

JUDGMENT SHEET

ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

Criminal Appeal No.188/2020

Nasir Yaqoob

versus

National Accountability Bureau through its Chairman & 11 others

Appellant by: Mr. Omer Farouk Adam, Advocate.

Respondents by: Ms. Rakhshanda Younas, Advocate for
respondents No.3 to 9 & 11.

Rana Zain Tahir, Special Prosecutor, NAB

Ahmad Saeed Wazir, DD/I.O., NAB.

Date of Hearing: 17.03.2021.

JUDGMENT

MOHSIN AKHTAR KAYANI, J: Through the instant criminal appeal, the appellant has called in question order of the learned Accountability Court-II, Islamabad, dated 26.10.2020, whereby application filed by the appellant seeking permission to transfer his property has been dismissed.

2. Succinctly, Zakia Shaheen sold commercial property "Fatima Arcade", located at Plot No.24, measuring 196 sq. yds., Sector E-11/2, Services Cooperative Housing Society, Islamabad (*suit property*) to Mrs. Lubna Zahir in the year 2016, who further sold it out to Nasir Yaqoob (*appellant*) for valuable consideration, however the suit property could not be transferred in the name of purchaser Nasir Yaqoob due to pendency of Reference No.11/2018 before the learned Accountability Court, Islamabad having been filed against Management Committee of the Services Cooperative Housing Society (*Society*) for allotting ten (10)

commercial plots without open auction. Accordingly, the appellant filed application before the learned Accountability Court seeking transfer of the suit property in his name but, the application was dismissed vide impugned order dated 26.10.2020 on the ground the suit property has been sold without auction and said application is not maintainable in terms of Section 23 of the NAO, 1999. Hence, instant criminal appeal.

3. Learned counsel for appellant contended that Reference No.11/2018 has been filed against the Members of the Management Committee of the Society and not against the previous owner or the present appellant; that neither the appellant nor the previous owners can be held liable for recovery of any potential loss caused to the Society in case the reference is answered against the delinquents; that the appellant is bona fide purchaser of the suit property, whose fundamental rights to acquire, hold and dispose of the property could not be denied as guaranteed under Articles 23 and 24 of the Constitution of the Islamic Republic of Pakistan, 1973.

4. Conversely, learned Special Prosecutor, NAB contended that accused persons being Members of the Management Committee of Society knowingly and with malafide intention approved the allotment of ten (10) commercial plots, including the suit property, without open auction and in violation of by-laws of the Society, as such, the suit property had also been allotted by the said Management Committee to Mrs. Zakia Shaheen without open auction and in violation of the by-laws of Society, as such, the suit property attracts the provision of Section 23 of the NAO, 1999, which bars the transfer of property during inquiry / investigation or proceedings pending before the learned Accountability Court.

5. Arguments heard, record perused.

6. Perusal of record reveals that Nasir Yaqoob (appellant) has assailed the order dated 26.10.2020, passed by learned Accountability Court-II, Islamabad, in Reference No.11/2018 (State vs. Abdul Razaq Memon, etc.), whereby appellant has filed an application for necessary orders and sought permission for transfer of subject property i.e. Plot No.24, Sector E-11/2, Services Cooperative Housing Society, Islamabad but, his application has been turned down primarily on the ground that a reference is pending and caution under Section 23 of the NAO, 1999 is in field i.e. any property against which an inquiry / investigation or proceeding before the NAB or the Court is pending, such property shall not be transferred rather its transfer is void, even no right, title or interest or charge could be created without the approval of the court.

7. We have gone through the details of the entire matter and observed that commercial property i.e. Plot No.24, measuring 196 sq. yds., Sector E-11/2, SCHS, Islamabad, was originally allotted to one Mst. Zakia Shaheen for total consideration of Rs.22.54 Million (at the rate of Rs.115,000/- per sq. yard). The payment was made in installments from 20.05.2013 to 20.06.2013 by the said allottee in favour of the Society. The first allottee Mrs. Zakia Shaheen had further transferred the plot to Mrs. Lubna Zahir on 14.07.2016, who entered into agreement to sell with present appellant on 30.07.2019 and transfer application was filed on 18.09.2019 before the Society but, the same was not transferred due to caution imposed by the NAB authorities.

8. In order to settle the controversy, we have gone through the details of reference, including the final investigation report submitted by the NAB authorities in this case, and observed that the reference has been filed under Section 18(g) of the NAO, 1999 against ten (10) accused persons on the basis of initial inquiry authorized on 03.02.2016, which was subsequently converted into investigation on 01.12.2016, whereby it was, *prima facie*, established that the Management Committee of the Society knowingly and with malafide intention approved allotment of ten (10) commercial plots without open auction in violation of by-laws of the Society through corruption and corrupt practices. Perusal of the reference reveals that Abul Razzaq Memon (Accused No.1) the then President of Management Committee, Muhammad Ramzan Zia Bhatti (Accused No.2) the then General Secretary and other accused persons namely Muhammad Javaid Awan, Shahid Aziz, Khawaja Manzoor Ahmed, Haji Noorullah, Muhammad Asghar Shahid, Saad ur Rehman Qureshi, Muhammad Ramzan and Akhtar Saeed, the then Members of the Managing Committee, have given their approval for the allotment of ten (10) commercial plots, including the suit property, without adhering to the procedure provided in By-law 45(3) of the Society, which restricts the Society from allotment of commercial plot, except through an open auction.

9. The NAB authorities have calculated the loss against each plot amounting to Rs.219.11 million and the loss caused to the Society against the suit property has been calculated as Rs.11.76 million, approximately,

per se, such calculations were, *prima facie*, made on the basis of rate for commercial plots in the year 2010 when auction conducted by the society.

10. The above referred background primarily reveals that it is not the case that subject property was transferred without any sale consideration, rather it was not sold through auction process.

11. Now adverting to the case of appellant, this Court has gone through agreement to sell, dated 30.07.2019, and observed that appellant is bona fide purchaser of the plot in question for valuable consideration of Rs.155.00 Million, made through banking channel in favour of Mrs. Lubna Zahid i.e. last owner.

12. The analogy in terms of Section 23 of the NAO, 1999 could be well judged if said provision is considered in its true perspective, as such, the transfer of any property is declared to be void if *the Chairman NAB initiated an inquiry or investigation into any offence under this Ordinance, alleged to have been committed by an accused person, such **accused person or any relative or associate of such accused person** or any other person on his behalf, shall not transfer by any means whatsoever or create a charge on any property owned by him or in his possession while the inquiry, investigation or proceedings are pending before the NAB or the Court, and any transfer of any right, title or interest or creation of charge on such property shall be void.*

13. The above mentioned provision only targets the person accused in an inquiry, investigation or reference pending before the Accountability Court. In the present case, the appellant, Mrs. Lubna Zahir (ex-allottee) or for that matter first owner of subject property i.e. Zakia Shaheen, are not accused persons in the pending reference, inquiry or investigation, per se,

such aspect has also been conceded by the Investigating Officer as well as by the Special Prosecutor, NAB before this Court. In such eventuality, explicit restriction of accused person in the provision of Section 23 of the NAO, 1999 could not be extended to those persons who have nothing to do with this case, even they are claiming to be bona fide purchaser of property, therefore, scope of Section 23 of the NAO, 1999 is only applicable to the accused persons and property owned by them. Reliance is placed upon 2010 P.Cr.LJ 579 Karachi (Khan Muhammad Maheshir vs. NAB Sindh).

14. Similar circumstances have also been considered by this Court in another case reported as 2019 P.Cr.LJ 997 Islamabad (Mst Ashi Munir vs. NAB, Rawalpindi), whereby it was held as under:

“6. The Ordinance of 1999 was promulgated and the objects and purpose are described in the preamble i.e. to provide for effective measures for the detection, investigation, prosecution and speedy disposal of cases involving corruption, corrupt practices, misuse or abuse of power or authority, etc. Section 5(a) defines the expression 'accused' while 'assets' is defined in section 5(c). Clause (a) of section 23 starts with a non-obstante clause. Firstly, this provision is attracted after the Chairman of the Bureau has initiated an inquiry or investigation into any offence under the Ordinance of 1999, secondly, it is explicitly restricted to an accused person, the latter's relative or associate or any other person who acts on behalf of such an accused and lastly the section bars transfer of property, owned by the accused or if it is in possession of any one of the aforementioned categories, while proceedings are pending under the Ordinance of 1999 before the Bureau or the Court, as the case may be. The consequence of transfer, title, right, interest or creation of charge relating to the property of an accused which offends section 23 has been explicitly

declared as void. Moreover, under clause (b) of section 23, contravention of clause (a) is an offence and punishment has also been provided therein. In a nutshell the mischief contemplated under section 23 is solely restricted to the property of a person who falls within the ambit of the definition of the expression "accused" under section 5(a) i.e against whom inquiry or investigation before the Bureau, or proceedings before an Accountability Court are pending. If a person is not an accused nor proceedings are pending against him or her before the Bureau, or the Accountability Court then in such an eventuality provisions of section 23 relating to property owned by such a person are not attracted."

15. In view of above background, we have also confronted the Special Prosecutor, NAB with the scenario that if the Accountability Court passes a judgment for conviction of accused persons arrayed in the reference, would such decision have any bearing upon the status of subject plot? The learned Special Prosecutor, NAB has also been confronted whether the status of subject property to the extent of loss caused to the Society is to be determined by the Annual General Meeting of the Society or by the Circle Registrar Cooperative Societies in terms of the Cooperative Societies Act, 1925 but, the learned Special Prosecutor, NAB was unable to answer any of the aforementioned question.

16. In our view, the loss caused to the Society allegedly by the accused persons have to be recovered from them in final judgment, if the Accountability Court arrives at the conclusion that they are guilty of offence of corruption and corrupt practices in terms of the NAO, 1999 and loss so calculated by the NAB authorities in the reference could only be

recovered from those accused persons and, as such, it has nothing to do with the case of bona fide purchaser.

17. In view of above reasons, we are convinced that the present appellant is neither an accused person in pending reference nor the property in question belongs to any accused person arrayed in Reference No.11/2018 pending before the learned Accountability Court-II, Islamabad, therefore, the caution imposed by the NAB authorities against subject property is considered to be unlawful as the learned Trial Court has not adverted to the true interpretation of Section 23 of the NAO, 1999, hence, the instant criminal appeal is hereby ALLOWED, the impugned order dated 26.10.2020 is SET ASIDE and the application filed by the appellant is ALLOWED.

(FIAZ AHMAD ANJUM JANDRAN)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: 29th March, 2021.

JUDGE

JUDGE

Khalid Z.