

IN THE SUPREME COURT OF PAKISTAN

(Original/Review Jurisdiction)

Present:

Mr. Justice Jawwad S. Khawaja

Mr. Justice Khilji Arif Hussain

C.R. P No. 167/2012 in Suo Motu Case No. 5 of 2012

(Against the order dated 14.6.2012 passed by his Court in SMC No. 5 of 2012)

Dr. Arsalan Iftikhar.

Petitioner (s)

VERSUS

Malik Riaz Hussain etc.

Respondent (s)

For the Petitioner : Sardar M. Ishaq Khan, Sr. ASC with petitioner.

For respondent No.1: Mr. Zahid Hussain Bokhari, ASC
Raja Abdul Ghafoor, AOR

For respondent No.4 : Mr. Shafi Muhammad Chandio, DAG.

For the NAB (on Court notice): Mr. K. K. Agha, Prosecutor General, NAB,
Mr. M. Akbar Tarar, Additional Prosecutor-General,
NAB.
Mr. Fauzi Zafar, ADPG, NAB

Dates of hearing: 31.7.2012, 2.8.2012 & **28.8.2012.**

J U D G M E N T

Jawwad S. Khawaja, J. This petition has been filed to seek review of our judgment dated 14.6.2012 passed in SMC No.5 of 2012. The petition is focused on the allegation of partiality and bias of the learned Attorney General, National Accountability Bureau (NAB) and a Joint Investigation Team (JIT) constituted by the Chairman, NAB to probe into the culpability of individuals including the petitioner Dr. Arsalan and respondent No.1. namely, Malik Riaz Hussain. After hearing learned counsel for the parties and the Prosecutor General NAB and for reasons discussed below, we have transferred the inquiry and investigation from NAB to a Commission.

2. Our judgment dated 14.6.2012 had been passed after considering the concise statements submitted by the parties and after hearing their learned counsel. The relevant part of our judgment on which the hearing of this petition is mainly focused is para 22 which, for ease of reference, is reproduced as under:-

“While this suo moto action has been brought to an end in view of the material considered above, the learned Attorney General who has assisted us in this case is fully abreast of all aspects of this case. It is our expectation

that he will set the machinery of the State in motion so that all those who may have committed any illegal acts, including Malik Riaz Hussain, Dr. Arsalan, Salman Ali Khan etc. are pursued and brought to book with the full force and rigour of the law".

3. It has been brought to our notice through the present proceedings that the Attorney General wrote a letter to the Chairman, NAB on 18.6.2012, purporting to be in furtherance of para 22 our judgment of 14.6.2012. Learned counsel for the petitioner has taken us through the said letter which was placed on record by the learned Deputy Attorney General. According to learned counsel, instead of abiding by para 22 *ibid* the learned Attorney General has transgressed the terms thereof and has exerted illegal and unwarranted influence over NAB. The contents of the letter dated 18.6.2012 written by the Attorney General will be considered shortly. It may be noted that the learned Attorney General was not a contesting party in the case and was only assigned the limited function, as an officer of the Court and as the principal law officer of the Federation, of setting the machinery of State in motion.

4. The main allegation leveled by the petitioner against the Attorney General is that he acted in a partisan manner and influenced NAB to favour the respondent Malik Riaz Hussain. To support his contention, learned counsel for the petitioner drew our attention to Writ Petition No. 258 of 2007 which was filed in the Lahore High Court by nine petitioners against a number of respondents including Malik Raiz Hussain who was arrayed as respondent No. 7. The Writ Petition and other documents filed in the case have been placed on record. Mr. Irfan Qadir (now Attorney General) represented Malik Riaz Hussain in the said Writ Petition. He filed parawise comments and appeared in Court on various dates of hearing on behalf of Malik Riaz. The learned DAG, upon being questioned, stated that as per his information, the Attorney General did act as counsel for the respondent Malik Riaz Hussain in the said Writ Petition. Learned counsel representing Malik Riaz Hussain interjected at this point and contended that there was nothing wrong or improper if Mr. Irfan Qadir represented the respondent as his client in the case. He added that even Sardar Muhammad Ishaq learned counsel for the petitioner had represented Malik Riaz Hussain in certain cases as his counsel.

5. There is indeed no impropriety if an Advocate represents a client in any given case. Learned counsel for the respondent is, however, missing the point of the petitioner's objection. The objection is not to the fact that the Attorney General, in his private professional capacity represented the respondent. The allegation being made is that neither during the course of hearing of SMC No.5 of 2012 nor when our judgment was announced in Court on 14.6.2012 nor at any time thereafter the Attorney General disclosed to the Court his association or professional relationship with the respondent. It is quite clear that we would not have tasked the Attorney General with any responsibility in this matter if he had made disclosure to us as to his professional association with the respondent Malik Riaz Hussain. It is of concern to us that the learned Attorney General did not make the requisite disclosure.

6. Learned counsel for the petitioner contended that the above facts provide substantiation in respect of a number of allegations which have been made against the Attorney General in this petition and which were reiterated during the course of arguments. The primary objection in this respect is that the learned Attorney General through his letter of 18.6.2012 sent to NAB, went much beyond the scope of our order of 14.6.2012 and this amounted to interference with and unlawful influence on the inquiry by NAB and also constituted failure on his part, to abide by our order. To examine this objection we revert to para 22 *ibid* wherein the Attorney General had only been asked to "*set the machinery of the State in motion*". It is evident from the contents of his letter of 18.6.2012 addressed to the Chairman, NAB that the Attorney General went well beyond setting the machinery of the State in motion. The Attorney General's letter dated 18.6.2012 is reproduced below *in extenso*:-

*"My dear Admiral Fasih Bokhari,
This is to bring to your notice the order of the Supreme Court of Pakistan dated 14th of June 2012. The relevant extract thereof is reproduced below:-*

'While this suo moto action has been brought to an end in view of the material considered above, the learned Attorney General who has assisted us in this case is fully abreast of all aspects of this case. It is our expectation that he will set the machinery of the State in motion so that all those who may have committed any illegal acts, including Malik Riaz Hussain, Dr. Arsalan, Salman Ali Khan etc. are pursued and brought to book with the full force and rigour of the law'.

Having regard to the aforesaid desire of the Supreme Court, I take this opportunity to request you to kindly proceed in this matter in exercise of the powers conferred upon you by the National Accountability

Ordinance 1999, for the purposes of an inquiry or investigation so that all those found involved in the acts of corruption or corrupt practices are proceeded against in accordance with law.

As the responsibility for inquiry into and investigation of an offence alleged to have been committed under this Ordinance rest on the National Accountability Bureau to the exclusion of any other agency or authority, I am therefore referring this matter to you with the expectation that you in your capacity as Chairman of our country's apex anti-corruption agency may constitute a broad based team by including therein competent and honest officers from NAB, FIA and Islamabad Police. The desirability of inclusion of experts on financial crime from within your Bureau or any banker with expertise in forensics may also be considered to form a part of the said team.

It is hoped that the needful will be accomplished at your earliest convenience in line with the letter and spirit of the aforesaid order of the Supreme Court. You are also requested to send a fortnightly progress report to this office.

Sd/-
Irfan Qadir
Attorney General for Pakistan
18.6.2012"

(underlining is ours for emphasis)

The parts of the letter highlighted by us show the extent to which the Attorney General transgressed the terms of our order of 14.6.2012.

7. Secondly, we also find it odd that the Attorney General adopted a position and used words in his letter which should have been objectionable to a truly independent investigator but have, to date, remained unanswered and unattended. The Attorney General stated that he was "*referring this matter to [Chairman, NAB] with the expectation that [he in his] capacity as Chairman of our country's apex anti-corruption agency may constitute a broad based team by including therein competent and honest officers from NAB, FIA and Islamabad Police*". This "expectation" on the part of the Attorney General also went beyond the terms of para 22 of our judgment *ibid*, and appears to have influenced the Chairman, NAB in the performance of his duties which he was required by law to undertake without outside influence. We are fortified in this conclusion by the fact that pursuant to the Attorney General's letter the Chairman, NAB obediently followed the Attorney General's instruction as if it were an obligatory and binding command coming from his superior, thus giving rise to the perception that NAB's independence appears to have been compromised. Surprisingly, this was done without consulting the learned Prosecutor General, who is the top legal within NAO.

8. The foregoing facts which are floating on the surface of this record provide *prima facie* evidence that NAB may have wilted under the outside influence of the Attorney General and may, therefore, not be in a position to conduct an impartial inquiry in the matter. We may add that when we passed our order dated 14.6.2012, we had no reason to believe that the Attorney General will go beyond the simple and limited act of *"setting the machinery of the State in motion"*. It is, therefore, disturbing to see that he chose to write a letter in terms reproduced above thus overstepping the remit of our order.

9. In addition to the above, the unusual conduct of the learned Attorney General in these proceedings has previously been subject of comment by us. In our order dated 24.7.2012, we noted that Mr. Shafi Muhammad Chandio, learned DAG had undertaken on 17.7.2012 that he will file in Court the letter sent by the learned Attorney General to the Chairman, NAB. The DAG failed to file the same despite the lapse of several days. We also noted that such failings impeded the administration of justice and could not be approved. Expressing our disappointment, we had asked Mr. Chandio, learned DAG to appear and inform us of the reasons, if any, for not abiding by his undertaking, but were informed that he was unavailable. We, therefore, recorded in our order that we were *"surprised and somewhat taken aback when the learned Attorney General became agitated at this and made remarks that the Court was taking undue interest in this case, implying that this was not appropriate. In the same agitated state he also remarked that there were sensitivities to this case. We are in particular surprised at the attitude of the learned Attorney General because he was not present on the last date of hearing. Instead of putting his own office in order, it is clear that he had not been briefed by the learned DAG in respect of what transpired at that hearing"*. We had also commented that *"the learned Attorney General may be careful in maintaining the decorum of these proceedings being an officer of the Court in addition to being the principal law officer of the Federation"*. Perhaps the above facts which have now been brought to our attention, can help explain the Attorney General's unusual conduct in the case.

10. The effect *prima facie*, of the foregoing circumstances whether taken independently or cumulatively is that there is a reasonable and well founded *prima*

facie basis for the petitioner's allegation that the Attorney General did not act fairly and impartially while purporting to act in furtherance of para 22 *ibid* reproduced above. Since these are matters of serious concern to us and also would be to the Attorney General as a member of our bar, it would be in the interest of fairness and justice if he is provided an opportunity of hearing to explain his conduct. The office shall, therefore, create a file and issue notice to the Attorney General.

11. In the absence of the Attorney General, learned counsel for the respondent took up cudgels on his behalf and contended that these were bald and unsubstantiated allegations being leveled by the petitioner and if accepted, would create a precedent where any accused person could level such allegations to impugn the integrity of an investigating officer or agency. Learned counsel need not have any apprehension on this score. His contention has no merit firstly, because the allegations are not frivolous or without substance but are supported by judicial record. The submission of learned counsel for the respondent Malik Riaz Hussain is based on a misconception of established legal norms. It overlooks the fundamental distinction between judicial review of the investigative process to ensure fairness therein as opposed to interference in an investigation itself which otherwise may not suffer from bias, dishonesty, partiality etc. Although the legal distinction is well settled in our jurisprudence, it will be useful to refer to some recent pronouncements of this Court. Firstly, in the case of Tariq Aziz-ud-Din (2010 SCMR 1301), it has been clearly stated that functions of executive bodies cannot be exercised "*at their whims, sweet will or in an arbitrary manner; rather they are bound to act fairly, evenly and justly*". The National Accountability Ordinance (NAO) has also attempted to insulate NAB from external influence in an attempt to ensure its impartiality and professionalism. This has been done *inter alia*, by providing security of tenure to the Chairman and Prosecutor General of NAB. In the case titled Muhammad Yasin v. Federation of Pakistan (PLD 2012 SC 132), we have highlighted the nature of judicial review of executive actions or decisions and the grounds on which Courts will interfere in the same. These principles have been further elaborated in the case of Tariq Aziz-ud-Din supra wherein it has been held that "*if the action or decision . . . has been arrived at by [an] authority misdirecting itself by adopting a*

wrong approach or has been approached by irrelevant or extraneous matters, the Court would be justified in interfering with the same". Recently, in a number of cases, we have transferred the investigation of criminal cases where we have found the investigation to be tainted by bias or lack of competence. Thus the contention of learned counsel for the respondent is without force and is, therefore, rejected.

12. In our order dated 26.7.2012, we have made note of and commented on two letters dated 23.7.2012 and 25.7.2012 which were addressed by NAB to the Registrar of this Court in his official capacity. The two letters simply state that the Registrar is *"acquainted with the facts and circumstances connected to the case"*. The Registrar was also asked to bring *"all original documentary and other evidence to the NAB Headquarter"*. However, no information or particulars were given as to the nature of the documentary and other evidence or the facts and circumstances of the case. This form of letter has been strongly deprecated by the Courts and is in clear breach of settled law as enunciated by precedent.

13. The clear and unambiguous pronouncements given in the case titled *Ghulam Hussain Baloch and another vs. Chairman, National Accountability Bureau Islamabad and 2 others* (PLD 2007 Karachi 469) were violated by NAB in its two letters. In the cited precedent NAB has been given express guidelines as to its responsibilities while summoning or requiring the attendance of persons/witnesses in an inquiry. As per ratio of the case, before summoning a person to attend, NAB was duty bound to identify and particularize the information sought from any witness etc. and to state the nexus between such information and the subject of the inquiry being conducted by NAB. It was observed by the Court that *"while calling [for] the information from any person, the person must be informed of the fact, point, allegation, offence, name of accused, specified matter, if any, concerning the matters ... in the notice so that the person can furnish such information"*. None of this was done by NAB. The Sindh High Court also laid down the principle that if the specified information can be otherwise furnished, then the person *"should not normally be called to appear in person"*. The case of Ghulam Hussain Baloch *supra* gave further clarity to NAB by declaring that *"normally a person should not be asked to appear ... for the simple reason that when the document or thing is*

received by the investigating officer [it] will serve the purpose and if for any reason attendance of such person is [still] required then he can be called by assigning valid and cogent reasons which will appear in the case diary". None of these guidelines, reiterated in a number of subsequent cases [e.g. Muhammad Younus Arain versus Chairman, NAB and another (2008 MLD 1431), Niaz A. Baloch versus Chairman, NAB and 4 others (2008 MLD 1451) and Raja Muhammad Zarat Khan and another versus Federation of Pakistan through Secretary, Ministry of Cabinet Division and 2 others (PLD 2007 Karachi 597)] was followed by NAB. Instead an imperious and pernicious "*thana*" mentality is apparent from the letter, which NAB persisted with obdurately, as discussed below. This raises serious questions, *prima facie*, as to the fairness, competence and professionalism of the members of the JIT.

14. We are not in any doubt that the letter dated 23.7.2012 was in flagrant breach of the law laid down by binding precedent. What is even more egregious is that the same error and violation of legal norms and principles was repeated by NAB on 25.7.2012 through another letter to the Registrar, purporting to be "*a second notice for appearance*". In our order dated 26.7.2012 we observed that the Registrar being the executive head of the office of this Court had been asked in his official capacity to appear before the JIT alongwith all original documentary and other evidence but without informing him of the nature of such evidence. In the circumstances we had observed that NAB should act with due care and ensure transparency to avoid an impression of absence of due diligence or lack of competence. On the same date i.e. 26.7.2012, the learned Prosecutor General NAB stated that he had been "offended" by the reply received from the Registrar.

15. It seems that instead of looking at and correcting the failure of NAB to abide by the directions/guidelines given in the case of Ghulam Hussain Baloch *supra*, and other precedents referred to above, NAB took offence to the response given by the Registrar based on his justified assumption that he was being summoned in his official capacity. We were then informed by the Prosecutor General in Court, that the Registrar had not been summoned in his official capacity. This surprising statement, however, is wholly inconsistent with the contents of the two letters which were written to the Registrar of

this Court and were clearly addressed to him in his official capacity. The oral submission, therefore, that NAB was purporting to seek some evidence/information which was personal to the Registrar and not in his official capacity is, on its face, not tenable. This stance taken in Court on 26.7.2012 is nowhere even remotely indicated in the two letters of 23.7.12 and 25.7.12 sent to the Registrar. This is also apparent from the Registrar's reply as an officer of this Court. It is for this reason we had stated that instead of being needlessly touchy and offended, NAB should issue a letter if necessary, setting out the particulars of information/evidence which were being sought from Dr. Faqir Hussain (not as Registrar) and *"if that information has nothing to do with his official duties, [it would] be for Dr. Faqir Hussain to respond to the same in his individual capacity"*. It appears that no such letter had been issued by NAB until the previous date of hearing. We may add at this point that it is not open for investigating agencies (funded by public taxes) to take offence or umbrage when a citizen asserts his rights. The investigating agency has to act dispassionately, objectively and strictly in accordance with law. The fact that a senior functionary of NAB namely, the Prosecutor General who is the highest officer of NAB on the legal side got offended due to a legitimate concern raised by the Registrar, further creates the perception that it may not be possible for NAB to conduct its investigation in a dispassionate and objective manner.

ROLE OF FAISAL BASHIR MEMON SP (RURAL), MEMBER JIT:

16. On 31.7.2012, CCTV footage was screened in the Court Room as per our directive, in circumstances set out in our order of the same date. This was necessitated on account of a probe into the breach of security procedures of the Court on 12.6.2012 when Malik Riaz Hussain first appeared in Court in SMC 5 of 2012. The Hon'ble Judge of the Court Incharge of security had initially directed the IGP Islamabad to conduct an inquiry. However, the report of the IGP was perfunctory and was found unsatisfactory. It was, thereafter, that the Secretary, Ministry of Interior was directed to look into the matter and submit a report. The Secretary was *inter alia*, required to probe as to *"why the SP Rural, Bashir Memon [a member of the JIT] and DSP Rural, Malik Tahir in uniform received Malik Riaz at the Court entrance and accompanied him? Why these two*

Police Officers were there when the regular court time was over and there was no court functioning? If these two Police Officers were deputed for security reasons, it was not notified / informed to the Supreme Court. The inquiry should look in this matter as to why these two Police Officers were there?". Faisal Bashir Memon, it may be mentioned, was nominated as a member of the JIT by the Chairman NAB although he neither belonged to NAB nor was he under NAB discipline. A three-Member inquiry committee constituted by the Secretary Interior, has concluded that Faisal Bashir Memon "... has over stepped just to please the litigant Malik Riaz at the cost of his duty and lied all the way to deceive the committee by concealing the facts". The inquiry committee also recommended that "the competent authority may be moved to initiate departmental action under Efficiency and Discipline Rules as well as under police rules against the said officer".

17. The relevance of Faisal Bashir Memon and his presence in the CCTV footage can be gathered from our order dated 31.7.2012 wherein we noted that *"we have seen in Court the footage of the entry of Malik Riaz Hussain in the Supreme Court premises and have also observed from the said footage that Faisal Bashir Memon was indeed "sticking close" to Malik Riaz Hussain and was also seen making a few protective/sheltering gestures while walking closely with and escorting the respondent Malik Riaz Hussain. In this view of the matter and even if, for the time being, we do not take into account the other submissions made on behalf of the petitioner alleging serious bias and partiality in the inquiry, it would, in our opinion, be prudent to stay the investigation ... so that Faisal Bashir Memon can explain his position".*

18. Pursuant to the above order, Faisal Bashir Memon has submitted his explanation. The same is full of inconsistencies and is, *prima facie*, riddled with untruths. To demonstrate these untruths/inconsistencies, we may point out that he has not even attempted to explain his apparent conduct seen on CCTV as noted in our order of 31.7.2012. Secondly, his security duty at the Supreme Court (which was proffered by way of explanation) was related to the hearing by a nine-member larger Bench before whom eleven Constitution Petitions (Memo Case) were listed. As per report of the Court Associate, the hearing in the said case concluded around 10 a.m.

Therefore, there was no further justification for Faisal Bashir Memon to be escorting Malik Riaz inside the Court building between 2:15 p.m. to 2:32 p.m.

19. In his reply Faisal Bashir Memon has also tried to explain his meeting with Malik Riaz on 12.6.2012 by saying that he only greeted Malik Riaz Hussain by saying *salam* by way of Islamic tradition and that he was “*proceeding to [his] place of duty outside the Supreme Court building after attending the proceedings before the Bench headed by Hon’ble Chief Justice of Pakistan*”. This statement is belied, *prima facie*, by the CCTV footage seen in Court which shows Faisal Bashir Memon escorting and extending protocol to Malik Riaz seemingly as a “*personal security employee of Malik Riaz*”. Furthermore, it is relevant to note that the DIG Security, Islamabad Police during an inquiry identified the personnel from his force who were seen hovering around Malik Riaz Hussain. As per observations of the DIG, at least six different CCTV cameras captured either Faisal Bashir Memon or his immediate subordinate Malik Tahir DSP (Rural) accompanying Malik Riaz right from the reception entrance of the Supreme Court building upto the entrance upstairs, of Court Room No.1. These six cameras and the footage captured by them have been noticed in the report by the DIG Security. This being relevant is reproduced verbatim, as under:-

- “i) Camera No.26: At 1423:40 hours Malik Riaz Hussain arrived at public reception gate in two minutes. Haji Nawaz Khokhar and Colonel (name not known) and Mr. Faisal Bashir Memon SP/Rural accompanied him. Mr. Ahmed Iqbal, DSP/SC and SI Irshad Ahmed, Line Officer SC were present at gate. Other people were stopped outside the gate.
- ii) Camera No.26: At 1425:12 hours Malik Riaz Hussain entered the reception. Haji Nawaz Khokhar and Ali Riaz accompanied him. Mr. Liaquat Niazi, DSP and Malik Tahir, DSP also entered the reception. As some people were already present at reception and due to rush/disturbance, recording system of camera No.2 remained off for 15 minutes.
- iii) Camera No.27: At 1427 hours Malik Riaz Hussain and Media people are coming behind Haji Nawaz Khokhar, Mr. Ahmed Iqbal, DSP/SC and Malik Tahir, DSP/Rural.
- iv) Camera No.1: At 1429 hours Malik Riaz Hussain alongwith Mr. Faisal Bashir Memon, SP/Rural entered public reception. Malik Tahir, DSP Media personnel and lawyers were also with them. (Clip seen in Court on 31.7.2012).

- v) Camera No. 10: At 1430:36 hours Malik Riaz Hussain alongwith Mr. Faisal Bashir Memon, SP/Rural, his operator, Media personnel and lawyers went upstairs towards court room No.1.
- vi) Camera No. 13: At 1431:10 hours Malik Riaz Hussain, Mr. Faisal Bashir Memon SP/Rural, his operator and Media personnel came in front of court No.1".

This report made on 13.6.2012 based on available CCTV footage, shows *prima facie*, that Faisal Bashir Memon has not been forthright, honest and truthful in his reply filed in Court.

20. We may also add that the duty roster issued by the SSP Islamabad clearly specified that Faisal Bashir Memon's duty was confined to "supervision in front of Supreme Court of Pakistan". He, therefore, had no security duty assigned to him inside the Supreme Court building. Faisal Bashir Memon has made an attempt to justify his presence inside the Supreme Court Building by submitting he was present in connection with some cases which were listed for hearing on 12.6.2012 for which notice had been issued to the IG Islamabad. To support his submission he has attached with his reply a notice issued by the Court in respect of cases (CRP No.20 of 2011 and connected matters) listed before a three-member Bench headed by Hon'ble the Chief Justice. The hearing of these cases was concluded at 1:15 p.m. The report of the Court Associate (CA) has specified with clarity that the said cases were fixed at serial No. 3 before Bench-I headed by Hon'ble the Chief Justice and no police officer came to the rostrum during the hearing of the case (CRP No.20 of 2011 and connected matters) or seek to mark attendance as had been regularly done previously in these cases as manifested by order sheets dated 1.2.2012 and 27.2.12 wherein Mr. Faisal Bashir Memon SP has been marked present in the attendance sheet. The report of the CA is also in line with the proceedings in the aforesaid cases because investigation therein had been withdrawn from Islamabad Police shortly after 27.2.2012. These connected cases, according to the CA, were called for hearing at about 10 a.m. and the hearing continued until 1:15 p.m. when the matters were adjourned to 22.6.2012. Faisal Bashir Memon, therefore, had no business inside the Court building, even if he had been assigned security duty in front of the Supreme Court.

21. We are concerned that even after the above circumstances have come to the notice of NAB, Faisal Bashir Memon is being defended rather than being probed under section 31 of the NAO and other legal provisions as to his conduct. In the statement submitted in Court by NAB, it has been stated that *"in this case NAB has confidence in the abilities of Mr. Faisal Bashir Memon to be a part of credible, transparent and fair inquiry and he has given an explanation to this ... in respect of his presence in the Court and his meeting with Mr. Malik Riaz as per video recording"*. This statement in the face of such overwhelming evidence, *prima facie*, against Faisal Bashir Memon further shows an apparent lack of objectivity, transparency and fairness on the part of NAB. It would have been much more appropriate for NAB to examine the facts which are evident from the record rather than turning a blind eye to the same and defending Faisal Bashir Memon without even looking at such facts, record and video footage which have been noted by the DIG, Security, Islamabad and also separately by the inquiry committee constituted by the Secretary, Ministry of Interior.

22. The above narration of events has been given in some detail because it shows either bias or lack of transparency or gross incompetence on the part of NAB or that the proceedings of the inquiry may have been tainted by considerations other than merit. We cannot find any other explanation as to why NAB and the five Member JIT which supposedly was comprised of upright and diligent officers, failed to abide by law or adhere to norms demonstrating fairness, competence and transparency. These circumstances, noted above, lend further credence *prima facie*, to the allegation that NAB may not have been acting in a fair, impartial and lawful manner in the inquiry.

23. We may add that Mr. K.K. Agha, learned Prosecutor General NAB had informed us that Salman Ali Khan (son in law of Malik Riaz) had been summoned and would appear before the JIT in Islamabad in the week commencing Monday i.e. 30.7.2012. We are, therefore, surprised that the JIT as per explanation given by Faisal Bashir Memon, had already booked itself for a trip to England from 1.8.2012 to 6.8.2012 during which period Salman Ali Khan had been summoned to appear before the JIT in Islamabad. It may well be that the Prosecutor General had been kept in the dark in this

respect because we donot expect him to make an incorrect or misleading statement at the Bar. But this also points to a lack of transparency on the part of NAB.

24. We have considered above only such factors of the case which are demonstrable from the available record in relation to the Attorney General, NAB, the Joint Investigation Team and Faisal Bashir Memon. There are a number of other circumstances which have been adverted to by learned counsel representing the petitioner. Instead of elaborating on these aspects of the case it would be more appropriate to leave consideration of the same for the inquiry which we propose to order.

25. On 2.8.2012, the learned Prosecutor General NAB had made a statement in Court which has been reproduced in the order of the said date. It was stated by him, *inter alia*, that *"the formation of the JIT has become controversial to the extent of several allegations of bias/impartiality being alleged against the Chairman NAB and members of the JIT"*. It was also added that *"NAB has no particular interest in proceeding with this inquiry"* and if the inquiry is transferred to any other agency *"NAB has absolutely no issue with that"*. The opinion of the Chairman NAB has also been stated that *"to retain SP Faisal in the inquiry team may lead to the perception of the inquiry team not carrying out a fair and transparent inquiry"*. Nasrullah Gondal, another member of the JIT is an outsider being employed with FIA. Both Nasrullah Gondal and Faisal Bashir Memon have been removed from the inquiry team and thus as per above statement, *"in effect the JIT no longer exists"*. The remaining 3 members of the erstwhile JIT namely, Kausar Iqbal Malik, Ahmed Luk and Aamer Shahid, who are employees of NAB have also demonstrated their ignorance of the law or utter disdain for judicially recognized norms of fair investigation and due process. No action to date, appears to have been taken against them for violating such norms. On the contrary, their continued participation in the inquiry is being urged and defended. Mr. Akbar Tarar, learned Additional Prosecutor General NAB gave a verbal assurance to us in Court that although NAB is not insistent or interested in continuing with the inquiry, if the Court entrusts such inquiry to NAB, the same shall be conducted in an impartial and

transparent manner. This assurance, however, does not inspire much confidence in light of the objective reality emerging from the foregoing discussion.

26. We have previously emphasized that even-handed openness and transparency are among the defining features of our legal system. In our judgment under review, we have made it clear that *“even the highest constitutional functionaries, and their kith and kin, cannot but submit themselves and their affairs to the law”*. In the case titled Syed Yousaf Raza Gillani versus Assistant Registrar, Supreme Court of Pakistan (2012 SCMR 424), we have cited the hadith of the Holy Prophet (peace be upon him) wherein he warned: *“O people, those before you were ruined because when someone of high rank among them (sharif) committed theft, they would spare him, but when a weak person from amongst them (zaeef) committed theft, they would inflict the prescribed punishment upon him.”* (Sahih Bukhari).” Executive agencies or Courts are duty bound to give effect to the rule of law without fear or favour, within their respective spheres of authority. In our judgment of 14.6.2012, we have reminded Courts and investigating agencies *“that they must proceed with no consideration before them, save the law and the Constitution”*. Guidance in this regard is also available in the Holy Quran for State functionaries, including members of investigating agencies:-

يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ بِالْقِسْطِ شُهَدَاءَ لِلَّهِ وَلَوْ عَلَىٰ أَنْفُسِكُمْ أَوِ الْوَالِدِينَ وَالْأَقْرَبِينَ إِن يَكُنْ غَنِيًّا أَوْ فَقِيرًا فَاللَّهُ أُولَىٰ بِهِمَا فَلَا تَتَّبِعُوا الْهَوَىٰ أَنْ تَعْدِلُوا وَإِنْ تَلَوْا أَوْ نَعَرَضُوا فَإِنَّ اللَّهَ كَانَ بِمَا تَعْمَلُونَ خَبِيرًا

Translation:

“O ye who believe! Stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor: for Allah can best protect both. Follow not the lusts (of your hearts), lest ye swerve, and if ye distort (justice) or decline to do justice, verily Allah is well-acquainted with all that ye do.”

[Al-Qur'an, 004.135 (An-Nisa)]

27. Given the circumstances noted above, we have concluded that any inquiry by NAB in the matter will not be free from perception of partiality or bias or lack of competence. In order, therefore, to meet the ends of justice and to ensure a fair, impartial, honest and competent inquiry, the same should be transferred to some other person or agency to act independently, fairly and justly. We have given thought to possible alternatives towards this end. Although at the hearing of SMC 5 of 2012, it had been suggested by learned counsel for Malik Riaz that a judicial commission similar to the three-Member Memo Commission be constituted, this suggestion had consciously

not been accepted us. We are of the opinion that in order to keep matters clear of any subjective perceptions, it would be appropriate if the inquiry is entrusted to someone with relevant seniority, experience and standing. After giving consideration to the matter, we entrust the inquiry to a one man inquiry Commission comprising of Dr. Muhammad Shoaib Suddle who is a senior functionary having experience of investigations in the police and fiscal hierarchies and is occupying an independent tenured position as the Federal Tax Ombudsman. The professionalism and thoroughness of the inquiry undertaken by him in SMC 16 of 2010 (ISAF Containers Scam) has also persuaded us to refer this inquiry to him. He will:-

- (a) probe into the culpability of Malik Riaz Hussain, Dr. Arsalan Iftikhar, Salman Ali Khan and all those others who may be found involved in criminal activities in the light of our earlier order dated 14.6.2012 and the observations made hereinabove;
- (b) specify the legal provisions and offences, if any, which may be attracted in the case based on the fact finding undertaken by the Commission;
- (c) inquire into and ascertain such facts as may be relevant, connected with or ancillary to the determination of the foregoing matters and to set the machinery of the State in motion so that all those who may have committed illegal acts are pursued and brought to book with the full force and rigour of the law.

The entire record available with NAB which relates to this matter shall be handed over to the Commission. The Office shall also provide copies of the record of this petition and of SMC 05 of 2012 to the Commission.

28. The Commission shall have the following powers and may seek such further orders as may be considered necessary:-

- i) he shall exercise all the powers envisioned in the Supreme Court Rules, 1980 and the powers of Judicial Officers for the purpose of carrying out the objects mentioned hereinabove;
- ii) he shall be free to avail the services of advocates, experts of forensic science, persons with relevant experience, including fiscal laws etc. State functionaries when called upon to do so shall provide necessary assistance to the Commission;
- iii) the Commission shall be authorized to collect evidence within and outside Pakistan according to prevailing laws on the subject;
- iv) the Commission is required to complete this task within a period of thirty days after receipt of the copy of this order.

29. There appears to be sufficient material on record (considered above) to show, *prima facie*, that Faisal Bashir Memon SP and his immediate subordinate Tahir Malik DSP, may have submitted false, dishonest or deliberately misleading statements in Court during these proceedings or during inquiries ordered by the Court. The said two officers of Islamabad Police were specifically asked if they wished to add anything to their written submissions filed in Court (CMAs Nos. 3411/12 & 3413/12). They stated that they had

nothing to add. In order to ensure that they receive due process, the Commission shall look into the facts relevant to the conduct of Faisal Bashir Memon SP and Tahir Malik DSP and the material adverted to above. However, considering the foregoing aspects of the matter relating to these two officers, we consider it appropriate that the said officers are assigned duties and are kept posted at the Islamabad Police Headquarters during the course of the inquiry. The proceedings in the inquiry shall not preclude the departmental authorities from taking disciplinary proceedings against these two officers in accordance with law as has also been recommended by the inquiry committee of the Ministry of Interior.

Judge

Judge

Islamabad

Announced on 30.8.2012.

A.Rehman.

Approved for reporting.