

JUDGEMENT SHEET
ISLAMABAD HIGH COURT
ISLAMABAD

W.P No.3519 of 2011

Sheikh Muhammad Tahir
Versus
The State etc.

Petitioner by: **M/s Sana Ullah Zahid and Sajid Mehmood Shahd, Advocates for petitioner.**
State by: **Mr. Tariq Mehmood Jehangiri, DAG and Khalid Naeem, AD (Law) FIA.
Ghazanfar Abbas, Inspector FIA.**

Date of hearing: **13-03-2012.**

SHAUKAT AZIZ SIDDIQUI; J: Through instant petition, petitioner seeks quashment of FIR No.03, dated.17.03.2011 under section 109, 420, 468, 471 PPC, 5(2) 47 PCA registered at P.S, FIA/SIU, Islamabad Circle, Islamabad.

2. Facts presented through instant writ petition are that during the investigation of Hajj Corruption scam, it transpired that D.G Hajj Shakeel Ahmed Rao submitted his particulars before the Establishment Division for his appointment as DG, Hajj wherein he has mentioned his date of birth as 25-12-1954 with malafide intention whereas his correct date of birth is 25-12-1952. As per criteria laid down by Establishment Division vide memorandum No.E-V/4/4/2006 dated 09-03-2009, no officer shall be appointed as DG Hajj above the age of 56 years and against whom any criminal proceedings are pending. The notings of Establishment Division dated 13-06-2009 & 16-06-2009 made by Section officer and Deputy Secretary respectively, make it clear that they have informed in writing to their higher officials that keeping in view the correct date of birth of Shakeel Ahmed Rao and pendency of NAB cases against him, he does not fulfill the requirements for his appointment to the post of DG, Hajj but despite this fact Establishment Division has mentioned wrong date of birth of Shakeel Ahmed Rao and also concealed the fact that cases in NAB are pending against him. Former Secretary Establishment Division, Muhammad Ismail Qureshi and Joint Secretary S.M Tahir etc. while concealing the true facts

have sent the name of Shakeel Ahmed Rao to Special Selection Board (SSB) while tampering in the record and Muhammad Ismail Qureshi and Joint Secretary S.M Tahir being member and Secretary respectively of SSB did not inform, in the meeting to other members of SSB regarding wrong date of birth and pendency of cases before NAB against Shakeel Ahmed Rao, therefore, the SSB recommended the name of Shakeel Ahmed Rao alongwith two other officers to the competent authority. Shakeel Ahmed Rao was provided financial benefit and he committed corruption of billions of rupees during his appointment as DG, Hajj. Fajar Ali, Section Officer of Establishment Division sent letter and clearance form of Shakeel Ahmed Rao from Intelligence Bureau and did not mention pendency of NAB cases in it. Further name of Shakeel Ahmed Rao was placed on ECL by NAB due to these cases and a written instruction was issued that neither he be given any effective posting nor his name may be excluded from ECL without permission of NAB but despite clear instructions of NAB, the Interior Ministry excluded the name of Shakeel Ahmed Rao from ECL illegally and he was issued official passport. In these circumstances, after getting permission from competent authority, proceedings will be conducted against Shakeel Ahmed Rao, former DG, Hajj, Ministry of Religious Affairs and other officers of Establishment Division etc. whose accusation shall be determined during investigation, hence FIR under above mentioned Sections of Law was registered.

3. The learned counsel for petitioner submits that FIR is illegal, without jurisdiction and lawful authority which is result of dishonest and malafide exercise of authority by the officials, that the petitioner is innocent and have no concern whatsoever with the alleged commission of offence. The allegations leveled against petitioner are false, frivolous, baseless, concocted and there is no truth in prosecution story. The petitioner is a secretariat group officer, a senior bureaucrat and Additional Secretary (BPS-21), Govt. of Pakistan and the FIR has been registered with malafide intention just to blackmail and harass the petitioner. That the ingredients of mens-rea, are completely missing in the instant

case. That no incriminating material is available on record to connect the petitioner with the commission of alleged offences. The present petitioner forwarded noting to Additional Secretary on the file for the process of names for consideration by Special Selection Board~~s~~ which reveals that petitioner has written his notes 99 to 101 as follows;

"The panel of three officers, against one post, has been submitted, as decided in the SSB meeting on 05-06-2009. Rao Shakeel Ahmed, mentioned at serial No.3 above is 57 years and 6 months old and thus crossed the limit of maximum age of 56 years as mentioned in the guide lines issued by the Establishment Division. As regards the news item published in the press, I informally discussed it with Major Shah Nawaz Baddar, DG NAB, Punjab. He confirmed the contents of the news item. The SSB will be requested to keep both the aspects in view above the said officer (Rao Shakeel Ahmed) while interviewing the candidates."

4. The Additional Secretary brought it to the notice of the Secretary, Establishment Division, Govt. of Pakistan. The Secretary put a note "please speak" and forwarded the noting to the Additional Secretary. The Additional Secretary spoke with Secretary and gave the noting of "spoken" and referred back the noting to the petitioner as Joint Secretary (T) and the noting was processed to Deputy Secretary (T) for further correspondence. The note of petitioner reveals that it was made much prior to the date of approval of the name of Shakeel Ahmed Rao as DG Hajj and the petitioner has never concealed or suppressed the relevant information from the competent authority, therefore, keeping in view the above note of the petitioner the prosecution version falls on the ground and by no stretch of imagination petitioner can be made accused of any offence. Record further reveals that willing officers were invited by Establishment Division in the year 2006-07 for selection/posting as DG Hajj, Jeddah. Shakeel Ahmed Rao has shown his willingness at the relevant time for consideration of his name but as incumbent of said office continued and remained in office till 2009 and the vacancy did not occur in the said office therefore, the process for selection/posting as DG Hajj, Jeddah was started in the year 2009 and Shakeel Ahmed Rao has reminded that in view of his submission

of application in 2007 his name may very kindly be included amongst the officers being considered for selection/posting as DG Hajj, Jeddah, therefore it is clear that prior to the last date for submission of applications i.e 20-04-2009, the application of Shakeel Ahmed Rao was already there and petitioner cannot be blamed for entertaining the application of Shakeel Ahmed Rao after the above said target date, therefore, said blame cannot be converted into a criminal act/an offence. That the report of Addl. DG, FIA dated.07-04-2011, submitted before Hon'ble Supreme Court of Pakistan clearly reveals that Mr. Tauqeer Ahmed, Additional Secretary, Establishment Division has stated that **"he was asked by the Secretary Establishment Division, Mr. Ismail Qurehsi that he will disclose the fact (as mentioned by the petitioner in his note dated 15-06-2009) in the meeting of Special Selection Board (SSB) and same instructions were passed up to selection officer."** In SSB four members recommended the name of Rao Shakeel Ahmed as DG Hajj, Jeddah, and in the said four members the name of petitioner does not figure rather it included Mr. Ismail Qureshi, the then Secretary Establishment Division. Report further reveals that above facts were not disclosed by Mr. Ismail Qureshi in SSB for the reasons best known to him. The report declares Mr. Ismail Qureshi responsible for concealing the factual position. Statement of petitioner was recorded as PW under Section 161 Cr. PC but surprisingly said Mr. Ismail Qureshi, nominated co-accused of the petitioner has been exonerated from the charge and the petitioner has been made an escape-goat without any basis or justification. Moreover, petitioner realizing sensitivity of the matter responded to NAB positively. The petitioner has been thoroughly investigated by the investigating agency and it has been established on record that petitioner has never received any financial gain or pecuniary benefit from Shakeel Ahmed Rao or any other person. There is no material whatsoever against the petitioner to substantiate the accusation or charge of criminal misconduct as defined in Section 5 of Act II of 1947. That in view of provisions of Sections 415, 420, 463, 464, 467, 468 & 471 PPC, there is no incriminating evidence available against petitioner. That by involving the

petitioner in the present case the process of law is being abused and it is a glaring example of misuse of authority and transgress of authority by FIA officials. The learned counsel for petitioner further prayed that in view of above, appropriate writ may be issued declaring the FIR as illegal, without lawful authority and same may be quashed. In support of his contentions learned counsel placed reliance on 2005 SCMR 594, PLD 2007 SC 48 and 2009 SCMR 141.

5. Conversely learned Deputy Attorney General, submits that this court lacks jurisdiction to quash the FIR, more particularly when report u/s 173 Cr.PC had already been submitted. Learned DAG placed reliance on PLD 2002 SC 969, 2006 SCMR 276 and 1999 MLD 2239.

I have heard learned counsel for the parties and gone through the contents of FIR.

6. First aspect which this court has to examine is that, whether in the sleeves any power, discretion, mandate, jurisdiction and authority to quash any FIR is vested or not? It is well settled, that High Court being Constitutional Institution is savior and protector of the rights of the citizens. Article 199 of the constitution showers mandate upon the High Court to issue writs of all kinds, for convenience sake article 199 of the Constitution of Islamic Republic of Pakistan is being supplied, which reads as under:-

199. Jurisdiction of High Court.- (1) Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law,-

(a) On the application of any aggrieved party, make an order-

- (i) directing a person performing, within the territorial jurisdiction of the Court, functions in connection with the affairs of the Federation, a Province or a local authority, to refrain from doing anything he is not permitted by law to do, or to do anything he is required by law to do; or*
- (ii) declaring that any act done or proceeding taken within the territorial jurisdiction of the court by a person performing functions in connection with the affairs of the Federation, a province or a local authority has been done or taken without lawful authority and is of no legal effect, or*

(b) *On the application of any person, make an order-*

- (i) *directing that a person in custody within the territorial jurisdiction of the court be brought before it, so that the court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner: or*
- (ii) *requiring a person within the territorial jurisdiction of the court holding or purporting to hold a public office to show under what authority of law, he claims to hold that office; or*
- (c) *On the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that court as may be appropriate for the enforcement of any of the Fundamental Rights conferred by Chapter-I of Part-II.*

7. Reading of above, makes it clear that discretion to declare any act of the police officials, to be without lawful authority is available to the High Court. Now, question arises that in which cases declaration can be made that registration of FIR is besides the law, making the same liable to quashment? Answer to this, has been provided by the Hon'ble Supreme Court through different authoritative pronouncements. Reference is being made to 1993 SCMR 71 and 2000 SCMR 122, 2012 SCMR 94.

8. Judgments on the issue provide following situations wherein discretion of exercising the authority of quashment of FIR has been approved;

- (i) Registration of FIR by Police/Authorities having no jurisdiction to register the same.
- (ii) From the admitted contents of FIR, no offence is constituted;
- (iii) From contents of FIR matter purely is of civil nature.

9. Even in the judgments through which exercise of such discretion has been dis-approved "**door of extraordinary circumstance**" has been kept open. Guidance in this regard has been borrowed from 1996 SCMR 186, 2006 SCMR 276 & PLJ 2011 SC 1932.

10. Petitioner has been made escape-goat and real culprits have been either let free or exonerated by the FIA authorities. When asked from I.O of the case

that why the competent authority before whom all facts were presented in a summary, ignored the same by appointing Shakeel Ahmed Rao as Director General Hajj? The I.O did not reply to the question however, submitted that there is no evidence to the effect that petitioner acted for any pecuniary benefit. On court question I.O confirmed that Federal Secretary who was part of Selection Board has also been exonerated.

11. Unfortunately trend to involve the subordinate employees is on increase so that persons on the helm of affairs may be saved. Entire accusation against present petitioner is tainted with malafide, ulterior motives and simply to protect the appointing authority before whom summary dated.07-08-2009 was submitted which contained following reference about Shakeel Ahmed Rao:-

"Bio-datas of the above mentioned three officers, Job description of the post and Guidelines for selection of officers for posting in Pakistan Missions abroad are placed at Annex-II, III & IV, respectively. However, two cases are pending in NAB against the officer at serial no.(ii) at para-3 above as intimated by the Office of NAB, Punjab, Lahore (Annex-V).

12. In my estimation, registration of case to the extent of present petitioner on face of it is tainted with malafide, without jurisdiction and even if FIR is allowed to hold the field, there is no probability of the conviction of the petitioner. This evasive exercise carried out only for public consumption and that too, when august Supreme Court showed indulgence in the matter, resultantly big scandal was unearthed. To my mind appointing authority was liable to be dealt with in accordance with law. But who dares in FIA?

13. The High Court being custodian of the fundamental rights of the citizens is under obligation to provide shield against any invasion made on the guaranteed constitutional rights and protect the subject from discrimination, exploitation, colourable exercise of authority, bolted actions, malafide and stinking proceedings. As held by august Supreme Court in the case of Kenneth Marshal, reported as 2005 SCMR 594, that partial Quashment of proceedings is

permissible, therefore, instant petition is allowed, impugned FIR to the extent of petitioner is declared to be illegal, unlawful, unprecedented, sham, result of colourable exercise of authority, an abuse of process of law, tainted with malafide, ulterior motives, a device of exploitation without jurisdiction and outcome of arbitrary exercise of authority, and same is hereby quashed.

(SHAUKAT AZIZ SIDDIQUI)
JUDGE

ANNOUNCED IN OPEN COURT ON 30-03-2012.

JUDGE

APPROVED FOR REPORTING.

"Waqar Ahmed"

Blue slip added