

Judgment Sheet
IN THE PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT

W.P.No.2872-P of 2016 with I.R.

JUDGMENT

Date of hearing: 06.02.2018

Petitioner (s) _____.

Respondent (s) _____.

IKRAMULLAH KHAN, J.- On the allegation that petitioner had illegally invested the General Provident Investment Fund and Pension Fund in risky business of Stock Exchange Commission of Pakistan, the Bureau of Ehtesab Commission initiated an inquiry against the petitioner under the Provisions of Khyber Pakhtunkhwa Ehtesab Commission Act, 2014. In this regard, Call-up notice was issued to the petitioner in term of section 13 (b) of the Khyber Pakhtunkhwa Ehtesab Commission Act, 2014. Petitioner apprehending his arrest instead of participating in the proposed inquiry filed the instant constitutional petition with the following prayer:-

“On acceptance of this Writ Petition, may kindly hold, direct and declare:-

- (i) That after closure of the case by
National Accountability Bureau after*

extensive probe and Final Inquiry against the petitioner, now the initiation of afresh inquiry, probe and investigation by the Khyber Pakhtunkhwa Ehtesab Commission on the same allegations is illegal, overlapping, harassment, without lawful authority, without jurisdiction, abinitio void and said afresh enquiry, probe and investigations are liable to be set aside and quashed;

- (ii) That the respondents No.1 to 5 (i.e. Khyber Ehtesab Commission) should also refrain from arresting/detaining, humiliating and harassing the petitioner; and*
- (iii) Any other remedy and relief, considered just and appropriate in favour of the petitioner, not specifically prayed may also be granted, if deemed fit and appropriate in the circumstances of the case.*

2. Learned counsel for petitioner based his whole arguments in order to get the desired relief on the following grounds:-

- A. That the matter in issue had already been inquired, investigated by a competent Agency (NAB), whereby, the petitioner

was exonerated and the inquiry was closed / dropped;

- B. That no person shall be twice punished for the same allegations;
- C. That initiation of 2nd inquiry by Ehtesab Commission on allegation already investigated by NAB is illegal, unconstitutional, malafide, whimsical, capricious, arbitrary and abuse of power;
- D. That initiation of inquiry by the Ehtesab Commission against the petitioner is violation of constitutional rights of petitioner guaranteed under Articles, 4, 9, 10A, 13, 18 and 25 of the Constitution of Pakistan, 1973;
- E. That respondents could not initiate fresh or 2nd inquiry against the petitioner in view of explicit bar envisaged thereunder section 403 Cr.P.C.

3. Respondents were put on notice, they filed their comments, whereby, raised numerous legal objections over the maintainability of the writ petition. While learned DPG appearing on behalf of Ehtesab Commission argued that the petition in hand is pre-mature only call up notice has served upon the petitioner in order to record his statement and the

commission has not yet decided to make the petitioner an accused or launch prosecution, however, petitioner is bound to appear before the concern authority in order to facilitate the inquiry and as a right, defend his acts, if he so desire, while the closure of investigation by NAB or even any finding in regard to innocence of petitioner by no stretch of imagination attract either the provisions of Article-13 of the Constitution of Islamic Republic of Pakistan, 1973 or the provisions contained in section 403 Cr.P.C.

4. We have heard learned counsel for the parties in light of law and facts on available record.

5. The record reveals that petitioner was served with call up notice dated 30.6.2016 in order to procure his attendance before Ehtesab Commission but petitioner did not avail the opportunity to appear in person before the commission, however, made representation through its duly nominated representative and the respondents issued a questionnaire to petitioner, in order to know the contention of the petitioner insofar as the allegations in regard to illegal investment of public fund in risky business was concerned. The record further reveals that petitioner was Chief Executive of Pearl Securities Limited and he was the person, exclusively empowered to invest the Government money, which the petitioner invested in his own establishment, being Financial

Advisor appointed by the Khyber Pakhtunkhwa Government for the purpose of the above mentioned funds.

6. Prior to resolve the legal proposition raised by both the parties, we would like to express our opinion at this stage, to refrain ourselves to discuss and give any findings in regard to the allegations or subject matter of inquiry, initiated against the petitioner by respondents less it would prejudice case of either party, however, we confine ourselves only to answer, the proposition of law agitated by petitioner, in order to set aside the process of inquiry initiated by respondents Ehtesab Commission.

7. The provisions contained in section-22 of the NAB Ordinance, 1999 (NAB Ordinance) confers exclusive jurisdiction upon the Chairman NAB to inquire into and investigate any suspected offence, which appears to him on reasonable grounds to involve an offence under the NAB Ordinance, while clause (h) of section (18) of the NAB Ordinance, empowers the Chairman NAB or Deputy Chairman NAB or any other authorized officer in this regard, if a complaint is inquired into and investigated by NAB and it is concluded that the complaint received was prima facie, frivolous or has been filed with intent to malign or defame any person, may refer the matter to the court and if the complainant is found guilty, he shall be punished with

imprisonment for a term, which may extend to one year or fine or with both.

8. We thoroughly perused the record and also confronted learned counsel for petitioner that whether the provisions contained in clause (h) of section 18 of the NAB Ordinance is complied with before closing the inquiry by the NAB but there was no satisfactory answer from him and even no any court order is available on record that the provision of section 18 (h) of the NAB Ordinance had followed while exonerating the petitioner.

9. The provisions contained in sub-section (c) of section-9 of the NAB Ordinance explicitly and in unambiguous terms explain that *“if after completing the investigation of an offence against a holder of public office or any other person, the Chairman NAB is satisfied that no prima facie case is made out against him and the case may be closed, the Chairman NAB shall refer the matter to the concern court for approval and for the release of the accused, if in custody”*.

10. Keeping in view the above mentioned provision of law, that if a person (public office holder or any other person) against whom, the NAB, thereafter inquiry or investigation, as the case may be, had closed its inquiry or investigation in regard to a specific allegation or had found

the complaint, if any, false in both eventualities, the Chairman NAB or other authorized person, shall place the report/findings of such inquiry or investigation before the Accountability Court and it would be the court to discharge an accused and to close the inquiry. In such an eventuality, the provisions contained in section 403 Cr.P.C. as well as the provisions contained in Article-13 of the Constitution of Islamic Republic of Pakistan, 1973 shall apply to save, such an accused from double jeopardy while mere initiation of inquiry and its closure by a person not competent to do so, could not resolve an accused from his responsibility to be inquired into, serious allegations of financial loss to the exchequer. The provisions contained in section 403 Cr.P.C, if reproduced would be read as:-

“S.403. Persons once convicted or acquitted not to be tried for the same offence. (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not to be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 36, or for which he might have been convicted under section 237.

(2) A person acquitted or convicted for any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under sections 235, subsection (1).

(3) A person convicted of any offence constituted by any act causing consequences which together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequence had not happened, or were not happened, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) Nothing in this section shall affect the provision of section 26 of the General Clauses Act, 1897, or section 188 of this Code.

11. And likewise, the provisions of Article-13 of the Constitution, if reproduced would be read as under:-

“Article-13. Protection against double punishment and self-incrimination. No

person-

- (a) shall be prosecuted or punished for the same offence more than once; or
- (b) shall, when accused of an offence, be compelled to be a witness against himself.”

12. The letter dated 2.7.2014 communicated to the petitioner by the NAB, reads as:-

GOVERNMENT OF PAKISTAN
NATIONAL ACCOUNTABILITY BUREAU
PDA COMPLEX BLOCK-III PHASE-V, HAYATABD,
KPK, PESHAWAR.

No.7-4(05)/FC/W/NAB/2014/
02nd July, 2014

To

Amjad Pervez,
Pearl Securities Limited.
Room NO.204, 2nd Floor, Business & Finance Centre,
I.I. Chundrigar, Road,
Karachi.

Subject:-CLOSURE OF INQUIRY AGAINST AMJAD PERVEZ-
FINANCIAL ADVISOR, FINANCE DEPARTMENT,
KPK & OTHERS.

Reference:NAB KPK letter NO.7-4 (05)/FC/W /NAB /2014 /657,
dated 18.3.2014, sent to, Secretary to Govt of KPK, Finance
Department, Peshawar.

1. The subject case was inquired against under the provisions of National Accountability Ordinance (NAO)1999, on following allegation (s):-

“Illegally, invested General Provident Investment Fund & Pension Fund amount in risky businesses and caused loss to Exchequer”
2. Based on the findings of Final Inquiry Report and the recommendation of RBM held on 27th June, 2014, the competent authority has approved the case for closure.
3. The closure of this inquiry only relates to the allegation (s) mentioned above. However, it will not affect any other case, if already under investigation and shall not prevent initiating investigation into any new case under the ordinance.

Sd/-

Additional Director Staff
For Director General
(Muhammad Imran Butt)
Ph. 091-9217545

Copy to:

- (1) Secretary to Govt. of KPK Finance Department, Peshawar.

- (2) Addl. Director (Coord) Ops Div. NAB HQ, Islamabad.
- (3) Desk Officer (KPK), NAB Hq, Islamabad.
- (4) HQ Wing NAB (KPK).

13. The above mentioned letter by no stretch of imagination be considered as an legal instrument as there is no description of approval of the court to close the inquiry against the petitioner, while once a case is inquired or investigated, as the case may be, it would be closed in term of section 9 (c) of the NAB Ordinance by the Accountability Court.

14. The provisions contained in section 35 of the Ehtesab Commission have no any bearing on instant case as Ehtesab Commission is independently sanctioned the inquiry against the petitioner while no any other inquiry is pending with NAB at the moment. For convenience, we have to reproduce, sub-section 3 of section 35 of the KPK Ehtesab Commission Act, 2014 which reads as:-

“If jurisdiction over the inquiry or investigation of a suspected offence is assumed by an agency of the Federal Government, the Director General shall meet with the relevant officers of such agency and determine whether the Commission or such agency has proper jurisdiction over the matter; provided that in making such determination, the Director General shall take into regard the following factors:

- (a) The stage of inquiry or investigation being conducted by the Commission at the time of assumption of jurisdiction by Federal Agency;
- (b) Territorial location from where evidence has been collected during the inquiry or investigation; and
- (c) Place of residence of prosecution witnesses who are to testify against the accused.

While sub-section-4 of section-35 of the *ibid* Act, read as:-

“Following a determination based on the factors mentioned in sub-section (3), the Director General shall make a recommendation to such agency of the Federal Government with regard to exercise of jurisdiction over the matter in the interest of effective prosecution and crime prevention and the decision of the agency of the Federal Government in the matter shall be final and binding.

15. As discussed hereinabove, there is no inquiry or investigation pending before the NAB, therefore, the provisions of sub-section 3 and 4 of section 35 of the Ehtesab Act, having no bearing on inquiry initiated by Ehtesab Commission against petitioner.

16. To summarize the legal proposition, the KPK Ehtesab Commission is not restricted by any provisiona of law either by NAB Ordinance or KPK Ehtesab Commission

Act, 2014 to inquire or investigate matters, which is not pending before any Federal Agency, however, in case of inquiry by both Federal and Provincial Agencies, at the same time the provisions of section 35 (3) of the Ehtesab Act, 2014 shall come into play. While sub-section (1) of section 35 of the Ehtesab Act, 2014 confers exclusive jurisdiction upon the Director General to order an inquiry or investigation into any incident or an act or omission of a person or accused that reasonably appears to constitute an offence under the Ehtesab Act, 2014.

17. For the reasons mentioned hereinabove, this petition having no merits stands dismissed, accordingly.

Announced.

Dated: 06.02.2018.

JUDGE

JUDGE