

IN THE SUPREME COURT OF PAKISTAN

(Original Jurisdiction)

Present:

Mr. Justice Iftikhar Muhammad Chaudhry, CJ
Mr. Justice Gulzar Ahmed
Mr. Justice Sh. Azmat Saeed

C.M.As.NO.s.3685-3686 of 2012 in HRC No.7734-G of 2009

*(Implementation of judgment of this Court, dated 30.3.2012 passed in
HRC No.7734-G of 2009 regarding alleged corruption in Rental Power Plants)*

Voluntarily appeared : Kh. Muhammad Asif, MNA

For NAB : Mr. K.K. Agha, P.G.

Date of Hearing : 31.01.2013

ORDER

IFTIKHAR MUHAMMAD CHAUDHRY, CJ.-We have passed an order on 30.01.2013, contents whereof are reproduced herein below: -

"It has transpired that during pendency of instant matter, relating to implementation of the judgment of this Court dated 30.03.2012, reported as Alleged Corruption in Rental Power Plants, etc. (2012 SCMR 773), some print and electronic media had printed and televised, the contents of a letter of the Chairman NAB. We enquired from the learned Prosecutor General NAB, about such letter, he replied in affirmative. We also enquired from him, as to whether the Chairman, NAB has expressed some reservations, he stated that perhaps some reservations have been expressed by the Chairman NAB.

2. In such view of the matter, we direct to the Chairman, NAB to place on record, an authentic copy of the said letter and also disclose the name of the Authorities to whom

the same has been circulated and also verify, as it has been delivered to the media, both print and electronic, for its publication and telecasting, he may do so till 31.01.2013."

2. Mr. K.K. Agha, Prosecutor General, NAB in compliance of the aforesaid directions has placed on record copy of the letter authenticated by the Chairman NAB, reference of which has been made in the order noted above. Before considering its contents, it is to be noted that this Court in a case of "alleged corruption in the Rental Power Plants etc" initiated proceedings on the basis of applications submitted by Makhdoom Syed Faisal Saleh Hayat, one of the Parliamentarians of PML (Q) and the Parliamentary Leader of his Party in the National Assembly as well as Khawaja Muhammad Asif, Member of National Assembly of PML(N). The applications moved by them were numbered as HRCs No.7734-G of 2009, 1003-G of 2010, and 56712 of 2010. These matters were heard from time to time, however, the final judgment in respect of the issues of corruption in the matter of the Rental Power Plants was delivered on 30.3.2012. It is to be noted that during hearing of the petitions, a considerable amount which had been doled out to the sponsors of the RPPs was received back on short notices pointing towards illegal payments of the said amounts. In the judgment, *inter alia*, following directions were made:

"ix. All the Government functionaries, including the Ministers for Water and Power holding charge in 2006 and onward and from

2008 to onward, during whose tenure the RPPs were approved/set up and Minister as well as Secretary Finance holding the charge when the down payment was increased from 7% to 14%, prima facie, violated the principle of transparency under Articles 9 and 24 of the Constitution and Section 7 of the Act, 1997, therefore, their involvement in getting financial benefits out of the same by indulging in corruption and corrupt practices cannot be overruled in view of the discussion made hereinabove. Consequently, they are liable to be dealt with under the National Accountability Ordinance, 1999 by the NAB;

x.

xi. The Chairman NAB is directed to proceed against all the persons referred to in sub paragraphs (iii), (ix) and (x) above forthwith in accordance with law and submit fortnightly progress report to Registrar for our perusal in Chambers."

As it is evident from the contents of the relevant directions that this Court having been conscious about the rights of the persons involved in corruption and corrupt practices had used guarded language. However, in view of findings so recorded and as per the directions noted herein above, Chairman NAB was directed to proceed against the persons reference of which has been made in directions, noted above and conveyed to him immediately after the pronouncement of the judgment of even date. The office had been receiving reports from time to time but with certain reservations at times: and the NAB was asked to do the needful. Ultimately, despite lapse of considerable period of time, on 15th September, 2012, specific order was passed wherein it was

concluded that *prima facie*, it appears that NAB authorities are intentionally avoiding to implement the judgment in clear violation of the observations/directions and are committing contempt of Court as envisaged under Article 204 of the Constitution of the Islamic Republic of Pakistan, 1973 read with Section 3 of the Contempt of Court Ordinance, 2003. Therefore, show-cause notices were issued to the Chairman NAB as well as other persons whose names find mention in the order dated 14.09.2012. He along with his other officers appeared and thereafter matter was postponed and on some of the dates of hearing appearance of the Chairman NAB was also not insisted upon, in this behalf reference may be made to the hearing which had taken place on 25.09.2012, 01.10.2012 and 08.11.2012. On the last mentioned date, CMA No.4649 of 2012 was submitted by Makhdoom Syed Faisal Salah Hayat. Notice of the same was issued. It is to be noted that in this application, it was complained that one of the RPP Barage Mounted Karkay was being allowed to sail out of the territorial waters of Pakistan without effecting recovery of the amount due against it. Therefore, orders were also passed that without settling the outstanding dues against it may not be allowed to go. In the meanwhile, learned Attorney General for Pakistan appeared and he was also requested to look into the matter in respect of the implementation of judgment to the extent of settling the accounts of Karkay and an order was

passed on 12.11.2012 and for this purpose the case was adjourned for 20.11.2012 , 21.11.2012, 22.11.2012 and 26.12.2012, when the matter to the extent of Karkay was disposed of with the observation that let the NAB effect the recovery of outstanding amount, subject to all just and legal exception with further observation that it shall be the responsibility of the Chairman NAB to effect its recovery, if the ship left the territorial waters of Pakistan.

3. On 09.01.2013, Raja Amir Abbas, learned counsel for the officers of NAB to whom the contempt notices were issued, informed that references have been recommended in two cases and the reports have been received from the Regional Headquarters of the NAB. The numbers of those cases are as follows:

- (i) Case No.2(3-RPP)/SOD/2012/NAB
(Against Raja Parvez Ashraf, Ex-Minister W&P and 15 others)
- (ii) Case No.2(4-RPP)/SOD/2012/NAB
(Against Shahid Rafi & 21 others)

4. These references were recommended against the former Minister for Water & Power, Raja Parvez Ashraf, the incumbent Prime Minister and others. On the said date, it was also informed that vide letter dated 07.01.2013 when the IOs under contempt have been removed from those cases on the ground that the Supreme Court did not appear to be happy with their performance. As this Court had never expressed any reservation about their performance, therefore, on query as to

why the name of the Supreme Court is being used for such purpose and it was informed by Brig (R) Farooq Nasar Awan, who appeared in person. He was asked that as to why action in this behalf should not be taken against him in accordance with law. However, subsequently, it transpired that there is a handwritten note of the Chairman NAB, which in fact had furnished the basis for their removal. It is to be noted that these reports were signed by one Asghar Ali. The notice was issued to the Chairman NAB to explain as to why he falsely used the name of the Supreme Court to remove those IOs. This order was written on 15.01.2013, wherein the names of M/s Asghar Ali and Kamran Faisal were also mentioned. However, directions were issued to prepare the challan/reference and process the same and thereafter cause arrest of the accused. On 17.01.2013, CMA No.224 of 2013 was filed in the Court, which was signed by Rana Zahid Mehmood, which was not found satisfactory and the Court expressed strong reservations, however, on the said date it was decided to see the files of investigation as to whether the judgment is being implemented in letter and spirit. Learned Prosecutor General NAB raised objection upon the jurisdiction of the Court to look into the investigation. However, he was asked to address the Court and the case was adjourned to 23.01.2013. In the meanwhile, on 18.01.2013 Mr. Kamran Faisal, Assistant Director, NAB engaged in investigation of the cases was mysteriously found dead,

therefore, a note was received from the Registrar and the matter was transferred to another Hon'ble Bench to look into the same. After 23.01.2013, it appeared in the newspapers that a letter has been sent by the Chairman NAB to the President of Pakistan, therefore, vide order dated 30.01.2013, Prosecutor General was asked to inform the Chairman NAB to make available an authenticated copy of the letter. We have gone through contents of the letter, which was read out at our request by Mr. K.K. Agha. On having gone through the letter, we have noticed that the Chairman NAB has mentioned the situation prevailing in the country and admitting that our people are anxious to hold free and fair elections and, *inter alia*, stated as follows: -

"At this juncture all political players appear unanimous and united to respond to the aspirations of their countrymen. There is broad consensus that non-political players must not be allowed to derail the political process. The Military has made its position clear and firmly stands with the people".

He further states that :-

"I am constrained to observe and bring to your notice that the position of the Hon'ble Supreme Court, on this issue, remains clouded by actions that are bearing heavily on my mandate to strictly abide by the NAO in both letter and spirit, as the time for elections approaches."

The letter further reads as follows: -

"The clear line between the recognized authority of the Supreme Court monitor NAB investigations to the limited extent of ensuring fair investigation, and itself becoming involved in guiding investigations

appears to be becoming breached as a norm as the elections near. Contempt Notices, verbal orders that defer from written orders, and insufficient time to prepare numerous progress reports, are placing extreme pressure on NAB personnel who appear before the Hon'ble Judges. There is even a danger that NAB personnel could lose their independence and are unable to carry out their investigation in an independent manner due to the pressure being exerted on them by the Hon'ble Supreme Court to proceed along lines which seem to be desired by the Supreme Court. In relieving this pressure, to safeguard their jobs, and so as not to displease the Hon'ble Court, there is danger of unfair investigation being resorted to. This phenomenon is observable in the investigation of very senior politicians of the Govt. where orders, to even arrest them, have been issued on investigation reports of regional investigators that had yet to reach the Executive Board Meeting at NAB Headquarters that is chaired by me. This could be construed as a clear violation of the powers of the Chairman NAB, and to some degree circumventing the NAO which I am required by law to follow. The NAO in my view as it remains law passed by Parliament represents the will of the people and as such I am bound to follow it. The National Accountability Ordinance mandates that no reference can be filed until I have been allowed to exercise my mind, and decide that a clear case of criminality has been made out. I would be failing in my statutory duty if I shirk from upholding the law that I am mandated to protect. Let me assure you, Mr. President that I will not flinch from prosecuting whosoever may be identified as having committed a criminal act under the National Accountability Ordinance. All are equal before the law. The nation expects that there be no sacred cows, nor rigging bulls.

The above para was followed with the following para: -

"I am constrained to also bring to your notice the revolt within NAB, clearly abated by a certain section of the media that used the sad demise of Mr. Kamran Faisal to vilify me and some senior NAB officers. This section of the media appears to be acting as an intelligence unit influencing the public and possibly influencing certain members of the judiciary. Long stand "stay" on taxes to be paid by this media house appears to be relevant also. This campaign, in which the role of the Hon'ble Supreme Court appears evident, is placing great pressure on me to please the Hon'ble Supreme Court in what could be seen as pre-poll rigging, and hurried unlawful action on my part."

5. It is to be noted that reference to the stay order on taxes to be paid by some media house, nothing was stated in respect of the case which is pending before this Court. However, last line starting from the expression "this campaign" wherein he has also gone to the extent of using the expression "the role of the Hon'ble Supreme Court appears evident, is placing great pressure on me to please the Hon'ble Supreme Court in what could be seen as pre-poll rigging, and hurried unlawful action on my part". (Emphasis is supplied)

6. Similarly, he has made further observation in the following para in respect of functioning of the Supreme Court, etc.:-

"The Ombudsman offices were established to also address human rights issues. The need to allow the Hon'ble SC to be diverted from its prime roles as the final Appellate and Constitutional Court may need to be addressed since ability to take suo moto notice of human rights cases can become an

open license to undermine government, and may be taking time away from addressing the issues of judicial management of the current huge pendency of cases in our courts. In the absence of timely justice the people are forced to take the law into their own hands and their anger becomes focused on their governments. The essence of law is to provide a moral benchmark to society. That benchmark is sadly being lost by a judiciary that may be fast losing its own moral authority by relying on the contempt law, media, street power of lawyers, and unchecked violations of the Supreme Court Judges code of conduct."

7. It is needless to observe once again that this Court vide its judgment dated 31st July, 2009, and subsequent thereto at different occasions had repeatedly insisted and shall continue to insist about the enforcement of rule of law and supremacy of the Constitution as well as the continuance of the democratic order and in this context while delivering judgments, particularly, in the case of Workers' Party Pakistan through Akhtar Hussain, Advocate, General Secretary and 6-others Vs. Federation of Pakistan and 2-others (PLD 2012 SC 681) certain suggestions have also been made and during the hearing of this case on 30.01.2013 had made it loud and clear that there should not be any delay in the forthcoming elections which should be held freely, fairly, honestly and strictly in accordance with the Constitution without any interference or obstacles from any quarters. Despite of such a clear stance of the judiciary in this country, we the Judges are confident that there would not be any

delay of whatsoever nature in holding the elections in accordance with the Constitution, but at the same time, we have to express our concern being the custodian of the Constitution about the press reports as well as the statements being made by the highly reputable personalities like Mr. Raza Rabbani, who has shown his concern about the derailment of the democracy in a news item published on 29th January, 2013 in the Daily Dawn, Nation, Daily Times, Daily Jang, Daily Express, Khabrain and Al-Akhbar, etc. Similarly, there are analysis of different authors published in different newspapers on a daily basis wherein it is being apprehended by the persons who believe in the rule of law and the Constitution, that in view of the letter which has been noted hereinabove a situation is being created whereafter taking on the judiciary the elections will be delayed or some other ulterior motives and objects are achieved. The people/citizens are fully aware that as far back as on 3rd of November, 2007, when important matters were pending before this Court and the Benches were seized of the same, particularly, in respect of the qualification or otherwise of Gen. Pervez Musharraf to contest elections in uniform but before the conclusion of the case under certain apprehensions, Martial Law was imposed in the name of Emergency Plus in the country. However, immediately on coming to know of it an order was passed by a seven Members Bench of this Court, which ultimately resulted after the restoration of the

instant judiciary in a judgment in the case of Sindh High Court Bar Association through its Secretary and another Vs. Federation of Pakistan through Secretary, M/o Law & Justice, Islamabad and other (PLD 2009 SC 879).

8. In such view of the matter, at present it is our duty being the Apex Court who had made a commitment to protect and preserve the Constitution of 1973 not to allow any subversion or deviation in any manner for the purpose of achieving the objects noted hereinabove. And also to ensure that as far as the constitutional authority of this Court is concerned, it cannot be undermined or the respect or the honour of this Court can be bring under hatred. This Court undoubtedly enjoys the confidence of the citizens of this country being the Apex Court and similarly in the case of Baz Muhammad Kakar and others Vs. Federation of Pakistan through M/o Law & Justice and others (PLD 2012 SC 923) we have already observed that it is the confidence which gives trust to the general public and citizens who are the subject or person in the country in the judicial system, therefore, it is considered utmost necessary to pass two following orders.

- (i) As the parliamentary system is flourishing in the country on the basis of a democratic order in terms of the Constitutional provisions and the elections after 5 years, for the National and Provincial Assemblies are scheduled to be held shortly, therefore, it is held that the elections must be held in accordance with the Constitution and there should be no apprehension of the

derailment of the democracy as expressed in the statements which are being published and have also been attributed to highly reputable and respectable parliamentarians and nor the executive both the civilians and the military shall take any action in this behalf which would tantamount to deviation from the Constitution and the democratic order whereunder the country is governed by elected representative of the people only or by introducing any other system which is not recognized under the Constitution, in the name of taking actions against the judiciary or the Judges of the superior Court on the basis of the letter which has been written by the Chairman NAB, relevant paras there-from have already been reproduced hereinabove.

- (ii) Copy of the letter of Admiral (R) Fasih Bokhari, Chairman NAB, as presented which he has sent to the President, contents whereof have been noted hereinabove and perused. We are of the opinion that whatever he has expressed therein, tantamounts to causing interference with and obstruction in the process of the Court and is substantially detrimental to the administration of justice and also has used certain expressions which have also scandalized the Court and its performance with the object to undermine the authority of the Court and bring it into hatred and ridicule in the eyes of the general public who have to approach the Court for the purpose of decision of their cases and if such a move made by him is not noticed properly the people would loose the confidence in this Institution as he has involved the Supreme Court as a whole being an Institution, therefore, we issue notice to him under Article 204 of the Constitution read with Section 3 of the Contempt of Court Ordinance, 2003, with the direction to him to enter

appearance in person on 4th February, 2013, for filing of the reply and for further proceedings according to the Constitution and law".

9. The Office is directed to issue notice to Admiral (R) Fasih Bokhari, Chairman NAB, to the extent of the contents of the letter and the last preceding para of this order noted hereinabove during the course of the day.

10. Adjourned to 04.02.2013.

CJ.

J.

Islamabad
31.01.2013

J.