

IN THE HIGH COURT OF SINDH, KARACHI

Present:

*Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Anjad Ali Bohio*

CR. ACCTT. APPEAL NO.03 OF 2001

Appellant: Khan Muhammad Mahar s/o. Fakir Jan Muhammad Mahar through M/s. Farooq H. Naek, Advocate.

Respondents: The State through M/s. Hayatullah and Syed Dilshad Hussain Shah, Special Prosecutor NAB and Mr. Jan Muhammad Khoro, Addl. Advocate General Sindh.

CR. ACCTT. APPEAL NO.02 OF 2007

Appellants:

1. Fakir Jan Muhammad Mehar s/o. Mubarak Mehar.
2. Mst. Jannat wife of Fakir Jan Muhammad Mehar.
3. Mst. Rahat d/o. Fakir Jan Muhammad Mehar, through M/s. Farooq H. Naek and Mahmood A. Qureshi, Advocates.

Respondents: The State through M/s. Hayatullah and Syed Dilshad Hussain Shah, Special Prosecutor NAB and Mr. Jan Muhammad Khoro, Addl. Advocate General Sindh.

CR. ACCTT. APPEAL NO.03 OF 2007

Appellants:

1. Haji Badal s/o. Mubarak Mehar.
2. Abdul Rahman son of Haji Badal.
3. Mubarak Ali s/o. Haji Badal, through M/s. Farooq H. Naek and Mahmood A. Qureshi, Advocates.

Respondents: The State through M/s. Hayatullah and Syed Dilshad Hussain Shah, Special Prosecutor NAB and Mr. Jan Muhammad Khoro, Addl. Advocate General Sindh.

CR. ACCTT. APPEAL NO.04 OF 2007

Appellants:

1. Muhammad Hassan s/o. Fakir Jan Muhammad.
2. Mst. Sami wife of Muhammad Hassan.

3. Gul Muhammad s/o Muhammad Hassan,
4. Ali Anwar son of Muhammad Hassan through M/s. Farooq H. Naek and Mahmood A. Qureshi, Advocates.

Respondents:

The State through M/s. Hayatullah and Syed Dilshad Hussain Shah, Special Prosecutor NAB and Mr. Jan Muhammad Khoro, Addl. Advocate General Sindh.

CR. ACCTT. APPEAL NO.05 OF 2007

Appellants:

Mst. Zarina Malik wife of Malik Mehar Khan through M/s. Farooq H. Naek and Mahmood A. Qureshi, Advocates.

Respondents:

The State through M/s. Hayatullah and Syed Dilshad Hussain Shah, Special Prosecutor NAB and Mr. Jan Muhammad Khoro, Addl. Advocate General Sindh.

Date of Hearing:

11.09.2023

Date of Announcement:

25.09.2023

JUDGMENT

Mohammad Karim Khan Agha, I:- Vide judgment dated 10.02.2001 passed by the Accountability Court No.III, Karachi in Reference No.39 of 2000 appellants Khan Muhammad Mehar s/o Jan Muhammad Mehar and Abdul Rehman s/o. Haji Badal were convicted for the offence u/s.9(a)(IV&V) punishable under Section 10 of the NAB Ordinance 1999 and sentenced to suffer R.I. for 10 years and to pay a fine of Rs.14,00,00,000/- (Fourteen Crores) and in case of default in payment accused persons shall undergo R.I for 2 ½ years more. The entire movable and immovable properties mentioned in the charge except properties at S.No.30 to 32 of agriculture properties and S.No.7 of residential were forfeited to the Government of Pakistan.

2. The background of this case is that the Supreme Court in Criminal Appeal No.1-K of 2016 vide order dated 14.04.2016 ordered that these appeals be sent back to the Appellate Court (this court) in order to first determine the question of maintainability of the Reference in the following terms:-

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"2. However today upon hearing learned counsel for the appellant, the learned Attorney General for Pakistan and also the learned Additional Prosecutor General NAB, we find that instead of entertaining a separate application to that effect and deciding the matter, it was perhaps appropriate for the court of appeal to decide the matter after probing into the nature of the absence of the Chairman on the given date i.e. 9.9.2000 and whether signing of the reference by the Acting Chairman was one of the functions which falls within the purview of his jurisdiction.

3. Thus with the concurrence of the learned counsel for the parties, this appeal is allowed and the order in question is set aside, however as the main appeal is pending adjudication before the learned Accountability Appellate Court since 2001, we direct the Registrar of the learned High Court to fix this matter within two weeks and because of the long delay in this case, we are sanguine that the learned High Court shall decide this matter within a period of three months including the question whether the reference filed with the signatures of Maj. General Syed Usman Ali Shah as Acting Chairman, NAB was competent in law and the effect thereof. It is also expected of the learned High Court to attend to the question that objection to the competence of the reference was not raised by the appellant during the trial and it is not one of the grounds set out in the memo of appeal, rather for the first time the question was agitated through a miscellaneous application, thus in view of such situation whether the rule of acquiescence, estoppel, waiver etc. was attracted to the appellant and on this score alone his plea of challenging the competence of reference should be rejected"

3. As can be seen the first issue before us as per order of the Supreme Court is the maintainability of the reference which was the foundation of the conviction and appeals. If the reference is not maintainable in the first place then it would follow that the reference was without lawful authority. Thus, we will confine ourselves to the issue of the maintainability of the reference in this judgment.

4. Learned counsel for the appellants has contended that the reference was signed on 09.09.2000 by Syed Usman Shah who at the time was deputy chairman and had no lawful authority to sign the reference as the absence, and in particular the nature of the absence, of the chairman NAB had not been proven; that even otherwise the deputy chairman had no lawful authority under the NAO to sign the reference because he had no delegated authority to do so and that the doctrine of estoppel, waiver or acquiescence was not applicable based on the particular facts and circumstances of this case and as such the reference was not maintainable and should be set aside as being signed and filed without lawful authority. In support of his contentions he has placed reliance on the cases of *Al-Jehad Trust v Federation of Pakistan* (PLD 1996 SC 324), *Gulzar Ahmed Raza v Ghairman, National Accountability Bureau (NAB)* (2010 YLR 2977) *Haji Muhammad Boota v Member (Revenue) Board of Revenue, Punjab* (PLD 2003 SC 979), *Mian Muhammad Nawaz Sharif v President of Pakistan* (PLD 1993 SC 473), *Manak Lal, Advocate v Dr. Prem Chand Singhvi* (PLD 1957 SC (Ind.) 346),

Muhammad Ahmad v Mrs. Qamar Anwar Sheikh (1980 CLC 664), Basheshar Nath v Commissioner of Income Tax, Delhi and Rajasthan (AIR 1959 SC 149 (V 46 C22), Mst. Bilqis Sultana v Settlement Commissioner Lahore (PLD 1975 Lahore 185), Karachi Dock Labour Board v Messrs Quality Builders Ltd. (PLD 2016 SC 121), Munawar Husain v Sultan Ahmad (2005 SCMR 1388), Evacuee Trust Property Board v Mst. Sakina Bibi (2007 SCMR 262), Mst. Badshah Begum v The Addl. Commissioner (R) Lahore (2003 SCMR 629), Nawab Syed Raunaq Ali v Chief Settlement Commissioner (PLD 1973 SC 236), Muhammad Aslam v Shamim Akhtar (PLD 2012 High Court [AJ&K] 14), Irshad Ali v Province of Sindh through Home Secretary (2015 PLC (C.S) 283, Commissioner Income Tax v Habib Bank Limited and ANZ Grindlays Bank PLC (2014 SCMR 1557), Commissioner Income Tax v Habib Bank Limited and ANZ Grindlays Bank PLC (2015 PTD 619), Sheikh Khalid Mehmood v Station House Officer (2015 P Cr. L J 387), Bank of Punjab and another v. Haris Steel Industries (Pvt) Ltd. (PLD 2010 Supreme Court 1109), Ch. Nisar Ali Khan v. Federation of Pakistan and others (PTD 2013 Supreme Court 568) and Shahid Orakazi and another V. Federation of Pakistan through Secretary Law, Ministry of Law, Islamabad and another (PLD 2011 Supreme Court 365.

5. On the other hand special prosecutor NAB has conceded that the Chairman was absent but contended that this was not a bar on the Deputy Chairman signing the reference in his capacity as Acting Chairman or deputy Chairman; that the Deputy Chairman had full authority to sign the reference and that the case was hit by the doctrine of estoppel and as such the reference was maintainable.

6. We have heard the parties, considered the record as well as the relevant law.

7. As mentioned earlier we are only determining the maintainability of the reference and not its merits.

8. We are cognizant of the fact that the reference was filed in the year 2000 under the National Accountability Ordinance 1999(NAO) and as such we will have to consider the law operating at that time.

The first issue is the question of the nature of the Chairman's absence.

9. In this respect the following sections of the NAO as set out below will be of assistance in terms of who can appoint the Chairman NAB and Deputy,

Chairman and their role within the organization and who has the power to sign/file references;;

"5(e) "Chairman National Accountability Bureau" means a person who is appointed as such by the President of the Islamic Republic of Pakistan as mentioned in section 6(b) hereafter;

5(i) "Deputy Chairman" means the person appointed as Deputy Chairman by the Chief Executive of the Islamic Republic of Pakistan

6. National Accountability Bureau.—

(a) there shall be constituted a National Accountability Bureau for the whole of Pakistan;

(b) National Accountability Bureau:

(i) There shall be a Chairman NAB to be appointed by the President for such period as the Chief Executive of Pakistan may determine and consider proper and necessary;

(ii) The Chairman NAB shall be appointed on such terms and conditions and shall have the status and privileges as may be determined by the Chief Executive.

(iii) the Chairman NAB may resign his office by writing under his hand addressed to the Chief Executive.

(c) Acting Chairman, National Accountability Bureau:

As and when the Chairman NAB is absent or unable to perform the functions of his office due to any reason whatsoever, the Deputy Chairman will act as the Chairman NAB, and in case the Deputy Chairman is absent or unable to perform the functions of the office, any other person duly authorized by the Chairman NAB, to act as Chairman NAB.

7. Deputy Chairman, National Accountability Bureau.— (a) There shall be a Deputy Chairman NAB appointed by the Chief Executive in consultation with the Chairman NAB. The Deputy Chairman shall assist the Chairman in the performance of his duties and carry out such functions as may be directed by the Chairman.

(b) The Deputy Chairman shall serve at the pleasure of the President.

18. Cognizance of offences.—

(a).....

(b).....

(c).....

(d)....

(e).....

(f).....

(g) The Chairman NAB 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, he shall refer the matter to an Accountability Court.

10. The Supreme Court in its order reproduced above directed us to probe into the nature of the Chairman's absence on 09.09.2000.

11. The reason for this direction was because if the Chairman had no good reason for being absent then the Deputy Chairman would not have had the authority to sign the reference.

12. The Chairman National Accountability Bureau (NAB) holds the pivotal role in the functioning of the NAB as can be seen from his higher level of appointment, his qualification (Lt. General as opposed to Maj. General) and most important and significant powers being either assigned exclusively to the Chairman or other powers which cannot be carried out without his prior approval. For example, the signing/filing of references, filing of appeals and approving the arrest of individuals.

13. Due to the importance of the powers given to the Chairman NAB it cannot be simply claimed that when the Chairman was absent and as such the Deputy Chairman could step in and fill his shoes. As per the Supreme Court order we had to probe into the nature of the Chairman's absence on the day in question i.e 09.09.2000. For example, was he on annual leave, was he attending a conference outside Pakistan or was he unwell. It is an admitted position as can be ascertained by the Supreme Court's order and NAB's comments that the Chairman was absent from the office but not the reason why or where he was. This is the crux of the Supreme Court order i.e the nature of his absence i.e why was he absent and where was he.

14. The question is where was the Chairman on the day in question i.e 09.09.2000 which meant that he was unable to sign the reference. When confronted by this Court, despite being given numerous opportunities to find out the whereabouts of the Chairman on the given date, the Special Prosecutor NAB could not come up with any explanation. He simply stated that the Chairman was absent (a fact which was already known).

15. The Chairman NAB at the time when the reference was signed was Lt. General Syed Muhammed Amjad and the Deputy Chairman was Maj. General Usman (Shah) as per record who signed the reference in the absence of the Chairman Lt. General Syed Muhammed Amjad.

16. As mentioned above no reason has been assigned for the Chairman's absence. He may have been at home in which case the reference could have been sent to him at his house for signing as is often done in matters of urgency. Or the reference could have been signed by the Chairman the next day when he returned to the office or even the following week as there appears to be no particular urgency in signing the reference. The fact that the Chairman was not absent and unable to fulfill his duties is fortified by the fact that no notification making the Deputy Chairman Acting Chairman in the absence of the Chairman was ever issued which indicates that the Chairman was available on the day when the reference was signed.

17. Thus, since the NAB has not been able to explain the nature of the Chairman's absence on 09.09.2000 and there is no material on record to suggest that he was absent on the said day e.g through approved leave, approval to travel abroad, sick leave etc after our probe we find that there is no material to suggest that the Chairman was in fact absent from Pakistan that day apart from not attending the office in the context in which absence is usually meant i.e with a reason for the absence and NAB has been unable to explain the nature of the absence which implies his presence and availability.

18. By using the word "absence" the legislature could not have meant absence from office for example one day whilst the Chairman attended a meeting in Karachi as this would mean as soon as the Chairman was out of office the Deputy Chairman would not only assume his role but also his powers which could not have been the legislative intent. Absence in our view as intended by the legislature would mean for example when the Chairman was outside of Pakistan for a given period and as such the day to day affairs of running the NAB fell within the purview of the Deputy Chairman and/or Acting Chairman as to allow any other interpretation would imply that if the Chairman as mentioned earlier was outside of Islamabad and absent from NAB office for one day the Deputy Chairmen being much lower in title and position could step in and take over all the powers of the Chairman including extremely exclusive and significance ones such as signing references. Hence, absence turns on the nature of the absence as emphasized by the Supreme Court. If for example the Chairman was abroad for say about 6 months on NAB business such reason for his absence might trigger the absence as envisioned by the Statute as it was necessary for some one to temporarily step in to fulfill his functions and ensure continuity of the Organization.

19. Hence, we find that the Deputy Chairman could not have simply stepped in and signed the reference under these circumstances where no reason for the absence (which reason was essential to prove that the absence was genuine) was given and it appears that the Chairman was only absent from the office but not necessarily unreachable and could have signed the reference the next day, which was beyond his powers unless he had delegated powers to do so from the Chairman.

Did the Deputy Chairman have any delegated powers from Chairman NAB to sign the reference?

20. In this respect S.7 NAO as reproduced above is of importance.

21. Under S.7 NAO the Deputy Chairman;

- (a) may assist the Chairman in the performance of his duties and
- (b) carry out such functions as may be directed by the Chairman.

22. With regard to assist this clearly in our view does not apply to such an important function as signing references on his behalf. In fact in such a scenario he would not be assisting the Chairman but carrying out the actual functions of the Chairman which he had no legal authority to do under the NAO.

23. With regard to carrying out such functions as may be directed by the Chairman. NAB has failed to place on record any written function which the Chairman had directed the Deputy Chairman to carry out whether in terms of an SOP, rule, delegated authority or otherwise and as such there is no material to suggest that the Chairman NAB ever directed the Deputy Chairman to sign and file references. There is also no material to suggest that any verbal order was given to that effect and it is well settled by now that verbal orders have no sanctity in the eyes of the law.

24. This in any event would run contrary to S.18(g) NAO which was reproduced above which authorized the Chairman to 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, he shall refer the matter to an Accountability Court. How could such power to sign a reference be given to a Deputy Chairman would had not even appraised the material and evidence placed before him? It would not be possible as this was the function of the Chairman.

25. The NAO was amended on 5th July 2000 to enable the Chairman to delegate his powers by adding a new clause 6(iv) to the NAO which reads as under;

"The Chairman, NAB may 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."

26. Much later by Amendment (Ordinance)XXXV of 2001 dated 10.08.2001 a specific power to delegate was given to the Chairman NAB by virtue of S.34 (A) which is reproduced below for ease of reference;

"34-A. Delegation of Powers.--- The Chairman NAB may, by an order in writing, delegate any of his powers and to 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".

27. The special prosecutor NAB however was not able to produce any material to show that the Chairman had delegated any of his powers to the Deputy Chairman at the time when he signed the reference. When a delegation of powers takes place in the NAB this is always by way of statutory declaration in writing and is gazetted. For example, as is set out below;

The Gazette of Pakistan

EXTRAORDINARY
PUBLISHED BY AUTHORITY

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ISLAMABAD, FRIDAY, JULY 15, 2005

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PART II

Statutory Notifications (S.R.O.)

GOVERNMENT OF PAKISTAN

NATIONAL ACCOUNTABILITY BUREAU

ORDERS

Islamabad, the 22nd September, 2004

S.R.O. 712(I)/2005.---In exercise of powers vested in me under section 34-A of National Accountability Ordinance, 1999, I Ltd. General Munir Hafiez, Chairman National Accountability Bureau hereby delegate my powers to the officers of NAB to the extent indicated below for

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carrying out the purposes of the Ordinance with respect to the authorization of the following functions:-

S. No.	Nature of power/function	Officers of NAB authorized	Extent of delegation
1	2	3	4
1.	Closure of inquiry/investigation and release of the accused, if in custody u/s 9(c)	All DGs Regional NABs.	i. Grade 16 & below. ii. Holder of an office or post in connection with the affairs of a local council except District Nazim

CORRIGENDUM

In the order No.19(40)NACS (NAB)/2004 DATED 22-9-2004 regarding delegation of powers under section 34-A of National Accountability Ordinance, 1999 in column relating to extent of delegation against serial No.10, for "do" read "full powers".

Sd/-
MUNIR HAFIEZ
Lieutenant General
Chairman

National Accountability Bureau,
Islamabad,
Dated 1st July 2005.

28. When such statutory delegations are made by the Chairman they can even survive the maker leaving office for a reasonable period of time as was held in the cases of *Al-Jehad Trust V Federation of Pakistan* (PLD 2011 SC 811) and *Muhammed Rafiq V State(NAB)* (2019 SCMR 846)

29. In this case however despite the Chairman having the power to delegate authority to the deputy chairman he chose not to do so. Which is further support for the proposition that the Chairman was not absent or else he might have given such authority although it would be extremely rare, if ever, for a Chairman to delegate his authority to sign and file references to the Deputy Chairman under S.18(g) NAO as this is probably the most important power which the Chairman possesses under the NAO unless he was perhaps suffering from long term illness or would be away from Pakistan for a number of months as in most cases the signing of a reference can wait a week or two let alone a day or two.

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30. Thus, we find that the Deputy Chairman also had no authority to sign the reference on this count as well.

Estoppel, waiver and acquiescence

31. The key to this issue seems to be whether the appellant knew or was at least aware that the Deputy Chairman had no authority to sign the reference based on the particular facts and circumstances of the case when the reference was filed and knowing so he failed to raise the issue.

32. In this respect reliance is placed on the following cases;

In the case of Muhammad Ahmad (supra) it was held as under:-

"The term 'waiver' implies the intentional relinquishment of a known right after knowledge of the facts. It implies the intentional forbearance to enforce right and necessarily, therefore, assumes the existence of an opportunity for choice between the relinquishment and the enforcement of the right" (bold added)

In the case of Mst. Bilqis Sultana (supra) it was held as under:-

"It was pointed out that Brigadier Amjad Chaudhry had waived his right to the transfer of the property because he remained quiet for four years after its transfer to the petitioner. The first answer to this objection is that as has been shown above, the transfer of the property to the petitioner was wholly void being in excess of lawful authority and, therefore, the question of waiver would not arise. The second answer would be that it has not been shown at all the petitioner that the Brigadier was aware of the transfer of the property in her favour or that the property had been released by the Central Government and was thus available for transfer. Waiver has been defined as "an intentional relinquishment of a known right" but it has been held in Midnapore Zamindary Co. v. Kumar Chandra (1) that -

"Mere omission to claim or enforce a right for some time does not amount to a waiver of a right."

It has been held time and again that the doctrine of waiver would step in only when there is some "clear and decisive act or conduct beyond mere silence, as pure silence by a party in regard to a right perfectly known to the other can rarely mislead a man of average intelligence". (bold added)

33. In this case admittedly the appellant was a lay man and had no specific knowledge about the law and in particular the niceties of who and who could not sign the reference. Quite naturally he was only interested in defending the charges against him. Thus, he had no knowledge that the reference had been signed and therefore filed unlawfully against him and as such he cannot be said

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to have waived his right to raise the issue later or even acquiesce in the hearing of the case without lawful authority.

34. In any event a court cannot hear a case if it lacks jurisdiction even if the parties acquiesce to it. In this respect reliance is placed on the following cases;

In the case of **Munawwar Hussain and 2 others (supra)** it was held as under:-

"For the point of question, this Court has given a clear distinction in case of Muhammad Hussain v. Muhammad Shafi 2004 SCMR 1947. We have already held that when a Court suffers from want of inherited jurisdiction, no amount of consent or acquiescence in the proceedings can invest such Court with such jurisdiction. No question of waiver or estoppel is attracted in such circumstances".(bold added)

In the case of **Karachi Dock Labour Board (supra)** it was held as under:-

"It is proper to mention here that according to the settled rules of law, parties cannot confer jurisdiction upon a Court or other judicial or quasi-judicial forum through consent which otherwise in law would have no jurisdiction and the same is the position regarding waiver and acquiescence qua the Courts etc. which lack jurisdiction and such being an inherent defect cannot be cured on the rules of consent, waiver, estoppel, acquiesce etc.(bold added)

35. In this case since the Deputy Chairman based on the particular facts and circumstances of this case had no lawful authority to sign and file the reference the accountability court had no power to take cognizance of the same under S.18(g) NAO and hence lacked the jurisdiction to hear the reference.

36. This being the case we find that the reference was filed without lawful authority and it is set aside with the effect that the appellants are acquitted of the charge and their bail bonds stand discharged.

37. It follows that any properties confiscated on account of their convictions and sentences under the references shall be returned to the appellants or their lawful owners and all fines and any other financial penalties imposed by the impugned judgment upon the appellants or any one else mentioned therein are set aside.

38. The appeals stand disposed of in the above terms.