

IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha

Mr. Justice Amjad Ali Bohio

CONSTITUTION PETITION NO.D-3472 OF 2023

Petitioner: Dr. Asim Hussain s/o. Tajamul Hussain
through M/s. Farooq H. Naek and Syed
Qaim A. Shah, Advocates.

The State: Through Mr. Zahid Hussain Baladi,
Special Prosecutor, NAB and Qazi
Ayazuddin Qureshi, Assistant Attorney
General.

Date of Hearing: 30.08.2023.

Date of Announcement: 04.09.2023

ORDER

MOHAMMAD KARIM KHAN AGHA, J:- The petitioner has filed this petition against the order dated 08.04.2023 (the impugned order) passed by the Accountability Court No.IV, Karachi Sindh in Reference No.19/2023 (The State v. Dr. Asim Hussain and others) and prayed that the Reference filed by the National Accountability Bureau (NAB) be transferred to the Court / Authority having the jurisdiction to entertain and to try the same as according to the petitioner the Accountability Courts no longer have jurisdiction to hear this reference after the recent amendments made to the National Accountability Ordinance 1997 (NAO). The petitioner further seeks to suspend the operation of order dated 08.04.2023 passed by the respondent No.3 in Reference No.19/2016

2. The brief facts of the case are that the petitioner is alleged along with eight other co-accused to have misused their authority to favor co-accused No.10 who is the beneficiary in this case which caused a huge loss to the Government Exchequer. The aforementioned 9 co-accused consist of a former Federal Minister and senior officials of both OGDCL and SSGCL.

3. Learned counsel for the petitioner has contended that the learned trial court no longer has jurisdiction to try the reference for the following reasons; that according to the NAO as it now stands any amendments made to it are deemed to take effect from 01.01.1985; that according to Act No.XI of 2022 which amended the NAO the Accountability court had no jurisdiction to hear the reference based on the new section 4 as it was a case of misuse of authority and there was no evidence that the petitioner and/or any of his co-accused who were senior officials of OGDCL and SSGCL and were all public office holders had received any monetary gain on account of the decisions which the 9 aforesaid accused had made; that even otherwise if a procedural lapses had occurred by the petitioner and his public office holder co-accused there is no evidence that they had made any gain out of the procedural lapses and like wise with any decision which they had made with regard to the reference and as such the trial court had no jurisdiction to hear the reference as the offences so charged were specifically excluded from the purview of the NAO and as such the reference should be referred back to the accountability court to return the same to the Chairman NAB as the Accountability court now lacked jurisdiction to hear the matter. In support of his contentions he placed reliance on the provisions of the amended NAO, the Rules of business 1973 and a DB Order of this court dated 26.04.2023.

4. Learned Special prosecutor NAB and learned DAG supported the impugned judgment and contended that notwithstanding the recent amendments to the NAO the accountability court still had the jurisdiction to hear the reference although when confronted by the court they could not point to any gain, financial or otherwise which any of the accused had received on account of their actions as mentioned in the reference.

5. We have heard the parties, considered the record and the relevant law.

6. The legal point involved is whether following amendments made to the NAO the accountability court now has the jurisdiction to proceed with this reference.

7. The reference itself as mentioned earlier revolves around a misuse of authority by public office holders which favored the beneficiary which,

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caused him financial gain and loss to the exchequer based on various decisions made by the co-accused whilst acting in their official capacity.

8. Section 1(2) of Act XI of 2022 makes it clear that the amendments contained therein are deemed to take effect at once and from 01.01.1985 and are therefore retrospective in effect and will cover the reference in question.

9. Firstly let us examine the status of the accused in the reference as this might be relevant in terms of S.4 of Act XI of 2022 as relied upon by the petitioner.

10. The petitioner who is accused No.1 was a federal minister at the time and was a holder of public office as per definition 5 (n) (ii) as set out in Act XI of 2022 .

11. The co-accused being 2 to 9 in the reference either worked for OGDCL which is a statutory corporation established under the Oil and Gas Development Corporation Ordinance 1961 for the purpose of exploration and development of oil and gas resources, and production, refining and sale of oil and gas and for matters connected thereto. In effect it is a Government Corporation.

12. On the other hand SSGCL is once again a Government controlled company with the purpose of supplying Gas. As per Rules of Business 1973 S.3 as per allocation of business both of these companies fall under the purview of the Ministry of Petroleum and Natural Resources and the Petroleum and Natural Resources Division on account of their business and objectives.

13. The question is how do the co-accused working for the OGDCL and SSGCL fall within the purview of S.4 of Act XI (if at all) and whether it is that relevant based on the particular facts and circumstances of the case.

14. For ease of reference S.4 is set out below;

2. Amendment of section 4, Ordinance XVIII of 1999.—In the National Accountability Ordinance, 1999 (XVIII of 1999), hereinafter

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referred to as the Ordinance, for section-4, the following shall be substituted, namely:—

4. Application.—(1) This Ordinance extends to the whole of Pakistan and shall apply to all persons, including those persons who are or have been in the service of Pakistan, except persons and transactions specified in sub-section (2).

(2) The provisions of this Ordinance shall not be applicable to the following persons or transactions, namely:—

(a) all matters pertaining to Federal, Provincial or Local taxation, other levies or imposts, including refunds, or loss of exchequer pertaining to taxation;

(b) decisions of Federal or Provincial Cabinet, their Committees or Sub-Committees Council of Common Interests (CCI), National Economic Council (NEC), National Finance Commission (NFC), Executive Committee of the National Economic Council (ECNEC), Central Development Working Party (CDWP), Provincial Development Working Party (PDWP), Departmental Development Working Party (DDWP), the State Bank of Pakistan and such other bodies except where the holder of the public office has received a monetary gain as a result of such decision;

(c) any person or entity who, or transaction in relation thereto, which are not directly or indirectly connected with the holder of a public office except offences falling under clauses (ix), (x) and (xi) of sub-section (a) of section 9;

(d) procedural lapses in performance of any public or governmental work or function, project or scheme, unless there is evidence to prove that a holder

of public office or any other person acting on his behalf has been conferred or has received any monetary or other material benefit from that particular public or governmental work or function, whether directly or indirectly on account of such procedural lapses, which the said recipient was otherwise not entitled to receive;

(e) a decision taken, an advice, report or opinion rendered or given by a public office holder or any other person in the course of his duty, unless there is sufficient evidence to show that the holder of public office or any other person acting on his behalf received or gained any monetary or other material benefit, from that decision, advice, report or opinion, whether directly or indirectly, which the said recipient was otherwise not entitled to receive; and

(f) all matters, which have been decided by, or fall within the jurisdiction of a regulatory body established under a Federal or Provincial law.

(3) Upon the National Accountability (Amendment) Act, 2022 (___ of 2022), coming into force, all pending inquiries, investigations, trials or proceedings under this Ordinance, relating to persons or transactions mentioned in clause (a) of sub-section (2), shall stand transferred to the concerned authorities, departments and Courts under the respective laws."

15. Now it appears that the petitioner and all the co-accused (officials of OGDCL and SSGCL) except co-accused 10 who is the alleged beneficiary are public office holders and fall within the category of S.4 (2) (b) i.e "and such other bodies except where the holder of the public office has received a monetary gain as a result of such decision". Admittedly none of the accused 1 to 9 received any monetary gain as a result of any decision they made in terms of the reference and thus on this count the reference does not fall within the jurisdiction of the NAO as they

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are explicitly excluded from the ambit of the NAO by S.4 (2) (b) of Act XI of 2022.

16. Even otherwise any lapse which they might have made would qualify as a procedural lapse whilst performing there functions whilst working for the OGDCL and SSGCL unless under S.4 (2) (d) "there is evidence to prove that a holder of public office or any other person acting on his behalf has been conferred or has received any monetary or other material benefit from that particular public or governmental work or function, whether directly or indirectly on account of such procedural lapses, which the said recipient was otherwise not entitled to receive" Admittedly, there is no evidence that any of the accused 1 to 9 received any monetary or other material benefit on account of the Government/public work which they were doing in this case being senior officials either of the OGDCL or SSGCL in respect of any procedural lapse in terms of the reference and thus on this count as well the reference does come within the jurisdiction of the NAO as they are explicitly excluded from the ambit of the NAO by S.4 (2) (d) of Act XI of 2022.

17. Like wise under S.4 (2) (e) "any decision taken, an advice, report or opinion rendered or given by a public office holder or any other person in the course of his duty, unless there is sufficient evidence to show that the holder of public office or any other person acting on his behalf received or gained any monetary or other material benefit, from that decision, advice, report or opinion, whether directly or indirectly, which the said recipient was otherwise not entitled to receive". In this case there is no evidence to show that on account of any decision, advice, report or opinion made by accused No.1 to 9 in the allegations in the reference received or gained any monetary or other material benefit, from any decision, advice, report or opinion, whether directly or indirectly, which the said recipient was otherwise not entitled to receive. So once again by virtue of S.4 (2) (e) Act XI of 2022 the reference does not fall within the purview of the NAO.

18. Thus, for the reasons mentioned above pursuant to the amendments made to the NAO by Act XI of 2022 the reference in

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question being Reference 19 of 2016 (The State v Dr. Asim Hussain and others) does NOT fall within the jurisdiction of the NAO and as such the impugned order is set aside and Accountability Court No.IV at Karachi where the reference is pending is directed to return the aforesaid reference forthwith to the chairman NAB through the investigating officer of the case for passing appropriate orders including but not limited to referring the matter to relevant forum in accordance with law.

19. A copy of this order shall be sent by fax to Accountability Court IV Karachi for compliance.

20. The petition stands disposed of in the above terms.

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