

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Asif Saeed Khan Khosa
Mr. Justice Ejaz Afzal Khan
Mr. Justice Ijaz Ahmed Chaudhry
Mr. Justice Gulzar Ahmed
Mr. Justice Muhammad Ather Saeed

**Criminal Miscellaneous Application No. 486 of 2010 in
Criminal Appeal No. 22 of 2002**

Adnan A. Khawaja

... Appellant

versus

The State

... Respondent

**Suo Motu Case No. 4 of 2010, Civil Miscellaneous Application
No. 1080 of 2010, Civil Miscellaneous Applications No. 1238
and 1239 of 2010 and Civil Miscellaneous Application No. 129
of 2012**

(Suo Motu action regarding appointment of convicted person
namely Ahmed Riaz Sheikh (NRO Beneficiary), as Additional
Director General, Federal Investigation Agency)

**Civil Miscellaneous Application No. 1253 of 2010 in Sua Motu
Case No. 4 of 2010**

(Report submitted in Court by Attorney-General regarding Fact
Finding Inquiry in the case of Missing Letter No. PS/DG/FIA/
2009/5047-49 dated 17.11.2009)

**Civil Miscellaneous Application No. 1254 of 2010 in Sua Motu
Case No. 4 of 2010**

(Additional Documents comprising of Interim Report filed by
Secretary Law dated 04.04.2010, pointes formulated by Secretary
for Hon'ble Court, Advice of Former Attorney-General and
Authorization letter in favour of Mr. Hassan Wasim Afzal, Joint
Secretary of Ehtisab Bureau dated 20.05.1998)

Civil Miscellaneous Application No. 1082 of 2010

(Report/Minutes of Hon'ble Chief Justice of Lahore High Court,
Lahore)

For the Federation:

Mr. Irfan Qadir,
Attorney-General for Pakistan

On behalf of National Accountability Bureau: Mr. Akbar Tarar, Addl. PG. NAB
Mr. Fauzi Zafar, Addl. PG. NAB

For Ahmad Riaz Sheikh: Dr. A. Basit, Sr. ASC

On behalf of Secretary Law: Nemo

Date of hearing: 12.07.2012

ORDER

Asif Saeed Khan Khosa, J.: Mr. Shaiq Usmani, Sr. ASC, the learned counsel for the National Accountability Bureau, is on general adjournment and, therefore, consideration of the matters pertaining to Mr. Adnan A. Khawaja, Mr. Ahmad Riaz Sheikh and Malik Muhammad Qayyum is postponed.

2. On the last date of hearing, i.e. 27.06.2012 this Court had passed the following order:

"2. As regards the non-implementation of the direction of this Court given in para-178 in the case of Dr. Mubashir Hasan, the former Prime Minister was convicted and sentenced by this Court for contempt of Court. Resultantly, he lost his membership of the National Assembly and consequently the office of the Prime Minister. The newly elected Prime Minister has assumed the charge of his office last week. We trust that he will implement the aforesaid direction. The Attorney-General for Pakistan present in Court shall in this regard obtain instructions from the Prime Minister and inform the Court of his response on the next date of hearing. Relist on 12th July, 2012."

Today the learned Attorney-General for Pakistan has submitted that upon having been informed about the above mentioned order the Prime Minister of Pakistan has instructed him to state before this Court on his behalf as under:

"The matter was taken up in yesterday's Cabinet meeting and the Cabinet has desired that the Ministry of Law should furnish its views as regards the matter of implementation of the relevant paragraph of this Court's judgment and as and when the Ministry of Law renders its opinion in the matter the Cabinet shall then take decision in accordance with the provisions of the Constitution."

3. We are constrained to observe that we find it difficult to appreciate or accept the said response of the Prime Minister. It may be pertinent to mention that during the present implementation proceedings this Court had passed the following order on 08.03.2012:

"3. As regards the implementation of the direction given in Para 178 of the judgment in Dr. Mobashir Hassan's case, despite specific orders and warnings given from time to time since March, 2010, the implementation of the directions have still not been implemented. We need not repeat the previous orders, however, it may be mentioned that ultimately this Court was compelled to issue notice for contempt of court to the Prime Minister of Pakistan, Syed Yousaf Raza Gillani, for disobeying the orders of this Court in his capacity as the Chief Executive of the Federation of Pakistan. In response to the show cause notice, the Prime Minister appeared before the Bench on 02.02.2012 and personally addressed the Court. While making particular reference to the immunity of the President of Pakistan, he maintained that his decision that the letter to the Swiss Authorities in terms of Paragraphs 177 and 178 of the said judgment shall not be written was based on the advice tendered to him in the ordinary course of business. However, courteous in his demeanor, he made no commitment to implement the Court's direction. We will not comment upon the defence of the Prime Minister as the same will be examined in the contempt proceedings still pending adjudication. The said proceedings relate to disobedience of the earlier orders of the Court and their pendency does not affect the process already undertaken for implementation of the said directions. Thus, regardless of any advice tendered earlier or in future, the Prime Minister, being Chief Executive of the Federation, who admittedly has the final say in the executive domain, shall implement the directions given in Paras 177 and 178 of the judgment in Dr. Mobashir Hassan's case.

4. The Attorney General for Pakistan, present in Court, shall communicate this order to the Prime Minister. By the next date of hearing, the Prime Minister shall report to this Court compliance of the above direction and similar orders made from time to time in this respect.

5. Adjourned to 21.3.2012."

Unfortunately the said direction issued by this Court to the then Prime Minister in respect of implementation of the relevant order of this Court "regardless of any advice tendered earlier or in future" was also not obeyed and in the final judgment handed down by this Court in the contempt proceedings against the former Prime Minister (PLD 2012 SC 553) this Court had held as follows:

"It was a straightforward case for implementation of the judgment of this Court on which there could have been no two views. ----- It was not a matter where the respondent was left with any discretion. He was supposed to give a formal approval or direction to implement the decision of the Court. ----- He cannot shift the blame or the responsibility to his advisors for not giving him proper advice. ----- The respondent had no option but to order the implementation of this Court's direction, particularly after the review of the Federal Government was dismissed."

It goes without saying that all the above mentioned directions issued by this Court during the implementation proceedings apply with equal force to the present incumbent of the office of the Prime Minister / Chief Executive of the Federation as he has merely stepped into the shoes of his predecessor in office and, thus, he too is bound to implement the relevant directions of this Court "regardless of any advice tendered earlier or in future". We, therefore, reiterate the said directions to the Prime Minister requiring him to act in the matter forthwith.

4. We take judicial notice of the fact that after attending a meeting of the Federal Cabinet yesterday the Federal Minister for Information held a press conference wherein he categorically declared that the Constitution of Pakistan does not permit writing of the relevant letter to the Swiss authorities and, therefore, the direction of this Court issued in that regard cannot be implemented. We further note that different political functionaries of the Federal Government and others have also been harping on the same theme in the print and electronic media and even in public meetings for some time and a reference in this respect is being made to the provisions of Article 248 of the Constitution of the Islamic Republic of Pakistan, 1973. The record shows that on 10.01.2012 in these very implementation proceedings this Court had enlisted different options available with it and one of such options was as follows:

"Option No. 4: Although in the present proceedings nobody has so far raised the issue pertaining to the protections contemplated by Article 248 of the Constitution yet if anybody likely to be affected by exercise of these options by this Court wishes to be heard on that question then an opportunity may be afforded to him in that respect before exercise of any of these options."

It was further ordered on that date as under:

"The learned Attorney-General for Pakistan is hereby put on notice to address arguments before this Court on the next date of hearing, after obtaining instructions from those concerned, as to why any of the above mentioned options may not be exercised by us in these matters. It goes without saying that any person likely to be affected by exercise of the above mentioned options may appear before this Court on the next date of hearing and address this Court in the relevant regard so that he may not be able to complain in future that he had been condemned by this Court unheard. The learned Attorney-General for Pakistan is directed to inform all such persons mentioned above about the passage of this order and also about the next date of hearing."

5. On 16.01.2012 the then learned Attorney-General for Pakistan appeared and informed the Court that the order dated 10.01.2012 had been communicated by him to all the relevant persons and authorities mentioned therein, including the President of Pakistan and the Prime Minister, but he had not received any instruction from any of them to be communicated to the Court. It was in that backdrop that contempt of court proceedings were initiated, conducted and concluded by this Court against Syed Yousaf Raza Gillani, the then Prime Minister of Pakistan / Chief Executive of the Federation, culminating in his conviction and sentence, disqualification from membership of the *Majlis-e-Shoora* (Parliament) and removal from the office of the Prime Minister. During the said proceedings at the time of the preliminary hearing afforded to the then Prime Minister on 19.01.2012 he and his learned counsel Ch. Aitzaz Ahsan, Sr. ASC had briefly addressed the Court and the Prime Minister had maintained *inter alia* that his inaction in the matter was due to the immunity enjoyed by the President of Pakistan under Article 248 of the Constitution. The order passed by this Court on that date specifically referred to the said stance but soon after recording of that order Ch. Aitzaz Ahsan, Sr. ASC representing the then Prime Minister filed Criminal Miscellaneous Application No. 49 of 2012 in Criminal Original Petition No. 06 of 2012 before the Court clarifying and submitting as follows:

"4. In view of the recorded proceeding, it is submitted with respect that the aforesaid is not the correct record of proceedings

and submissions made on that day i.e. January 19, 2012. In particular:

a. The learned counsel representing the Prime Minister (Mr. Aitzaz Ahsan, Senior ASC) had expressly submitted at the Bar that there was no need to focus on Article 248 as to whether it did or did not provide immunity to the President of Pakistan;

b. -----

c. It was insistently, and with respect, argued that the court must not focus, in the contempt proceedings against the Prime Minister, on whether the President had complete immunity or not under Article 248. That was precisely the point.

5. -----

6. That the Prime Minister and his learned counsel continue to assert, with humility and respect, that the Hon'ble Bench should not concern itself with whether the President indeed has such immunity but should only seek to reassure itself that the Prime Minister believed, or had reason to believe, especially as per advice tendered to him that the President was immune and thus there was a constitutional impediment, for the time being, to writing the letter to the Swiss Authorities for compliance with Para 178 of the judgment in Dr. Mubashir Hassan Case.

7. That the Respondent/Prime Minister briefly seeks that the Show Cause notice be decided on the basis of the arguments submitted by the counsel, while reserving for some other appropriate case the examination and consideration of the scope of Article 248(2) of the Constitution."

The main judgment passed by this Court on 26.04.2012 in that matter shows that even during his final arguments Ch. Aitzaz Ahsan, Sr. ASC had categorically maintained that the immunity being referred to in defence of the then Prime Minister was that enjoyed by a Head of the State under the customary international law and not the one contemplated by Article 248 of the Constitution. This Court had observed in that judgment that an immunity under the customary international law was relevant to, and could be invoked by the person concerned before, a foreign court and was, thus, irrelevant to the contempt of court proceedings against the then Prime Minister. That judgment of this Court has already attained finality as it was never challenged through any appeal or review.

6. Adjourned to 25.07.2012 on which date the Prime Minister of Pakistan / Chief Executive of the Federation shall cause a report to be submitted before this Court regarding compliance of the

directions contained in paragraphs No. 177 and 178 of the judgment passed by this Court in case of Dr. Mobashir Hassan failing which this Court may initiate any appropriate action under the Constitution and the law.

Judge

Judge

Judge

Judge

Judge

Islamabad

12.07.2012

M. Yasin