mr. Akbar Tarar, Additional P.G.

For Ahmed Riaz Sheikh &
Adnan A. Khawaja

: Dr. A. Basit, Sr. ASC

For Ismail Qureshi &
Khalid Ikhlaiq Gillani

: Ch. Akhtar Ali, AOR

For Malik Qayyum

: Mr. Wasim Sajjad, Sr. ASC

For Ahsan Raja

: Raja Muhammad Ibrahim Satti, Sr. ASC

Date of hearing

: 26.06.2013

ORDER

We have taken this case for hearing and posed a
question to learned counsel appearing for parties as well as

the learned Prosecutor General, NAB about the functioning of the institution of NAB in absence of Chairman in terms of Section 34-A of NAO as his delegates i.e. Regional DGs etc., are responsible for monitoring the investigations of the cases. Mr. K. K. Agha learned Prosecutor General, NAB stated that a learned five Members Bench of this Court vide its judgment dated 28.05.2013, passed in Const.P.No.73 of 2011 (Ch. Nisar Ali Khan **vs.** Federation of Pakistan etc.), had allowed 30 days time to the Government to make fresh appointment without further loss of time, therefore, appointment of the Chairman, NAB has to take place on or before 30.06.2013. On this, we have communicated to the learned Attorney General through the learned Deputy Attorney General that he should make statement after soliciting instructions from the concerned functionaries. Learned Attorney General appeared and stated that consultation process for the appointment of Chairman, NAB, according to NAO, has commenced, which is likely to be completed as early as could be possible. In such view of the matter without dilating upon the merits of the instant case, we postpone its hearing.

2. Learned Attorney General for Pakistan has filed Criminal Miscellaneous Application No.374/2013 along-with a letter dated 5th November, 2012 followed by the letter dated

22nd November 2012 written by Justice (R) Yasmin Abbasey, the then Secretary, Govt. of Pakistan, Ministry of Law, Justice & Parliamentary Affairs, Islamabad, contents of both the letters are reproduced hereunder: -

"
No.3 (156)/2007-Sol-II
GOVERNMENT OF PAKISTAN
Ministry of Law, Justice & Parliamentary Affairs

the 5th November, 2012
Islamabad.....

Attorney General
Geneva
Switzerland

Re: PP/11105/1997 and CP 289/97

Dear Sir,

This is with reference to the letter dated 22nd May 2008 addressed by Malik Mohammad Qayyum, the then Attorney General of Pakistan to Mr. Daniel Zappelli, Attorney General, Geneva, Switzerland.

In view of the direction given by the Supreme Court of Pakistan in Paragraph 178 (copy attached as Annex-I) of its judgment dated 16th December 2009 in the case of Dr. Mobashir Hassan, reported as PLD 2010 SC 265, the aforesaid letter is hereby withdrawn and may be treated as never written and therefore, revival of requests, status and claims, is sought.

This is without prejudice to the legal rights and defences of the Presidents/Heads of State which may be available under the law, constitution and international law.

Yours sincerely,
Sd/-
Justice (R) Yasmin Abbasey
Secretary"

No. F.3 (156)/2007-Sol-II
GOVERNMENT OF PAKISTAN
Ministry of Law, Justice & Parliamentary Affairs

Islamabad 22nd November, 2012

Dr Nicholas Jeanding Avocate
Fontanet et associates
25-Grand rue
Case postale 3200
Ch 1211, Geneve 3
Switzerland

Re: **PP/11105/1997 and CP 289/97 and related proceedings.**

Dear Sir,

Please refer to our instructions and the letter dated 5th November, 2012 sent to the General Attorney of Geneva, please explain the position of Government of Pakistan to the General Attorney of Geneva which is summarized hereinbelow in order to simplify the approach of the case before him.

1. At the outset I must state that the Head of State viz President of Pakistan enjoys complete and absolute protection and immunity under Article 248 (2) of the Constitution of Pakistan 1973 (copy attached as Annex-1) as well as International Law, which is neither being waived nor lifted.
2. Requests for mutual legal assistance was made by Senator Saif-ur-Rehman, the then Chairman of Ehtesab (Accountability) Bureau and Chaudhry Muhammad Farooq, the then Attorney General of Pakistan through various letters written in 1997 without permission from the Federal Government. Thus all these requests and letters stand on the same footing as those of the then Attorney General of Pakistan Malik Muhammad Qayyum's letter dated 22nd May 2008. Consequently all of the said requests and letters written by Senator Saif-ur-Rehman and Chaudhry Muhammad Farooq were and are illegal and have no legal effect and are hereby withdrawn by Government of Pakistan and may be treated as never have been written, keeping into view the dictum laid down by Supreme Court of Pakistan in paragraph 177 and 178 of the Judgment in the case of Dr.

Mobashar Hassan, dated 16th December 2009, reported as PLD 2010 SC 265 (Copy attached as Annex-II).

3. I understand the order of closing of case passed by Mr. Daniel Zappelli former Attorney General of Geneva, on 25h August 2008 has also attained finality and under Swiss Law it cannot be re-opened for several legal reasons.
4. Government of Pakistan understands that revival of status of civil party can take place only when there are pending criminal proceedings in Switzerland. Since no criminal proceedings are admittedly pending in Switzerland there are legal constraints and bar in such revival.
5. Mutual legal assistance, as explained hereinabove, was never lawfully sought and in any event necessary documents and evidence have already been transmitted by the Swiss authorities to the Government of Pakistan and as such it has served its purpose. Furthermore the legal assistance requested in 1997 has been completely executed.
6. Moreover since the Judgment was passed by the Supreme Court of Pakistan in the case of Dr. Mobashar Hassan dated 16th December, 2009, much has happened factually and legally in Pakistan in respect of both the SGS and Cotecna cases in which Government of Pakistan was a civil party in Swiss proceedings.
7. References filed by Ehtesab (Accountability) Bureau before Accountability Courts in Rawalpindi, Pakistan in SGS and Cotecna cases against Messrs A.R.Siddiqui, Asif Ali Zardar and others for which mutual legal assistance was sought by Government of Pakistan from Switzerland and in which regard Investigating Magistrate, Geneva from time to time, transmitted documents and evidence to Pakistan, have resulted in the acquittal of the main accused Mr. A.R. Siddiqui. Regarding Mr. Asif Ali Zardari the Accountability Courts have accepted that he enjoys complete and absolute immunity under Article 248 (2) of the Constitution of Pakistan, 1973.
8. Even otherwise in the judgments in both the cases, the Honourable Judges have held that Mr. Asif Ali Zardari has not done any wrong doing has not committed any act of corruption and corrupt practices and that no loss was caused to the Government of Pakistan by the award of pre-shipment. Inspection contract to SGS and Cotecna by

Government of Pakistan, for which all legal/codal formalities were complied with. Thus, no offence or crime has been committed in Pakistan in respect of the award of the SGS and Cotecna contracts. Consequently, as no crime has been committed in Pakistan the alleged offence of money laundering, if any, under Swiss law does not seem to be applicable or attracted. (Copies of Judgments are attached as Annex-III and IV)

9. In view of the foregoing Government of Pakistan would understand and appreciate to receive official confirmation about the inability of the Swiss authorities to revive Government of Pakistan's status as civil party, mutual assistance and alleged claims.
10. This finally brings to an end the matters/issues that had arisen and initiated in 1997.

Yours sincerely,
Sd/-
Justice (R) Yasmin Abbasey
Secretary"

3. It is to be noted that letter dated 5th November, 2012 has been issued by the Federal Government with the approval of this Court vide order dated 14.11.2012.

4. At this stage, second letter referred hereinabove, which has been written on behalf of the Government of Pakistan after letter dated 5th November, 2012 needs no comments being self explanatory, *prima facie* to form the opinion and necessity felt by the then Federal Government to enter into correspondence with Dr. Nicholas Jeanding, counsel/advocate of the Federation of Pakistan.

5. Reference of another correspondence between Judicial Authority, Public Ministry, Republican and Canton of Geneva and Mr. Nicholas Jeanding, attorney of the letter dated 4th February, 2013 is also necessary and relevant. He has also placed on record order of "non-entry into the subject", dated 4th February, 2013 by the Judicial Authority of Republican Canton of Geneva, one of para relating to Abuse of Power and Ruling. For convenience same is reproduced below: -

c) Abuse of Power

"Swiss law establishes as a general principle the prohibition of the abuse of power, such as it arises from Article 2, Subparagraph 2 of the Civil Code. The criminal prosecution authorities are specifically required to conform thereto (CPC, Article 3, Subparagraph 2 b). In this case, the Republic of Pakistan's procedures constitutes an abuse of power. Indeed, it consists of demanding resumption of the criminal procedure P/11105/1997, while maintaining that such resumption could not take place. It is a question of a procedure constituting venire contra factum proprium, that is to say one of the traditional instances of an abuse of power."

RULING

On these grounds, the Public Ministry:

1. *Decides not to enter into the subject of the facts referred to by the procedure P/11105/1997 (CPC, Article 310, Subparagraph 1 b and 323).*
2. *States that the costs of proceedings shall be left to the charge of the State (CPC Articles 422 and 423, Subparagraph 1).*
3. *Notifies this order:*
-the republic of Pakistan, i.e. for it Me Nicolas Jeandin, post box 3200, 1211 Geneva 3
4. *Communicates this order to:*
The Federal Department of Foreign Affairs

Geneva, 4 February 2013

The Registrar

The Public Prosecutor

Lella Deloche Ramos

Oliver JORNOT"

6. Learned Attorney General stated that appeal against the order of the "non-entry into the subject" was maintainable within 10 days from the order noted hereinabove, relevant observation from the said order is reproduced hereinbelow:

"The parties can attack the order of non-entry into the subject within the ten days before the appeal authority of recourse, that is to say the Criminal Appeal Court (CPC, Articles 310, Subparagraph 2, and 322, Subparagraph 2 and LOJ 128, Subparagraph 1). The appeal must be justified and addressed in within (CPC, Article 396, Subparagraph 1).

The parties have been made aware of the fact that the costs of the appeal proceedings shall be at their expense, if their appeal is inadmissible, if they withdrawn it or if they do not win the case (CPC, Article 428, Subparagraph 1). In certain conditions, the costs of the appeal proceedings could also be charged to an appellant that had obtained a more favourable decision (CPC, Article 428, Subparagraph 2).

7. Learned Attorney General further stated that the above letter along-with the observations was not available on the official record. Further that order of non-entry into the subject was not communicated to the Government of Pakistan as per available record. He further stated that it is yet to be established that whether the entry into the subject has been communicated or not? However, vide letter dated 20th June, 2013, he has been informed by the Secretary to

the Prime Minister and no sooner this aspect was brought into his notice. He has authorized to the Secretary, Law and Justice & Human Rights vide letter of even date to file appeal and in pursuance whereof a local law firm M/s Python, Geneva has been engaged. He further stated that he has been instructed to bring above letters in the notice of this Court, whereas the competent authority (the Prime Minister) has already directed to conduct inquiry in this behalf as per contents of the letter dated 21.06.2013.

Relevant paras are reproduced hereinbelow: -

“(i) An appeal in the case shall immediately be filed before the appropriate court in Switzerland by Ministry of Law, Justice & Human Rights for which it shall engage services of a lawyer in Switzerland before the appeal period expires on 23rd June, 2013 and

(ii) A Two-Member Enquiry Committee comprising of Mr. Sami Saeed, Secretary, Cabinet Division and Mr. Aftab Sultan, Director General, Intelligence Bureau, Government of Pakistan, is constituted to look into the matter of missing record and documents of this case from the Ministry of Law, Justice & Human Rights, delay in communication of decision of “the Order of Non-entry into the subject” issued by the Judicial Authority in Geneva on 04.02.2013 and subsequent delay, if any, in the offices of Ambassador of Pakistan in Switzerland and Ministry of Law, Justice & Human Rights, in communication of these facts to the Prime Minister between 13.06.2013, when it was first brought to the notice of Ambassador of Pakistan in Switzerland to 20.06.2013. The Committee shall furnish its report within a period of two weeks, positively.”

8. Let the Committee constituted by the Prime Minister return its findings and share it with us through the

learned Attorney General. On having received the same further appropriate proceedings as envisaged under the law shall be initiated.

9. Adjourned for a date to be fixed by office after two weeks.

Chief Justice

Judge

Islamabad
26.06.2013
Rabbani

Judge