

**IN THE SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

**PRESENT:**

MR. JUSTICE SH. AZMAT SAEED  
MR. JUSTICE MAZHAR ALAM KHAN MIANKHEL  
MR. JUSTICE YAHYA AFRIDI

**CRIMINAL APPEAL NOS. 322 AND 323 OF 2018**

*(On appeal against the judgment dated 30.01.21017 of the High Court of Balochistan, Quetta passed in Ehtisab Appeal No.7 & 8 of 2015)*

Muhammad Rafiq

...Appellant(s)

**VERSUS**

State (NAB)

...Respondent(s)

For the appellant(s): Syed Iftikhar Hussain Gillani, Sr. ASC  
Mr. Muhammad Farooq, ASC a/w  
Mr. Muhammad Kasim Mirjat, AOR

For NAB: Syed Asghar Haider, PGA a/w  
Mr. Haider Ali, Addl. PGA and  
Mr. Imranul Haq Khan, Special  
Prosecutor General

For Federation (On Court's Notice): Ch. Aamir Rehman, Additional Attorney  
General

Date of Hearing: 19.12.2018

**JUDGMENT**

**YAHYA AFRIDI, J.**— Muhammad Rafiq, the present appellant, has been granted leave of this Court *vide* order dated 17.05.2018 to consider the decision dated 30.01.2017 passed by the Balochistan High Court, Quetta in Criminal Ehtisab Appeals No.7 and 8 of 2015, in terms that:

*"Leave to appeal is granted, inter alia, to consider whether the Reference so filed is valid and in accordance with the law, as at that point of time, there was no Chairman, NAB."*

2. The brief and essential facts leading to the filing of the subject reference, in chronological order, are as follows:

15.3.2011	An investigation was initiated against Muhammad Rafiq for owning property beyond his known sources of income.
27.09.2011	Director General, NAB filed reference no. 7 of 2011 against the present appellant (Settlement <i>Patwari</i> ), his wife and two brothers for owning property beyond their known sources of income before the Accountability Court No.II, Balochistan, Quetta (" <b>Accountability Court II</b> "). The post of Chairman, NAB was then vacant.
23.06.2015	The Accountability Court II convicted the appellant and his wife for the offence of corruption and corrupt practices under section 9(a)(v) of the Ordinance and they were accordingly sentenced to five (05) year rigorous imprisonment (R.I.) each besides the payment of fine of Rs.3,65,98,214/- collectively or two (02) years simple imprisonment (S.I.) in default of the payment of the fine. The amount maintained in the various bank accounts in the name of Muhammad Rafiq were declared to be wrongful gains and thus forfeited. In addition, the two were to cease to hold public office and further to face the disqualification envisaged under section 15 of the Ordinance.
18.08.2017	Three appeals filed by the Balochistan High Court were decided vide impugned order dated 30.1.2018 in terms:  <b>(i) <u>Criminal Appeal No.7 of 2015</u></b> (a) Fareeda Begum's appeal against the

	<p>conviction and sentence awarded by the Accountability Court II was accepted and she was acquitted.</p> <p>(b) Mohammad Rafiq's appeal against the conviction and sentence awarded by the Accountability Court II was dismissed.</p> <p><b>(ii) <u>Criminal Appeal No.8 of 2015</u></b></p> <p>The State sought the enhancement of the sentence, which was partially accepted only to the extent of Mohammad Rafiq.</p> <p><b>(iii) <u>Criminal Appeal No.9 of 2015</u></b></p> <p>The State's appeal against the acquittal of Rasheed Ahmed and Nazeer Ahmed was dismissed.</p>
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3. The learned counsel for Muhammad Rafiq (“**appellant**”) vehemently contested the maintainability of the reference as the same was signed by the Regional Director and not the Chairman, National Accountability Bureau (“**NAB**”), and that too, when the post of Chairman was vacant under the National Accountability Ordinance, 1999 (“**Ordinance**”). He further challenged the delegated authority to the Regional Director, NAB to file references, when the Chairman, NAB was not holding office. In this regard, he placed reliance upon the decisions of this Court in **Bank of Punjab v. Haris Steel Industries**(PLD 2011 SC 1109), **ShahidOrakazi v. Pakistan**(PLD 2011 SC 365), **Al-Jehad Trust v. Federation of Pakistan**(PLD 2011 SC 811) and finally, **National Accountability Bureau v. Fazal Ahmed Jat**(2018 SCMR

**1005).**

4. In rebuttal, the learned Prosecutor General, NAB strongly contested the stance taken by the learned counsel for the appellant by contending that the judgments cited were not relevant to the case in hand, as the same related to filing of an appeal and not of a reference, which was the subject matter of the instant appeals. He further argued that filing of a reference is a distinct act, expressly available under Section 18(g) of the Ordinance wherein, the Chairman or an officer of NAB duly authorized by the Chairman have been expressly empowered to file a reference. And finally, he argued that even otherwise, the act of the Regional Director, NAB to file the reference was valid in view of the doctrine of *de facto* exercise of authority.

5. The worthy Additional Attorney General supported the stance taken by the learned Prosecutor General, NAB and, in furtherance thereof, contended that Section 18(g) of the Ordinance expressly provided for delegation by the Chairman, NAB or an officer of the NAB to file a reference. He emphasized that as the Ordinance is a special law, the plain reading of the language used by the legislature was to be adopted, and any other interpretation would be against the settled principle of interpretation of statutes.

6. We have heard the learned Prosecutor General, NAB, the Additional Attorney General and learned counsel for the Muhammad Rafiq and with their assistance have gone through the record of the present case.

7. Let us first address the jurisdictional challenge made by the worthy counsel of Mohammad Rafiq to the very maintainability of the reference filed by NAB in the present case. In essence, the stance taken by the worthy counsel was that the reference against Muhammad Rafiq was not filed by Chairman, NAB, who was, under the Ordinance, the legally competent person to file the same. In support of his stance, he insisted that the *ratio* of **Fazal Ahmed Jat's case** (*supra*) should be applied to the present case. The said decision has settled, *inter alia*, that an appeal against the decision of an accountability Court by NAB under Section 32 of the Ordinance can only be filed by a permanent Chairman of NAB. The principle enunciated in the said decision was in terms that:

*"3. It is quite evident from a bare reading of section 32(a) of the National Accountability Ordinance, 1999 as well as from the provisions of section 8(d) of the National Accountability Ordinance, 1999 that at a time when there is no permanent Chairman of the National Accountability Bureau no other officer of the Bureau can perform the functions or exercise the powers of the Chairman and at a time when there is no permanent Prosecutor-General Accountability holding the said office no other officer of the Bureau can be required by the Chairman to perform the functions or exercise the powers of the Prosecutor-General Accountability and this was so held by this Court in the cases of Bank of Punjab and another v. Hair Steel Industries (Pvt.) Limited and others (PLD 2010 SC 1109) and Al-Jehad Trust and another v. Federation of Pakistan and others (PLD 2011 SC 811). It is clearly been laid down by this Court in the case of Director, Directorate-General of Intelligence and Investigation and others v. Messrs Al-Fait Industries (Pvt.) Limited and others (2006 SCMR 129) that **an appeal can be filed only by the authority or the officer designated or prescribed for the purpose by a statute and such filing of an appeal cannot be undertaken by any other officer or authority.** It is trite that when the law requires a thing to be done in a particular manner then that thing must be done in that manner alone or not at all."*

*(emphasis provided)*

8. Canvassing through the provisions of the Ordinance, it is noted that the mode and manner of filing a reference by

NAB against an accused is provided in Section 18(g) *supra*, while that of filing an appeal by NAB against the decision of an accountability Court before the High Court has been expressed in Section 32 *supra*, and thus the said two functions of the Chairman, NAB have been dealt with by the legislature separately.

9. Let us now read the said provisions to understand the true purport thereof. The same read:

### **Filing a Reference**

"18. **Cognizance of offences:**  
(g) The Chairman NAB, [or an officer of the NAB duly authorized by him] shall appraise the material and the evidence placed before him during the inquiry and the investigation, and if he decides that it would be proper and just to proceed further, [and there is sufficient material to justify filing of a reference] he shall refer the matter to [a] Court."

### **Filing an appeal**

"32. **Appeal [and revision]:**  
(a) Any [person convicted or Prosecutor General Accountability, if so directed by [the Chairman] NAB], aggrieved by the final judgment and order of the Court under this Ordinance may, within ten days of the final judgment and order of the Court prefer an Appeal to the High Court of the Province where the Court is situated: [: Provided that no appeal shall lie against any interlocutory order of the Court;]"  
**(emphasis provided)**

10. A careful combined reading of the aforementioned provisions clearly manifests the true intent of the legislature. The authority to file a reference against an accused before the Accountability Court under Section 18(g) of the Ordinance has been clearly vested in the Chairman, NAB or any officer of the NAB duly authorized by the former. In contrast, the authority to file an appeal against the decision of the Accountability Court under Section 32 *supra* has been expressly vested in the Prosecutor General, NAB, if so

directed by the Chairman, NAB. The crucial difference in the authority of the Chairman, NAB in carrying out the said two functions is simply that for filing an appeal against a decision of the Accountability Court under Section 32 of the Ordinance, he has not been vested with the power to delegate his said authority to any other officer of NAB, while in the case of filing a reference under Section 18(g) *supra*, he is empowered to do so. Thus, the reliance of the worthy counsel for the petitioner on **Fazal Ahmed Jat's case** (*supra*) is surely misplaced, as it relates to a distinct function of the Chairman, NAB. In the said case, the authority of the Chairman, NAB to file an appeal under Section 32 of the Ordinance has been elaborately dilated upon and settled, while in the present case, the issue to resolve is his other function of filing a reference against an accused, as provided under Section 18(g) of the Ordinance. The two functions of the Chairman, NAB are distinct and, thus the legislature in its wisdom has accordingly dealt with the same separately in the Ordinance.

11. Moving on to the next crucial issue of whether the Director General, NAB was validly delegated the authority to file a reference against the present petitioner. Apart from the clear provision of delegation provided under section 18(g) of the Ordinance, section 34 A (*supra*) expressly vests the Chairman, NAB with the authority to delegate his functions in terms:

**“Section 34 A. Delegation of Powers**

*The Chairman NAB may, by an order in writing, delegate any of his powers to and authorize performance of any of his functions by, an officer of the NAB as he may deem fit and proper, subject to such conditions, if any, as may be specified in the order, for carrying out the purposes of this Ordinance.”*

12. In this regard, the learned Prosecutor General, NAB drew our attention to S.R.O. 731(I)/2006 dated 13.06.2006 (“**SRO**”), whereby the then Chairman, NAB delegated some of his functions to designated officers of NAB. The SRO reads:

*“In exercise of powers vested in me under Section 34-A of National Accountability Bureau Ordinance, 1999 and in supersession of notifications SRO No.712(I)/2005 dated 22<sup>nd</sup> September, 2004, and SRO No.713(I)/2005 dated 27<sup>th</sup> May 2004, I Lt. General (Retd.) Shahid Aziz, Chairman National Accountability Bureau hereby delegate my powers to the officers of NAB to the extent indicated below for carrying out the purposes of the Ordinance with respect to authorization of the following functions:--*

S.No	Section	Nature of Power/function	Officer of NAB authorized	Extent of delegation
1.	2.	3.	4.	5.
.....				
5.	Section 18(g)	<u>To file a reference before an Accountability Court</u>	1. Dy. Chairman (operations) 2. <u>DGs Regional NABs.</u>	1. Grade-16 & below. 2. Holder of an office or post in connection with the affairs of a Local Council except Distt. Nazim. 3. All employees of Banks, Financial Institutions and Development Finance Institutions (DFIs) in Grade 2 & below. 4. A businessman employing up to 49 persons in a single business entity or in all of his business concerns, put together. 5. All registered contractors as categorized by Pakistan Engineering Council (PEC), falling within the



				categories C2, to C6 and all unregistered contractors irrespective of the amount involved. 6. Any person other than businessman, politician, contractor, government servant, employee of bank, employee of Development Finance Institution (DFI) and employee of financial institution, whose annual income is less than Rs.one million.
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13. A thorough combined reading of sections 18 and 34 A of the Ordinance with the provisions of the SRO, reveals two striking features regarding the authority of the Chairman, NAB to file a reference against an accused; firstly, the Chairman, NAB has the legal authority to delegate his power to file a reference under section 18(g) of the Ordinance, and secondly, the Chairman, NAB had delegated to the Director General, NAB the authority to file a reference under section 18(g) of the Ordinance against, *inter alia*, a government official in BPS 16 and below.

14. This would bring us to yet another jurisdictional objection to the maintainability of the reference raised by the learned counsel for Muhammad Rafiq, which is that the delegated authority to the Director General, NAB to file a reference ceased when the Chairman, NAB delegating the said power left his office.

15. What is crucial to note is that this authority of the Chairman, NAB to delegate his power to file a reference is, in

fact, *statutory delegation*, as it has been vested in him by statute. And further that this delegated authority has neither been expressed, nor can it be inferred from the provisions of the Ordinance, to be time-bound in any manner whatsoever. In such circumstances, restricting the validity of the said delegated authority to the Director General, NAB to file a reference till the Chairman, NAB holds office would be reading beyond the letter of the law. This would surely be against the settled principles of interpretation of statutes.

16. It appears that the learned counsel for Muhammad Rafiq mistakenly sought to apply the principles of principal and agent under the *contractual delegation* to that of *statutory delegation* of power by Chairman, NAB to the Director General, NAB. The distinguishing features of these two types of delegations have been explained in *Administrative Law (Eleventh Edition)* by H.W.R.Wade and C.F.Forsyth in terms that:

*"although there are similarities between the two concepts, the differences should be noted .....an authorised act of an agent may be generally ratified by the principal but the unauthorised act of the delegate, in the absence of statutory authority, cannot be ratified by the delegator..... agency and delegation is that in appointing an agent a principal does not divest himself of his powers in the same matter, but whether the public authority that delegates its powers retains the power to act concurrently with its delegate is a matter of controversy".*

17. The scope and extent of delegated power arising out of *statutory delegation* have, however, been very aptly explained by Justice Neave of the Federal Court of Australia in **Kelly v Watson (1985) 64 ALR 113**, in terms that:

*"49. The question whether the delegation*

continued to have operative effect notwithstanding Mr McKay's vacation of the office of Permanent Head is, in the final analysis, a question of the proper construction of sub-section 25(5) of the Act and an appreciation of the true nature of the power that sub-section confers.

50. As to the latter, the recipient of a delegation of powers under the sub-section is not in any real sense the agent of the person who exercises the power to delegate. The effect of the delegation is to confer upon the delegate an authority which he must exercise in accordance with the requirement of the statute but independently of any direction which might be given to him whether by the person delegating the power or any other person. He must exercise the powers delegated in accordance with his own independent discretion having regard only to those considerations which the statute, expressly or by implication, obliges him to take into account. There is, therefore, nothing in the relationship between the person delegating the power and the delegate, as there would be if the relationship was one of principal and agent, which would require that the delegation should cease to have any valid operation upon the delegator ceasing to hold office.

51. Further, there is nothing in the language of the statute which requires the conclusion that a delegation should cease to operate in such an event. And convenience of administration suggests that a statutory power to delegate should not be construed so as to produce such an inconvenient result unless that construction is compelled by clear and unambiguous language, language which is nowhere to be found in the provisions now under consideration."

(emphasis provided)

18. The ratio of the above case has been followed in Aban v Minister for Immigration, Local Government and Ethnic Affairs(1991) 31 FCR 93, and more recently in Johnson v Veterans Review Board [2002] FCA 1543.

19. This matter relating to the authority of the Chairman, NAB to delegate his functions under the Ordinance has been dilated upon in **Al-Jehad Trust** case (*supra*), wherein, it was

observed that the principles of principal and agent arising out of *contractual delegation* could not be applied to the authority of the Chairman, NAB to delegate his functions under the Ordinance, as the same derived its source from the Ordinance and thus fell under the scope of *statutory delegation*. It was observed that:

*"under the law of contract a delegation comes to an end when the delegator vanishes from the scene and an agent loses his authority to act on behalf of his principal when such principal is removed from the picture. Applicability of these principles relevant to a contractual delegation may, however, be inapt to the case in hand because the delegation of powers involved in the present case is a statutory delegation which, in an appropriate case, can survive a vacancy in the office of the delegator..."*

*"the delegation of powers involved in the present case is a statutory delegation which, in an appropriate case, can survive a vacancy in the office of the delegator. The real issue in the present case, therefore, is as to whether such a statutory delegation during a vacancy in the office of the delegator can be stretched to a period which is unduly protracted and indefinite and which creates an irresistible impression that those responsible for filling the vacancy in the office of the delegator are not interested in filling that vacancy and are contented with running the affairs of the concerned institution or department through the delegate himself.*

*"...preposterous and outrageous if in the garb of a statutory delegation of some of his powers by a Chairman, National Accountability Bureau in favour of a Deputy Chairman, National Accountability Bureau the Deputy Chairman may be permitted to keep on exercising the powers of the Chairman for a protracted and indefinite period of time while the office of the Chairman remains, or is deliberately kept, vacant for months at an end."*

20. And in conclusion, a clear warning was rendered by the Court to the executive not to abuse the provisions of delegation provided in the Ordinance and to immediately appoint a permanent Chairman, NAB, which had been kept vacant without valid reasons.

21. Accordingly, when the Director General, NAB was validly delegated the authority to file a reference, there is no need for validation or justification of filing a reference by the Director General, NAB on the basis of *de facto* doctrine. No doubt, the learned High Court has aptly described the *de facto* doctrine and circumstances in which the same is to be applied; however, in the present case, when the exercise of the authority was legally valid then invoking the *de facto* doctrine was not warranted.

22. To sum up the jurisdictional contours of the authority of Chairman, NAB to file a reference under the Ordinance, it would be important to note the following:

I. The Chairman, NAB has the legal authority to delegate his power to file a reference under Section 18(g) read with Section 34 A of the Ordinance.

II. The Chairman, NAB had *vide* SRO delegated to the Director General, NAB the authority to file a reference against, *inter alia*, a government official in BPS 16 and below.

III. The delegated authority of the Chairman, NAB to Director General, NAB to file a reference has neither been expressed under the Ordinance or the SRO to be time-bound nor can it be inferred from the provisions contained therein.

IV. At the time of filing of the reference by Director General, NAB against Muhammad Rafiq, who was then a *Patwari*, the delegated power to file a reference had

not been revoked by the Chairman, NAB.

V. The principles of principal and agent arising out of *contractual delegation* could not apply to the delegated authority of the delegator and the delegate, which derived its source from an enactment, being *statutory delegation*.

VI. The authority of the Chairman, NAB to file a reference and to sanction the filing of an appeal against the decision of the Accountability Court are two distinct functions and have thus been accordingly dealt with separately in the Ordinance.

VII. As the Director General, NAB was competently delegated the authority to file a reference, there is no need for validation or justification of filing a reference by the Director General, NAB on the basis of *de facto* doctrine.

VIII. Abuse by the executive of the provisions of delegation of authority of the Chairman, NAB under the Ordinance by keeping the post of the Chairman, NAB vacant for a prolonged period of time would render the same to be justiciable and the said inaction would be exposed to judicial review.

23. Moving on to the merits of the case against Muhammad Rafiq. It is noted that the learned High Court in its impugned decision has correctly appreciated the prosecution and the defense evidence in its correct perspective. The reasons rendered for accepting the prosecution evidence and rejecting

that of the defense are based on safe and settled principles of administration of criminal justice. Suffice it to state that NAB discharged its initial onus by producing sufficient evidence to prove Muhammad Rafiq having received Rs.1.185 million as his total salary for the entire twenty-three years of service, and owning seventeen immovable properties valuing Rs. 143.822 million and six bank accounts totaling Rs. 296.943 million, which were beyond the known sources of his income. In turn, Muhammad Rafiq could not discharge the onus on him to justify the lawful means to own the said assets.

24. For what has been discussed above, the conviction awarded and sentence rendered by the High Court in the impugned decision do not warrant interference. Accordingly, these appeals being bereft of merit are dismissed.

Judge

Judge

Judge

Announced in Open Court  
on \_\_\_\_\_ at Islamabad  
Naveed Ahmed/\*

**"Approved for reporting"**