

**IN THE SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

**PRESENT:**

MR. JUSTICE JAWWAD S. KHAWAJA, CJ  
MR. JUSTICE DOST MUHAMMAD KHAN  
MR. JUSTICE QAZI FAEZ ISA

**CIVIL PETITION NO. 1603 OF 2012**

*(On appeal from the judgment dated  
19.09.2012 in W.P. No. 3058/2011 passed  
by the Lahore High Court, Lahore)*

Anti Corruption Establishment, Punjab through its DG

.... Petitioner

Versus

National Accountability Bureau through Chairman NAB  
and others

.... Respondents

For the Petitioner: Mr. Razzaq A. Mirza, Addl. AG Punjab  
Mr. Zubair Ahmed Farooq, Addl. PG Punjab  
Mr. Muhammad Asif Anjum, Dir (L) ACF

On Court's Notice: Mr. Sajid Ilyas Bhatti, DAG

For Res. Nos. 1 to 3: Mr. Fauzi Zafar, DPG, NAB

For Res. Nos. 4, 5, 12 & 13: Mr. M. S. Khattak, AOR  
Mr. Gohar Ali Khan, Advocate  
(with court Permission)

Other Respondents: Nemo

Date of hearing: 31.8.2015

**JUDGMENT**

**Qazi Faez Isa, J.** This petition has been filed by the Anti-Corruption Establishment, Lahore through its Director General wherein the National Accountability Bureau ("**NAB**") has been arrayed as respondent No.1, Chairman NAB as respondent No.2, Additional Director NAB as respondent No.3, a number of revenue officials, and Malik Riaz Hussain, Chairman Bahria Town (Pvt) Ltd. as respondent No.4, Ahmed Ali Riaz, Chief Executive Officer Bahria Town (Pvt.) Ltd. as respondent No.5, Muhammad Iqbal, Site Supervisor, Bahria Town (Pvt.) Ltd. as respondent No.12 and Akhter Saeed, General Manager

Bahria Town (Pvt.) Ltd. as respondent No.13. Bahria Town (Pvt.) Ltd. is hereinafter referred to "**Bahria Town**" and respondent Nos. 4, 5, 12 and 13 as "**the Bahria Town respondents**".

2. The facts relevant to decide this case are that two criminal cases (FIR No. 29 of 2009 dated 4.11.2009 and FIR No. 53 of 2009 dated 6.11.2009) were registered by the Anti-Corruption Establishment ("**ACE**") wherein it was alleged that the Bahria Town respondents in collusion with certain revenue officials of Punjab had fraudulently transferred land measuring 1,401 kanals to Bahria Town. After concluding the investigation, ACE submitted charge sheet / *challan* on 1<sup>st</sup> November 2011 before the Special Judge Anti-Corruption, Rawalpindi. After filing of the *challan* in the Court of the Special Judge Anti-Corruption one of the Bahria Town respondents, i.e. respondent No.13, submitted an application on 21<sup>st</sup> November 2011 to the Director General NAB titled, "*Withdrawal of Cases from Anti-Corruption Establishment, Punjab and investigation thereof by NAB, Rawalpindi.*" In the said application it was alleged that, "*Bahria Town entered deal for purchase of land in the revenue estate of Khanpur and Malikpur Azizal, Tehsil & District Rawalpindi. This deal was with a property dealer Mr. Muhammad Ashfaq that he would purchase land for Bahria Town at the rate of Rs.40,000/- to 45,000/- per kanal.*" It was further alleged that the said Muhammad Ashfaq despite receipt of eighty five million rupees from Bahria Town, "*used fake and forged documents or persons (owners of the land) for mutations*".

3. Immediately upon receipt of the aforesaid application from Bahria Town NAB, in exercise of powers under section 16-A (a) of the National Accountability Ordinance ("**NAO**"), 1999, moved for the

transfer of case to the Administrative Judge Accountability Court, Rawalpindi / Islamabad. The application submitted by NAB in the Court of the Special Judge Anti-Corruption was under the hand and signature of its Chairman, Mr. Fasih Bukhari. The application is reproduced hereunder:

“Respectfully Sheweth:

1. That the above noted case was registered vide FIR No. 29 dated 04-11-2009 at PS ACE Rawalpindi through source report by Mr. Sohail Zafar, Inspector ACE-Rwp against the accused person which is pending in the honorable Court.
2. That Lt. Col. ® Akhter Saeed, GM Bahria Town Pvt. Ltd. lodged a complaint before DG NABG Rawalpindi and alleged that officials of ACE Punjab have wrongfully involved him in a land fraud scam of Rs.85 Million, where he himself was the complainant. Factual position is that the accused Muhammad Ashfaq (Property Dealer) in connivance of officials of revenue department had defrauded management of Bahria Town in purchase of land in Malikpur & Khanpur on forged documents & the case was registered with PS Rawat and is under trial. Later on another FIR was registered [*sic.*] ACE Punjab wherein ACE illegally maneuvered & involved complainant in the scam and sighted him as accused. He requested NAB to get the case transferred for impartial investigation. Perusal of the report u/s 173 Cr.PC shows that the accused have also committed the offences of corruption and corrupt practices as defined in section 9 (a) of National Accountability Ordinance 1999 and Schedule thereto.
3. That an inquiry against the said accused persons is also in progress at NAB Rawalpindi regarding the allegations viz misuse of authority etc.
4. That keeping in view the gravity of offence, for speedy trial in the best interest of general public and the reasonable possibility of recovery through the process of Section 25 of NAO 1999 and to determine the misuse of authority, it is just and proper that above

noted case may be transferred to Accountability Court Rawalpindi / Islamabad as per provision of Section 16-A (a) of National Accountability Ordinance 1999.

It is, therefore, respectfully prayed that the subject case may be transferred to the Administrative Judge Accountability Courts, Rawalpindi / Islamabad."

FIR No. 29 of 2009 was not mentioned in the application. On the same day, i.e. 21.11.2011, NAB also wrote to ACE directing it to hand over to the officers of NAB the record of FIR Nos. 29 and 53 of 2009.

4. Mr. Razzaq A Mirza, the learned Additional Advocate General ("AAG") Punjab, referred to the petition (Writ Petition No. 3058/2011) filed before the Rawalpindi Bench of the Lahore High Court wherein it was stated that Malik Riaz Hussain (respondent No.4) and his son Ahmed Ali Riaz (respondent No.5) had earlier filed Writ Petition No.2802/2011 for quashment of the final report as well as quashment of FIR Nos. 29 and 53 of 2009, but the jurisdiction of ACE was not assailed therein nor was it assailed in the case captioned Malik Riaz Hussain v. Anti Corruption Establishment (CPLA No. 1806 of 2011) wherein pre-arrest bail in FIR No. 29 of 2009 was applied for. Reference was also made to "*order dated 18.10.2011 passed by Mr. Sardar Muhammad Latif Khan Khosa, Governor of Punjab*" who it was alleged had attempted to interfere with the case despite the fact that he had no legal authority in this regard. He further stated that the Government had obtained the opinion of the Law Department with regard to the Governor's "*order dated 18.10.2011*" and that Secretary Law gave a categorical opinion on 28.10.2011, which had concluded in the following terms:

"The Punjab Anti Corruption Establishment Ordinance 1961 or the Punjab anti Corruption Establishment Rules 1985 or any other law or rules, does not confer any power or authority on the Governor to pass any order in relation to a matter under Investigation by the Anti Corruption Establishment. Likewise, he has no power to stay any such proceedings. In the Circumstances, the order passed by the governor on 18.10.2011 (annex-P) is wholly without lawful authority and is void *ab initio* and may be construed as if it had never been passed."

The Chief Secretary of the Province (Mr. Nasir Mahmood Khosa) concurred with the aforesaid opinion of the Secretary Law. The learned AAG stated that having failed in their attempt to thwart the prosecution, Bahria Town respondents approached NAB (as mentioned above) and the very day that an application was submitted to NAB its Chairman sought the transfer of the case, in purported exercise of his powers under section 16-A (a) of NAO. Reference was also made to page 26 of this Petition wherein it was stated that, "*at that time the daughter of Chairman NAB (Fasih Bukhari) was an employee of Malik Riaz*". He stated that this factual position has not been controverted by any of the respondents. It was lastly contended that having got the prosecution transferred to itself the principal beneficiaries of Bahria Town, namely, Malik Riaz Hussain and his son Ahmed Ali Riaz were exonerated by NAB, however proceedings against the revenue officials continued, which was incomprehensible. Learned AAG also made the following legal submissions:

- i) That under section 16-A (a) of NAO the Chairman NAB cannot seek transfer of the case for mala fide reasons, and the record incontrovertibly establishes Chairman NAB's mala fides;

- ii) That if an application under section 16-A (a) of NAO is submitted to a court it does not result in its automatic transfer, as an order thereon has to be passed by the court where the case was pending, which in the present case was Special Judge Anti-Corruption, however no such order was passed; and
- iii) That even if the case before the Special Judge Anti-Corruption stood recalled it had to be transferred to the Accountability Court and was to be treated as a reference under section 18 of NAO, therefore, NAB could not exonerate any of the nominated accused, and in exonerating the Bahria Town respondents NAB acted with mala fide and contrary to its own law, i.e. section 16-A (a) of NAO.

5. Learned Advocate General Punjab, Mr. Naveed Rasool, who was present in court was called upon to render his opinion on the Governor's said order. He stated that the Governor could not interfere in any criminal investigation / prosecution and in doing so acted contrary to the provisions of the Constitution of Pakistan.

6. Mr. Fauzi Zafar, the Deputy Prosecutor General NAB, appeared for respondent Nos. 1, 2 and 3, but was not able to controvert the contentions of the learned AAG, and even on the propositions of law stated that he needed to obtain instructions. This matter is pending since the year 2012 and the respondents, including NAB and its Chairman, have been on notice, therefore, there was no excuse not to be ready with the case or be unable to answer questions emanating from NAB's own law.

7. As regards the Bahrai Town respondents an application for adjournment was submitted on behalf of their counsel, learned Senior Advocate Supreme Court ("**ASC**") Mr. Aitzaz Ahsan. This petition was filed on 4<sup>th</sup> October 2012 and thereafter it was repeatedly fixed in court, but it did not proceed. Adjournments were sought and granted to learned ASC Mr. Aitzaz Ahsan on 10.7.2013, 12.9.2013, 10.10.2013, 21.01.2014, 20.08.2014, 3.9.2014 and on 17.9.2014, when it was ordered that, *"on the next date of hearing, if the Learned ASC [Mr. Aitzaz Ahsan] is not available, then the Learned AOR will proceed"*. However, on the next date of hearing, i.e. on 22.10.2014, the case was once again adjourned on the request of Mr. Aitzaz Ahsan. Thereafter, on 17.6.2015 the case was adjourned as Mr. Aitzaz Ahsan was busy; it was ordered that, *"the matter be listed for hearing after two weeks."* On 24.7.2015 the case was again adjourned, and it was ordered to be listed, *"in the week commencing 31.8.2015"*. When on 31.8.2015 this case was first taken up neither the learned ASC nor the learned AOR were present, instead an adjournment application was left with the court associate. The application sought adjournment on the ground, *"that the counsel for the aforesaid Respondents [Nos. 4, 15, 12 and 13] is out of country"*, however, since the learned AOR was not present, we waited for him. After the tea-break learned AOR appeared along with Mr. Gohar Ali Khan, Advocate, an associate of Mr. Aitzaz Ahsan, and requested for adjournment. However, as the case has been pending for about three years and as repeated adjournments had already been sought the request for adjournment was declined and the adjournment application was dismissed. We then called upon learned AOR to argue the matter as he had already been directed to do so in case of non-availability of learned ASC, but he stated that he has not been permitted to do so by his clients. In the circumstances we

permitted Mr. Gohar Ali Khan Advocate to argue the case even though he is not an Advocate of this Court, as he had appeared before the High Court in the matter and had also appeared a number of times in this case, but he too requested for an adjournment.

Whilst it is the right of a party to be heard and be represented by counsel, but a party cannot be permitted to defeat the cause of justice by indefinite procrastination, as the Bahria Town respondents have done.

8. We heard the learned AAG, Advocate General Punjab, Deputy Prosecutor General NAB, provided repeated opportunities to the counsel for the Bahria Town respondents and perused the documents before us.

9. We shall commence with first determining the scope of section 16-A (a) of NAO, which is reproduced hereunder:

**Section 16-A (a) of the National Accountability Ordinance, 1999**

“Notwithstanding anything contained in any other law for the time being in force, the Chairman NAB may apply to any court of law or tribunal that any case involving any offence under this Ordinance pending before such court or tribunal shall be transferred to a Court established under this Ordinance, then such other court or tribunal shall transfer the said case to any Court established under this Ordinance and it shall be deemed to be a reference under section 18 of the Ordinance, and it shall not be necessary for the Court to recall any witness or again to record any evidence that may have been recorded.”

The aforesaid section 16-A (a) enables the Chairman NAB to apply to any court where a case involving an offence under NAO is pending. And upon receipt of an application submitted by the Chairman NAB under section 16-A (a) the court before which the case is pending is obliged to transfer it. However, herein the Special Judge



Anti-Corruption did not pass any order transferring the case. The said section further provides that the transfer, *"shall be deemed to be a reference under section 18"* of NAO, however, NAB proceeded to exonerate a number of the listed accused, which after the filing of a reference it could not. At best NAB could have sought the transfer of the case, and if such transfer was allowed by the Special Judge Anti-Corruption, it was to be treated as a Reference and proceeded with by the Accountability Court.

10. We can also not ignore the fact that the very day that NAB received an application from one of the Bahria Town respondents the Chairman NAB moved an application in the court of Special Judge Anti-Corruption for transfer of the case. In the application submitted by the Chairman NAB he repeated the contents of the application of the said Bahria Town respondent, and in particular made a definite statement that, *"Factual position is that the accused Muhammad Ashfaq (Property Dealer) in connivance of the revenue officials had defrauded management of Bahria town in purchase of land in Malikpur and Khanpur."* This conclusion could not have been arrived at without first having investigated the matter, and it is clear from the record that NAB did not investigate the matter nor in fact had the opportunity to do so. The facts, which have not been controverted, disclose that the exercise by Chairman NAB Mr. Fasih Bukhari of his discretion was mala fide, as is confirmed from the following:

- (a) The very day that NAB received an application from a nominated accused, and without determining the application's merit or conducting any inquiry / investigation, the Chairman NAB with alacrity submitted

an application for transfer of the case under section 16-A (a) of NAO;

- (b) Section 16-A (a) of NAO stipulates that the transfer of a case shall be deemed to be a reference under section 18 of NAO, but this provision was intentionally disregarded as some of the nominated accused were exonerated by NAB itself;
- (c) In the application submitted by Bahria Town to NAB it was admitted that the land had been illegally transferred in the name of Bahria Town, however, it was simply presumed that neither Bahria Town nor any of the Bahria Town respondents were responsible for the same;
- (d) The aforesaid application submitted by Bahria Town stated that an amount of eighty five million rupees had been paid to a property dealer Muhammad Ashfaq, but there was nothing on the record to confirm the same, and the unsubstantiated statement made in the application was accepted by the Chairman NAB; and
- (e) The land revenue authorities maintain property records and admittedly in respect of 1,401 kanals the same had been tampered with, which had adversely affected a number of innocent persons, but no attempt to properly prosecute the culprits was made.

10. That for the aforesaid reasons we are persuaded to set-aside the impugned judgment. The petition is, therefore, converted into appeal and allowed. As a consequence the complete record of the case in respect of FIR Nos.29/2009 and 53/2009 will be transmitted to the Special Judge Anti-Corruption who shall proceed with the trial of the case in accordance with law. Since NAB could not have exonerated a

nominated accused after filing of a reference its purported attempt to do so is declared to be of no legal effect and shall be disregarded, however, they will be entitled to fully defend the cases and if considered necessary lead evidence to substantiate their point of view. Since these are old cases we expect that the learned Special Judge shall proceed with them expeditiously.

11. As we have been informed that the then Chairman NAB Mr. Fasih Bukhari is no longer its Chairman and no longer has any concern with NAB, therefore, if NAB deems it appropriate it may submit a fresh application for transfer of the case to an accountability court constituted under the NAO. If such an application is submitted it shall be dealt with strictly in accordance with law and upon transfer of the case to an accountability court constituted under NAO it shall be deemed to be a reference under section 18 of NAO. The purported previous exoneration by NAB of any person in respect of FIR Nos. 29/2009 and 53/2009 is however declared to be of no legal effect and shall be disregarded.

12. That section 9 (a) (i), (iv) and (xii) of NAO stipulates that if the holder of a public office does any official act or forbears to do any official act that he is supposed to do or misuses his authority or aids, assists, abets, attempts or acts in conspiracy with another with regard thereto he commits the offence of corruption and / or corrupt practices. The material placed before us *prima facie* indicates that the then Chairman NAB, and possibly other officers of NAB as well, misused their official positions and authority to extend undue benefit / favour to Bahria Town and /or the Bahria Town respondents. Therefore, NAB is directed to investigate the matter of the application

submitted by the then Chairman NAB under section 16-A (a) of NAO before the Special Judge Anti-Corruption, to complete the investigation expeditiously and proceed in accordance with section 18 (g) of NAO.

Chief Justice

Judge

Judge

Announced in Open Court

On \_\_\_\_\_

At Islamabad

**APPROVED FOR REPORTING**

(Zulfiqar)