

IN THE HIGH COURT OF SINDH KARACHI

Suit No. 1808 of 2016

[Mst. Bilqis Bano and another v. Pakistan Defence Officers Housing Authority and others]

- Dates of hearing : 09-04-2018; 16-04-2018; 23-04-2018;
30-04-2018 and 07-05-2018
- Date of Decision : 17-07-2018
- Plaintiffs : Mst. Bilqis Bano and Mst. Fatima Bai
through M/s. Khawaja Shams-ul-Islam and
Imran Taj, Advocates.
- Defendant No. 1 : Pakistan Defence Officers Housing
Authority through Mr. Asif Rasheed,
Advocate.
- Defendant No. 2 : Nemo.
- Defendant No. 3 : Clifton Cantonment Board, through
Mr. Abdullah Munshi, Advocate.
- Defendant No. 4 : National Accountability Bureau through
Mr. Muhammad Akram Javed,
Special Prosecutor a/w Javed Ali Lashari,
Investigation Officer.
- Defendant 5 : Directorate General Intelligence and
Investigation, through Mr. Muhammad
Khalil Dogar, Advocate.

JUDGMENT

ADNAN IQBAL CHAUDHRY J. -

1. The plaintiff No.1 (Bilquis Bano) claims to have purchased Bungalow No.75/I, Khayaban-e-Hafiz, Phase VI, DHA, Karachi, from its previous joint owners namely Hina w/o Muhammad Raza and Shabnam Raza w/o Ghulam Raza vide a registered Conveyance Deed dated 16-09-2006. The plaintiff No.2 (Fatima Bai) claims to have purchased the adjacent Bungalow No.75/II from its previous joint owners namely Muhammad Raza and Ghulam Raza vide a registered Conveyance Deed dated 11-11-2006. The said Bungalows

are hereinafter collectively referred to as “the Suit Properties”. In the records of the defendants 1 to 3 (the Defense Housing Authority - DHA, the Military Estates Officer - MEO and the Cantonment Board Clifton - CBC), the Suit Properties still stand in the name of the said sellers, the previous owners.

2. The grievance of the plaintiffs is that the defendants 1 to 3 (DHA, MEO and CBC) have refused to mutate the Suit Properties from the names of the previous owners to the names of the respective plaintiffs, thereby effectively restraining the plaintiffs from selling/transferring the Suit Properties. Per the plaintiffs, the refusal by the defendants 1 to 3 to mutate the Suit Properties, disclosed to the plaintiffs in March 2016, is on the pretext that certain legal proceedings are taken/pending against the previous owners under the Customs Act, 1969 and the National Accountability Ordinance, 1999 (NAO 1999). It is the case of the plaintiff No.1 that no such legal proceeding has ever been taken against the previous owners of Bungalow No.75/I (Hina w/o Muhammad Raza and Shabnam Raza w/o Ghulam Raza). Whereas, it is the case of the plaintiff No.2 that no such legal proceeding had been taken against the previous owners of Bungalow No.75/II (Muhammad Raza and Ghulam Raza) on 11-11-2006 when the plaintiff No.2 had purchased it from them, and that in any case the said previous owners were subsequently acquitted of the charges against them. Further, it is the case of the plaintiffs that no order has ever been passed either under the Customs Act, 1969 or under the NAO 1999 to attach/freeze the Suit Properties. The NAB has been arrayed as the defendant No.4 and the investigating agency of the Customs, has been arrayed as the defendants No.5. The concerned Sub-Registrar of properties has been arrayed as the defendant No.6.

3. The plaintiffs’ prayer in the plaint is as follows:

“(a) Declare that the Plaintiff No.1 is the lawful, bona fide owner of the property i.e, Bungalow No.75/1, Khayaban-e-Hafiz, Phase VI, measuring 983.32 Square Yards, Defence Housing Authority,

Karachi together with the construction of double story bungalow purchased by her from its previous joint owners Mrs. Hina wife of Muhammad Raza and Mrs. Shabnam Raza wife of Ghulam Raza through a registered Conveyance Deed dated 16.09.2006 for a hefty consideration thus protected under Articles 8, 9, 10, 10A, 14, 18, 23 and 24 of the Constitution and Sections 41, 53 read with Section 105 of the Transfer of Property Act;

- (b) *Declare that the Plaintiff No.2 is the lawful, bona fide owner of the property i.e. Bungalow No. 75/II, Khayaban-e-Hafiz, Phase-VI, measuring 983.33 Square Yards, Defence Housing Authority, Karachi with construction of ground plus one story purchased by her from its joint owners Muhammad Raza and Ghulam Raza both sons of late Akbar Ali through their lawful General Attorney Mrs. Shabnam Raza wife of Ghulam Raza through a registered Conveyance Deed dated 11.11.2006, thus protected under Articles 8, 9, 10, 10A, 14, 18, 23 and 24 of the Constitution and Sections 41, 53 read with Section 105 of the Transfer of Property Act;*
- (c) *To direct the Defendants specially Defendants No.1 to 3 to immediately mutate the properties i.e. Bungalow No. 75/I, Khayaban-e-Hafiz, Phase VI, measuring 983.32 Square Yards, Defence Housing Authority, Karachi and the property i.e. Bungalow No. 75/II, Khayaban-e-Hafiz, Phase-VI, measuring 983.33 Square Yards, Defence Housing Authority in the names of Plaintiffs No.1 and 2 respectively in their respective record of rights;*
- (d) *Mandatory injunction, suspend the operation of the letter dated 06.11.2006 and 11.4.2014 issued by Defendants No.1 and 5 respectively and consequently restrain the official Defendants from taking any coercive action against the Plaintiffs or to dispossess or evict them from their respective bungalows;*
- (e) *Grant permanent injunction restraining the officials of the Defendants, their employees, subordinates, agents, representatives, attorneys, successors or any one claiming on their behalf, from taking any coercive action and to dispossess/evict the Plaintiffs from their respective properties in question or seal the properties i.e. Bungalow No. 75/I, Khayaban-e-Hafiz, Phase VI, measuring 983.32 Square Yards, Defence Housing Authority, Karachi and the property i.e. Bungalow No. 75/II, Khayaban-e-Hafiz, Phase-VI, measuring 983.33 Square Yards, Defence Housing Authority;*
- (f) *Consequential relief(s),*;
- (g) *Grant any other relief(s),*;
- (h) *Costs*"

4. The background and facts as gathered from the record and submissions of the learned counsels, are as follows:

- (i) Muhammad Raza and Ghulam Raza, who were the previous joint owners of Bungalow No.75/II, were accused along with Raja Muhammad Zarat Khan and others, of making and benefitting from fraudulent claims of Customs duty drawbacks and sales tax refunds while carrying on business under the umbrella of Bawan Shah Group of Companies.
- (ii) Proceedings under Section 179 of the Customs Act, 1969 for adjudication of duties, taxes and penalties by the relevant Customs Officer, and proceedings under Section 185-A of the Customs Act, 1969 for the trial of offences before the Special Judge (Customs and Taxation) Karachi, were initiated against the accused *inter alia* Muhammad Raza and Ghulam Raza. It was during investigation leading to the said proceedings that the defendant No.5 (I.O. Customs), vide letter dated 13-10-2006, sought information *inter alia* from the defendants 1 and 6 (DHA and the Sub-Registrar) as to properties held by Muhammad Raza, Ghulam Raza and their dependents.
- (iii) On receiving information from the DHA on 06-11-2006 that their record reflected the Suit Properties to be held by Muhammad Raza, Ghulam Raza and their spouses (the previous owners), the defendant No.5 (I.O. Customs) vide letter dated 16-11-2006, requested the defendants 2 and 6 (MEO and Sub-Registrar) not to transfer the Suit Properties on the ground that criminal cases against Muhammad Raza and Ghulam Raza under Section 185-A of the Customs Act, 1969 were pending before the Special Judge (Customs & Taxation), Karachi. Apparently, at the time, the record of the DHA had not been updated with the conveyance deeds dated 16-09-2006 and 11-11-2006 of the Suit Properties in favor of the plaintiffs.
- (iv) In his reply dated 22-11-2006, the defendant No.2 (MEO) informed the defendant No.5 (I.O. Customs) that Bungalow No.75/I had been transferred by its previous owners (Hina

w/o Muhammad Raza and Shabana w/o Ghulam Raza) to the plaintiff No.1 vide a conveyance deed dated 16-09-2006, whereas Bungalow No.75/II stood in the name of Muhammad Raza and Ghulam Raza. Apparently, at the time, the record of the MEO had not been updated with the conveyance deed dated 11-11-2006 of Bungalow No.75/II in favor of the plaintiff No.2.

- (v) On 08-11-2006, the defendant No.5 (I.O. Customs) made a complaint to the defendant No.4 (NAB) of the fraud allegedly committed by Raja Muhammad Zarat Khan and others of Bawan Shah Group of Companies, including Muhammad Raza and Ghulam Raza, in claiming inadmissible Customs rebate, misuse of the DTRA scheme and sales tax refunds. On the said complaint, the defendant No.4 (NAB) initiated an inquiry on 21-11-2006. Therefore, per the defendant No.5, their entire record pertaining to the cases against the said accused persons was transferred by the defendant No.5 to the defendant No.4 (NAB) in January 2007. Subsequently, in March 2007, the criminal cases pending against the said accused persons under Section 185-A of the Customs Act, 1969 before the Special Judge (Customs & Taxation) Karachi, were also transferred to the Accountability Court at Karachi pursuant to Section 16-A of the NAO 1999 where these were registered as Reference No.s 13, 14, 15, 16 and 17 of 2007.
- (vi) Raja Muhammad Zarat Khan, who was the principal accused in the NAB References, had assailed his arrest by the NAB before this Court in C.P. No.D-1008/2007. The judgment in that case is reported at PLD 2007 Karachi 597 (*Raja Muhammad Zarat Khan versus Federation of Pakistan*). From the case diaries of NAB's inquiry reproduced in that judgment, it appears that it was on 19-12-2006 that the defendant No.4 (NAB) asked the defendants 1 and 2 (DHA and MEO) not to transfer properties

of persons under NAB's inquiry. However, as discussed *infra*, there was no order passed under Section 12 NAO 1999 to freeze the Suit Properties.

(vii) The aforesaid inquiry by the defendant No.4 (NAB) was converted to an investigation on 30-05-2007, and eventually on 07-08-2007 Reference No.46/2007 was filed before the Accountability Court at Karachi against Raja Muhammad Zarat Khan and others, including Muhammad Raza and Ghulam Raza, which Reference was in addition to Reference No.s 13, 14, 15, 16 and 17 of 2007 which were already pending before the Accountability Court on transfer from the Special Judge (Customs & Taxation) Karachi.

(viii) On 30-12-2008, the Accountability Court acquitted a number of accused persons in Reference No.17/2007, including the principal accused Raja Muhammad Zarat Khan, but not including Muhammad Raza and Ghulam Raza. On 30-03-2009, the Accountability Court acquitted a number of accused persons in Reference No.46/2007 including the principal accused Raja Muhammad Zarat Khan, but not including Muhammad Raza and Ghulam Raza. Therefore, the plaintiffs' contention that Muhammad Raza and Ghulam Raza too had been acquitted in Reference No.s 17 and 46 of 2007, is not borne from the record. Against the said acquittal orders it is said that appeals are pending before this High Court.

5. Contention of the defendant No.4 (NAB):

Both in its written statement and by way of CMA No.6007/2018 under Order VII Rule 11 CPC, the defendant No.4 has objected to the maintainability of the suit against it on the ground that the suit is barred by Section 36 NAO 1999. On the merits, it is the case of the defendant No.4 that the plaintiffs are related to the

accused Muhammad Raza and Ghulam Raza; that the plaintiffs hold the Suit Properties as benamidars of Muhammad Raza and Ghulam Raza; and that since References, appeals and other investigations under the NAO 1999 against Muhammad Raza and Ghulam Raza are pending, the plaintiffs are prohibited by Section 23 NAO 1999 from transferring the Suit Properties.

6. Contention of defendant 5 (investigation agency Customs):

The defendant No.5 has also objected to the maintainability of the suit against it on the ground that it is barred by Section 217 Customs Act, 1969. Per the defendant No.5, in the proceedings under section 179 Customs Act, 1969, duties, taxes and penalties were adjudged *inter alia* against Muhammad Raza and Ghulam Raza in March 2007 and those are still outstanding. However, as regards the criminal cases against the said accused persons, the defendant No.5 has conceded in its written statement that after the transfer of such cases from the Special Judge (Customs & Taxation) Karachi to the Accountability Court at Karachi in the year 2007 "*the Directorate General has no legal authority to deal with the matter any more*".

7. Contention of the defendant No.3 (CBC):

Both in its written statement and by way of CMA No.5388/2018 under Order VII Rule 11 CPC, the defendant No.3 has objected to the maintainability of the suit against it on the ground that the suit is barred by Section 273 Cantonment Act, 1924 which provision requires a prior notice of 2 months before filing suit. On the merits, the reason given by the CBC for not mutating the Suit Properties in its record to the names of the respective plaintiffs is stated in para 2 of its written statement as follows:

"...the defendant No.1/DHA and defendant No.2/MEO did not transfer the said properties in the names of the plaintiffs due to the inquiries initiated by the NAB and other Government Authorities against the previous owners namely Mr. Muhammed Raza and Mr. Ghulam Raza that after the intimation by the defendants 1 and 2, defendant No.3/Cantonment Board Clifton did not mutate the said

properties in the names of the plaintiffs the defendant No.3/Cantonment Board Clifton already informed/intimated the plaintiffs way prior to filing of the instant suit that the transfer/mutation was stopped because of the NAB inquiries and proceedings against the previous owners before Government Authorities and it is necessary to mention here that the NAB proceedings are still pending."

8. Contention of the defendant No.1 (DHA):

The written statement the defendant No.1 (DHA) states that in its record Bungalow No.75/I stands in the name of its previous owners (Hina and Shabana Raza) since 25-08-2003; that Bungalow No.75/II stands in the names of its previous owners (Muhammad Raza and Ghulam Raza) since 29-01-2002; that the said Suit Properties being held under a "B" Lease, the DHA has no control over their sale as the same can be effected by registering a conveyance deed with the defendant No.6 (concerned Sub-Registrar of properties).

9. The defendants 2 and 6 (the MEO and Sub-Registrar) have not contested the suit; they have not filed written statements despite service; therefore, I proceed against them *ex-parte*.

10. On a miscellaneous application moved by the plaintiffs in this suit, this Court on 17-8-2016 ordered that "*Plaintiffs shall not be dispossessed without due course of law.*" Such order was confirmed on 28-2-2017 by consent of learned counsels for the defendants 1, 3 and 4 (DHA, CBC and NAB). Arguments on CMA No.11602/2016 were commenced on 09-04-2018 which is an application by the plaintiffs praying for a mandatory injunction directing the defendants 1 to 3 to mutate the Suit Properties to the names of the plaintiffs. During the hearing of the said application, CMA No.5388/2018 and CMA No.6007/2018 under Order VII Rule 11 CPC were moved by the defendants 3 and 4 respectively (CBC and NAB) and with the consent of learned counsels these application were heard for disposal along with CMA No.11602/2016.

11. While opposing CMA No.11602/2016 Mr. Abdullah Munshi, learned counsel for the defendant No.3, stressed on the point that the grant of mandatory injunction sought by the said CMA would amount to granting final relief, and that since the suit required evidence, such mandatory injunction should be decided after the recording of evidence. On the other hand Mr. Khawaja Sham-ul-Islam, learned counsel for the plaintiffs argued that a mandatory injunction of the nature sought can be granted without evidence as the conveyance deeds of the Suit Properties in favor of the plaintiffs remain unchallenged. During the hearing of the listed applications, it was acknowledged by Mr. Akram Javaid, learned counsel for the defendant No.4 (NAB) that the Suit Properties were not yet subject matter of the NAB References nor has any order ever been passed under Section 12 NAO 1999 to freeze the Suit Properties. In view of such acknowledgment, Mr. Khawaja Shams-ul-Islam Advocate submitted that the parties remained at issue only on questions of law and therefore the plaintiffs did not desire nor need to lead evidence, and he prayed for final judgment on issues of law. To that end, Mr. Khawaja Shams-ul-Islam Advocate also filed proposed legal issues for final judgment in the suit. In this view of the matter the following order was passed in this suit on 23-04-2018:

“From the submissions of the learned counsels it transpires that the Plaintiffs are not accused in the NAB References No.13, 14, 15, 16 and 17-A, 2007, nor has the NAB nor the Accountability Court so far passed any order under Section 12 of the NAB Ordinance 1999 so as to put a hold or freeze on the suit property. This much is admitted by the learned counsels for the Defendants. In view thereof Mr. Kh. Shamsul Islam states that so sole issue that now remains is only a legal issue for which the Plaintiffs do not need nor desire to lead evidence. Therefore, he suggests that the suit be decided on the basis of the proposed legal issues. Learned counsels for the Defendants are put on notice to address this aspect of the case i.e as to whether the suit can be decided either ways on the basis of the legal issues proposed by the Plaintiffs, copy whereof is taken on record and is supplied to them by the learned counsel for the Plaintiffs. For such purpose to come up on 30.04.2018 at 8:30 a.m.....”

To the question raised in the order dated 23-04-2018 (*supra*), though learned counsels for the defendants conceded that they could not compel the plaintiffs to lead evidence if the plaintiffs chose to forgo it, they submitted that without evidence none of the reliefs claimed by the plaintiffs can be granted.

12. From the record and the submissions made by the learned counsels, the following emerged as the undisputed facts and features of the suit:

- (i) that title of the Suit Properties had been conveyed to the plaintiffs vide registered conveyance deeds dated 16-09-2006 and 11-11-2006 by Muhammad Raza and Ghulam Raza and their respective spouses;
- (ii) that the conveyance of the Suit Properties to the plaintiffs was prior to the adjudication against Muhammad Raza and Ghulam Raza under section 179 of the Customs Act, 1969 for outstanding taxes, duties and penalties which came about in March 2007. Therefore, the Suit Properties were not attached under section 202(3)(a) of the Customs Act, 1969;
- (iii) that Muhammad Raza and Ghulam Raza were not convicted in proceedings pending against them before the Special Judge (Customs & Taxation) Karachi under section 185-A of the Customs Act, 1969 because these proceedings were transferred to the Accountability Court in March 2007 pursuant to section 16-A NAO 1999;
- (iv) that for the reasons mentioned in sub-paras (ii) and (iii) above, and for the reason that the defendant No.5 (investigating agency Customs) has admitted in its written statement that it

has no further jurisdiction in the matter, the defendant No.5 is not relevant to these proceedings;

- (v) that though to-date none of the NAB References allege that the plaintiffs hold the Suit Properties as benamidars of the accused Muhammad Raza and Ghulam Raza, and though to-date there is no order under section 12 NAO 1999 to freeze the Suit Properties, References under the NAO 1999 are still pending against the accused Muhammad Raza and Ghulam Raza before the Accountability Court;
- (vi) that in the record of the defendants 1 to 3, the Suit Properties still stand in the names of the previous owners, and the defendants 1 to 3 have refused to mutate the Suit Properties and allow for their transfer on the ground that References under the NAO 1999 are pending against Muhammad Raza and Ghulam Raza.

13. Settlement of issues:

The refusal by the defendants 1 to 3 to mutate the Suit Properties and allow for their transfer is in essence on the ground of Section 23 NAO 1999. The plaint manifests that the relief for declaration that the plaintiffs are "*lawful, bona fide owners*" of the Suit Properties has been sought to address Section 23 NAO 1999, and that the reliefs for injunction are consequential reliefs only. Therefore, in actuality, the question raised by this suit is whether Section 23 NAO 1999 by itself prohibits the transfer of the Suit Properties when these properties have not been frozen under section 12 NAO 1999 and when there is no allegation against the plaintiffs before the Accountability Court that they hold the Suit Properties as benamidars of the accused. As a necessary consequence, the foremost issue arising for determination in this suit is whether the jurisdiction of this Court as a civil court to decide the said question

is barred by the NAO 1999. Thus, there being no question of fact triable by this Court, the following issues of law are settled :

- (i) Whether in the circumstances of the case, does this Court have jurisdiction to decide the question whether transfer of the Suit Properties is prohibited by the NAO 1999 ? or does that jurisdiction vest exclusively in the Accountability Court under the NAO 1999 ?
- (ii) Subject to determination of issue No.(i), whether suit against the defendants 3, 4 and 5 (CBC, NAB and I.O. Customs) is barred respectively by Section 273 Cantonments Act 1924, by Section 36 NAO 1999, and by Section 217 Customs Act, 1969 ?
- (iii) To what relief, if any, are the plaintiffs entitled to ? and what should the decree be ?

14. Applications for rejection of plaint:

Adverting first to the applications under Order VII Rule 11 CPC for rejection of the plaint, CMA No.5388/2018 is by the defendant No.3 (CBC) on the ground that the suit against the defendant No.3 is barred by Section 273 Cantonment Act, 1924. But that in my view is different from saying that the suit as a whole is not maintainable inasmuch as, the suit is not only against the defendant No.3 but also against other defendants. Thus, even if the suit is not maintainable against the defendant No.3 the plaint as a whole cannot be rejected. It is a settled law that a plaint cannot be rejected in piecemeal. Therefore, no case for rejection of the plaint is made out under CMA No.5388/2018 which is therefore dismissed. However, since the objection of Section 273 Cantonment Act, 1924 is also raised by the defendant No.3 in its written statement, an issue to that effect has been settled as above.

As regards CMA No.6007/2018 moved by the defendant No.4 (NAB) the same raises two objections: (a) that the subject matter being a criminal matter, the jurisdiction of a Civil Court under Section 9 CPC is barred; and (b) that the suit against the defendant

No.4 is barred by Section 36 NAO, 1999. Objection (a) is covered by Issue No.(i) as settled above and will be decided in the course of this judgment. As regards objection (b), again, even if the suit is not maintainable against the defendant No.4 the plaint cannot be rejected in piecemeal. However, since the objection of Section 36 NAO 1999 is also raised by the defendant No.4 in its written statement, an issue to that effect has been settled as above. CMA No.6007/2018 is disposed off accordingly.

Determination of Issue No.(i):

Whether in the circumstances of the case, does this Court have jurisdiction to decide the question whether transfer of the Suit Properties is prohibited by the NAO 1999 ? or does that jurisdiction vest exclusively in the Accountability Court under the NAO 1999 ?

15. The provisions of the NAO 1999 that are relevant to this issue are its Sections 12, 13 and 23. Under Section 12 NAO 1999 the Chairman NAB or the Accountability Court can by an order freeze property of the accused whether in possession of the accused or in possession of a third-party believed to be holding it on behalf of the accused:

“12. Power to freeze property:

(a) The Chairman NAB or the Court trying an accused for any offence as specified under this Ordinance, may, at any time, if there appear reasonable grounds for believing that the accused has committed such an offence, order the freezing of his property, or part thereof, whether in his possession or in the possession of any relative, associate or person on his behalf. (*underlining supplied for emphasis*)

- (b)
- (c)
- (d)
- (e)
- (f)

Section 5(d) of the NAO 1999 defines an “Associate” to also mean a “benamidar”. Section 5(da) defines a “benamidar” as “any person who ostensibly holds or is in possession or custody of any property of an accused on his behalf for the benefit and enjoyment of the accused”

The remedy against an order passed under Section 12 NAO 1999 is before the Accountability Court under Section 13 NAO 1999 as follows:

“13. Claim or objection against freezing:

(a) Notwithstanding the provisions of any law for the time being in force, the Court shall have exclusive jurisdiction to entertain and adjudicate upon all claims or objections against the freezing of any property under section 12 above. Such claims or objections shall be made before the Court within 14 days from the date of the order freezing such property.

(b) The Court may for sufficient cause extend the time for filing such claims or objections for a period not exceeding additional 14 days.

(c) The accused or any other aggrieved party, whose claim or objection against freezing of property has been dismissed by the Court, may, within ten days file an appeal against such order before the High Court.”

Section 23 NAO 1999 also deals with the property of an accused and third-parties believed to be holding properties on behalf of an accused:

“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 such 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."

16. It will be seen that clause (c) of Section 13 NAO 1999 provides a remedy also to "any other aggrieved party" to approach the Accountability Court under clause (a) of Section 13 with a claim/objection against a freezing order passed under Section 12 NAO 1999. This clarification had been brought about by an amendment to Section 13 NAO 1999 by Ordinance No. XXXV of 2001 dated 10-08-2001. In the case of *National Accountability Bureau v. Zahida Sattar* (PLD 2001 Karachi 256), which was decided prior to the said amendment, a Division Bench of this Court was confronted with the question that where an order under Section 12 NAO 1999 was passed freezing a property standing in the name of a person alleged to be the benamidar of the accused, what was the remedy of such person who claimed to hold the property in his own right. In that case, a charge had been framed against the accused alleging that he had acquired certain properties by corrupt practices and held such properties in the name of his benamidars. Subsequently, an order for freezing such properties was passed under Section 12 NAO 1999. Civil suits were filed by the ostensible owners for *inter alia* declarations that the said properties were held by them in their own right. It was the case of the plaintiffs that while their properties had been frozen under section 12 NAO 1999, they had not been arrayed as accused in the NAB Reference, nor provided a remedy under the NAO 1999, and thus their remedy lay before a civil court. Even though Section 13(c) of the NAO 1999 had not been amended at the

time, nonetheless the Court held that since Section 13(a) NAO 1999 gave exclusive jurisdiction to the Accountability Court to adjudicate all claims and objections against a freezing order passed under Section 12 NAO 1999, the principle of natural justice entailed that even the ostensible owner could file claims/objections before the Accountability Court under section 13(a) NAO 1999 notwithstanding that such ostensible owner had not been implicated in the Reference. In these circumstances civil suits were held to be barred. The nature of the jurisdiction that the Accountability Court exercised under Section 13 NAO 1999 was brilliantly explained in the said case by stating that the question that the Accountability Court decides under Section 13 NAO 1999 is not one of title to the frozen property, but whether the money invested in acquiring the such property was obtained through ill gotten means by the accused.

Judgment of the High Court in the case of *National Accountability Bureau v. Zahida Sattar* (*supra*) was upheld by the Honourable Supreme Court of Pakistan in the case of *Zahida Sattar v. Federation of Pakistan* (PLD 2002 SC 408), primarily on the ground that the trial of issues involved in the suit would amount to a trial of a criminal charge by a civil court, the cognizance of which had been taken by the criminal court of exclusive jurisdiction created under special law. In the pen-ultimate paragraph of the majority judgment, the Honourable Supreme Court directed : -

“18. Before parting with this judgment, we shall recommend the Federal Government to consider the desirability of making amendments in the NAB Ordinance providing that in a case in which holder of public office is sent for trial of charges of corruption for acquiring assets beyond his means in the names of other persons as benamidars, such other persons/ostensible owners should necessarily be summoned by the Accountability Court to provide them opportunity during the trial to prove that the said assets were acquired by them from their own resources and in case, finally it is decided that the charges against the accused person had been proved, and

such persons had failed to prove acquisition of assets from their own sources, they should be provided remedy of appeal in the same manner as is available to the accused persons in order to avoid any further litigation or complication which would advance the ends, of justice”.

It may be noted that by the time the Honourable Supreme Court had delivered judgment in the case of *Zahida Sattar*, Section 13 NAO 1999 had been amended by Ordinance No. XXXV of 2001 (dated 10-08-2001) to categorically provide a remedy also to “any other aggrieved party” against a freezing order passed under Section 12 NAO 1999. This aspect had been noticed in *Zahida Sattar* in a separate note authored by one of the learned members of the learned Bench.

17. But judgments of the High Court and the Honourable Supreme Court in the case of *Zahida Sattar* followed on facts where properties of ostensible owners were included in the charge framed against the accused, and where an order for freezing such properties had been passed under Section 12 NAO 1999, thereby attracting the jurisdiction of the Accountability Court under Section 13 NAO 1999, both of which facts are missing in the instant suit. However, the fact that no question against the Suit Properties is presently pending before the Accountability Court or that no order been passed under Section 12 NAO 1999, does not mean to say that the defendant No.4 (NAB) or the Accountability Court cease to have jurisdiction or that they cannot now exercise jurisdiction. Section 12 NAO 1999 reads that “.....the Court trying an accused, may, at any time, if there appear reasonable grounds for believing, order the freezing of his property,, whether in his possession or in the possession of any relative, associate or person on his behalf”. Thus, as long as any Reference against the accused Muhammad Raza and Ghulam Raza is pending before the Accountability Court, such Court retains jurisdiction and “may at any time” pass an order

under Section 12 NAO 1999 freezing the Suit Properties if there appear to it reasonable grounds for doing so.

18. The question that now arises is where jurisdiction under Section 12 NAO 1999 is not exercised by the NAB or the Accountability Court, what is then the remedy of a person other than the accused who is confronted by the restraint contained in Section 23 NAO 1999.

In the case of *Khan Asfandyar Wali v. Federation of Pakistan* (PLD 2001 SC 607), of the many provisions of the NAO 1999 (then known as the NAB Ordinance) under challenge before the Supreme Court of Pakistan, was also its Section 23 as it stood then. The challenge was on the ground that Section 23 did not at the time provide any right of appeal even to third-parties (relatives, associates etc. of the accused) whose property rights were being restricted by said Section, and therefore it was argued that Section 23 NAO 1999 was un-Constitutional. It was held by the Honourable Supreme Court (at page 930, para-262) that to the extent Section 23 NAO 1999 makes transfer of property void even where both the transferor and the transferee genuinely remained unaware of the investigation against the accused, said Section was contrary to Articles 2A, 4, 23, 24 and 25 of the Constitution of the Islamic Republic of Pakistan, 1973. Excepting that said scenario, it was held that Section 23 NAO 1999 was not in conflict with the said Articles of the Constitution of Pakistan for the reason that reasonable restrictions in the public interest may be imposed by a law on the right to hold, acquire or dispose off property. While discussing the intent behind Section 23 NAO 1999 it was observed by the Honourable Supreme Court that:

“Furthermore, Section 23 ibid is an interlocutory measure to prevent persons accused of such offences to frustrate the objects of law by creating third party interest in respect of illegally acquired property, thereby creating hurdles in the object of law i.e. to eradicate corruption and corrupt practices and hold accountable all those persons accused of such

practices and matters ancillary thereto. The purpose of this power is more to preserve the property acquired by the accused through corruption and corrupt practices so that ultimately if the guilt is proved the same can be taken back from him in accordance with law. Section 23 of the NAB Ordinance is also preventive in nature and prescribes penalties for the accused person who attempts to alienate or transfer by any means property after the Chairman NAB has initiated investigation, inquiry or proceedings have commenced against him in an Accountability Court. Put differently, it is in the nature of a restraint order. The protective measures are not by way of punishment but with a view to ensure that the final decision is not rendered redundant".

In paragraph 264 (in *Khan Asfandiyar Wali*), after noticing that a provision similar to Section 23 NAO 1999 existed in Section 7 of the Offences in respect of Banks (Special Courts) Ordinance, 1984, but which allowed for transfer of property after permission of the Special Court, the Honourable Supreme Court directed that:

"Viewed in this perspective, transfer of property by the accused or his relatives etc. seems permissible with the approval of the Court. We therefore, direct that Section 23 *ibid* be suitably amended to reflect that transfer of property by an accused person or any relative or associate of such person or any other person on his behalf or creation of a charge on any movable or immovable property owned by him or in his possession, while the inquiry, investigation or proceedings are pending before the NAB or the Accountability Court, shall not be void if made with prior approval in writing of the Judge, Accountability Court, subject to such terms and conditions as the Judge may deem fit in consonance with the well established principles of law for passing interlocutory orders in consonance with the objects of the Ordinance".

19. Pursuant to the aforesaid direction of the Honourable Supreme Court in the case of *Khan Asfandiyar Wali*, Section 23 NAO 1999 was amended by Ordinance No.XXXV of 2001 (dated 10-08-2001) to add the following proviso that is now part of Section 23 of

the NAO 1999 to essentially state that pending proceedings against the accused under the NAO 1999, the transfer of property otherwise prohibited by Section 23 can be done with the permission of the Accountability Court:

“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”.

20. The proviso to Section 23 NAO 1999 in essence provides both a remedy and the forum of the Accountability Court not only to the accused but also to other persons mentioned in the said Section against the restriction imposed by Section 23. Needless to say, that the NAO being special law, the remedy and forum so provided is exclusive and ousts the jurisdiction of any other court. Therefore, the claim that the plaintiffs hold the Suit Properties in their own right and not as benamidars of Muhammad Raza and Ghulam Raza and thus should be free/permitted to deal with the same, can only be made to and entertained by the Accountability Court under the proviso to Section 23 NAO 1999. Similar to Section 13 NAO 1999, the question that the Accountability Court decides under the proviso to Section 23 NAO 1999 is not one of title to the property, but whether the money invested in acquiring such property was obtained through ill gotten means by the accused.

21. In passing this judgment, I am mindful that Sections 12 and 23 of the NAO 1999 are provisions catering to different scenarios as also discussed in the cases of *Shuja Khan Baluch v. Capital Development Authority, Islamabad* (PLD 2011 Islamabad 25), and *Chaudhry Muhammad Akram Warraich v. Chairman NAB* (2010 YLR 2766). Section 12 NAO 1999 is an enabling provision which enables the NAB or the Accountability Court (as the case may be) to pass an express order to freeze transfer of suspected property when such property comes to its knowledge. On the other hand, Section 23 of

the NAO 1999 is a prohibitory and penal provision intending to act as a deterrence to transfer of such ill-gotten property, the existence of which property may be discovered after the transfer. But as discussed above, any grievance against restraints placed both under Section 12 and Section 23 NAO 1999 can only be redressed by the Accountability Court under the NAO 1999. In this view of the matter I have refrained from discussing or expressing any view on the ingredients of Section 23 NAO 1999.

22. In view of the foregoing, I decide Issue No.(i) as follows: I hold that the jurisdiction to decide the question raised in this suit vests exclusively in the Accountability Court under the proviso to Section 23 NAO 1999, thus the jurisdiction of this Court under Section 9 CPC is barred; and that the reliefs prayed for in this suit insofar as they seek to prevent the exercise of jurisdiction by the Accountability Court under Section 12 of the NAO 1999 are prohibited by Section 56(e) of the Specific Relief Act, 1877. Having concluded so, the other issues need not be addressed. Therefore, this suit along with CMA No.11602/2016 is dismissed. There is no order as to cost.

JUDGE