

IN THE HIGH COURT OF SINDH AT KARACHI

C. P. No. D-3553 of 2016

Present;
Mr. Justice Muhammad Junaid Ghaffar.
Mr. Justice Muhammad Humayon Khan.

Dr. Asim Hussain ----- Petitioner

Versus

Federation of Pakistan ----- Respondent

Date of hearing: 02.05.2017.

Date of order: 26.05.2017.

Petitioner: Through Ms. Umaimah Mansoor Advocate.

Respondent: Through Mr. Salman Talibuddin Additional Attorney General along with Mr. Riaz Alam Special Prosecutor NAB.

ORDER

Muhammad Junaid Ghaffar, J. Through this Petition the Petitioner has impugned letter dated 2.5.2016 issued by the Ministry of Foreign Affairs, Camp Office, Karachi, whereby, the attestation of the Power of Attorney executed by the Petitioner in favour of his son has been refused.

2. Briefly the facts of the case are that Petitioner was initially detained under Section 11EEEE of the Anti-Terrorism Act, 1997. Thereafter, two References have been filed bearing No.13 and 19 of 2016 before the Accountability Court wherein the petitioner was arrested and it has been alleged that Petitioner is involved in corrupt practices. It is further stated that while in custody, the Petitioner wanted to execute a Power of Attorney in favour of his son Ammad

Hussain for managing his properties in Dubai and for such purposes he was required to appear before the UAE Consulate at Karachi and the Foreign Office at Karachi and for that the Accountability Court at Karachi was approached and vide order dated 26.4.2016 the prison authorities were directed to produce the Petitioner before the UAE Consulate as well as Foreign office at Karachi. It is further stated that after attestation by the UAE Consulate, the Power of Attorney was presented before the Ministry of Foreign Affairs, Camp Office, Karachi, who has refused attestation of the Power of Attorney through the impugned letter.

3. Learned Counsel for the Petitioner has contended that there is no bar under Section 23 of the NAB Ordinance as objected to by the Ministry of Foreign Affairs, Camp Office at Karachi; that there is no order in field for freezing of the properties under Section 12 of the NAB Ordinance; that the Ministry of Foreign Affairs has no jurisdiction and authority to review or refuse to act upon the directions of the NAB Court; that the order of the NAB Court dated 26.4.2016 was never challenged and has attained finality; that the impugned letter is in violation of Article 24 of the Constitution; that the properties in question have got nothing to do with the pending References and in support she has relied upon the cases reported as *Choudhry Muhammad Akram Warraich and another V. Chairman, National Accountability Bureau, Islamabad and others (2010 YLR 2766)* and *The State through Prosecutor General, NAB V. Muhammad Ayub and 5 others (2012 P.Cr.L.J. 1911)*.

4. On the other hand, learned Additional Attorney General has contended that Power of Attorney is being executed in favour of a Canadian citizen who is not amenable to the offence if any, under Section 23 of the NAB Ordinance; that according to the Respondents

the properties in question have been accumulated out of the corrupt practices and there are References against the Petitioner and the Petitioner has assets beyond means; that no details of the properties abroad have been mentioned in Power of Attorney, nor it has been clarified that as to how and in what manner the money for the purchase of these properties was transferred and that whether it was brought to the knowledge of the State Bank of Pakistan or not as required under the Foreign Exchange Act; that since no details have been stated in the Power of Attorney, therefore, no freezing order has been passed as yet under Section 12 of the NAB Ordinance; that the impugned letter has correctly refused attestation as a Government functionary cannot endorse and grant permission for a criminal act; that the permission of the NAB Court was only to the extent of facilitating the Petitioner to appear before the concerned authorities as at the relevant time he was under custody; that the Petitioner has admitted to have various properties abroad including Zia Medical Centre whereas, no details have been provided to that effect and therefore, the impugned letter is correct in law and instant Petition is liable to be dismissed. Similarly, the learned Special Prosecutor NAB has contended that two References are pending against the petitioner, whereas, no details of the properties in question have been made available and the same is still being investigated, therefore freezing order as contemplated under Section 12 of the NAB Ordinance has not yet been passed; that the petitioner has admitted to be in possession of properties abroad which is unlawful, hence no case is made out.

3. We have heard the learned Counsel for Petitioner as well as the Additional Attorney General and Special Prosecutor NAB. On 3.11.2016 statement was made on behalf of the Respondent No.1 that no comments would be filed as it is only a legal question which has to

be decided and therefore, by consent, it was ordered that instant Petition will be decided finally at Katcha peshi stage. The case of the Petitioner is primarily dependent on the order passed by the learned Accountability Court dated 26.4.2016 whereby, the prison authorities were directed to produce him before the concerned officials at the UAE Consulate as well as the Ministry of Foreign Affairs, Camp Office, Karachi. Such order reads as under;-

“Heard learned Counsel for accused and learned Special Prosecutor for NAB. Learned advocate for accused while reiterating contents of application submit that accused has to execute two General Power of Attorneys in UAE Consulate on 27.4.2016 which is to be attested by the foreign office Karachi. He produced Power of Attorneys before Court for examination. Learned Special Prosecutor on the other hand vehemently opposed this application on the ground that date of appearing of accused before UAE Consulate is not mentioned on the application nor it disclosed the purpose of appearance of accused before UAE Consulate. Heard both the counsels and perused the record. The Power of Attorneys produced before Court for examination shows that accused intends to execute the same in favour of attorney named therein for the purpose of arrangement of his properties etc. in UAE. **Since accused is in custody regulated by this Court therefore, the Superintendent Central Prison is directed to produce him before Consulate General UAE and Foreign Office Karachi for execution of Power of Attorneys under strong police escort and also submit copies of attested Power of Attorneys by the UAE Consulate and foreign office Karachi before this Court on next date of hearing. Order accordingly.**”
(Emphasis supplied)

4. It appears that after attestation by the UAE Consulate the Ministry of Foreign Affairs was approached and through impugned letter the attestation was refused. The said letter reads as under;-

“Ministry of Foreign Affairs
Camp Office, Karachi

No. DCP/KAR/2016

May 2, 2016

Mr. Nasrullah Sheikh,
Advocate.

Dear Mr. Sheikh,

Reference your application regarding attestation of Power of Attorney to be executed by Dr. Asim Hussain in favour of Mr. Ammad Hussain.

2. Your application was forwarded to the Law Division which has conveyed the following opinion.

“Since the case against Dr. Asim Hussain is pending before the Special Judge, Accountability, Karachi therefore, in view of the bar under Section 23 of the National Accountability Ordinance 1999, the proposed Power of Attorney cannot be authenticated and execution of Power of Attorney by the accused (Dr. Asim Hussain) in favour of third person (Mr. Ammad Hussain) in order to dispose off the property registered in the name of the accused (Dr. Asim Hussain) is not lawful and its attestation by the Foreign Office is not appropriate at this stage of the case.”
(Emphasis supplied)

Yours Sincerely,

Sd/-
(Sohail Siddiqui)
Deputy Chief of Protocol”

5. It is the case of the Petitioner that the Ministry of Foreign Affairs, Camp Office at Karachi has no jurisdiction to take shelter under Section 23 of the NAB Ordinance and therefore, the same is without any lawful authority. At the very outset, Learned Counsel for the Petitioner was confronted that the Petitioner is now on bail, whereas, the order of the Accountability Court was passed when he was in custody and therefore, how could any assistance be sought on the basis of such order, the learned Counsel could not satisfactorily respond. She however, emphasized that the order, having attained finality, it to be implemented and complied with and no exception could be drawn. To this we may observe that this Court is not the executing or implementation Court for orders so passed by the Accountability Court which is fully competent to enforce its orders in accordance with law. If the order was not being implemented or complied with, the proper remedy should have been availed as provided in Section 16-B of the NAB Ordinance.

Be that as it may, it is also a matter of record that the application filed before the Accountability Court on which order dated

26.4.2016 was passed has not been placed before us for perusal. Even otherwise, a bare reading of the said order only reflects that the same was passed on the ground that “*since accused is in custody regulated by this Court therefore, the Superintendent Central Prison is directed to produce him before the Consulate General UAE and Foreign Office Karachi for execution of Power of Attorneys under strong police escort and also submit copies of attested Power of Attorneys by the UAE Consulate and Foreign Office Karachi before this Court on the next date*”. This to our understanding is merely an order to regulate the custody of the Petitioner. It does not direct either the UAE Consulate, or for that matter, the Ministry of Foreign Affairs, Camp Office at Karachi to do or not to do the attestation of the Power of Attorney. In fact the issue before the Accountability Court was never to that effect nor we have been assisted on behalf of the Petitioner that it was an order under Section 23 (specially the proviso) of the NAB Ordinance which reads as under;-

“23. Transfer of property void. (a) Notwithstanding anything contained in any other law for the time being in force after the Chairman NAB has initiated [an inquiry or] investigation into any offence under this Ordinance, alleged to have been committed by an accused person, such accused person or any relative or associate of accused person or any other person on his behalf, shall not transfer by any means whatsoever, or create a charge on any property owned by him or in his possession, while the inquiry, investigation or proceedings are pending before the NAB or the Court and any transfer of any right, title or interest or creation of a charge on such property shall be void.

(b) Any person who transfers or creates a charge on property in contravention of sub-section (a) shall be punishable with rigorous imprisonment for a term, which may extend to three years and shall also be liable to fine not exceeding the value of the property involved;

[Provided that such transfer of any right, title or interest or creation of a charge on such property shall not be void if made with the approval of the Court, subject to such terms and conditions as the Court may deem fit.]

6. The aforesaid provision provides that notwithstanding anything contained in any other law for the time being in force after the Chairman NAB has initiated an inquiry or investigation into any offence under this Ordinance, alleged to have been committed by an

accused person, such accused person or any relative or associate of accused person or any other person on his behalf, shall not transfer by any means whatsoever, or create a charge on any property owned by him or in his possession, while the inquiry, investigation or proceedings are pending before the NAB or the Court and any transfer of any right, title or interest or creation of a charge on such property shall be void. Sub-section (b) further provides that any person who transfers or creates a charge on property in contravention of sub-section (a) shall be punishable with rigorous imprisonment for a term, which may extend to three years and shall also be liable to fine not exceeding the value of the property involved. Whereas, in the proviso it has provided that such transfer of any right, title or interest or creation of a charge on such property shall not be void if made with the approval of the Court, subject to such terms and conditions as the Court may deem fit. As discussed earlier, it is not the case of the Petitioner that any application was filed under Section 23 of the NAB Ordinance and on which any order has been passed as provided in the proviso to Section 23 *ibid*. In fact it could not have been so passed as there is no detail of the property in question, either in the Power of Attorney or in this Petition, whereas, the application is also not on record. **Section 23 bars transfer by any means, whatsoever, or creation of charge on property when an inquiry or investigation or proceedings (Reference) are pending before NAB or the Court** (See Chaudhry Muhammad Akram Warriach-Supra). Section 23 has a very wider implication and is applicable even when only an *inquiry* or *investigation* is pending against an accused under the Ordinance whereas; in this case two References have already been filed. **Section 23 is a self-executing section and it creates an offence. Therefore, any person who violates the provisions of Section 23 renders himself liable to prosecution and**

if found guilty, to punishment. (See Chaudhry Muhammad Akram Warriach-Supra). Section 23 very clearly and explicitly provides in general terms, (without referring to any property except that it should be owned by an accused) that any transfer of the properties of the accused will be void and therefore, it cannot be expected that a Government functionary like the Ministry of Foreign Affairs would permit attestation of a power of attorney for a *void* transaction, as such attestation would in fact permit transfer/sale/alienation of a property of accused. This has been admitted that the property(s) in question are of the accused and for this reason power of attorney is being executed. The Government functionary is required to act in accordance with law and the arguments on behalf of the Petitioner that the order of the Accountability Court is being reviewed or disobeyed has no force. The learned Accountability Court did not issue any directions as it was never an order under Section 23 of the NAB Ordinance to permit any such transfer. Moreover, the argument regarding no order in field for freezing of the property under Section 12 of the NAB Ordinance is also misconceived inasmuch as it is not the case of NAB Authorities that there is any need of such an order as the details are not available as yet. In fact their case is that any such transfer of alienation would be void in terms of section 23, and this cannot be permitted by a Government office by attesting a Power of Attorney.

7. Even otherwise, we are of the view that after release on bail, the order so relied upon by the Petitioner has lost its force and efficacy as he is no more in custody and is not to be regulated by the Accountability Court, at least to the extent of his production before the UAE Consulate or before the Ministry of Foreign Affairs, Camp Office at Karachi. Since he has been enlarged on bail the very purpose and intent of Power of Attorney has also gone as he can do and manage his

properties on his own and therefore, we are of the view that no support is available to the Petitioner from the order of the NAB Court any more.

8. In view of hereinabove facts and circumstances of this case, we are of the view that no case for indulgence is made out and accordingly the Petition is dismissed.

Dated: 26.05.2017

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