

IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha

Mr. Justice Amjad Ali Bohio

CONSTITUTION PETITION NO.D-3871 OF 2023

Petitioner: Kamran Gul s/o. Muhammad Ismail
Memon through M/s. Muhammad Haseeb
Jamali and Shumail Sikandar, Advocates.

The State: Through Mr. Zahid Hussain Baladi and
Syed Dilshad Hussain Shah, Special
Prosecutors NAB and Ghulam Sarwar
Baloch, Assistant Attorney General.

Date of hearing: 07.09.2023.

Date of Announcement: 11.09.2023.

ORDER

MOHAMMAD KARIM KHAN AGHA, J:- The petitioner has filed this petition against the order dated 13.07.2023 (impugned order) passed by the Accountability Court No.VI, Karachi Sindh in Reference No.15/2019 (The State v. Sharjeel Inam Memon and others) and prayed that the impugned order dated 08.04.2023 be set aside.

2. The brief facts of the case are that the petitioner is the alleged beneficiary along with eleven other co-accused persons in the said Reference wherein NAB has alleged that the petitioner Kamran Gul is one of the beneficiary of Rawal Farm House, constructed on the land situated in Deh Rahoki Tap A Tando Qaiser, Survey No.161-3, 162-1, 162-2 and 162-3 (the Property) and so far experts from Pak PWD have evaluated Rs.346,974,582/- has been spent on this construction. The petitioner was prosecuted by the Respondent No.1 on account of benamidar owner of the Property, which is allegedly owned by the accused No.1 Sharjeel Inam Memon in the Reference No.15/2019.

3. Learned counsel for the petitioner has contended that the petitioner is the actual owner of the Property and is not a benamidar of any one in respect of the Property. In support of this contention he referred to

various documents on record. He further contended that through Ordinance III of 2019 he had availed a tax amnesty with respect to the Property as it was an undeclared asset for taxation purposes and as such he was not liable to be prosecuted under any law. In this regard he referred to various documents. He further contended that since he had availed the tax amnesty under the aforesaid Ordinance by virtue of Ordinance XVI of 22 the National Accountability Ordinance (NAO) or any other law was no longer applicable to him and as such the reference in respect of him should be quashed.

4. On the other hand learned Special Prosecutor NAB and DAG supported the impugned judgment.

5. We have heard learned counsel for the petitioner, special prosecutors NAB and learned DAG, considered the record and the relevant law.

6. It appears from the record that in 11.07.2014 the petitioner brought the shares of the Property in so far as they related to accused No.1 through a registered sale deed with possession of the petitioner being confirmed and payment being received which was then registered in the record of rights so the evidence suggest that the Property belonged to the Petitioner and he was not a benamidar of the same for any one and that he subsequently constructed a house on the Property. This finding is fortified by the actions carried out by the petitioner following the promulgation of Ordinance III of 2019 (the Amnesty Ordinance).

7. The aim of the Amnesty Ordinance promulgated on 15.05.2019 was to provide for voluntary declaration of undisclosed assets, Sales and expenditure with the object and purposes of as per its Preamble of allowing (a) non documented economy's inclusion in the taxation system and (b) serve the purpose of economic revival. In effect the Amnesty Ordinance was a tax amnesty scheme whereby if a person voluntarily disclosed an asset which belonged to him , such as the Property, or else held as a benamidar and paid the appropriate amount of tax on the same to the FBR he was given immunity from prosecution.

8. The record reveals that on 03.06.2019 after the promulgation of the Amnesty Ordinance the petitioner took advantage of the same and disclosed the Property which had been undeclared to the FBR and paid the appropriate tax on the same as determined by the FBR. The question arises why would the petitioner do this if he was not the real owner of the Property? Why would he pay a substantial amount of tax out of his own pocket if the Property did not belong to him and why even reveal it at all if he did not own it. The fact that he took advantage of the tax amnesty shows that the petitioner was the real owner of the Property and not a benamidar owner.

9. In a tax amnesty scheme people would generally not come forward unless there was an incentive for them to do so and as such the Amnesty Ordinance would not achieve its objects and purpose and in effect would be meaning less and in effective in practice. Thus, as an incentive for persons to come forward and disclose undeclared assets and pay tax on the same (which would otherwise not be recovered) the Amnesty Ordinance provided at S.12 and 16 as under;

12. Declaration not admissible in evidence.--- Notwithstanding anything contained in any other law for the time being in force, nothing contained in any declaration made under this Ordinance shall be admissible in evidence against the declarant **for the purpose of any proceedings relating to imposition of penalty or adverse action or for the purposes of prosecution under any law.**(bold added)

16. Ordinance to override other laws.--- The provisions of this Ordinance shall have effect **notwithstanding anything to the contrary contained in any other law for the time being in force.**(bold added)

S.12 provides explicitly provides that a person who has entered into a tax amnesty cannot have that used against him **for the purpose of any proceedings relating to imposition of penalty or adverse action or for the purposes of prosecution under any law.**(bold added).

S.16 is a non obstante clause which provides that the Amnesty Ordinance will over ride any other law for the time being in force which will include the NAO.

Hence we find that the petitioner cannot be subject to prosecution under the NAO or any other law based on the Amnesty Ordinance.

10. In addition in order for the Amnesty Ordinance to be harmonized with the NAO the NAO S.4(2)(a) was amended in first amendment of the

National Accountability (Amendment) Act, 2022 notified/gazette on 22.06.2022, which is reproduced as under for ease of reference;

"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 the Federal, Provincial or Local taxation, other levies or imposts, including refunds, or loss of exchequer pertaining to taxation".

11. Subsequently, another amendment called National Accountability (Second Amendment) Act, 2022 dated 12.08.2022, was passed by the legislature and further amended Section 4 sub-section (2) Clause (i)(a) which is reproduced as under for ease of reference;-

"2. Amendment of section 4, Ordinance, XVIII of 1999.-- In the National Accountability Ordinance, 1999 (XVIII of 1999), hereinafter referred to as the Said Ordinance, in section 4, in sub-section (2)".-

"(i) in clause (a), after the word "taxation", occurring at the end, the expression "transactions or amounts duly covered by amnesty schemes of Government of Pakistan" shall be inserted;"

12. The amendments to the NAO all have retrospective effect i.e from 01.01.1985 and as such will apply to the reference in question.

13. The amendments reproduced above clearly **exclude** the petitioner from the NAO and as such the Accountability courts have no jurisdiction to try the petitioner.

14. That since under the amendments to the NAO, as mentioned above, the Accountability court has no jurisdiction to try the petitioner and even otherwise as discussed above having entered into a tax amnesty the petitioner cannot be prosecuted under any other law the impugned judgment is set aside and the petitioner is acquitted of the charge.

15. The petition is disposed of in the above terms.